

Court Enforces CFPB Civil Investigative Demand Against Tribal Lending Entity; Rejects Argument that Tribal Sovereignty Precludes Such Demands

by Alex Hontos and Ben Kappelman

On January 20, 2017, in CFPB v. Great Plains Lending, a three-judge panel of the Ninth Circuit Court of Appeals upheld the Consumer Financial Protection Bureau's civil investigative demands for documents from lending companies owned by sovereign Indian Tribes. The decision suggests that Tribal sovereignty and regulatory authority will not preclude the Bureau from exercising its investigative jurisdiction over Tribal enterprises engaged in consumer lending.

As described in the decision, the Chippewa Cree, Tunica Biloxi, and Otoe Missouri Tribes enacted regulations governing for-profit lending and established lending companies under those regulations. The companies engage in small-dollar lending over the internet, including to customers who are not Tribal members.

The Bureau initiated an investigation into whether the companies' activities violated the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Truth in Lending Act, the Electronic Funds Transfer Act, the Gramm-Leach-Bliley Act, "or any other Federal consumer financial law." The Bureau issued investigate demands to the companies. The Tribes instructed the companies not to respond to the demands, but the Tribes offered to cooperate with the Bureau as co-regulators of consumer lending services. Rejecting the Tribes' offer, the Bureau filed suit to enforce the investigative demands.

Affirming the district court and upholding the Bureau's authority, the Ninth Circuit panel concluded that the Consumer Financial Protection Act, which established the Bureau and describes its authority, was a law of general applicability enforceable against Tribes and the lending companies. The court reasoned that Congress had not excluded Tribes from the law's application and that three exceptions to the enforcement of generally applicable laws against Indian tribes were inapplicable. The court rejected the Tribes' argument that Congress's inclusion of Tribes within the definition of "State" in the Act evinced Congress's intent to treat Tribes only as co-regulators, not regulated entities. The court also held the lending activities were not "purely intramural matters involving self-governance" and that the Act's legislative history did not show Congress intended to

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- Alex Hontos
- Ben Kappelman

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exclude Tribes from the enforcement of the Act.

The court left the door open to a different outcome later in the litigation. At this early stage, the court was only evaluating whether the Bureau's jurisdiction to issue investigative subpoenas was "clearly lacking," and it highlighted that standard in its decision. Although the issuance of the investigative demands in this particular case does not necessarily evidence a trend for greater scrutiny of Tribes by the Bureau, Tribes and the lending entities that they create may be subject to additional investigative demands as a result of this ruling.