Update on the Short-Term Lending Industry: Government Investigations and Enforcement Actions

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Introduction

The short-term-lending industry has increasingly become the subject of government investigations and enforcement actions at both the federal and the state levels. While their initial focus was on the lenders themselves, the scope has now broadened to include affiliated third parties, including banks and third-party payment processors ("TPPPs").[1] This survey reviews these developments.

Federal Investigation and Enforcement Actions

U.S. Department of Justice Operation Choke Point

The U.S. Department of Justice ("DOJ") launched its controversial Operation Choke Point in early 2013.[2] The DOJ has stated that Operation Choke Point is a law enforcement initiative designed "to prevent access to the banking system by the many fraudulent merchants who had come to rely on the conscious assistance of banks and processors in facilitating their schemes."[3] However, in a status report, the DOJ stated that "many banks have decided to stop processing transactions in support of Internet Payday lenders. We consider this to be a sig-

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1. TPPPs "are bank customers that provide payment-processing services to merchants and other business entities." Fed. Fin. Insts. Examination Council, Bank Secrecy Act Anti-Money Laundering Examination Manual 239 (2014), *available at* https://www.ffiec.gov/bsa_aml_infobase/pages_manual/manual_online.htm.

2. Staff of the H. Comm. on Oversight and Gov't Reform, The Department of Justice's "Operation Choke Point": Illegally Choking Off Legitimate Businesses? 2 (May 29, 2014) [hereinafter House Oversight Comm. Report], *available at* http://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf.

3. *Hearing Related to "Operation Choke Point" Before the H. Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. 2 (2014) (statement of Assistant Attorney General Stuart F. Delery) [hereinafter Delery Statement], *available at* http://financialservices.house.gov/uploadedfiles/hhrg-113-ba09-wstate-sdelery-20140715.pdf.

nificant accomplishment and positive change for consumers."[4] According to the Operation's many critics, this was the plan all along. For example, the U.S. House Committee on Government Oversight and Reform has stated that "Operation Choke Point was created by the Justice Department to 'choke out' companies that the Administration considers 'high risk' or otherwise objectionable, despite the fact that they are legal businesses."[5]

The DOJ has issued over fifty administrative subpoenas to banks and TPPPs since Operation Choke Point's launch,[6] stating that it issued them to entities for which it had "specific evidence suggesting that those entities might be engaged in fraud or might have evidence of fraudulent conduct by others."[7] The DOJ sought information relating to merchants in industries deemed "high risk," a term that includes both illegal businesses, like Ponzi schemes, and legal businesses, like short-term lending businesses.[8] After the DOJ issued its subpoenas, banks started terminating their account relationships with high-risk merchants, particularly short-term lenders,[9] citing "regulatory trends" and "heightened scrutiny required by [bank] regulators for money service businesses."[10]

Critics of the Operation have pointed out that, in issuing these subpoenas, the DOJ focused on ambiguous and potentially innocuous evidence, including consumer complaints and return rates—i.e., the percentage of debits into bank customers' accounts that the bank reverses and credits back to the customers.[11] While a return might indicate unauthorized account activity, it might also indicate that a consumer has simply failed to keep sufficient funds in a bank account to cover an authorized debit.[12] Moreover, because of their customer base, certain businesses, like those in the short-term-lending industry, have higher return rates.[13]

As of July 2014, the DOJ has brought only one enforcement action under Operation Choke Point[14] against Four Oaks Bank & Trust Company ("Four Oaks Bank"), a small community bank in North Carolina.[15] The DOJ alleged that Four Oaks Bank permitted a TPPP to originate debits against consumers' accounts for internet payday lenders that were engaged in fraud against borrowers "by hiding in small print and in confusing language steps required for borrowers

4. House Oversight Comm. Report, *supra* note 2, at 1.
5. *Id.*
6. *Id.*
7. Delery Statement, *supra* note 3, at 2.
8. House Oversight Comm. Report, *supra* note 2, at 8.
9. *Id.* at 6. Authors Ledsky and Helfand represent several short-term lenders that have had banking relationships terminated.
10. *Id.* (internal quotation marks omitted).
11. *See* Delery Statement, *supra* note 3, at 2.
12. *See id.*
13. *See* Marjorie J. Peerce & Jeremy T. Rosenblum, *DOJ Hits Bank Target in "Operation Choke Point,"* 67 Consumer Fin. L.Q. Rep. 243, 255 (2013) [hereinafter *Bank Target*].
14. Delery Statement, *supra* note 3, at 2.
15. Complaint, United States v. Four Oaks Fincorp, Inc., No. 5:14-cv-14-BO (E.D.N.C. Jan. 8, 2014) [hereinafter Four Oaks Complaint]; *see also Bank Target*, *supra* note 13, at 243.

to avoid a loan rollover trap."[16] In addition, the DOJ alleged that Four Oaks Bank permitted the TPPP to originate debit transactions for "other merchant-clients engaged in allegedly illegal activity, including alleged Internet gambling entities and an alleged Ponzi fraud scheme."[17] Four Oaks Bank allegedly was on notice of the fact that payday borrowers were misled because, during a twenty-month period, the bank had received hundreds of requests for proof of authorization from borrowers' banks, and that should have indicated to it that borrowers represented to their own banks, under oath, that debits to their accounts were not authorized.[18] The DOJ also stated that the bank ignored "incredibly high return rates" associated with the TPPP's internet-payday-lending customers.[19]

Four Oaks Bank entered into a consent order under which it agreed to pay $1.2 million in monetary relief[20] and to subject itself to extensive injunctive relief governing the conduct of its banking services, both directly and through TPPPs.[21] Among other things, the bank agreed that it would cease doing business with any TPPP that services short-term lenders or other high-risk merchants with high return rates.[22]

Shortly after the Four Oaks Bank consent order, the Community Financial Services Association of America ("CFSA") and Advance America Cash Advance Centers filed suit over Operation Choke Point against the Federal Deposit Insurance Corporation ("FDIC"), the Federal Reserve Board, and the Office of the Comptroller of the Currency.[23] The complaint alleged that the defendants "engaged in a concerted campaign" to "drive a lawful and legitimate industry" out of business "by exerting back-room pressure on banks and other regulated financial institutions to terminate their relationships with payday lenders."[24] The defendant regulators allegedly relied on several of their "informal guidance" documents to support their campaign.[25] The informal guidance documents allegedly warned banks that "reputational risk" can affect their "safety and soundness," warned them of reputational risk from doing business with short-term lenders, and urged them to terminate their relationships with such customers without providing objective criteria for measuring reputational risk or identifying customers that engage in "fraudulent or otherwise unlawful financial practices."[26]

16. Four Oaks Complaint, *supra* note 15, at 13–14.
17. *Id.*
18. *Id.* at 16.
19. *Id.* at 24.
20. United States v. Four Oaks Fincorp, Inc., No. 5:14-cv-14-BO (E.D.N.C. Apr. 25, 2014) (consent order at 11–12).
21. *Id.* at 6–12.
22. *Id.* at 5–6.
23. Complaint, Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Fed. Deposit Ins. Corp., No. 1:14-cv-953 (D.D.C. June 5, 2014) [hereinafter CFSA Complaint].
24. *Id.* at 3.
25. *Id.* at 15–19. In its complaint against Four Oaks Bank, the DOJ cites this informal guidance. *See* Four Oaks Complaint, *supra* note 15, at 12–13.
26. CFSA Complaint, *supra* note 23, at 15–19.

The plaintiffs further alleged that the regulators' informal guidance on reputational risk amounts to de facto rulemaking in violation of the Administrative Procedure Act[27] and violates their due process rights.[28] They sought an order declaring the informal agency guidance invalid and enjoining the defendants' complained-of conduct.[29] Motions to dismiss the amended complaint by the defendant agencies are pending.[30] Shortly after the CFSA filed suit, the FDIC withdrew the list of high-risk industries that the DOJ had used in issuing its subpoenas, noting one of the chief concerns that had been expressed by Operation Choke Point's critics—that legitimate businesses were getting cut off from banking services.[31]

CFPB Enforcement Actions

The Bureau of Consumer Financial Protection ("CFPB") has also initiated an enforcement action and civil investigations into online lending operations. The CFPB has indicated that its purpose in these investigations is to determine whether small-dollar online lenders have complied with federal consumer financial laws in their advertising, marketing, and collection activities.[32]

In December 2013, the CFPB initiated its first lawsuit against an online loan servicer, CashCall, Inc. and its affiliates ("CashCall").[33] CashCall allegedly entered into an arrangement with a tribal-member-owned online lender to purchase consumer installment loans originated by the lender.[34] The loans were marketed by CashCall, financed by its subsidiary, sold and assigned to the subsidiary, and then serviced and collected by a collection agency affiliate.[35] Under the arrangement, borrowers allegedly signed loan agreements permitting loan payments to be debited directly from their bank accounts.[36] Although CashCall ceased its business operations in September 2013, it allegedly continued to take monthly installment payments from the consumers' bank accounts.[37] The CFPB

27. 5 U.S.C. § 553 (2012).
28. CFSA Complaint, *supra* note 23, at 27–30, 32–34, 36–38.
29. *Id.* at 39–41.
30. *See* Defendant Board of Governors of the Federal Reserve System's Motion to Dismiss the Amended Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim; Federal Deposit Insurance Corporation's Motion to Dismiss Amended Complaint for Lack of Subject Matter Jurisdiction, or for Failure to State a Claim; Defendants Office of the Comptroller of the Currency and Thomas J. Curry's Motion to Dismiss Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief, Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Fed. Deposit Ins. Corp., No. 1:14-cv-953 (D.D.C. Aug. 18, 2014).
31. *See* Press Release, Fed. Deposit Ins. Corp., FDIC Clarifying Supervisory Approach to Institutions Establishing Account Relationships with Third-Party Payment Processors (July 28, 2014), *available at* http://www.fdic.gov/news/news/financial/2014/fil14041.html.
32. *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Examines Payday Lending (Jan. 19, 2012), *available at* http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-examines-payday-lending/.
33. Complaint, CFPB v. CashCall, Inc., No. 1:13-cv-13167 (D. Mass. Dec. 16, 2013), *available at* http://files.consumerfinance.gov/f/201312_cfpb_complaint_cashcall.pdf.
34. *Id.* at 9.
35. *Id.* at 9–10.
36. *Id.* at 13–14.
37. *Id.* at 16.

alleged that CashCall engaged in unfair, deceptive, and abusive practices because its high-cost loans violated various states' licensing requirements and interest-rate caps.[38] No substantive decision or consent order has been issued in the case as of this writing.[39]

In May 2014, the CFPB obtained an order in *CFPB v. Great Plains Lending LLC*,[40] requiring certain tribal online lenders to comply with civil investigative demands ("CIDs") issued to them. The CFPB issued CIDs to three Indian tribes and their lending entities in June 2012 seeking certain information, but they declined to produce records on the grounds that they were not subject to the CFPB's jurisdiction.[41] The CFPB therefore filed a petition to enforce the CIDs and compel the lenders to turn over the requested documents.[42]

The primary issue before the *Great Plains Lending* court was how to reconcile the Supreme Court's seemingly conflicting holdings in *Federal Power Commission v. Tuscarora Indian Nation*[43] and *Vermont Agency of Natural Resources v. United States ex rel. Stevens*[44] in order to apply the Consumer Financial Protection Act[45] properly to tribes and arms of tribes.[46] In *Tuscarora*, the Court held that, when a law of general applicability is silent as to whether it applies to Indian tribes, it should be presumed to apply, subject to exceptions.[47] In *Stevens*, the Court held that, unless there exists an affirmative showing of statutory intent to the contrary, the term "person" as used in legislation should be presumed not to include sovereigns.[48] In granting the CFPB's petition to enforce the CIDs, the *Great Plains Lending* court brushed over the apparent conflict between the cases, indicating that *Stevens* was more limited in scope and that the two cases were therefore not actually in conflict.[49] The court appeared to invite an appeal by the defendants on this point,[50] and it stayed enforcement of the CIDs pending the lenders' appeal to the U.S. Court of Appeals for the Ninth Circuit.[51]

38. *Id.* at 3–9.

39. The defendants filed a motion to transfer the case to the Central District of California, which is pending as of this writing. *See* Motion to Transfer Case (Renewed), or Alternatively, to Dismiss All Claims Against J. Paul Reddam for Lack of Personal Jurisdiction to Central District of California, CFPB v. CashCall, Inc., No. 1:13-cv-13167 (D. Mass. Apr. 11, 2014).

40. No. 2:14-cv-2090-MWF-PLA, 2014 U.S. Dist. LEXIS 89022, at *1 (C.D. Cal. May 27, 2014). This matter is presently pending appeal before the United States Court of Appeals for the Ninth Circuit. Authors Eckman, Zack, and Hud represent MobiLoans, LLC and Plain Green, LLC in this matter.

41. *Id.* at *3.

42. *Id.*

43. 362 U.S. 99 (1960).

44. 529 U.S. 765 (2000).

45. Pub. L. No. 111-203, tit. X, 124 Stat. 1955 (2010) (codified as amended at 12 U.S.C. §§ 5481–5603 (2012)).

46. *Great Plains Lending*, 2014 U.S. Dist. LEXIS 89022, at *21–22.

47. *Tuscarora*, 362 U.S. at 116.

48. *Stevens*, 529 U.S. at 780.

49. *Great Plains Lending*, 2014 U.S. Dist. LEXIS 89022, at *22.

50. *Id.* at *2.

51. *Id.* at *63.

FTC Enforcement Action

The Federal Trade Commission ("FTC") has likewise been active in regulating and investigating online lenders. In *FTC v. AMG Services, Inc.*,[52] the FTC brought suit against a tribally owned online lender and several related individuals and entities for violations of the Federal Trade Commission Act ("FTC Act")[53] and other laws.[54] The defendants argued that the FTC lacked the authority to regulate their conduct because the FTC Act was not a "law of general applicability" and therefore did not apply to them under *Tuscarora*.[55] The defendants also asserted that they were not subject to regulation by the FTC Act because they did not constitute "for profit corporations" as defined by the Act.[56] In March 2014, the district court upheld a magistrate judge's ruling that the FTC Act is a law of general applicability and it therefore applies to tribes, arms of tribes, and their employees and contractors.[57] With respect to the defendants' alternative argument, the district court likewise upheld the magistrate judge's ruling that genuine issues of material fact existed as to whether the defendants were "for profit corporations" within the meaning of the Act.[58] Significantly, if the court ultimately determines that a tribal lender is not a "for profit corporation," then the FTC will not have jurisdiction over the tribal lender.[59]

State Investigations and Enforcement Actions

Several states have also initiated their own investigations and enforcement actions seeking to impose limits on private lenders.[60] New York and Vermont have been particularly active in investigating online payday lenders and their affiliates.

52. No. 2:12-cv-536, 2013 U.S. Dist. LEXIS 185783 (D. Nev. July 16, 2013).
53. 15 U.S.C. § 53 (2012).
54. *See AMG Servs.*, 2013 U.S. Dist. LEXIS 185783, at *7.
55. *Id.* at *19–20 (citing Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960)).
56. *Id.* at *56.
57. FTC v. AMG Servs., Inc., No. 2:12-cv-536, 2014 U.S. Dist. LEXIS 29570, at *16–18 (D. Nev. Mar. 7, 2014).
58. *See id.* at *20.
59. The U.S. Attorney's Office for the Southern District of New York has also initiated a federal criminal probe into online payday lending by AMG. *See* Nate Raymond, *Exclusive: Payday Lender Subpoenaed in U.S. Criminal Probe*, Reuters (May 5, 2014), http://www.reuters.com/article/2014/05/05/us-paydaylender-crime-idUSBREA440ME20140505. It appears that the government is interested in AMG's allegedly "deceptive lending practices." *Id.*
60. The short-term lending industry has also been the subject of civil litigation in federal and state courts that challenges contract clauses that place exclusive jurisdiction in tribal courts or arbitral tribunals and mandate the application of tribal law. *See* Jackson v. Payday Fin., LLC, No. 12-2617, 2014 U.S. App. LEXIS 16257 (7th Cir. Aug. 22, 2014) (tribal arbitration provision was unreasonable and both substantively and procedurally unconscionable, and tribal court lacked subject matter jurisdiction); Heldt v. Payday Fin. LLC, No. 3:13-cv-3023-RAL, 2014 U.S. Dist. LEXIS 43352 (D.S.D. Mar. 31, 2014) (finding applicability of forum selection and arbitration clauses turned on issue of tribal exhaustion doctrine and expressing doubt that borrowers could be subject to tribal jurisdiction). *But see* FTC v. Payday Fin., LLC, 935 F. Supp. 2d 926 (D.S.D. 2013) (noting strong public policy favors enforcement of forum selection clauses, and that it is paradoxical for courts to favor a forum selection clause that specifies a foreign nation's courts over one that specifies a tribal court).

New York Actions

The New York Department of Financial Services ("NYDFS") has been actively investigating the online payday lending industry. In February 2013, the NYDFS issued a warning to all debt collectors operating in the state indicating that loans with interest rates higher than the statutory maximums, including payday loans, will be found void and unenforceable under New York law.[61] In August 2013, the NYDFS sent letters to thirty-five online payday lenders demanding that they cease and desist from making loans to consumers in the state, as well as letters to 117 banks and the National Automated Clearing House Association ("NACHA") requesting assistance with creating new model safeguards to block payday lenders' access to the Automated Clearing House ("ACH") electronic payment network.[62] In December 2013, the NYDFS issued subpoenas to sixteen online "lead generation" firms that operated websites that marketed loans to New York consumers, collected personal information about them, and sold the leads to payday lenders.[63] This greatly expanded the scope of the investigation to include entities not traditionally targeted by such subpoenas.

The reach of the New York investigations continued to expand in 2014. In January 2014, the NYDFS sent another letter to the NACHA stating that its standards did not adequately address online payday lenders' use of the ACH network and urging the association to adopt more specific and stringent protocols in order to root out online predatory lending practices.[64] In April 2014, the NYDFS sent twenty cease-and-desist letters to companies it identified as illegally promoting, making, or collecting on payday loans using the debit card system rather than the ACH network.[65] In connection with this initiative, Visa and Mastercard entered into an agreement with the NYDFS to take steps to halt the processing of payday loans through debit card transactions that automatically deduct loan payments from borrowers' accounts.[66] Under the agreement, the NYDFS will continuously provide Visa and Mastercard with information concerning lenders identified as using debit networks to collect on payday

61. *See* Press Release, N.Y. Dep't of Fin. Servs., Governor Cuomo Announces Department of Financial Services Notifies Debt Collectors Not to Seek Collection on Illegal Payday Loans (Feb. 22, 2013), *available at* https://www.governor.ny.gov/press/02222013cuomo-annc-deptoffinanc-debtcollect-not-seek-collections-illegal-paydayloans.

62. *See* Press Release, N.Y. Dep't of Fin. Servs., Cuomo Administration Demands 35 Companies Cease and Desist Offering Illegal Online Payday Loans that Harm New York Customers (Aug. 6, 2013), *available at* http://www.dfs.ny.gov/about/press2013/pr1308061.htm. Authors Eckman, Zack, and Hud represent some of the lenders that received these letters.

63. *See* Press Release, N.Y. Dep't of Fin. Servs., Governor Cuomo Announces Creation of New DFS Database Tool to Help Banks Identify and Stop Illegal, Online Payday Lending (June 16, 2014), *available at* http://www.dfs.ny.gov/about/press2014/pr1406161.htm.

64. *See* Press Release, N.Y. Dep't of Fin. Servs., NYDFS Urges Bank Payment Processing Gatekeeper NACHA to Take Stronger Action to Root Out Illegal Payday Lending (Jan. 14, 2014), *available at* http://www.dfs.ny.gov/about/press2014/pr1401141.htm.

65. *See* Press Release, N.Y. Dep't of Fin. Servs., Cuomo Administration Takes Action to Halt Illegal, Online Payday Lending Through Debit Card Networks (Apr. 30, 2014), *available at* http://www.dfs.ny.gov/about/press2014/pr1404301.htm. Authors Eckman, Zack, and Hud represent some of the lenders that received these letters.

66. *Id.*

loans,[67] while Visa and Mastercard, in turn, will cease their activity with such lenders, work with the NYDFS to investigate their actions, and issue alerts to financial institutions about the risk of doing business with lenders that may be operating in violation of state law.[68]

In June 2014, the NYDFS launched a database of companies that it has identified as having engaged in illegal payday lending activities.[69] Financial institutions are given access to the database and are required to use the information contained in it to enhance their due diligence and "know your customer" procedures and requirements.[70] Specifically, financial institutions can use the database to confirm that merchant customers are not using their accounts to facilitate payday loans and to identify payday lenders seeking to engage in lending activity with New York consumers.[71] Bank of America was the first financial institution to agree to use the new database.[72]

In August 2014, the Manhattan District Attorney initiated criminal charges against a dozen companies and their owner for operating an illegal offshore "payday syndicate" based in Anguilla and the British West Indies through an office in Tennessee.[73] The indictment charged that the payday syndicate controlled every facet of the loan process, from the initial extension of credit to loan collection.[74] The indictment further charged that the payday syndicate engaged in conspiracy and violated the state's criminal usury rate of 25 percent.[75] The defendants entered pleas of not guilty in August 2014.[76]

Vermont Actions

Vermont has likewise been active in investigating and regulating the lending industry. After the Vermont Consumer Protection Act ("VCPA") was amended to include entities that assist lenders in the facilitation of payday loans,[77] the Vermont Attorney General engaged in a series of efforts to enforce the expanded VCPA. In April 2014, the Attorney General filed suit against two lenders and a TPPP seeking immediate cessation of all lending activities and the facilitation of such activities in Vermont and full restitution to consumers of all amounts

67. *Id.*
68. *Id.*
69. *See* Press Release, N.Y. Dep't of Fin. Servs., Governor Cuomo Announces Creation of New DFS Database Tool to Help Banks Identify and Stop Illegal, Online Payday Lending (June 16, 2014), *available at* http://www.dfs.ny.gov/about/press2014/pr1406161.htm.
70. *Id.*
71. *Id.*
72. *Id.*
73. Indictment No. 2687/2014, New York v. Brown (N.Y. Sup. Ct. Aug. 11, 2014).
74. *Id.* at 2, 5.
75. *See* Arraignment, New York v. Brown, Case No. 2687/2014 (N.Y. Sup. Ct. Aug. 11, 2014).
76. *See* Jessica Silver-Greenberg, *New York Prosecutors Charge Payday Loan Firms with Usury*, N.Y. Times (Aug. 11, 2014), http://dealbook.nytimes.com/2014/08/11/new-york-prosecutors-charge-payday-lenders-with-usury/.
77. Vt. Stat. Ann. tit. 9, § 2481w (2013).

collected.[78] At the same time, the Attorney General also entered into settlement agreements with three of the largest online lenders and one TPPP.[79] As a result of the settlements, the lenders and the TPPP paid over $1 million to over 1,600 consumers and made $90,000 in direct payments to the state.[80]

The Vermont Attorney General also issued cease-and-desist letters to eighty-one lenders operating within the state,[81] and wrote advisory letters and requests for assistance to various parties involved in the facilitation of payday lending, including the NACHA, state banks and credit unions, employers, industry trade groups, television and radio networks, and major internet search companies.[82] The Attorney General has also distributed guidance to Vermont consumers that explains predatory lending and provides assistance to financially troubled individuals.[83]

Response to State Investigations and Enforcement Actions

Some state investigations and enforcement actions have been challenged in court, with varying results. In *Otoe-Missouria Tribe of Indians v. New York Department of Financial Services*,[84] three Indian tribes and tribally owned lending entities filed suit against the NYDFS seeking to establish their right to market and sell short-term loans online and to enjoin the NYDFS from interfering with their lending activities.[85] The lenders argued that the NYDFS lacked the authority to regulate their business activities because they have sovereign immunity.[86] The district court disagreed, finding that consumers "have not, in any legally

78. *See* Complaint, Vermont v. PBT Loan Servs., LLC (Vt. Super. Ct. Apr. 22, 2014), *available at* http://ago.vermont.gov/assets/files/Consumer/Complaint%20(4-22-14%20PBT%20).pdf; Complaint, Vermont v. A-1 Premium Budget, Inc. (Vt. Super. Ct. Apr. 22, 2014), *available at* http://ago.vermont.gov/assets/files/Consumer/Complaint%20(4-22-14%20A-1).pdf; Complaint, Vermont v. Intercept Corp. (Vt. Super. Ct. Apr. 22, 2014), *available at* http://ago.vermont.gov/assets/files/Consumer/Complaint%20(4-22-14%20Intercept).pdf. Authors Eckman, Zack and Hud represent some of the TPPPs.

79. *See* Assurance of Discontinuance, *In re* W. Sky Fin., LLC, Civ. A. No. 241-4-14-wncv (Vt. Super. Ct. Apr. 17, 2014), *available at* http://ago.vermont.gov/assets/files/Consumer/AOD%20filed%20(CashCall%204-18-14).pdf; Assurance of Discontinuance, *In re* Gov't Emp. Credit Ctr., Inc., Civ. A. No. 173-3-14-wncv (Vt. Super. Ct. Mar. 24, 2014), *available at* http://ago.vermont.gov/assets/files/Consumer/AOD%20filed%20(GECC)%203-24-14.pdf; Assurance of Discontinuance, *In re* Sure Advance, LLC, Civ. A. No. 107-2-14-wncv (Vt. Super. Ct. Feb. 25, 2014), *available at* http://ago.vermont.gov/assets/files/Consumer/AOD%20Filed%20(SureAdvance)%202-25-14.pdf; Assurance of Discontinuance, *In re* T$$, LLC, Civ. A. No. 249-4-14-wncv (Vt. Super. Ct. Apr. 22, 2014), *available at* http://ago.vermont.gov/assets/files/Consumer/T%20Money%20Vermont%20AOD%20(filed%204-22-14).pdf.

80. *See* Press Release, Vt. Office of Att'y Gen., Attorney General Announces $1,000,000 Crackdown on Illegal Lending (Apr. 23, 2014), *available at* http://ago.vermont.gov/focus/news/attorney-general-announces-$1000000-crackdown-on-illegal-lending.php.

81. *See* Vt. Office of Att'y Gen., Illegal Lending: Facts and Figures 9 (Apr. 23, 2014), *available at* http://ago.vermont.gov/assets/files/Consumer/Illegal_Lending/Illegal%20Lending%20Report%20April%202014.pdf. Authors Eckman, Zack, and Hud represent some of the lenders that received these letters.

82. *Id.*

83. *Id.*

84. 974 F. Supp. 2d 353 (S.D.N.Y. 2013), *aff'd*, No. 13-3769, 2014 U.S. App. LEXIS 18752 (2d Cir. Oct. 1, 2014).

85. *Id.* at 357.

86. *Id.*

meaningful sense, traveled to Tribal land" because they "are not on a reservation when they apply for a loan, agree to the loan, spend loan proceeds, or repay those proceeds with interest."[87] It held that "to the extent the State seeks to prevent the Tribes from making loans to New York residents who are in New York, it is regulating off-reservation activity."[88] The court therefore refused to find that the lenders were immune from suit and it declined to enjoin the NYDFS from investigating and issuing cease-and-desist letters to the tribes and their lending entities on the basis of tribal sovereign immunity, stating that it found "no express federal law prohibiting the State's regulation of payday loans to New York residents in New York."[89]

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the district court's denial of the lenders' motion for a preliminary injunction.[90] In its detailed opinion, the court engaged in an extensive analysis of jurisprudence discussing the Indian Commerce Clause and tribal sovereign immunity.[91] The Second Circuit recognized that the "hybrid transaction" of loans brokered over the internet constituted a "novel question" in this jurisprudence,[92] but it concluded that the issue of whether tribal entities that initiate lending transactions online engage in solely on-reservation activity was premature at the preliminary injunction stage of proceedings.[93] In so doing, however, the Second Circuit recognized that, although it was affirming the district court's denial of the preliminary injunction, the lenders could ultimately prevail in their lawsuit once more facts about the nature of the lending operations came to light during discovery.[94] Specifically, the court stated:

> With the benefit of discovery, plaintiffs may amass and present evidence that paints a clearer picture of the 'who,' 'where,' and 'what' of online lending, and may ultimately prevail in this litigation. But at this stage, the record is still murky, and thus, the District Court reasonably held that plaintiffs had not proven that they would likely succeed on the merits.[95]

On the other hand, in *People v. Miami Nation Enterprises*,[96] a California appellate court affirmed a finding that state regulators were powerless to challenge two out-of-state tribal payday lending businesses on sovereign immunity grounds be-

87. *Id.*
88. *Id.* at 360.
89. *Id.* (internal citations and quotations omitted).
90. *See* Otoe-Missouria Tribe of Indians v. N.Y. Dep't of Fin. Servs., No. 13-3769, 2014 U.S. App. LEXIS 18752, at *3 (2d Cir. Oct. 1, 2014).
91. *Id.* at *17–22.
92. *Id.* at *22–23.
93. *Id.* at *23, *26–33.
94. *Id.* at *12, *22–27, *33.
95. *Id.* at *33. Nevertheless, on October 31, 2014, the tribes and lending entities filed a voluntary dismissal of their complaint pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), which the court approved on November 2, 2014. *See* Notice of Voluntary Dismissal Without Prejudice, Otoe-Missouria Tribe of Indians v. N.Y. Dep't of Fin. Servs., No. 13-cv-05930 (S.D.N.Y. Nov. 3, 2014).
96. 223 Cal. App. 4th 21, *pet. for rev. granted*, 324 P.3d 834 (Cal. 2014).

cause the businesses operated as arms of a tribe.[97] In rendering its decision, the court noted that the businesses were established under tribal law, were run by boards comprised of tribal members, and furthered tribal autonomy by reinvesting money derived from their commercial activities into the tribe.[98] The court held that the lenders were "not merely passive bystanders to the challenged lending activities," but were "engaged in a commercial enterprise that is otherwise entitled to be protected by tribal immunity" and did not "lose that immunity simply by contracting with nontribal members to operate the business."[99]

97. *Id.* at 43.
98. *Id.* at 29, 41–42.
99. *Id.* at 41 (internal citation omitted).