

# Litigation Update



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# *Hengle v. Asner* – E.D. Va. (Pending 4th Circuit – Argument 1/26/21)

- Plaintiffs alleged lending entities violated Virginia law and RICO
- Found that RICO does not provide private plaintiffs with right to injunctive relief
  - Oral argument: Court pointed out DOJ's view is that equitable relief limited to AG only
- Followed *Gingras* by extending *Ex Parte Young* to allow injunction against tribal officials to enforce state law
  - Oral argument: Appellants stated *Bay Mills* authorized individual capacity actions, not subjecting co-equal sovereigns to 50 or more jurisdictions' laws.
- Injunction prohibits collection on existing loans; does not prohibit “future usurious lending”
- Loans were “off-reservation conduct” not subject to immunity.
  - “Such ‘off-reservation effects’ clearly exist here and warrant the imposition of Virginia's generally applicable laws. Moreover, the Court does not base its off-reservation-conduct finding solely on the physical location of Plaintiffs when they executed the loan agreements”

# Choice of Law Issues

- What Law Applies Can Be Determinative Issue in Case
- Lending Agreements Usually Specify Tribal Law and Arbitration as Forum
- “Prospective Waiver” – Whether Party Waived, In Advance, Right to Federal Statutory Remedies
  - Language Must Apply “Applicable Federal Law”
    - “By repeatedly stating that the Arbitration Agreement will be interpreted “in accordance with . . . applicable federal law,” the... Agreement acknowledges it is subject to the laws of the United States... As such, the prospective waiver doctrine does not apply.” *Gibbs v. Stinson*, 421 F. Supp. 3d 267, 304 (E.D. Va. 2019).
  - Courts Look Beyond Contract as Well to Interplay with Tribal Code
    - “[T]he choice of law and forum selection clause here does not state that federal law is inapplicable to resolution of disputes arising from the loan... [f]or now, the Court concludes that the more prudent approach is simply to decline to find that the choice of law and forum selection clause is an unenforceable prospective waiver.” *Smith v. Martorello*, 2021 U.S. Dist. LEXIS 49210 (D. Or. March 16, 2021).

# Trends in Tribal Lending Space

- Standing following *Ramirez v. TransUnion*
  - Every class member required to have standing
  - *Kale v. Procollect, Inc.* (W.D. Tenn. July 2, 2021) – Risk of future harm not satisfied for person “seeking retrospective damages.”
  - Impact on class members who did not pay interest over state usury limit
- *Gingras* Type Claims
  - Issue is Whether Federal Court Can Issue Injunction Requiring Tribal Officials to Enforce State Law
  - *Great Plains Lending. LLC v. Dep’t of Banking*, 2021 Conn. LEXIS 136, (Conn. May 20, 2021).
    - “The department... proceeds against him in his official capacity to enjoin further unlawful practices. Such relief is appropriate under *Ex parte Young* and is consistent with the Second Circuit's decision in *Gingras*”
- Suits Avoiding Arm-of-Tribe Entities, Bringing Suit Against Non-Sovereign Actors
  - But Really Going After Tribal Operations Through Non-Tribal Actors
  - “True Lender” Concept – Suit is Being Brought to Accord Relief WITHOUT:
    - Bringing Suit Against All Parties to Loan Transaction; or
    - Bringing Suit Against All Persons in Alleged RICO Conspiracy
  - *Williams v. Martorello*, No. 3:17-cv-461, Dkt No. 1092, (E.D. Va. May 20, 2021).