Fields of Opportunities

IOWA DIVISION OF BANKING

TERRY E. BRANSTAD
GOVERNOR
KIM REYNOLDS
LT. GOVERNOR

JAMES M. SCHIPPER
SUPERINTENDENT

April 23, 2014

IN THE MATTER OF:	)	DIA Nos. 12IDB002, 13IDB001
	)	IDOB File No.
	)	2012-NRR 2003-0154
CashCall, Inc.	)	
1600 South Douglass Road	)	**ORDER ADOPTING**
Anaheim, CA 92806,	)	**ADMINISTRATIVE LAW JUDGE'S**
	)	**RULING DATED**
Respondent.	)	**SEPTEMBER 26, 2013**
	)	

I. INTRODUCTION

The matter before the Superintendent of the Iowa Division of Banking ("the Superintendent") is the Ruling on Whether Loans at Issue are Subject to Iowa Law ("the Ruling"[1]) of Administrative Law Judge Laura E. Lockard ("ALJ Lockard") dated September 26, 2013. For the reasons expressed in Part III below, the Superintendent shall **ADOPT** the Ruling.

II. RELEVANT PRIOR PROCEEDINGS

On November 12, 2013, CashCall, Inc. ("CashCall") filed its Brief on Interlocutory Review ("Opening Brief"). On December 2, 2013, the State of Iowa ("the State") filed a Response. On December 11, 2013, CashCall filed a Reply. Neither party requested oral argument, and the Superintendent finds oral argument is unnecessary.

[1]Complete familiarity with the Ruling, as well as the Superintendent's Order dated October 22, 2013, is assumed.

III. ANALYSIS

In its Opening Brief, CashCall makes one general argument and four specific arguments in favor of reversing or vacating the Ruling.

As a general matter, CashCall argues the State and ALJ Lockard have misunderstood the basis for CashCall's position that Iowa law cannot apply to CashCall. According to CashCall, CashCall has "consistently emphasized, it has not invoked the doctrine of tribal sovereign immunity." Rather, CashCall stresses the Indian Commerce Clause, U.S. Const. art I., § 8, cl. 3, and various federal statutes preempt Iowa law.

More specifically, CashCall alleges ALJ Lockard erred in (1) finding "Western Sky loan agreements were formed off-reservation"; (2) holding "Western Sky was not entitled to the protections of a [Cheyenne River Sioux Tribe ("the CRST")] tribal member"; (3) "misconstru[ing] and unduly limit[ing] Supreme Court precedent defining the scope of a tribe's jurisdiction over commercial dealings involving tribal members"; and (4) "overlook[ing] the substantial tribal and federal interests at stake in its preemption analysis."

The State rejoins the Ruling is correct in all respects.

A. Tribal Sovereign Immunity

As indicated, CashCall now expressly disclaims relying on the doctrine of tribal sovereign immunity. For good reason: the United States Supreme Court has squarely held that the doctrine of tribal sovereign immunity cannot immunize individual members of an Indian tribe. *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 171-72 (1977). "At its most expansive, tribal sovereign immunity may extend to tribal *officers*—but only when such officers are acting within the legitimate scope of their official capacity." *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 30 (1st Cir. 2006) (emphasis in original) (en banc). If tribal sovereign immunity cannot immunize the conduct of members of an Indian tribe, but perhaps only its officers acting in their

official capacities, then it clearly follows here that tribal sovereign immunity could not immunize the conduct of CashCall. CashCall is merely a California corporation that has an agreement with a South Dakota limited liability company owned by a member of an Indian tribe.[2]

B. Preemption

Because the doctrine of tribal sovereign immunity cannot and does not apply here, CashCall correctly frames its argument as an argument of *preemption.*[3] As the Supreme Court observed long ago—even in cases involving Indian Tribes as parties to the litigation—"the trend has been away from that idea of inherent Indian sovereignty[4] as a bar to state jurisdiction and towards reliance on federal pre-emption." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973). "The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." *Id.*

"[I]n almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction." *Id.* at 172 n.8. That said, the Supreme Court has rejected "a

[2]CashCall faults ALJ Lockard for analyzing the doctrine of tribal sovereign immunity, but it was CashCall that repeatedly raised that defense in its Motion to Dismiss, filed June 28, 2013. For example, CashCall argued, "[T]he doctrines of tribal immunity and federal prevention prevent Iowa from imposing its statutes on loans issued by Western Sky." Motion to Dismiss, at 1.

[3]There is no indication in the record that CashCall, or anyone else, applied for a waiver or variance from Iowa law or the Division's rules when applying for its non-resident license. *See* Iowa Admin. Code r. 187—ch. 12. The State does not argue, however, that CashCall waived its arguments by its past actions or inactions.

[4]The doctrine of tribal sovereign immunity devolves from tribal sovereignty. *Narragansett*, 449 F.3d at 24-25 (citing *Okla. Tax. Comm'n v. Citizen Bank Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)).

narrow focus on congressional intent to preempt State law as the sole touchtone" but rather holds that "[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). This "consideration of the nature of the competing interests at stake," usually gauged through the lens of extant treaties and statutes, must remain the principal focus of the preemption analysis. *Id.*

The aforementioned preemption analysis is consistent with the well-settled legal principle that tribes are sovereign nations and "states have no power to regulate the affairs of Indians on a reservation." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Conversely, an Indian tribe may extend tribal jurisdiction to non-members and extraterritorially[5] in narrowly circumscribed circumstances: tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana v. United States*, 450 U.S. 544, 565 (1981); *see also Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010) (indicating that the Supreme Court has construed *Montana* to govern a tribe's attempt to assert civil jurisdiction over nonmembers regardless of land ownership). But it remains the case that "'efforts by a tribe to regulate nonmembers . . . are presumptively invalid,'" and thus any attempt to broadly construe the extraterritorial preemptive force of tribal jurisdiction to govern the off-reservation conduct of nonmembers or the states should be rejected—the *Montana* "exceptions are narrow ones and 'cannot be construed in a manner that would swallow

[5]CashCall raised a separate state law argument regarding extraterritoriality and the Commerce Clause in its Motion to Dismiss but has apparently abandoned that independent challenge.

the rule.'" *Attorney's Process*, 609 F.3d at 936 (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330)).

To support its argument that Iowa banking law is preempted, in its Opening Brief and Reply CashCall cites various federal statutes, including but not limited to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, the Indian Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4101 *et seq.*, the Indian Financing Act, 25 U.S.C. § 1451 *et seq.*, as well as the existence of the Office of Indian Affairs within the U.S. Small Business Administration, as evidence of an alleged "clear federal mandate that tribes be permitted to regulate their own commercial affairs, including businesses owned by tribal members." CashCall maintains the State's interests in protecting its citizen-consumers must cede to "that of the federal government in protecting the economic well-being, self-sufficiency, and sovereignty of the CRST and its constituents." In short, while again expressly disclaiming direct reliance on the doctrine of tribal sovereign immunity, CashCall concludes the Division's actions are preempted because CRST's very sovereignty is threatened; CashCall maintains "application of state law would unduly interfere with tribal adjudicatory and regulatory jurisdiction, infringe on tribal sovereignty, and conflict with federal treaties and statutes promoting Indian economic self-determination." Enforcement of Iowa law would, CashCall submits, "eviscerat[e] a tribe's sovereign rights."[6]

There is no preemption here. In the view of the Superintendent, CashCall is impermissibly attempting to use venerable principles of tribal sovereignty as a sword, not as a shield. More importantly, CashCall's assertions that the CRST's economic self-determination is in jeopardy are self-serving and finds no support in the record evidence.

[6]CashCall says "CashCall's counsel is unaware of any United States Supreme Court case that permitted states to regulate tribes outside their boundaries, and there is no basis for [ALJ Lockard] to assume otherwise."

Indeed, the CRST did not intervene in these proceedings or otherwise attempt to assert its interests; if the very sovereignty of the CRST were threatened, it would seem more likely than not that the CRST would have done so here.

In lieu of record evidence, CashCall's argument consists of unwarranted leaps in logic. Boiled down to its essence, CashCall appears to offer the following argument to support its assertion that regulating CashCall's actions would implicate tribal interests that outweigh the State's interests in protecting its citizens from unscrupulous lending: (1) Webb is a member of the CRST; (2) because Webb is a member of the CRST, Western Sky is "imbued with the attributes" of Webb and has *de facto* "tribal member status"; and (3) through assignment or other contractual maneuvers, "CashCall steps into the shoes of Western Sky and is permitted to assert Western Sky's rights under the loans" and "has the same immunity from enforcement of state laws as Western Sky enjoys."

Webb is unquestionably a member of the CRST, but the remainder of CashCall's syllogism consists of false premises and conclusions. Webb is not Western Sky or the CRST, and Western Sky is not CashCall or CRST, and *vice versa*. CashCall relies heavily on *Pourier v. South Dakota Department of Revenue*, 658 N.W.2d 395, 403-04 (S.D. 2003), *vacated in part on other grounds*, 674 N.W.2d 314 (S.D. 2004), for the proposition that a corporation may obtain "the racial identity" of a tribe or an enrolled member of the tribe. But *Pourier* is inapposite—*Pourier* did not purport to apply the Supreme Court's preemption analyses but instead concerned an attempt by a state to use the Hayden-Cartwright Act of 1936, 4 U.S.C. § 104, to authorize taxes on Indians upon Indian reservations. In any event, *Pourier* is inconsistent with *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 263 (1977), in which the Supreme Court observed that a corporate entity cannot have a racial identity. *Pourier* is also inconsistent with the greater weight of authority. *See, e.g.*, *Baraga Prods., Inc. v. Comm'r of Rev.*, 971 F. Supp. 294, 295-98 (W.D. Mich. 1997) (collecting

cases and holding that, absent instances in which a corporation is organized under tribal law, is controlled by the tribe, and is operated for government purposes, or is acting as the tribe's agent, a corporation will not be held to be immune from state taxation); *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1109 (Ariz. 1989) (voicing concerns about extension of the subordinate economic organization doctrine in the tribal sovereign immunity context, because the law "does not favor bestowing immunities . . . on preferred classes of defendants"). In any event, *Pourier* does not say this alleged imbued "racial identity" may be assigned by contract for the corporation's profit. Tribal self-government, not profit, is at the heart of tribal jurisdiction, tribal sovereignty, and the *Montana* exceptions. *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010).

The Iowa laws from which CashCall seeks a variance treat all companies equally, and there is no indication or evidence that those laws directly or indirectly discriminate against Indian tribes, Indians, or Indian commerce. *See Omaha Tribe of Ne. v. Miller*, 311 F. Supp. 2d 816, 825 (S.D. Iowa 2004). Even if CashCall were an Indian tribe or a member thereof, the Supreme Court has said "the off-reservation activities of Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the contrary.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 n.18 (1983).

This observation of the Supreme Court in *Mescalero Apache Tribe* is fatal to CashCall's preemption argument. Regardless of where the "meeting of the minds" occurs, for purposes of Iowa contract law[7] or conflicts-of-law jurisprudence more generally, by its very nature Internet lending is "off-reservation activity" for purposes of

[7]With respect to the parties' dispute concerning application of *Heartland Express, Inc. v. Terry*, 631 N.W.2d 260 (Iowa 2001), it is a common lending practice to retain the right to verify borrower information *throughout* the term of the loan.

the preemption analysis CashCall invokes. *See, e.g., Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, No. 13 Civ. 5930(RJS), 2013 WL 5460185, *5 (S.D.N.Y. Sept. 13, 2013); *State ex rel. Suthers v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389, 400 (Colo. App. 2008). And there is no express federal law to the contrary forbidding the Iowa laws at issue. Indeed, the Eighth Circuit Court of Appeals has upheld the I.C.C.C. against a challenge that the I.C.C.C. placed an undue burden on interstate commerce. *Aldens, Inc. v. Miller*, 610 F.2d 538, 538-39 (8th Cir. 1979).

The Iowa laws at issue in these proceedings are important to Iowans, a fact CashCall does not appear to dispute. For example, [Iowa Code c]hapter 536 was enacted by the legislature for protection of the public doing business with small loan companies." *Beneficial Fin. Co. of Waterloo v. Lamos*, 179 N.W.2d 573, 580 (Iowa 1970). As the Eighth Circuit observed in *Aldens*,

> In contrast to the insubstantial burdens the operation of Chapter 537 imposes on interstate commerce, the interest of the State of Iowa in protecting its citizens from usurious interest rates in consumer credit transactions is considerable. And, it extends to credit sales solicited of and by Iowa residents in Iowa, notwithstanding that the contract terms declare the contract to be governed by the laws of the state in which the seller is located. It suffices to note that it is necessary for the states to enact reasonable consumer credit legislation to protect this public interest, for in the power of the lender to relieve the wants of the borrower lies the germ of oppression.

610 F.2d at 539-40 (internal quotation omitted).

In sum, this is not a case in which a state is attempting to regulate the on-reservation activities of an Indian tribe or its members. Rather, this is a case in which the State seeks to protect its own citizens from a California company and allegedly usurious loans. As the Connecticut Banking Commissioner recently wrote in imposing a $350,000 civil penalty upon CashCall:

> Neither [CashCall nor Western Sky] could legally claim the immunity extended to an Indian tribe. To conclude otherwise would do a disservice to legitimate Native American lending operations. . . . [CashCall] claims that the Commissioner . . . is attempting to 'regulate a reservation'. This argument misconstrues the Commissioner's action. The Commissioner was attempting to regulate California-based [CashCall's] unsecured lending activity and the exorbitant interest rates charged and/or received by [CashCall].

In re CashCall, Inc., Findings of Fact, Conclusions of Law, and Order, Dated March 3, 2014, at 21.

IV. ORDER

IT IS ORDERED, therefore, that the Ruling is **ADOPTED** for the reasons set forth above. The Superintendent's stay of October 22, 2013 is **LIFTED** and this matter is **REMANDED** for further proceedings consistent with this Order.

_____

James M. Schipper
Superintendent