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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Advocates Urge 9th Circ. To Rethink Payday Lending Order

By **Victoria McKenzie**

Law360 (November 9, 2021, 3:06 PM EST) -- National advocacy groups have asked the Ninth Circuit for a rehearing or en banc review of its split decision to send a payday lending case to arbitration, saying that fraudsters who use tribes as a front to skirt federal consumer laws "should not be permitted to abuse arbitration as a way to avoid scrutiny of their operations."

In an amici brief filed Monday, the National Consumer Law Center and the Public Justice Center said that the appellate court's September analysis ignored important parts of the underlying arbitration agreement between consumers and online lenders Think Finance, Plain Green and Great Plains Lending.

According to the brief, the three-judge panel enforced the delegation clause of the agreement but "failed to address the terms of the agreement that restrict class proceedings and limit post-arbitration review," and that "these terms, if enforceable, mean that the borrower protections underpinning the panel's decision do not exist."

The panel justified its decision by outlining some of the "back-end" protections that would theoretically be available to the borrowers once arbitrators decided whether the agreement impermissibly waived consumers' federal rights — but these very protections are prohibited under the arbitration agreement, the advocates argued. Since arbitration would have to occur on an individual basis, those decisions may very well differ and will never become part of case law.

The panel ignored a "tangle of questions" about the rights of class members in this situation, according to the brief. And if borrowers were to try and challenge an arbitrator's ruling in federal court, it could lead to additional questions that might be again delegated to an arbitrator, it said.

Kimetra Brice and two others are leading a class of consumers suing the now-defunct online lender Think Finance and its associated companies for issuing interest rates up to 45 times higher than California's legal limits. According to the complaint, the companies got away with this scheme by conducting business with tribal entities and declaring tribal sovereign immunity.

The lenders appealed to the Ninth Circuit in June, arguing that a California district court improperly granted certification to the class before deciding how to identify class members, how to manage the suit and how to ensure only people who experienced injuries were included.

In the opinion, U.S. Circuit Judge Danielle J. Forrest cited the U.S. Supreme Court's 2010 decision in Rent-A-Center, West, Inc. v. Jackson, which ruled that when a party challenges an entire agreement — not just an arbitration provision — an arbitrator must decide the contract's enforceability. The three-judge Ninth Circuit panel's decision created a circuit split — the Second, Third and Fourth Circuits have each held that certain arbitration agreements are unenforceable for various reasons.

U.S. Circuit Judge William A. Fletcher, who also sat on the panel, "strongly" dissented from his colleagues and argued that under the Federal Arbitration Act, arbitration agreements are invalid if they effectively waive a party's right to pursue justice.

On Monday, consumer advocates zeroed in on the profile of cash-strapped payday borrowers — the majority of whom use the loans for recurring expenses like rent and utilities — and the catastrophic

consequences of getting caught in a "debt trap." For their part, these types of lenders don't verify the client's ability to repay the loan, according to the brief, and most wind up refinancing month after month. "Moreover, to cover the initial loan and its interest, borrowers often take out new loans; 76 percent of payday loans are taken out to pay back prior payday loans, and borrowers who take out five or more loans a year generate 90 percent of the industry's business," the brief said.

The brief noted a "growing trend" of short-term lenders that reorganize under the name of a tribe in order to avoid compliance with state and federal payday lending laws, and for the added benefit of broad sovereign immunity from lawsuit. According to the brief, most of these operations are funded and controlled by non-tribal executives and headquartered far from tribal lands. The lender-tribe affiliations and financial agreements are "notoriously opaque," the advocates said, particularly to consumers, who are unaware that they are doing business with a company that isn't subject to consumer protection laws.

In 2017, the Public Justice Center conducted a study examining the relationships between 100 short-term lenders and their affiliate tribes. According to Leah Nicholls, senior attorney for the Public Justice Center, the group found that tribes typically earned little more than a "pittance" as part of the deal. "Predatory lenders were trying to use the cover of the tribe to evade state law, and in exchange the tribes didn't get much benefit at all," Nicholls told Law360 on Tuesday.

There are lawyers involved, too, she said, pointing to the Consumer Financial Protection Bureau's "infamous" case against CashCall and the well-documented role that its in-house counsel and Katten Muchin Rosenman attorneys played in setting up the scheme.

"Arbitration agreements that limit or extinguish the application of state and federal law — like the ones at issue here — are indispensable" to these operations, according to the brief. The advocates went on to argue that the court should consider the substance of the arrangement, rather than its form, to determine whether tribal versus state and federal law should apply to disputes over the legality of interest rates and other practices.

A class in Virginia won a $50 million class action settlement with Think Finance in March, and the Pennsylvania attorney general's office in 2019 also reached a multimillion-dollar settlement with parties associated with the lenders that worked with Think Finance.

The National Consumer Law Center did not immediately respond to requests for comment Tuesday.

Brice and the borrowers are represented by Matthew W.H. Wessler and Gregory A. Beck of Gupta Wessler PLLC; Kristi C. Kelly and Andrew J. Guzzo of Kelly & Guzzo PLC; Leonard A. Bennett, Craig C. Marchiando and Elizabeth W. Hanes of Consumer Litigation Associates PC; and Anna C. Haac of Tycko & Zavareei LLP.

The lenders are represented by Richard L. Scheff, David F. Herman and Michael C. Witsch of Armstrong Teasdale LLP, and Anna S. McLean and Jacqueline Simonovich of Sheppard Mullin Richter & Hampton LLP.

The case is Brice et al. v. Stinson et al., case number 19-15707, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Gemma Horowitz.