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United States—Sovereign Immunity

Little Tucker Act's Waiver of Immunity Doesn't Apply to Credit Card Receipt Claims

An attorney's attempt to sue the federal government because the government generated an electronic receipt from his credit card transaction that included too much information ran into trouble from a unanimous U.S. Supreme Court Nov. 13, as the court held that the attorney could not rely on the Little Tucker Act's general waiver of sovereign immunity at 28 U.S.C. § 1334 to support jurisdiction for his damages claims under the Fair Credit Reporting Act (*United States v. Bormes*, U.S., 11-192, 11/13/12).

A statute such as the FCRA that contains a specific remedial scheme provides the exclusive method for determining whether suits against the federal government are permitted, and therefore the Little Tucker Act's general waiver of sovereign immunity does not apply, Justice Antonin Scalia wrote for the court.

Whether the federal government has waived its sovereign immunity with regard to FCRA violations can only be determined by reference to the FCRA itself, the court said, but it did not answer that question itself. Instead, it left it to be resolved by an appeals court on remand.

Phil Pucillo, a lecturer at Michigan State University law school, East Lansing, Mich., said that "plaintiffs frequently invoke the Little Tucker Act whenever a statute doesn't provide for a remedy," and that today's decision does not upset that process.

Gregory Sisk, a professor at the University of St. Thomas School of Law, Minneapolis, agreed with Pucillo and said that "the *Bormes* decision changes nothing . . . with respect to the traditional Tucker Act docket."

FCRA's Comprehensive Scheme. The FCRA, 15 U.S.C. § 1681a et seq., is a consumer privacy statute regulating the use of consumer credit information. Among other provisions, the FCRA permits a credit or debit card receipt to list no more than the last five digits of a credit card number or the card's expiration date—but not both.

A "person"—defined in the FCRA to include a "government or governmental subdivision or agency"—who negligently or willfully violates the act is liable to the

consumer for actual damages or statutory damages of up to \$1,000. Further, the act provides for jurisdiction in the federal district courts, and sets a statute of limitations period.

Attorney James X. Bormes brought the claims after he paid court filing fees for a client online using the federal government's Pay.gov website. In particular, the receipt generated for the filing fees contained both the last four digits of Bormes's credit card and the card's expiration date.

Subsequently, Bormes filed a putative class action in federal district court in Illinois against the federal government for FCRA violations. He asserted jurisdiction under the FCRA and the Little Tucker Act.

Little Tucker Act's Waiver. Specifically, the Little Tucker Act, 28 U.S.C. § 1334, waives the federal government's sovereign immunity for any "civil action or claim against the United States, not exceeding \$10,000 in amount, founded [] upon . . . any Act of Congress." It creates concurrent jurisdiction in the federal district courts and the Court of Federal Claims for such claims.

The court explained that before the Little Tucker Act and its predecessors were enacted, several statutes "impose[d] monetary obligations on the United States," but failed to provide a judicial mechanism to enforce those obligations. Accordingly, individuals seeking payment from the federal government would frequently petition for private bills in Congress.

To avoid this burdensome process, Congress created the Court of Claims—the predecessor to the Court of Federal Claims—and waived sovereign immunity for obligations arising from federal statutes. Describing it as a "gap-filling" measure, the court said that the Little Tucker Act does not itself "'creat[e] substantive rights,'" but merely provides "the missing ingredient for an action against the United States for the breach of monetary obligations not otherwise judicially enforceable."

Bormes therefore argued that both the FCRA and the Little Tucker Act permitted FCRA claims against the government.

The district court dismissed Bormes's class action. It determined that the FCRA did not provide the "explicit waiver" necessary to find a waiver of sovereign immunity, and declined to address Bormes's Little Tucker Act argument.

Bormes appealed to the Federal Circuit, which has exclusive jurisdiction over appeals from district courts

when the basis of the district court's jurisdiction was the Little Tucker Act.

The Federal Circuit denied the government's request to transfer the case to the Seventh Circuit, vacated the district court's opinion, and held that the Little Tucker Act waived sovereign immunity for FCRA violations.

Can't 'Mix and Match.' The Supreme Court disagreed with the Federal Circuit. It said that the Little Tucker Act is "displaced" when a statute imposing monetary obligations has its own process for judicial remedies.

For example, in *Nichols v. United States*, 7 Wall. 122 (1869), the Supreme Court held that the predecessor to the Little Tucker Act—the 1855 act—did not apply to revenue laws because those laws already provided a comprehensive remedial scheme. The *Nichols* court determined that permitting suit under the 1855 act would "frustrate congressional intent with respect to the specific remedial scheme already in place."

Here, the court determined that the FCRA had a "self-executing remedial scheme," because it delineated the plaintiffs could sue, established the available damages, identified the appropriate court, and specified a statute of limitations period.

Accordingly, the Little Tucker Act's general remedial scheme—including the waiver of sovereign immunity—was supplanted by the FCRA's more specific scheme, the court said. Otherwise, permitting plaintiffs to "mix and match" liability creating provisions with the Little Tucker Act's waiver of sovereign immunity "would transform the sovereign-immunity landscape," it said.

The court therefore vacated the Federal Circuit's opinion.

Feds May Still Be Liable. The court did not, however, reach the issue of whether the FCRA itself waived sovereign immunity and permitted claims against the federal government. Instead, the court remanded the case with instructions to transfer the case to the Seventh Circuit, which will determine the scope of the government's liability.

Pucillo told BNA Nov. 13 that the "good news for FCRA plaintiffs is that there still might be a chance to sue the federal government" for FCRA violations.

The bad news: Pucillo does not think that the Seventh Circuit will find a waiver of sovereign immunity in the FCRA.

While the definition of "person" in the FCRA does include a "government or governmental subdivision or agency," he said that those terms were "too broad." Notably, he said that courts typically require that a waiver of sovereign immunity be "crystal clear," and he did not think that the reference to "government" in the FCRA meets that standard without specifically referring to the "United States" or the "federal government."

Sisk agreed. He said that "[w]hile the Supreme Court carefully refrained from commenting on whether the FCRA itself contains a waiver of sovereign immunity[], the Court's reaffirmation that such consent must be 'equivocally expressed' suggests that those seeking to find a right to sue the United States in the FCRA have a steep hill to climb."

Although the court's decision had a "direct practical significance for" for FCRA plaintiffs, Sisk said that the "significance of the *Bormes* decision [outside of the FCRA] is likely to be limited."

"The *Bormes* decision simply holds that when Congress enacts a statute with a specific judicial remedy . . . that particular statute's detailed remedial scheme is the first and [last] word on the availability and scope of a judicial remedy," Sisk said.

He added that "[b]y limiting the general waiver of sovereign immunity for monetary claims found in the Tucker Act to those federal statutes that impose an obligation on the federal government without saying how such an obligation may be enforced in court, the Supreme Court today does little or nothing to narrow the traditional scope of the Tucker Act. The Tucker Act has always played the most prominent role in authorizing a suit for a money judgment when a statute grants a government benefit that a person claims has been denied or directs compensation by the government that a person claims has been withdrawn. Examples include military employment claims, Indian trust claims, contract claims. Those cases fell under the Tucker Act yesterday, and those cases are still under the Tucker Act today."

John G. Jabobs, Jacobs Kolton Chtd., Chicago, argued for *Bormes*.

Sri Srinivasan, Department of Justice, Washington, D. C., argued for the government.

BY KIMBERLY ROBINSON

Full text at [*http://pub.bna.com/lw/11192supct.pdf*](http://pub.bna.com/lw/11192supct.pdf) *and 81 U.S.L.W. 4007.*

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