



Are federal courts committing a FCRA violation when lawyers pay filing fees online?

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Fellow federal practitioners, could something most of us do on a regular basis be a money making opportunity we've simply overlooked? An enterprising lawyer in the Northern District of Illinois thought so. Unfortunately, in the case of *Bormes v. United States of America*, No. 13-1602, (7th Circuit), handed down July 22, 2014, the Seventh Circuit answered in the negative.

Mr. Bormes, the plaintiff, paid a filing fee for one of his suits online via pay.gov, which all federal courts use to accept electronic payments. Mr. Bormes received an email receipt that included the last four digits of his social security number and his credit card's expiration date.

Mr. Bormes believed this receipt violated §1681c(g)(1) of the Fair Credit Reporting Act (FCRA) ^[1] and brought a civil action for damages. The crux of his argument is that §1681c(g)(1) allows a receipt to contain either the last four digits of your social security number or your credit card expiration date, but not both.

As the Seventh Circuit explained, any "person" who willfully or negligently fails to comply with FCRA is liable for damages. 15 U.S.C. §§ 1681n(a), 1681o(a). FCRA defines a "person" to include any "...government or governmental subdivision or agency."

Perhaps trying to one-up Mr. Bormes' in the chutzpah department, the government, despite conceding that it is a "person" for the purposes of FCRA's substantive requirements, denied that § 1681n authorizes damage against it. As best as I can relay, the logic of the argument appears to be that when § 1681n was originally enacted in 1970 – only consumer reporting agencies and users of information could be liable. Although it was subsequently amended in 1996 to authorize damages against all "persons," the government argued that the legislative history of the amendment did not mention or evidence a Congressional intent to expose the government to damages. The government therefore argued that the plain language of the FCRA amendment did not waive the government's sovereign immunity against damages.

To put it mildly, the Seventh Circuit was skeptical of the government's argument, asking "...if the United States is a 'person' under § 1681a(b) for purposes of duties, how can it not be one for purposes of remedies?" The Court continued: "[t]he argument that a silent legislative history prevents giving the enacted text its natural meaning has been made before – and it has not fared well." Finally, this gem: "Congress need not add 'we really mean it!' to make statutes effectual."

You obviously get where this is going. Unfortunately, Mr. Bormes' victory on that point would ultimately prove short lived. Bormes argued the government violated 15 U.S.C. § 1681c(g)(1), which provides that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." Not to be outdone, the government argued in response that it didn't "print" anything – it simply sent an email. Further, even if sending an email was the same as printing – it wasn't provided at the "point of the sale or transaction," but rather sent from the website to his email account.

AUTHORS

- [Patrick T. McLaughlin](#)

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Ironically, it was now Bormes turn to ask the Court to ignore the plain language of a statute. The Seventh Circuit declined, responding that “[t]he text is what it is, no matter which side benefits.” The Court concluded that the email Bormes received as neither “printed” nor received at the “point of the sale or transaction.” Although Bormes convinced the Court the federal government waived its immunity to damages under FCRA, it ultimately held Bormes could not prevail on the merits of his claim. ^[2]

If in the future I find myself arguing a case in which the plain text of a statute is not availing to my argument, I may be tempted to try the “who are you going to believe, me or your lying eyes” approach to statutory construction used by both parties in this case – but it probably won’t be in the Seventh Circuit.

[1] 15 U.S.C. §§ 1681-1681x.

[2] The Court acknowledged that Bormes was likely correct that §1681c(g)(1) did not allow a receipt printed at the point of sale to contain both the last four digits of his social security number AND his credit card expiration date – but that was ultimately immaterial to its decision in this case.