

Banking and Finance Law Daily Wrap Up, CREDIT, DEBIT, AND GIFT CARDS—7th Cir.: Tribe has sovereign immunity from excess credit card information claim, (Sep. 8, 2016)

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By Richard A. Roth, J.D.

The Oneida Tribe was protected by sovereign immunity from a putative class action claiming that stores owned by the Tribe violated the Fair and Accurate Credit Transactions Act restrictions on what information can be printed on credit card receipts, the U. S. Court of Appeals for the Seventh Circuit has decided. The court drew a distinction between whether the Tribe is subject to FACTA and whether it can be sued for violating FACTA, saying the act is a statute of general applicability that covers the Tribe, but the Tribe cannot be sued under it (*Meyers v. Oneida Tribe of Indians of Wisconsin*, Sept. 8, 2016, Rovner, I.).

It was undisputed that on several occasions in February 2015, a customer used a credit card to make purchases in three stores owned by the Oneida Tribe in the Green Bay, Wis., area. It also was undisputed that on each occasion he was given electronically printed receipts that included both his credit card's expiration date and more than the last five digits of the card number, which he said was contrary to the FACTA restrictions.

The customer filed a class action against the Tribe for the alleged FACTA violations. The Tribe asked the federal district court judge to dismiss the suit, in part based on the Tribe's sovereign immunity and in part based on the customer's failure to describe an injury in fact that gave him standing to sue.

The district court judge chose to rely on the sovereign immunity analysis when he dismissed the suit, and the appellate court also chose to bypass the standing issue.

Sovereign immunity. Tribal sovereign immunity has been recognized for at least 200 years, the court first said. Congress can abrogate sovereign immunity, but it must do so "clearly and unequivocally." FACTA does not contain such a clear and unequivocal statement of congressional intent.

To begin with, FACTA says that no "person" that accepts credit or debit cards shall print excess information on the receipt. The definition of "person" does not explicitly include Indian tribes. Given that Congress has explicitly included Indian tribes as persons under other statutes, the court said the absence of congressional intent was clear.

In fact, the court found only one case in which a circuit court found that tribal sovereign immunity had been abrogated by a statute that did not explicitly mention Indian tribes—*Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), which said that an Indian tribe was included as a "foreign or domestic government" under the Bankruptcy Code. The Seventh Circuit expressed clear skepticism about that decision but, in the end, decided that it was irrelevant. Regardless of what the Bankruptcy Code might say, FACTA does not unequivocally abrogate tribal sovereign immunity.

Abrogation of tribal sovereign immunity must be express, not implied, the court made clear. If there is any ambiguity, it must be resolved in favor of preserving sovereign immunity.

The case is No. 15-3127.

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Companies: Oneida Tribe of Indians of Wisconsin

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