

1998

Federal Express Corporation v. United States Postal Service: You Can Sue the Post Office

Hala Souman

Sean McMurrough

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>

 Part of the [Consumer Protection Law Commons](#)

Recommended Citation

Hala Souman & Sean McMurrough *Federal Express Corporation v. United States Postal Service: You Can Sue the Post Office*, 11 Loy. Consumer L. Rev. 65 (1998).

Available at: <http://lawcommons.luc.edu/lclr/vol11/iss1/6>

This Case Note is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

CASE NOTE

Federal Express Corporation v. United States Postal Service: You can Sue the Post Office

by Hala Souman and Sean McMurrough

In *Federal Express Corp. v. U.S. Postal Svs.*,¹ the Court of Appeals for the Sixth Circuit affirmed the district court's denial of the United States Postal Service's ("USPS") motion to dismiss, which claimed immunity under the Lanham Act² from a false advertising lawsuit. The court reviewed the district court's disposition of USPS's motion to dismiss for lack of subject matter jurisdiction, *de novo*. The Sixth Circuit ruled that: (1) the Postal Reorganization Act's ("PRA") incorporation of the Federal Tort Claims Act ("FTCA") did not prevent tort claims which were not encompassed by the FTCA from being brought against USPS; and (2) that, under the Lanham Act section allowing false advertising claims, the USPS was a "person."³

Congress Creates USPS as a Hybrid of a Federal Agency and a Commercial Enterprise

In 1970, Congress, via the PRA, legislatively dissolved the United States Post Office Department and created the USPS. While Congress allowed the USPS to retain some of the characteristics of a federal agency, it also "invested this hybrid entity with

the 'status of a private commercial enterprise'."⁴ With its new commercial mission, the PRA granted various powers to the USPS, among which includes the authority "to sue and be sued in its official name."⁵ The Supreme Court in *Federal Deposit Ins. Corp. v. Meyer*⁶ interpreted this clause as a presumption of waiving sovereign immunity. Thus, in the absence of any proof indicating Congress's intention to insulate the USPS from private lawsuits, the USPS should be treated as any other business that is a party to a lawsuit.

The purpose of this hybrid entity was to promote efficiency. Subsequently, the commercial courier market opened its doors to private competition. Although the USPS holds a monopoly over the delivery of ordinary letters, a postal regulation allows private commercial couriers, like Federal Express ("FedEx"), to deliver "extremely urgent letters."⁷ Because of increased competition, in 1995 the USPS has launched a massive advertising campaign to increase its share of the expedited delivery market. The content of those advertisements became the basis for FedEx's claim against the USPS.

FedEx Claims USPS's Ad Campaign Is False and Misleading

FedEx charged the USPS with false and misleading advertising and unfair competition on the supposed advantages provided by the USPS's "Priority Mail" and "Global Priority Mail" services, compared to the "FedEx 2Day" service.⁸ FedEx claimed that, although the USPS offers its priority mail services at a reduced cost, the USPS's quality of services were not comparable to those offered by FedEx.⁹ On the contrary, FedEx alleged that its delivery services include guarantees that USPS does not offer. For example, Plaintiff complained that, unlike the USPS, its company tracks all shipped packages and offers a money-back guarantee for packages not arriving within the promised time.¹⁰ Therefore, FedEx, under the Lanham Act, sought immediate cessation of the USPS's false and deceptive advertising campaign, an injunction for future misleading advertising, monetary damages, and other relief.¹¹

USPS Insists That Court Lacks Subject Matter Jurisdiction

The district court rejected the USPS's motion to dismiss FedEx's claim that USPS had allegedly violated the Lanham Act¹² for disseminating false and misleading advertisements. The USPS, in support of its motion, expressed two alternate theories for the court's lack of subject matter jurisdiction. First, the USPS claimed immunity from federal tort lawsuits due to the incorporation of the FTCA.¹³

Second, the USPS argued that the Lanham Act does not apply to it because it is not a "person" as defined by the Act.¹⁴ Further, the USPS challenged the district court's edict, which stated that when "Congress statutorily waived the Postal Service's traditional sovereign immunization against lawsuits including federal tort actions," the USPS became a "federal instrumentality capable of being sued."¹⁵

Federal courts have jurisdiction over suits against a federal agency only if the United States has waived its sovereign immunity by consenting to be sued. Ultimately, the USPS argued that Congress' incorporation of the FTCA into the PRA immunized the USPS from causes of action under the Lanham Act regardless of the "sue and be sued" clause.

USPS Claims Immunization From Lanham Act Litigation Regardless of "Sue and Be Sued" Proviso

The USPS argued that Congress' incorporation of the FTCA into the PRA mandates postal immunization from Lanham Act litigation, irrespective of the PRA's "sue and be sued" clause.¹⁶ The USPS maintained that Congress intended to limit lawsuits that implicate the USPS to those that meet the criteria of the FTCA.¹⁷ Importantly, the FTCA provides the only way by which an agency of the federal government may be sued, regardless of whether that agency's charter contains a "sue or be

sued" proviso.¹⁸ As a result, the USPS urged the court to restrict tort claims under the FTCA to encompass only state law torts. Thus, the USPS argued, because Lanham Act claims are federal law claims, they should be barred by the PRA's incorporation of the FTCA.¹⁹ According to the USPS, no federal tort lawsuits can be initiated against a federal agency under the FTCA.

Before 1994, three circuits accepted USPS's theory that federal suits against the USPS were precluded due to the FTCA's limited scope.²⁰ However, since the Supreme Court's landmark decision in *Federal Deposit Ins. Corp. v. Meyer*,²¹ tort suits may be initiated against a federal agency when Congress has equipped that agency with the "sue or be sued" proviso. *Meyer* held that the FTCA does not preclude lawsuits against federal instrumentalities which have been "congressionally invested with the power to sue and be sued in their own names."²²

At present, the USPS emphasized the PRA, which states in pertinent part: "[the FTCA] shall apply to tort claims arising out of the activities of the Postal Service."²³ The USPS attempted to distinguish *Meyer* by theorizing that, unless §409(c) reflected Congress's intention to limit tort lawsuits against the USPS to state law tort claims, that clause is rendered null.²⁴ This is due to the fact that Congress legislated in the FTCA²⁵ a "blanket rule that any state law tort pressed against any arm of the federal government, including an agency such as the USPS invested with

legislative authorization to 'sue or be sued,' must be initiated according to the FTCA."²⁶

Since the *Meyer* decision, however, two circuits have rejected the USPS's theory that no federal tort law claim may be asserted against it. Analogously, no circuits have accepted this theory. The Fourth Circuit, in *Global Mail Ltd. v. U.S. Postal Svs.*,²⁷ held that §409(c) does not limit the PRA's surrender of sovereign immunity, so that the USPS is liable for only those torts encompassed by the FTCA.²⁸ The Eighth Circuit similarly dismissed the USPS's identical argument in *U.S. v. Q Int'l Courier, Inc.*²⁹ by stating,

A more logical reading of 39 U.S.C. §409(c) is that the Federal Tort Claims Act provides the only remedy against the Postal Service for torts to which the Federal Tort Claims Act by its own terms applies in the first place. Nothing in §409(c) suggests that it intended to forbid recovery against the Postal Service for tort claims that are beyond the reach of the Federal Torts Claims Act.³⁰

The Sixth Circuit followed the rules of statutory construction in rejecting the USPS's argument. First, the Court literally construed the statute "to accord meaning and effect to each of its provisions."³¹ Thus, when §409(c) states that the FTCA applies to "tort claims arising out of the activities of the Postal Service," it means that all federal law torts not governed by the FTCA may be initiated against a federal instrumentality. Hence, federal

law torts can be asserted against the USPS, "in its own name under the global 'sue and be sued' stipulation of the PRA."³² Second, the court adopted the presumption that Congress meant what it legislated in the statute.³³ As a result, the Sixth Circuit held that, in the absence of congressional intent to limit the expansive divestment of postal immunity, the type of lawsuits that may be asserted against the USPS are not limited to FTCA-type suits.³⁴

Not surprisingly, the Sixth Circuit adopted the Fourth and Eighth Circuits' analyses. Essentially, the holding in *Meyer* persuaded the Sixth Circuit that federal tort law claims may be asserted against the USPS due to the "sue and be sued" proviso. The court ultimately found that the application of the FTCA to the USPS will only occur in lawsuits of state law tort causes against the United States.

Sixth Circuit Finds USPS a Lanham Act "Person"

Arguing in the alternative, the USPS claimed that, because it was not a "person" under the Lanham Act, federal courts lacked jurisdiction over it.³⁵ The USPS focused on the definition of "person" within the Lanham Act, which states that it includes a juristic person as well as a natural person. The term "juristic person" includes a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law.³⁶ In 1992, Congress added to the meaning of "person" to include state actors:

"the term 'any person' includes any State, instrumentality of any State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity."³⁷

However, the USPS contended that it was not a Lanham Act "person" because 15 U.S.C. § 1127 only enumerated private entities, and 15 U.S.C. § 1125 (a)(2) lists only state governments and employees.³⁸ The USPS invoked the "interpretive canon of *ejusdem generis*, which posits that 'a general term following a list of particulars [should] be interpreted as a reference to subjects akin to those specifically enumerated.'"³⁹ The USPS argued that because "person" included private parties and state government instrumentalities, Congress implicitly excluded all United States governmental entities. This included the USPS, even though it had waived its sovereign immunity. The USPS relied on *Preferred Risk*, which explained that the Act does not classify divisions of the federal government that have not surrendered their sovereign immunity as Lanham "persons."⁴⁰

No court has accepted the proposition that the USPS is not a Lanham Act "person." The Eighth Circuit rejected the USPS's position when it distinguished its *Preferred Risk* notes by pointing out that "Congress bestowed that status upon the USPS by

when they equipped the USPS with the "sue and be sued" language."⁴¹ The Fourth Circuit in *Global Mail* also found the USPS a person within the meaning of a "person" under the Lanham Act. The Fourth Circuit classified the USPS and all other federal agencies, which have waived their immunity and are capable of suing and being sued, as "juristic persons."⁴² Further, the Fourth Circuit could not distinguish the USPS, as a government entity involved in commercial enterprise, from other private firms or associations.⁴³ Using these holdings as guidance, the Sixth Circuit thus held that agencies that have waived their sovereign immunity are "juristic persons" and thus may be sued under the Lanham Act.⁴⁴

Conclusion

In sum, the Sixth Circuit's position that federal courts had jurisdiction over the USPS arose for two reasons: (1) the PRA's incorporation of the FTCA did not preclude tort suits against the Postal Service; and (2) the USPS was a Lanham Act "person." Because of these very propositions, the USPS was not immune from a false advertising claim under the Lanham Act. The Court summarily rejected the USPS's attempt to take advantage of the benefits and protections afforded by the law while simultaneously avoiding the burdens imposed by the laws which constrain others. Further, the Court admonished the USPS's aggressive market participation and then "hastily elevat[ing] the shield of governmental privilege when accused

of competitive wrongdoing, by demanding insulation from the legal consequences of its alleged false and misleading public broadcasts" which have allegedly damaged the "financial interests of both a private sector competitor and the consuming public."⁴⁵ Put concisely by Judge Krupansky, Congress never intended to "launch USPS into the commercial world and also to immunize USPS from liability for federally-created commercial torts such as the Lanham Act."⁴⁶

Endnotes

¹ 151 F.3d 536 (6th Cir. 1998).

² See 15 U.S.C. § 1051 (1998). Note: The Lanham Act deals primarily with the protection of trademarks. Here, Federal Express claimed that the USPS's advertisement violated the Lanham Act because it improperly compared its "Priority Mail" to "FedEx 2Day."

³ *Federal Express*, 151 F.3d at 542, 546.

⁴ *Id.*, citing *Loeffler v. Frank*, 486 U.S. 549, 556 (1988).

⁵ See Postal Reorganization Act, 39 U.S.C. § 401(1).

⁶ 510 U.S. 471 (1994).

⁷ See 39 C.F.R. § 320(6) (1998).

⁸ See *Federal Express*, 151 F.3d at 546.

⁹ See *id.*

¹⁰ See *id.*

11 *See id.*

12 *See* 15 U.S.C. § 1051 (1998).

13 *Federal Express*, 151 F.3d at 540.

14 *See id.* at 544.

15 *Id.* at 538.

16 *Id.* at 540.

17 *See* 39 U.S.C. § 409(c) (1998) (“The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of the activities of the Postal Service.”).

18 *See Federal Express*, 151 F.3d at 540. *See also* 28 U.S.C. § 2679(a). (“The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under § 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.”).

19 *See id.*

20 *See Peneira v. U.S. Postal Service*, 964 F.2d 873, 876-77 (9th Cir. 1992); *Houston v. U.S. Postal Service*, 821 F.2d 896, 898-99 n.1 (5th Cir. 1987), and *Active Fire Sprinkler Corp. v. U.S. Postal Service*, 811 F.2d 747, 753 (2d Cir. 1987).

21 510 U.S. 471 (1994).

22 *See Federal Express*, 151 F.3d at 541.

23 Postal Reorganization Act, 39 U.S.C. § 409(c) (1998).

24 *See Federal Express*, 151 F.3d at 542.

25 *See* 28 U.S.C. § 2679(a) (1998).

26 *Id.*

27 142 F.3d 208 (4th Cir. 1998).

28 *See id.* at 214-15.

29 131 F.3d 770 (8th Cir. 1997).

30 *Id.* at 775, citing *Meyer*, 510 U.S. at 480-83.

31 *Federal Express*, 151 F.3d at 542, citing *U.S. v. Menasche*, 348 U.S. 528, 528-39 (1955).

32 *Id.*

33 *See id.*, citing *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

34 *See id.*

35 *See id.* at 544.

36 *See Federal Express*, 151 F.3d at 544, citing *Lanham Act*, 15 U.S.C. § 1127 (1998).

37 *See* 15 U.S.C. § 1125 (a)(2) (1998).

38 *See id.*

39 *Id.* at 544-5, citing *Preferred Risk Mut. Ins. Co. v. U.S.*, 86 F.3d 789, 794 (8th Cir. 1996).

40 *See id.* at 545, citing *Preferred Risk*, 86 F.3d at 793-95. (Explaining “the Lanham Act does not by its own terms, control a division of the U.S. Government which has not clearly waived sovereign immunity because the federal government *per se* is not a “person” within the Lanham Act’s definition.”).

⁴¹ *Id.*, citing U.S. v. Q Int'l Courier Inc., 131 F.3d 770, 775 (8th Cir. 1997).

⁴² *See id.*, citing *Global Mail*, 142 F.3d at 216-17.

⁴³ *See id.*.

⁴⁴ *See id.* at 546.

⁴⁵ *Id.*

⁴⁶ *Id.* at 539.

CLR

Loyola University Chicago School of Law Publications

Loyola University Chicago School of Law invites you to subscribe to the following publications for students, practitioners, and scholars:

• *Children's Legal Rights Journal*
Published quarterly by the CIVITAS
ChildLaw Program in conjunction
with the American Bar Association
Center on Children and the Law.

• *Loyola Law Journal*
Published quarterly.

• *Annals of Health Law*
Published annually by the Institute for
Health Law in cooperation with the
National Health Lawyers Association.

• *Public Interest Law Reporter*
Published in conjunction with
Loyola's Center for Public Service Law.

For further information, please contact the appropriate publication at:

Loyola University Chicago School of Law
One East Pearson Street
Chicago, Illinois 60611-2055

Loyola Consumer Law Review Volume 10, Number 1, 1998. ISSN 1041-5114. Copyright ©1998, Loyola University Chicago School of Law. Cite as: 10 LOY. CONSUMER L. REV. __. This issue went to press March 16, 1998.

Unless otherwise noted, the author of each article in this volume has granted permission for copies of that article to be made and used by non-profit educational institutions, provided that the author and this journal are identified and that proper notice of copyright is affixed to each copy.

The views expressed in *The Loyola Consumer Law Review* are those of the authors, and do not necessarily reflect the views of *The Review's* editors, trustees, administration, or faculty of Loyola University Chicago School of Law.

The editors welcome unsolicited lead articles written by practicing attorneys, judges, law professors, and other qualified people. Generally, manuscripts should total 15-30 double-spaced typed pages. Magnetic media are preferred. Endnotes should conform to *The Bluebook: A Uniform System of Citation*, sixteenth editions, published by the Harvard Law Review Association. We cannot return manuscripts. For more information, call *The Loyola Consumer Law Review* office at 312/915-7181 or E-mail: consumer-law@luc.edu.

The Loyola Consumer Law Review is published quarterly by the students of Loyola University Chicago School of Law. Subscriptions are \$15 per year.

Complete sets and individual back issues of *The Review* can be ordered directly from:

William S. Hein & Co.
1285 Main Street
Buffalo, New York 14209-1911
Phone 800/828-7571 & 716/882-2600
Fax 716/883-8100

Loyola Consumer Law Review