Legal Opinion Letter

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Federal Government Crossfire: Fix the "Catch-22" Businesses Face from Conflicting Agency Demands

by Victor E. Schwartz & Christopher E. Appel

When federal agencies take inconsistent positions on an issue, the resulting mixed message is likely to cause confusion within a regulated community.[1] But, when different agencies demand that a specific company take different and conflicting actions, the federal crossfire that results may effectively put that company in a serious and expensive "no win" situation.

Almost any business in America can get caught in such crossfire. Eventually, the company may be exonerated for choosing to follow one federal agency's direction over another's, but not before expending thousands of hours of time and potentially millions of dollars in legal fees. This Legal Opinion Letter discusses a recent case example and explains why a remedy is needed.

A Company Caught in Federal Agency Crossfire

For decades, companies have leased land from Native American tribes to mine coal or other minerals, and, as part of those lease agreements, included a hiring preference for members of the tribe upon whose land the mining operations take place. The U.S. Department of Interior has "routinely" approved such lease agreements since "at least as early as the 1940s."[2] In many cases, the Agency itself drafted the lease agreement and specifically required the tribal hiring preference.[3]

Enter Peabody Western Coal Co. ("Peabody") and the Navajo Nation. In the mid-1960s, the Department of Interior drafted and approved two leases between Peabody's predecessor-in-interest and the Navajo Nation to mine coal on land owned by the Native American tribe. The leases required Peabody to hire members of the Navajo tribe when available and qualified for a position, as well as to "utilize the services of Navajo contractors whenever feasible."[4]

This government-required hiring preference was then challenged in 2001 by the Equal Employment Opportunity Commission ("EEOC"). The EEOC sued Peabody, alleging that the company violated Title VII of the Civil Rights Act of 1964 in providing hiring and contracting preferences to members of the Navajo Nation. Over thirteen years of litigation ensued, with the case being bounced back and forth from federal district court to the

[1] *See, e.g., EPA Fines Energy Department Over Delays in Hanford Nuclear Reservation Cleanup*, Assoc. Press, Oct. 15, 2014, *available at* http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/10/epa_fines_energy_department_ov.html#incart_river (reporting that EPA is fining the U.S. Department of Energy up to $10,000 per week for failing to remove radioactive sludge from the Columbia River).
[2] *Equal Opportunity Employment Comm'n v. Peabody Western Coal*, No. 12–17780, 2014 WL 4783087, at *1, *5 (9th Cir. Sept. 26, 2014).
[3] *See id.* at *1.
[4] *Id.*

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U.S. Court of Appeals for the Ninth Circuit.[5] Only recently did the Ninth Circuit hold that the district court properly granted summary judgment to Peabody because the hiring preference was based on a permissible "political classification," not a discriminatory national origin classification.[6]

A company's having to pay millions of dollars and endure over a decade of litigation merely to settle a disagreement between federal agencies offends basic fairness and the rule of law, and it deserves an expedited remedy. The agencies themselves, or oversight bodies such as the Office of Management and Budget (OMB), should endeavor to resolve any differences without suing a company that is simply doing what an agency has told it to do (possibly for decades, as in Peabody's case). Where that cannot be accomplished, Congress could consider legislation to provide relief. Further, and apart from providing justice to companies caught in crossfire, it is in the interest of federal judges, whose time and resources are limited, to expeditiously resolve such litigation.

Potential Remedies for Companies Caught in Federal Government Crossfire

Most federal government crossfires can, and should, be handled within the government by the OMB review process. If two or more agencies are poised to take different positions, such actions are often identified by the OMB management process. The agency then serves as an effective "umpire" to resolve agency conflicts.

OMB's umpire role, however, is generally limited to internal government disputes. Private parties lack the ability to initiate OMB's management process for resolving inter-agency disputes. Accordingly, if the agencies do not pursue a streamlined approach via OMB on their own, a private company, as seen with Peabody, may remain in the crossfire.

Solutions to remedy the injustice caused by federal agency crossfire could potentially take several forms. Legislation, or possibly an Executive Order, could provide private parties with limited access to the OMB process once it became clear that a private party has been caught in crossfire. Legislation or a modification to the Federal Rules of Civil Procedure could also empower judges to refer cases involving conflicting federal agency requirements to OMB.

Alternatively, Congress could enact legislation to reduce or eliminate the financial burden on private companies caught in federal agency crossfire. Such an effort might entail amending the Equal Access to Justice Act (EAJA), which generally authorizes the payment of attorneys' fees to a "prevailing party" in an action against the federal government.[7] EAJA was enacted to help level the playing field between the federal government and aggrieved businesses and individuals.[8] Recovery under EAJA, however, is limited to businesses with a net worth under $7 million and individuals with a net worth under $2 million.[9] Hence, under the existing EAJA, it is clear that a large business cannot obtain the benefits of the law. A targeted change to EAJA to permit monetary relief to larger private entities caught in crossfire could deter inappropriate government enforcement actions, and, in doing so, save rather than cost taxpayer funds.

In the absence of legislative reforms, federal judges should exercise their discretion to promptly resolve federal government crossfire. If it becomes clear that a particular defendant has been put in a "no win" situation of conflicting government demands, the judge should stay the litigation and attempt to have the government attorney(s) resolve the issue rather than continue with a private lawsuit that ensnares an innocent regulated entity. The Peabody case is a graphic illustration of how the current system fails to prevent protracted litigation over federal government crossfire and results in injustice to a private party, the judicial process, and the people to whom the government serves. A remedy is needed.

[5] *See id.* n.1 (citing five court decisions in the case, designated "*Peabody I*" through "*Peabody V*," between 2002 and 2012).
[6] *Id.* at *10.
[7] 28 U.S.C. § 2412(d)(1)(A).
[8] *See* Rep. No. 99-120 (I), at 2 (1985) ("The Act reduces the disparity in resources between individuals, small businesses, and other organizations with limited resources and the Federal Government.")
[9] *See* 28 U.S.C. § 2412(d)(2)(B).

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