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EEOC Continues To Adopt Novel and Aggressive Enforcement Positions In Litigation and Compliance Investigations

by Thomas P. Gies

The EEOC has been widely criticized by the employer community in the last year or so for taking a number of novel enforcement positions. Despite taking it on the chin in some widely publicized cases, all indications are that the EEOC is continuing to pursue an aggressive enforcement agenda. It includes challenging several common, long-standing employer practices and policies. This article summarizes a few of these challenges that are of particular interest to mining companies.

1. EEOC Challenges to "Overly Broad" Language in Separation Agreements

On February 7, 2014, the EEOC filed a Title VII pattern and practice lawsuit in Chicago against CVS Pharmacy. (*EEOC v. CVS Pharmacy, Inc.*, No 14-cv-863 (N.D. Ill.).) The complaint alleges that a standard separation agreement used by CVS is unlawful. The EEOC challenges five different paragraphs in the separation agreement:

- A cooperation clause, requiring the employee to notify CVS's General Counsel of any interview request or "inquiry" regarding an "administrative investigation."
- A non-disparagement clause, prohibiting the employee from making "any statements that disparage the business or reputation" of CVS or its officers, directors, or employees.
- A non-disclosure clause, prohibiting the employee from disclosing any "confidential information" about CVS to any third party, including information about CVS personnel.
- A general release provision, releasing all claims including "any claim of unlawful discrimination of any kind."
- A covenant not to sue, preventing the employee from initiating or filing any lawsuit or complaint with any court or agency. The covenant not to sue specifically carves out the employee's right to participate in, and cooperate with, any federal, state, or local agency investigation enforcing discrimination laws.

The EEOC contends that these provisions violate Title VII because they interfere with employees' ability to communicate voluntarily with the EEOC and other enforcement agencies. It is noteworthy that the EEOC asserts that the above-referenced "carve out" in the covenant not to sue is not enough, because it is not repeated anywhere else in the agreement.

Just last month, the EEOC filed a complaint in federal court in Denver making similar allegations against a private for-profit college, challenging its separation agreement under the Age Discrimination in Employment Act. (*EEOC v. CollegeAmerica Denver, Inc.,* No. 1:14-cv-01212 (D. Col.).)

These lawsuits are the latest in a series of periodic challenges by the EEOC to what is often thought of as "standard boilerplate language" in separation agreements. The current initiative should be seen as consistent with the agency's "Strategic Enforcement Plan for FY 2013 - 2016," which includes a goal to "target policies that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts."

This is not an entirely new issue for employers. In *EEOC v. Cosmair, Inc.,* 821 F.2d 1085 (5th Cir. 1987), the court upheld the agency's position that a separation agreement barring an employee from filing a charge with EEOC violated Title VII. The court reasoned that such language would have a "chilling effect" on the agency's principal function as a law enforcement agency. More recently, the agency's position on cooperation with EEOC investigations was endorsed by the First Circuit in *EEOC v. Astra USA, Inc.*, 94 F.3d, 738, 742 (1st Cir. 1996). There, the employer obtained settlement agreements and releases from employees that prohibited the employees from assisting the EEOC in investigating any sexual harassment charges against the employer. The EEOC sued for injunctive relief, and the district court granted the agency's request. The First Circuit affirmed. The court noted that the EEOC has a duty to vindicate the public interest in preventing unlawful employment discrimination and observed that "if victims of or witnesses to [employment discrimination] are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered . . . ."

The latest complaints seek to extend these existing principles in ways that will be problematic for employers. The language in the CVS agreement, or some variation of it, is likely familiar to many lawyers working for mining companies. While it's always wise to take a periodic look and update the language in standard form agreements, the specific allegations made by EEOC make it difficult to revise standard agreements to address the agency's chilling effect theory. This is particularly so with respect to certain provisions that are typically viewed by employers as valuable consideration in exchange for payment money to resolve pending claims. The willingness of employers to settle litigation, after all, is highly correlated with the ability to have reasonable certainty that the matter is, in fact, resolved. The bottom line here is that, until there is more guidance from courts on this issue, many separation agreements are susceptible to challenge.

2. The EEOC Focuses on Religious Accommodation Issues

EEOC made news last year when it filed a lawsuit against CONSOL, accusing the coal company of violating Title VII's provisions requiring accommodation of sincerely held religious beliefs. (*EEOC v. CONSOL Energy, Inc. and Consolidation Coal Co.,* No. 1:113-cv-00215-FPS (N.D. W. Va.).) The complaint alleges that the company's biometric hand scanner system, installed as part of a new time and attendance control system, violated the religious beliefs of a devout evangelical Christian employee who opposed using the scanning technology based on a Bible passage stating that the antichrist will force people to receive his mark on their hand or forehead. The complaint alleges that the employee was forced to retire, even though the company had previously made exceptions to the requirement that employees use the biometric scanner system.

The *CONSOL* complaint illustrates a rising trend in claims against employers alleging discrimination on the basis of religion. For example, many claims are being made on behalf of devout Muslims challenging various types of dress code policies. In March 2014, the EEOC issued a new Fact Sheet and Question-and-Answer Guide on religious discrimination and accommodation. This guide indicates that a number of fairly typical employer responses to accommodation issues may now trigger EEOC scrutiny. In particular, an employer cannot defend against a failure to accommodate by saying that the accommodation will, or could, cause an undue hardship—the employer can only justify the refusal to accommodate by showing an *actual* undue hardship caused by the accommodation. Additionally, a customer preference or customer complaint is not a defense to a failure to accommodate unless the employer can show an actual undue hardship. Finally, the EEOC has stated that an employer cannot justify a refusal to accommodate based on its belief that the employee's religious beliefs are not "sincere."

> IN CASES WHERE THE COMPANY TRULY BELIEVES THAT AN ACCOMMODATION CANNOT REALISTICALLY BE PROVIDED, THE EMPLOYER SHOULD GATHER AS MUCH CONCRETE SUPPORT AS POSSIBLE TO DEMONSTRATE THE EXISTENCE OF AN ACTUAL UNDUE HARDSHIP.

The EEOC's current enforcement position leaves many employers in an uncertain position. These new developments confirm the wisdom of engaging in a good faith, thoughtful assessment of an employee's accommodation request. In cases where the company truly believes that an accommodation cannot realistically be provided, the employer should gather as much concrete support as possible to demonstrate the existence of an actual undue hardship.

3. Lack of Clarity Regarding EEOC's Obligations Prior to Filing Suit

In late December 2013, the Seventh Circuit, in *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013), held that employers cannot defend against lawsuits brought by the EEOC by contending that the agency failed to undertake its pre-suit obligations, such as attempting to conciliate the dispute. The case began when a woman filed a gender discrimination charge with the EEOC alleging that her multiple applications for "mining positions" (as opposed to office jobs) were denied because of her gender. The EEOC began an informal conciliation process with Mach Mining, after concluding the charge had merit. The agency ultimately determined that further conciliation efforts would be futile and filed a complaint in federal court on behalf of a class of women.

In the district court, Mach Mining asserted an affirmative defense that the case should be dismissed because of the EEOC's failure to conciliate in good faith. The EEOC moved for summary judgment on this issue, which the district court denied. The trial court certified the issue for interlocutory appeal. On appeal, the Seventh Circuit reversed the trial court and determined that the EEOC was entitled to summary judgment on Mach Mining's affirmative defense. The Court noted that there is no provision in Title VII that provides such an affirmative defense and that the statute is clear that conciliation is an informal, confidential process left solely to the EEOC's judgment. There is no guidance in the statute by which to judge the quality of the EEOC's efforts to conciliate a dispute. The court also raised concerns that such an affirmative defense allows employers to manipulate the conciliation process by making a record to support an affirmative defense and thereby shift the focus away from the lawfulness of the employment practices at issue in the investigation.

The Seventh Circuit's decision conflicts with decisions from other courts, including a relatively recent Eighth Circuit decision in *EEOC v. CRST Van Expedited, Inc.*, Case Nos. 09-3764, 09-3765 & 10-1682 (8th Cir. Feb. 22, 2012). In that case, the Eighth Circuit affirmed the trial court's dismissal of numerous individual discrimination claims, on the basis that the EEOC had not undertaken its required investigation and conciliation duties.

Mach Mining filed a petition for a *writ of certiorari* with the Supreme Court in late February 2014, and briefing is recently completed, with the EEOC supporting the request for review. If the Supreme Court decides to hear this case, its decision could provide helpful guidance to employers as to how far the EEOC needs to go in its pre-suit obligations before it can file a complaint.

4. Uncertainty Remains Regarding the Permissibility of Background Checks

The EEOC remains focused on employers who conduct criminal background checks of applicants and employees, on the theory that such policies have a disparate impact on African American and Hispanic applicants. This is another of the top priorities listed in the agency's "Strategic Enforcement Plan for FY 2013 – 2016."

In 2013, the EEOC's efforts to limit employer use of background checks were met with tough opposition. For instance, in October 2013, the Sixth Circuit affirmed an award of $752,000 in attorneys' fees and costs against the EEOC in *EEOC v. Peoplemark, Inc.,* 732 F.3d 584 (6th Cir. 2013). In that case, the EEOC sued Peoplemark for an alleged policy of rejecting applicants with felony backgrounds. In discovery, the EEOC learned that Peoplemark in fact had no such policy, but the EEOC continued to pursue its case for a total of nearly 18 months. In affirming an award of fees and costs against the EEOC, the Sixth Circuit noted that it was "unreasonable to continue to litigate the commission's pleaded claim" after learning that there was no blanket policy regarding felony convictions.

In August 2013, the U.S. District Court for the District of Maryland granted summary judgment for the defendant in *EEOC v. Freeman,* No. 09cv2573 RWT (D. Md., Aug. 9, 2013). The EEOC's complaint alleged that the event planner's credit and background checks were discriminatory, but the EEOC never identified any part of Freeman's policy that resulted in disparate impact. The Court described the complaint as "a theory in search of facts to support it." Moreover, the EEOC tried to prove its case with "laughable" expert reports filled with a "plethora of errors and analytical fallacies." The EEOC has appealed *Freeman* to the Fourth Circuit.

Despite these losses, the EEOC is still actively pursuing background check cases. In June of last year, the EEOC filed a class action lawsuit in Chicago against DolGenCorp. (*EEOC v. DolGenCorp LLC,* No. 1:13-cv-04307 (N.D. Ill.).) The same month the agency sued BMW in South Carolina. (*EEOC v. BMW Manufacturing Co. LLC*, No. 7:13-cv-01583 (D.S.C.).) The complaints in both cases allege that the background check policies improperly screened out African American workers even though many of these workers have been employed for years.

These complaints should be read in the context of the March 10, 2014 guidance on background checks issued jointly by the EEOC and the Federal Trade Commission. *See http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm*. Most employer-side commentators have criticized this guidance as failing its stated objective of providing clear guidance to employers seeking to comply with Title VII.

"THE OBVIOUS LESSON TO BE LEARNED HERE IS THAT EMPLOYERS WHO CONDUCT CRIMINAL BACKGROUND CHECKS MUST CONTINUE TO CLOSELY FOLLOW LEGAL DEVELOPMENTS IN THIS UNSETTLED AREA."

The obvious lesson to be learned here is that employers who conduct criminal background checks must continue to closely follow legal developments in this unsettled area. Background checks should be limited to analysis of information that has a demonstrable relationship to actual qualifications for the position being filled, so that the employer can defend the use of background checks with evidence that the individual would then be categorically unqualified for the job.

5. Strict Scrutiny of Employer's ADA Policies

The EEOC remains focused on employer policies that restrict employees' rights under the ADA. The EEOC's longstanding litigation against UPS illustrates the concern. Back in 2009, the agency first sued UPS in Chicago, claiming an ADA violation with respect to its policy providing that all employees will be automatically terminated from employment after they have taken twelve months of leave. (*EEOC v. United Parcel Service Inc.,* No. 1:09-cv-05291 (N.D. Ill.).) The EEOC contends that this policy applies to qualified individuals with disabilities who would be capable of performing their jobs with or without a reasonable accommodation.

After a fair bit of procedural wrangling and a trip to the Seventh Circuit, UPS filed a motion to dismiss on the basis that employees who need more than 12 months of leave are not qualified to work, because "the ability to regularly attend work" is an essential function of any job within the meaning of the ADA. On February 11, 2014, the court denied UPS's motion. The court concluded that, because UPS has a medical requirement that individuals must meet before they are able to return from leave, the Court decided that the policy might actually be a potentially suspect qualification standard rather than an essential function of the job.

The decision serves as a reminder that blanket policies related to ADA accommodations and leave, such as "no-fault" or automatic termination policies, are risky. Instead, employers faced with requests for accommodations should engage in the interactive process with each individual employee and determine whether the accommodation can be made. Each step in this process should be documented.

What's Next

EEOC got off to a fast start in 2014. The developments summarized above signal continued, aggressive litigation and agenda-setting by the EEOC. As these cases move toward resolution, employers—including mine operators—need to remain vigilant about monitoring policies and practices that are on the EEOC's list of enforcement priorities.

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Credit Risks and Bankruptcy Exposure: The Importance of Implementing Mitigation Strategies and Understanding Your Rights in Bankruptcy

by Matthew W. Cheney

The recent Chapter 11 bankruptcy filing by James River Coal was the latest reminder that mining companies continue to face unique and myriad challenges. Several factors, including the depressed global economy, tougher environmental rules and enforcement, funding and liquidity challenges, and market volatility, are causing industry-wide stress, particularly for coal companies. Trade press and pundits suggest that more mining company bankruptcies may be on the horizon. Mining industry participants should manage this distress by exploring and implementing credit and bankruptcy risk mitigation strategies. This article offers a few pre-petition mitigation measures and provides an overview of some key bankruptcy concepts and issues.

Shore Up Credit Risks Before Bankruptcy

In these challenging times, all industry participants should assess and try to mitigate counterparty risks. It is prudent for every business to know the financial status of its counterparties, customers, and vendors. A sudden or growing trend toward late or partial payments may be an indication of potential financial troubles.

A coordinated program of business diligence and legal counseling may result in the implementation of a few steps to take (among others):

Analyze aging accounts receivable. Understanding and monitoring aging receivables is important for beginning to understand the potential magnitude of counterparty risk. There may be time to manage receivables and to react quickly to avert slippage if receivables are growing. An active receivables management program also can help reduce one's exposure in the event of a bankruptcy filing. Having aging receivables reports and account histories on hand also can be useful when negotiating for preferred vendor or critical/essential supplier treatment in a bankruptcy scenario.

Protect against preference exposure. In bankruptcy, creditors often can be made to return funds received within 90 days before a bankruptcy filing. An analysis of aged receivables, payment history, and business terms is necessary to determine whether and how a company can reduce this risk and what defenses may be available. Again, implementing a receivables management program now may help mitigate future clawback risks.

Analyze and amend current business terms. When dealing with a stressed or distressed company, it becomes increasingly important to reduce credit exposure, ensure timely payment, and protect against writing off receivables. The worst case, of course, is to be directed to return funds already received. Delivery and payment terms, other commitments, collateral or other security, and a variety of other situation-specific terms can be amended (or enforced if they already exist) to mitigate exposure.

Consider whether an expiring contract should be renewed or allowed to lapse. When contracts are up for renewal, a company should consider whether or not to operate without a contract in place (so as not to be locked into a long-term contract) if operating on an invoice-only, month-to-month basis is a viable business option. In bankruptcy, the arrearages due on contracts are treated as unsecured claims. Generally, pre-petition receivables are only paid in full if and when a contract is assumed by a debtor. Usually, contracts are assumed late in the case in connection with confirmation of a plan of reorganization. Thus, counterparties can be required to perform under contracts while being forced to carry receivables. If the contract is rejected (*i.e.*, breached, not terminated) in the bankruptcy, then the pre-petition receivables and any breach damages will be paid in bankruptcy dollars—usually pennies on the dollar. If a contract expires according to its terms (either prior to or during the bankruptcy), then there are no performance obligations and there may be an opportunity to negotiate more favorable terms with the debtor.

Analyze and improve available rights and remedies. Depending upon the nature of the goods or services being provided and the specifics of the contractual relationship, a variety of rights and remedies may exist or be available. For example, there may be statutory lien rights, rights and remedies under the Uniform Commercial Code, common law rights, and contract-based rights and remedies, such as cross default provisions, available if the parties modify or amend their agreements. Additionally, creditors should explore and exercise any available rights and remedies under the Uniform Commercial Code, such as security interests and liens and rights of stoppage and reclamation relating to the sale of goods.

Consider other potential mitigation strategies. Any mitigation program should include a wide-ranging review of business and operational issues. In dealing with liquidity challenges, for example, it may be necessary to consider capital-raising alternatives such as joint ventures or mergers. Sales of non-core or low-margin assets and low-yield projects also may be appropriate. It also is prudent to closely monitor regulatory/compliance programs and tax creep.

Understand and Protect Your Rights in Bankruptcy

When a business suffers financial distress, most often the company needs to raise cash and restructure its debt obligations. For a variety of reasons, not the least of which may be creditor dissent, distressed companies often seek bankruptcy protection. The two basic options available under the U.S. Bankruptcy Code are liquidation in Chapter 7 and reorganization in Chapter 11. It is not uncommon for a company in Chapter 11 to effectuate a controlled liquidation of some or all of the business. For purposes of this article, we will consider a Chapter 11 bankruptcy filing in which the company is known as a "debtor in possession" because existing management usually continues to run the debtor's business operations.

Overview of Chapter 11. The Bankruptcy Code is designed to achieve two objectives. The first goal is to ensure a fair and orderly distribution of the debtor's assets (the "estate") for the benefit of creditors. The second goal is to provide an honest debtor with the ability to start over financially (*i.e.*, to obtain a "fresh start"). Chapter 11 allows a financially troubled entity to first stabilize and then reorganize its business. Certain key Bankruptcy Code sections assist in this goal and are discussed below.

Administration of the estate includes running the debtor's business during bankruptcy and necessarily involves various expenses. Administrative expenses are paid out of the assets of the estate and are given priority over other claims. This priority goes some way to protecting a vendor who supplies goods or services to a debtor during its bankruptcy.

If the debtor is able to stabilize its business operations, it will seek to negotiate a "plan of reorganization" with its creditors and shareholders. The plan will provide how "claims" of creditors or "interests" of shareholders will be treated. Either the proceeds of the estate (in a liquidation) or a portion of the property of the estate (in a reorganization) will be distributed to creditors in accordance with their respective rights and priorities. As a general rule, similarly situated creditors (*e.g.*, two unsecured vendors) will receive equal treatment, or the same percentage recovery. The claim of a secured lender may not be placed in the same class as the claim of an unsecured vendor. In return, a plan of reorganization may provide the reorganized debtor with a "discharge" of certain claims against it other than those exempted by statute or order of the court.

Before a debtor can seek acceptance of its plan from creditors and confirmation by the bankruptcy court, a disclosure statement must be sent to all holders of claims or interests. The disclosure statement must contain "adequate information," which is generally enough information to allow a reasonable investor to make an informed judgment about the plan. Creditors who will not receive payment in full, with interest, are known as "impaired creditors" and are entitled to vote to accept or reject the proposed plan. Although voting rights provide larger creditors with some leverage in negotiating the terms of a plan, a bankruptcy court may confirm a plan over the objections of dissenting creditors if the plan does not discriminate unfairly, is fair and equitable, at least one impaired class of claims accepts the plan, and the plan meets the other requirements for confirmation. Confirmation over the objection of a class is called a "cramdown." The ability to cramdown a plan allows a debtor to negotiate a plan that is acceptable to some but not all creditors.

Important Bankruptcy Concepts. For those uninitiated, the rights, responsibilities, and results in bankruptcy proceedings may seem as foreign as the bankruptcy jargon (*e.g.*, the automatic stay, executor contracts, core bankruptcy proceedings, Chapter 11 plans, proofs of claim, etc.) used by practitioners. Below is a brief introduction to a few important bankruptcy concepts. The following discussion is not exhaustive, as even these few concepts have intricacies that are beyond the scope of this overview.

> THE AUTOMATIC STAY GRANTS THE FINANCIALLY TROUBLED ENTITY BREATHING SPACE AND AN OPPORTUNITY TO FIRST STABILIZE AND THEN REORGANIZE ITS BUSINESS WITHOUT LITIGATING NUMEROUS CLAIMS CONTEMPORANEOUSLY.

The Automatic Stay. Section 362 of the Bankruptcy Code—the "automatic stay"—is one of the most important provisions of the Bankruptcy Code. The stay goes into effect automatically upon the filing of a bankruptcy petition. It places an immediate stay on all actions by creditors to collect debts owed by the debtor. By doing so, the automatic stay grants the financially troubled entity breathing space and an opportunity to first stabilize and then reorganize its business without litigating numerous claims contemporaneously. For example, once a party files its bankruptcy petition, a vendor is prevented from suing the debtor to recover on an unpaid pre-petition invoice. The automatic stay also prevents a creditor from taking unilateral action to terminate a contract.

The scope of protection afforded by the automatic stay is broad and is applicable to all entities, which are deemed to have notice of the bankruptcy filing. There are severe consequences for violating the automatic stay. The Bankruptcy Code provides that a party injured by a willful violation of the automatic stay shall recover its damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Treatment of Executory Contracts. "Executory contracts" are contracts where the obligations of the debtor and the other party are not fully performed so that the failure of either to perform would constitute a material breach. The debtor's estate is comprised of all legal and equitable interests of the debtor in property as of the commencement of the bankruptcy case. This includes the debtor's interests in any unexpired contracts (*i.e.*, executory contracts). As a Chapter 11 debtor develops its reorganization strategy, it often seeks to shed (*i.e.*, reject) burdensome contractual obligations and preserve (*i.e.*, assume) beneficial contracts. Further, Section 363(1) of the Bankruptcy Code gives the debtor the authority to use its property, including its contracts. There are several issues and requirements in bankruptcy relating to assumption, rejection, or performance of executory contracts, a few of which are discussed here.

Pursuant to Section 365 of the Bankruptcy Code, the debtor can pick and choose which "executory contracts" it wishes to assume or reject, applying its business judgment. The debtor can only assume, and otherwise require performance of, contracts that are "executory" at the time the bankruptcy case is commenced. Thus, if a contract has expired by its own terms or has been terminated, there is nothing for the debtor to assume. The termination process, however, must be complete and not subject to reversal (*i.e.*, any cure period must have expired).

Generally, the debtor will assume beneficial contracts or unexpired leases for personal and real property, and reject those that are burdensome to the estate. Importantly, a contract must be assumed or rejected in its entirety. This can be an important issue in structuring contractual relationships, whereby avoiding a scenario where a debtor retains the beneficial aspects of the relationship and sheds out of the market or otherwise burdensome obligations. It is also important to understand that rejection is simply treated as a breach—not a termination—giving the creditor a claim for damages arising immediately prior to the petition date. If a contract is rejected, the creditor is left with a claim for its pre-petition damages and an administrative expenses claim for its post-petition damages, if any.

A court order is required for a debtor to assume or reject an executory contract. Generally, a debtor must file a motion seeking the bankruptcy court's approval. However, an executory contract also can be assumed in a Chapter 11 plan. The debtor can wait until just before confirmation of its plan to identify which executory contracts it will assume or reject. In complex cases, the time period from commencement of a case until confirmation of a plan can be a matter of years. During that period, a creditor can be required to provide services to the debtor without any firm assurance that it will be paid in full for those services, unless such party obtains a Bankruptcy Court order requiring timely payment. The creditor may move the Bankruptcy Court for the debtor to assume or reject the contract in a shorter time frame. However, such motions are seldom successful in the early stages of a bankruptcy.

If, before assumption or rejection, the debtor elects post-petition to receive benefits under a contract from another party before assuming or rejecting that contract, the debtor must pay for those post-petition benefits. On occasion, a question arises as to whether the debtor must pay the contract price for those benefits. The Bankruptcy Code is silent and the case law is not clear about whether the debtor should pay the market value for those benefits to the estate or pay the actual price under the contract. If the estate is administratively solvent and there are sufficient assets and cash flow to pay on-going business expenses, a vendor or service provider is generally paid in the ordinary course after the initial period of the bankruptcy. Further, for a Chapter 11 plan to be confirmed, administrative expense claims for post-petition goods and services must be paid in full. Many debtors, however, are unable to reorganize, become administratively insolvent, and are forced into liquidation under Chapter 7. If this occurs, the vendor or provider is unlikely to receive full payment for its post-petition goods or services.

As mentioned above, the automatic stay prevents a creditor from unilaterally terminating a contract. Thus, the creditor cannot terminate a contract post-petition because of a pre-petition default. Contracts often include provisions, known as *ipso facto* clauses, that seek to terminate a debtor's interest in a contract because of the debtor's bankruptcy or financial condition. Although special exceptions apply to commodity, swap, and other similar contracts, the Bankruptcy Code generally provides that such clauses have no force and effect. It is not clear if a creditor can terminate a contract post-petition because of post-petition default. However, in any event, it would be prudent to seek court approval before taking such action.

Like *ipso facto* clauses, anti-assignment provisions in contracts generally are not enforceable under Section 365(f) of the Bankruptcy Code. There are exceptions for certain contracts, such as those involving non-delegable duties and debt accommodation contracts. But generally, a debtor can assign a contract without the consent of the other party. The debtor can only assign a contract if it has been assumed and the assignee provides adequate assurance of future performance.

Recovering amounts due. To participate in any recovery in a Chapter 11 proceeding, a creditor may need to file a "proof of claim," which is a form required to describe the nature and basis of the amount(s) due. The proof of claim is the mechanism for asserting pre-petition claims. Section 502 of the Bankruptcy Code precludes each unsecured, pre-petition creditor, including an undersecured lender, from accruing interest on its claims after the petition date. This allows a business in Chapter 11 to increase its cash flow by deferring (or in some cases eliminating) the accrual and payment of interest after a bankruptcy filing. If other amounts become due after a bankruptcy is filed, then a creditor may file a request for payment of an administrative claim.

The bankruptcy court will set a bar date or deadline by which all proofs of claims must be filed. A creditor should automatically receive notice of the bar date, which generally occurs some months into the bankruptcy. It is always worthwhile, however, to check with debtor's counsel or the bankruptcy court to see if the bar date has been set. In certain circumstances, when a Chapter 11 debtor properly lists a creditor's claim in its bankruptcy schedules and the claim is not disputed, contingent, or unliquidated, a creditor may rely on the debtor's schedules. However, a proof of claim for the pre-petition amount(s) owed should be filed as a matter of course.

If the debtor's plan of reorganization is successful it will provide for the treatment of pre-petition claims. The percentage of recovery will depend on the case: it could be 100%; it could be nothing, or a few pennies on the dollar. The creditor is only paid upon the completion of the bankruptcy, which could be a matter of months or years. Furthermore, there is a priority scheme for distributions in bankruptcy and unsecured creditors may not be paid before certain other creditors, such as holders of administrative claims and secured claims. If the debtor is forced into Chapter 7, an unsecured creditor may not receive any distribution on account of its claim.

Clawback risks – preferential and fraudulent transfers. Under the Bankruptcy Code a Chapter 11 debtor has certain "avoidance powers" that allow the debtor to recover certain transactions made by the debtor prior to the filing of the bankruptcy petition, which are known as preferential transfers and fraudulent transfers. Once recovered, these transfers will be included in the debtor's estate for the benefit of all creditors.

Technically speaking, a preferential transfer is a transfer by the debtor to a creditor made within 90 days of the petition date on account of an "antecedent debt" that enables the creditor to receive more than the creditor would have received if the debtor's estate had been liquidated. In other words, if a creditor receives a payment on a debt within 90 days of the bankruptcy that is received outside of the ordinary business terms of the parties, such payment may be recoverable by the debtor.

A creditor may assert certain defenses to a preferential transfer, such as that the payments were in fact made in the "ordinary course of business" or that the bankruptcy estate received an equal benefit in return for the transfer. For example, a payment to a supplier will not be recoverable by the debtor, if, after the payment is made, the creditor transfers new supplies to the debtor equal in value to the payment received.

"THE AVOIDANCE OF PREFERENTIAL TRANSFERS SERVES TO DETER CREDITORS FROM TAKING ACTION ON THE EVE OF BANKRUPTCY THAT IMPROVES THEIR POSITION WITH REGARD TO OTHER CREDITORS."

The avoidance of preferential transfers serves to deter creditors from taking action on the eve of bankruptcy that improves their position with regard to other creditors. From a creditor's perspective, it may be prudent to collect as much as possible from a debtor before any bankruptcy. If and when a debtor later files for bankruptcy protection, a creditor may litigate or settle the matter of how much, if any, of the pre-petition amounts collected must be returned to the debtor's estate.

In addition to preferential transfers, a Chapter 11 debtor may seek to avoid fraudulent transfers. A fraudulent transfer is a transfer of property that has the effect of improperly placing assets outside the reach of creditors. Fraudulent transfers are generally recoverable from the party causing the fraudulent transfer or the recipient of the transfer. And the period of time in which a Chapter 11 debtor may look back to avoid transfers is two years under the Bankruptcy Code and can be longer under applicable state law.

Absent actual fraud, in the context of commercial parties dealing with each other at arms' length, one may believe that fraudulent transfers should not occur. However, a one-sided or really good deal made by an insolvent debtor may be unwound as being constructively fraudulent where, for example, assets of the debtor are sold to a third party for no consideration or substantially less than market value. Some transfers may appear to be legitimate transfers, but are in reality fraudulent transfers recoverable by the debtor. For example, if a creditor receives a payment from an insolvent debtor for a debt owed by another entity (such as a solvent affiliate), the transfer may be fraudulent. In that situation, the debtor has diverted assets of the insolvent debtor without the debtor receiving any benefit in return for the payment. Therefore, it may be prudent for a creditor to only accept payment from the party with whom the creditor has contracted to do business.

Other issues. When a counterparty files for bankruptcy protection, it is important to promptly gather all related documentation and information related to the relationship and to obtain a prompt assessment of the situation, including each party's rights and responsibilities. There may be a variety of rights, remedies, defenses, and potential pitfalls to consider. For example, a party may request "adequate protection" of its rights when a debtor is using, selling or leasing property, borrowing against property, or when a creditor is otherwise stayed from enforcing its rights or interests. Adequate protection may be in the form of periodic payments, additional or replacement liens, or other relief depending on the circumstances. A creditor also may seek to exercise certain rights such as recoupment, setoff, or reclamation.

Conclusion

Although financial distress and bankruptcy are nothing new to the mining industry, the current economic environment is a reminder to creditors to remain vigilant about credit risks. Planning for and dealing with a party suffering financial distress can be complex and nuanced. Now is the time for mining companies to have wide-ranging discussions to develop and implement mitigation strategies.

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RECENT ALERTS

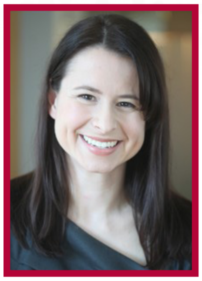
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION HOLDS THAT MINE OPERATORS CAN BE CITED FOR VIOLATIONS DISCOVERED DURING PRE-OP EXAMINATIONS

The Federal Mine Safety and Health Review Commission held that a regulation that requires a mine operator to maintain manual horns and other audible warning devices on self-propelled mobile equipment in functional condition means that the horns or warning devices must be functional at all times, and that the operator can be cited for violating the regulation even where the defective condition of the horn is found in the course of a mandatory pre-operation equipment examination. The case is Wake Stone Corp., SE 2010-95-M, decided April 18, 2014.

The case stems from a 2009 inspection at a crushed stone quarry in North Carolina. While inspecting the quarry, the MSHA inspector said he wanted to examine two pieces of parked mobile equipment, neither of which had been tagged out of service. Before the equipment was operated for the inspector, the mine superintendent insisted on performing the pre-operation examination required by regulation. It was during that exam that the operator discovered that the service horns on the vehicles did not work. The inspector issued two citations for violations of 30 C.F.R. § 56.14132(a).

The operator argued that no violation had occurred because the defective horns were found during the mandatory pre-op examination. According to the operator, the requirement that horns be kept functional should be read in conjunction with the regulation requiring pre-op examinations of mobile equipment. In other words, the operator argued that if a problem with the horn is found during the pre-op examination, and the vehicle is then taken out of service (as is routine and would have been done in this instance once the defect was identified), there is no violation of § 56.14132(a).

Although the administrative law judge who initially heard the case agreed with Wake Stone, a unanimous Commission disagreed, reversing the judge and remanding the case for the determination of a civil penalty. The Commission held that the plain language of § 56.14132(a) did not limit the applicability of the regulation only to equipment that is to be used during a shift. According to the Commission, the strict liability scheme of the Mine Act means that an operator cannot avoid liability even if the defective horn is found during the pre-op examination. The Commission saw no conflict between the cited regulation and the requirement for a pre-op examination, and said that allowing a mine operator to avoid liability where a violative condition is caught while performing a pre-op examination, prior to the official MSHA inspection, would permit operators to engage in "gamesmanship." Because the cited equipment had not been removed from service, the Commission rejected the operator's argument that the equipment was not in service, citing its own precedent that vehicles located in normal work areas and not locked and tagged out are considered to be "in use" and thus subject to inspection.



Mine Safety Disclosures to the SEC: A Recent Study Under the U.S. Securities Laws

by Kelly G. Howard

Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") on July 21, 2010. A combination of legislation aimed largely at tightened financial regulation, the Dodd-Frank Act also included a few additional disclosure requirements for public companies. One of the last sections of the Dodd-Frank Act, Section 1503, mandates the public disclosure by public companies of mine safety and health violations and statistics in their filings with the U.S. Securities and Exchange Commission (SEC). While the provision was self-executing upon its August 20, 2010 effective date and was fairly detailed in its disclosure requirements from the outset, it also required the SEC to promulgate its own set of rules to administer the disclosure program. Because the SEC needed time to wade through its many Dodd-Frank Act rule promulgation requirements, consider the best form in which to require the disclosure, and solicit comments from the public, its final SEC rule on mine safety disclosure was not released until December 21, 2011.

Nearly four years into these requirements, unlike the turmoil, resistance, and legal challenges that have surrounded the SEC's implementation of the Dodd-Frank Act's requirements regarding the use of "conflict minerals" sourced from the region in and around the Democratic Republic of the Congo and the payments by natural resource extractors to U.S. or foreign governments for the development of those resources, implementation and compliance with Section 1503's mine safety disclosure rules have gone fairly smoothly. Affected mining companies seem to have a good understanding of the rules and their obligations. Further, based on the SEC's publicly available review correspondence, to date, the SEC has had little to criticize with respect to companies' mine safety disclosures under Section 1503.

Two Types of Section 1503 Disclosure

Section 1503 requires public companies that operate or perform services at a mine in the U.S. or its territories, or have subsidiaries that do so, to make mandatory mine safety disclosures in periodic reports (*i.e.*, annual reports on Form 10-K and quarterly reports on Form 10-Q) and in current reports (*i.e.*, a Form 8-K).

Periodic Reports on Form 10-K and 10-Q:

Annually, public companies—or "issuers"—must file a report on Form 10-K containing audited annual financial statements, related textual discussion and analysis and certain other enumerated disclosures in respect of their completed fiscal years. Further, on a quarterly basis, public companies must file a quarterly report on Form 10-Q containing unaudited interim financial statements, related textual discussion and certain other, but more limited, enumerated disclosures, for the first, second and third completed fiscal quarters of their fiscal years (results of the fourth quarter are included on Form 10-K).

Under Section 1503, issuers who are mine *operators* (a term that includes independent contractors who perform services or construction work at a mine) must report their mine safety violations and MSHA notices, as enumerated below, for the period covered by that periodic report. That is, each Form 10-Q must include all violations, notices and other disclosable items occurring within the fiscal quarter to which the Form 10-Q relates. Further, each Form 10-K must include disclosure for the entire fiscal year, not just the fourth quarter, to which the Form 10-K relates.

With respect to the language specifically required by Section 1503 and Item 104 of Regulation S-K (the SEC's rule promulgated in accordance with Section 1503), issuers must include a brief disclosure in the body of their periodic reports with the required mine safety information included in an exhibit to the filing named and filed as Exhibit 95. The SEC recommends a tabular disclosure with explanatory footnotes. The issuer must report on a mine-by-mine basis; this means the issuer must provide information, if any, for each mine that has an MSHA-issued identification number and may not group or otherwise aggregate mines for reporting purposes. Otherwise reportable information for any independent contractors that are not subsidiaries of issuers need not be reported.

An issuer must disclose in the periodic report, for the time period covered by the report, the following information for each mine it operates:

- The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under Section 104 of the Federal Mine Safety and Health Act of 1977 (the "Mine Act") for which the operator received a citation from MSHA (aka "S&S violations").
- The total number of orders issued under Section 104(b) of the Mine Act.
- The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under Section 104(d) of the Mine Act.
- The total number of flagrant violations under Section 110(b)(2) of the Mine Act.
- The total number of imminent danger orders issued under Section 107(a) of the Mine Act.
- The total dollar value of proposed assessments from MSHA under the Mine Act (even if actively being challenged or appealed, although issuers may provide details on the status of their challenges or appeals in footnote or textual disclosure).
- The total number of mining-related fatalities.
- A list of the mines that receive notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act.
- Any pending legal action before the Federal Mine Safety and Health Review Commission (FMSHRC) as of the last day of the period covered in the report, as well as the aggregate number of legal actions (i) instituted and (ii) resolved during that period. Further, the pending legal actions need to be categorized by type:
  - Contests of citations and orders (*i.e.*, pre-penalty contests).
  - Contests of proposed penalties.
  - Complaints for compensation (cases under Section 111 of the Mine Act filed by miners with FMSHRC for compensation they claim is owed for time they were idled as a result of an MSHA mine closure order).
  - Complaints of retaliation under Section 105 of the Mine Act (which includes (i) discrimination proceedings for adverse employment action related to miner conduct protected by the Mine Act (like safety complaints) and (ii) temporary reinstatement proceedings if the miner claims that there was discrimination and termination of employment).
  - Temporary relief applications (under Section 105(b)(2) of the Mine Act for relief from certain orders (or modifications or terminations of orders).
  - Appeals of judges' decisions or orders pending before the FMSHRC.

Any occurrence of a violation, order, or other event from the list above must be reported; no materiality threshold applies. The SEC's rules do not permit issuers to exclude from disclosure information about orders or citations that were received during the time period covered by the filing but subsequently dismissed, reduced, or vacated, although issuers can explain the status of reported matters. These additional details are frequently included by footnotes attached to the specific event or mine name in the table.

The reporting obligations on Form 10-K and Form 10-Q apply to all public companies, including "smaller reporting companies" and "foreign private issuers," as long as they operate, or have subsidiaries that operate, mines in the U.S. or its territories.

Current Reports on Form 8-K:

As a result of Section 1503, the SEC added a new line item disclosure to Form 8-K, Item 1.04 for U.S.-based public companies (foreign private issuers do *not* need to make similar filings). An issuer is required report on Form 8-K under Item 1.04 upon the receipt of either of the following:

- An imminent danger order issued under Section 107(a) of the Mine Act.
- A written notice from MSHA of a pattern of violation of mandatory health or safety standards that are of such

> a nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act (please note that Section 1503 also called for a Form 8-K where the issuer received a written notice from MSHA of the potential to have a pattern of such violations, but that requirement has effectively been nullified by a recent MSHA rule that eliminated the "potential pattern" notice).

Like all events reportable on Form 8-K, the Form 8-K must be filed with the SEC within four business days of the occurrence of the triggering event, by 5:30 p.m. Eastern time.

For each specified notice or order, issuers are required to report under Item 1.04 of Form 8-K (i) the date of receipt, (ii) the category of notice or order and (iii) the subject mine's name and location. Such disclosure requirements are still required even if the notice or order is vacated by MSHA within the four business days' time period for filing the Form 8-K. However, if the order is vacated prior to filing the Form 8-K, the issuer can provide details on the status of the order in the Form 8-K.

The Form 8-K, Item 1.04 reporting obligations apply to smaller reporting companies, but do *not* apply to foreign private issuers, who would not need to report the enumerated events on Form 6-K or 8-K, but would need to make the reports on a quarterly and annual basis as described above.

Trends in SEC Comments on Section 1503

While not conducted on a set schedule, as required by the Sarbanes-Oxley Act of 2002, the SEC reviews the SEC filings of public companies at least once every three years, and even more frequently for larger companies or companies who have experienced reporting challenges in the past. These periodic SEC reviews typically focus on issuers' reporting under the Securities Exchange Act of 1934—*i.e.*, the companies' most recent annual report Form 10-K and the quarterly reports on Form 10-Q, current reports on Form 8-K and proxy statements filed thereafter. The review process entails the SEC's issuance of a comment letter to the issuer with its concerns, and the issuer carefully responds to the SEC staff by a response letter. This correspondence becomes publicly viewable on the SEC's filing database, EDGAR, 45 days after filing.

Therefore, inasmuch as Section 1503's requirements became effective approximately four years ago, affected mine operators that have been in continuous operation should by now have undergone at least one SEC review cycle since the effective date of the mine safety disclosure obligations. We have undertaken a comprehensive review of all relevant SEC comment correspondence since January 2010—a few months prior to the enactment of Section 1503.

As one might suspect, the SEC is not an authority on mine safety and health law; it relies on MSHA for enforcement of applicable rules and regulations. Instead, the SEC is an authority on disclosure. Not surprisingly, we do not observe a significant uptick in SEC comments following the enactment of Section 1503 related to mine safety disclosures.

Overall, very few SEC comment letters of the last three and a half years include comments related to deficiencies or other concerns with mine safety disclosures—whether related to Section 1503 or otherwise. Of the modest number of substantive SEC comments and issuer responses regarding Section 1503 disclosure, most constitute a reminder by the SEC to mine operators of their disclosure obligations (or at the time, upcoming obligations) under Section 1503. Put simply, in the early days of compliance, a few issuers either did not appropriately include disclosure or they included it in the wrong location. In limited other instances, the SEC issued comments

> "THE SEC REVIEWS THE SEC FILINGS OF PUBLIC COMPANIES AT LEAST ONCE EVERY THREE YEARS, AND EVEN MORE FREQUENTLY FOR LARGER COMPANIES OR COMPANIES WHO HAVE EXPERIENCED REPORTING CHALLENGES IN THE PAST."

asking issuers for missing Section 1503 disclosures, only to be corrected by such issuers that they were not operators of U.S. or U.S. territorial mines subject to Section 1503 disclosure.

Of the limited number of comments on the substance of provided disclosure, the SEC reiterated the clear requirements and instructions of the disclosure rules. Violations, orders, citations, assessments or legal actions cannot be omitted from disclosure under Section 1503 because the issuer finds such events to be immaterial. Disclosure is still required for each incident or event even if the issuer challenged or appealed the matter, though such disclosure could be supplemented with further discussion. Each legal action needed to be identified in the related category of action.

In one instance in our review we observed the SEC reaching below the surface of an otherwise apparently "complete" disclosure on Exhibit 95, requesting that the issuer reconcile the dollar value of a citation included in its table with a higher dollar value listed for such violation on the MSHA website. The issuer explained that the total assessment under the citation was issued by MSHA in two different calendar years.

Disclosure Obligations of Mine Safety and Health Issues Are Not Limited to Section 1503

Section 1503 does not represent the entirety of mine safety and health disclosures that a publicly traded mine operator or related entity might be required to provide under the securities laws. Indeed, mine safety issues can be material—and therefore disclosable in other portions of periodic reports—for a host of entities working in the mining industry, whether or not these entities qualify as mine operators, and whether or not their activities are conducted in the U.S.

Specifically, a public company in the mining industry should take care that its annual report on Form 10-K adequately addresses mine safety and health issues to the extent material or otherwise necessary for an understanding by investors of such company's operations, business, challenges, costs, and risks. The areas where these disclosures might appear in an annual report on Form 10-K or, as applicable, in a quarterly report on Form 10-Q include:

- In the Business section, details of the environmental, safety and health laws and regulations and proposed regulations applicable to the issuer, and the necessary permits, approvals and internal safety framework the issuer must maintain to comply with such regulations and operate a competitive and safe organization.
- In the Risk Factors section, details on the potential impact on the issuer's operations and financial performance based upon the costs of compliance with safety and health laws, actual safety and health violations, injuries or fatalities, and potential citations by MSHA and other regulating bodies.
- In the Legal Proceedings section, details of significant legal actions related to mine safety and health.
- In the Management's Discussion and Analysis section, details on the costs of compliance with safety and health regulations, including violations, assessments, and settlements and the losses related to injuries and fatalities.

Please note: unlike Section 1503, generally *materiality* does inform disclosure in connection with respect to these items.

Indeed, the SEC routinely scrutinized the disclosure of companies in the mining industry, well before the Dodd-Frank Act. Common SEC comments to mining companies prior to the effective date of Section 1503 related to requests for more detailed disclosures on:

- The actual or potential losses, whether from fine, settlement or production delay, as a result of MSHA or other safety and health violations.
- The nature and extent of capital expenditures, safety programs, and statistical or other measures (including those reported to MSHA or other regulatory bodies) utilized by the issuer to monitor compliance with safety and health regulations.
- If providing statistics on safety and health, or claims of a positive safety performance, the related actual safety data and information from its facilities underlying such statistics or claims (i.e., man-hours, fatalities, lost time, and reportable injuries broken out by facility or facility type) and any benchmarks or targets used in measurement.
- If operating internationally, comparisons of safety performance statistics reported to MSHA vs. other jurisdictions in which the issuer operates.

Summary

In Section 1503 of the Dodd-Frank Act, Congress added more specific disclosure obligations in an effort to make mine safety and health statistics for operators of U.S. and U.S. territorial mines more transparent to the public. Almost four years on, affected companies appear to have adapted well to the additional disclosure requirements—with little challenge to the SEC and little difficulty in following the rules.

Beyond Section 1503, mine safety and health issues are important to the operations and, therefore, the financial performance of companies operating in the mining industry. As a result, an understanding of these issues is important for investors, and compliance with Section 1503 alone is not the only disclosure consideration for issuers. Mine operators should not only follow the clear requirements of Section 1503, but also continue to consider how their safety and health record, costs of compliance, losses from violations and other incidents have an impact on their business and financial results, and make thoughtful disclosures accordingly.

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RECENT ALERTS

BLM ANNOUNCED A RULEMAKING ON CAPTURING METHANE FROM FEDERAL LEASES

On April 29, 2014 the Department of the Interior's Bureau of Land Management (BLM) published an Advance Notice of Proposed Rulemaking (ANPRM) in the Federal Register, seeking public comment and suggestions on technologies for, and the economics of, capturing, using, selling, or destroying waste mine methane released as a result of underground and surface mining operations on federal coal and mineral leases (79 Fed. Reg. 23923). The BLM manages more than 700 million acres of federal mineral estate and seeks to regulate waste mine methane pursuant to its leasing authority under the Mineral Leasing Act of 1920, 30 U.S.C. § 181, et seq.

The rulemaking is part of President Obama's Climate Action Plan announced last year on June 25 that is aimed at cutting domestic greenhouse gas emissions, preparing the country for the impacts of climate change, and promoting American leadership in international climate change efforts. According to the Administration, methane has a global-warming potential of more than 20 times that of carbon dioxide, and makes up nearly 9 percent of domestic greenhouse gas emissions. The administration's Strategy To Cut Methane Emissions targets the largest sources of human methane emissions, including coal mines, which are estimated to make up 10 percent of domestic emissions equivalent to 56 million tons of carbon monoxide pollution.

The BLM rulemaking targets the methane that exists naturally in federal coal lease estates and is released as waste methane through both surface and underground coal mining operations. Traditionally, waste mine methane released during mining has been vented into the atmosphere for safety purposes, pursuant to standards issued by the Mine Safety and Health Administration. Waste mine methane can also be destroyed by combustion through flaring or captured for beneficial use or sale. The BLM is seeking comment on options for capturing or reducing waste mine methane without compromising miner safety. All of the methods for managing waste mine methane must protect miners' safety. The BLM is not attempting to regulate coalbed methane development and extraction carried out under the federal oil and gas leasing program.

The ANPRM seeks feedback on the following questions in particular:

- What steps can BLM take to reduce waste mine methane emissions from mining on federal lands?
- What technologies and methods exist for capture, use, and destruction of high, medium, and low quality methane and what design, economic, and operational considerations attach to each technology or method?
- What are the acquisition and operation costs associated with capture, use, and destruction of waste mine methane?
- What are the possible financial impacts of incentives for managing waste mine methane?
- Should BLM assist the formation of cooperative ventures or partnerships to encourage methane capture and use?
- What are the barriers to waste mine methane capture and how can BLM reduce those barriers to facilitate capture and use from drainage wells, gob gas, and ventilation air?
- Should waste mine methane capture be mandated where technically and economically feasible and consistent with safe operating practices or should BLM use incentives to encourage capture such as royalty rate reductions? What incentives would be most effective when balanced with the need for transparency and a fair return to taxpayers from mineral production on federal lands?
- What kinds of surface disturbances and environmental impacts might be caused by methane capture?
- Would incentives for mine methane recovery from drainage wells affect mine safety, coal production, or royalty revenues?
- How should best practices for methane management be defined and encouraged?

Cognizant that mandating the capture of methane without offering offsetting economic incentives to mine operators could make coal mining on federal lands uneconomic and thereby drive operators off of federal lands and toward private lands (which in turn could defeat the benefits of its program to reduce the net emissions of waste mine methane), the BLM seeks ideas on striking the right balance between reducing waste mine methane and continuing to promote coal mining on federal lands. The 60-day comment period runs through June 30, 2014.

Mixed Signals From MSHA on the Status of Staffing Agencies Under the Mine Act

by Daniel W. Wolff

[A version of this article was previously published in the June 2014 edition of Sharpe's Point: On Mine Safety]

The Fourth Circuit recently upheld a citation issued to a coal mine operator for not reporting an occupational injury even though the injury had already been reported by the injured miner's employer (*Dickenson-Russell Coal Co. v. Secretary of Labor*, No. 13-1374 (4th Cir. March 27, 2014)). Given that the injured miner was a temporary laborer, and his legal employer the staffing agency that contracted to provide temporary labor to the mine, the outcome was not surprising—for several years now, the Mine Safety and Health Administration (MSHA) has been pretty clear that, for accident-and-injury-reporting purposes, production operators are responsible for reporting the reportable events involving temporary laborers (or contract miners). The premise for this reporting policy is that providers of temporary labor are not like independent contractors: they do not control or supervise mines or mine personnel; they do not perform mining work or services. Rather, staffing agencies merely provide the labor that, in turn, works under the supervision and control of the production operator (or some other independent contractor itself doing actual work at the mine).

There are troubling aspects of the Fourth Circuit's decision, however. First, by its terms, the decision commands every operator that has some level of responsibility over the site of the accident or injury to report the accident or injury even if another responsible operator has already done so. Second, the decision perpetuates the notion that staffing agencies are themselves operators under the Mine Act. This article addresses both points and urges the agency to do the easy and responsible thing to clear up the confusion that it has sown: publish a program policy letter clarifying that staffing agencies are not operators as defined in Section 3(d) of the Mine Act.

The Statute, Regulations, and Policy

Section 3(d) of the Mine Act defines "operator" to include "any independent contractor performing services or construction at" a mine. This definition was included in the Act to make clear what courts had already held was true under the 1969 Coal Act: if you are an entity other than the production operator and in charge of some aspect of work at a mine, you are an operator. The 1969 Act did not say this expressly, but the courts determined it was implicit. With the 1977 Act, Congress added the independent contractor language to remove the ambiguity.

By regulation, operators are required to report within 10 days of the occurrence or diagnosis any accident or occupational injury or illness on MSHA Form 7000-1. The relevant language says: "*Each* operator shall report *each* accident, occupational injury, or occupational illness at the mine" (30 C.F.R. 50.20(a)). Inasmuch as independent contractors are operators, the reporting obligation extends to them. The question inevitably arises whether the reporting obligation falls on the production operator, the independent contractor, or both, when a reportable event occurs at an area over which both operators have some measure of control. Common sense says MSHA

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MSHA HAS BEEN PRETTY CLEAR THAT, FOR ACCIDENT-AND-INJURY-REPORTING PURPOSES, PRODUCTION OPERATORS ARE RESPONSIBLE FOR REPORTING THE REPORTABLE EVENTS INVOLVING TEMPORARY LABORERS
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only needs to be told once—regardless of who reports, MSHA will have the information necessary for further investigation of its own and for its legitimate statistic-keeping purposes (to the extent the information is erroneous, MSHA is of course authorized to issue a citation to send a message of deterrence). And, to its credit, MSHA states in its Program Policy Manual that, "in order to assure accurate reporting and recordkeeping and to avoid duplication, it is important that production-operators and their independent contractors carefully coordinate their Part 50 [*i.e.*, reporting] responsibilities." So far, so good: one injury, one report.

Staffing agencies are another story, however. In a 2009 Program Policy Letter (the Part 50 PPL), P09-V-02, MSHA formally adopted the policy position that production operators are responsible for reporting the accidents and occupational injuries and illnesses involving temporary miners. MSHA's view was that, "in contrast to a traditional contractor where the contractor is performing a specific task and the contractor maintains supervisory control over its employees," the staffing agency does no such thing: it is not at the mine; it is not responsible for the task and does not supervise its employees. Rather, it is the production operator that supervisors temporary miners no differently than it does the miners on its own payroll, it is the production operator that is responsible for maintaining a safe workplace, and it is therefore the production operator that should be responsible for reporting (and being held accountable for) any accidents or workplace injuries or illnesses suffered by the temporary miner.

MSHA's Litigating Position Sows Confusion

The *Dickenson-Russell* case was more or less a challenge to MSHA's Part 50 reporting policy as it applies to temporary laborers and, as noted, the outcome in MSHA's favor is neither surprising nor disturbing. There is a logic to MSHA's Part 50 reporting policy and, after several years of it being in effect, most production operators by now understand their reporting responsibility in this regard.

Unfortunately, MSHA has been so far unwilling to extend the logic of its Part 50 PPL (the latest reissuance of which is P13-V-02) for enforcement purposes, *i.e.*, it has failed to renounce the notion that staffing agencies can be "operators" for purposes of Mine Act enforcement. Its litigating positions in *Dickenson-Russell* and a 2012 case, *David Stanley Consultants, LLC v. Secretary of Labor*, 34 FMSHRC 2947 (Nov. 2012) (ALJ), illustrate the unnatural dichotomy between MSHA's Part 50 reporting policy and its enforcement policy as they relate to staffing agencies, and in turn foster ongoing confusion about the status of staffing agencies under the Mine Act.

To be fair, the production operator in *Dickenson-Russell* pressed the argument that the staffing agency that supplied the injured miner was an "operator" under the Mine Act. This was an understandable litigating position for it to take and, until the Part 50 PPL was issued, that would have been the proper position to take, as MSHA had previously interpreted the definition of mine operator to include staffing agencies, which frequently have their own MSHA- issued contractor identification numbers. Thus, as operators, staffing agencies, prior to the Part 50 PPL, had an apparent duty to report the mine-related injuries of their employees. But the Part 50 PPL changed that.

The right thing for MSHA to do in *Dickenson-Russell* would have been to adopt the position that staffing agencies are *not*, under any circumstances, "operators" because they themselves neither perform services at a mine nor supervise or control the work being performed at the mine. That position would have carried the day in litigation and been completely consistent with the Part 50 reporting policy reflected in its Part 50 PPL. Instead, MSHA crafted a novel litigating position that distinguished between operators for Mine Act enforcement purposes and operators for Part 50 reporting purposes. Staffing agencies could fall into the former category but be excluded by regulation from the latter category, so the argument went. And that is what the administrative law judge held in the first instance. In his 2013 decision, the ALJ held that irrespective of the staffing agency's "operator" status under Mine Act Section 3(d), it was not an operator for Part 50 reporting purposes (35 FMSHRC 123 (Jan. 2013) (ALJ)). According to the ALJ, the staffing agency's own 7000-1 was "gratuitous" and thus did nothing to obviate the production operator's responsibility to file its own report.

On appeal, that novel distinction (on which the ALJ relied) was apparently abandoned. Indeed, the court of appeals noted that MSHA posited that there were "plausible reasons for the [Part 50] regulation to require potentially overlapping or duplicative accident and injury reports." For its part, the court of appeals assumed for the sake of argument that the staffing agency *was* an operator with reporting obligations of its own and then adopted MSHA's position on appeal that duplicative reporting was a good thing inasmuch as it gives greater assurance that a reportable event will be reported (for

> WHAT STARTED OUT AS A CASE CALLING FOR NOTHING MORE THAN A SIMPLE APPLICATION OF MSHA'S PART 50 REPORTING POLICY ENDED UP GENERATING A DECISION THAT, BY ITS TERMS, NOW REQUIRES EVERY OPERATOR AT A MINE TO REPORT EVERY ACCIDENT OR INJURY FOR WHICH MSHA MIGHT FIND IT HAD SOME LEVEL OF RESPONSIBILITY.

example, in the event one of the operators forgets). After all, the court said, the regulation itself says "*each* operator shall report *each*" reportable event. "Each" means "every" such that "where there are two or more operators who are subject individually to the reporting requirement ... *every one* of them must report *every* qualifying accident or injury." (Emphasis by the court.)

In other words, what started out for MSHA as a case calling for nothing more than a simple application of its Part 50 reporting policy—a policy that requires production operators to file the 7000-1 for a reportable event concerning a temporary miner—ended up generating a decision that, by its terms, now requires every operator at a mine to report every accident or injury for which MSHA might find it had some level of responsibility." So much for MSHA's admonition to production operators and independent contractors in its Program Policy Manual to coordinate their reporting obligations to avoid duplication. This author doubts very much that the Fourth Circuit's expansive proclamation is what MSHA intended at the outset of the case, but by failing to do the right thing—to take the simple and disciplined position from the start of the litigation that staffing agencies are not operators under the Mine Act—the agency has helped create a potential compliance nightmare that, at the very least, deserves an additional program policy letter (even if at odds with MSHA's litigating position in the Fourth Circuit) to set MSHA's Part 50 reporting and enforcement policy straight.

MSHA's position in *Dickenson-Russell* reflects an unwillingness on the part of the agency to draw bright lines and acknowledge that not all entities that do business with the mining industry are subject to its enforcement reach. The *David Stanley* case highlights the point. The staffing agency in that case had the misfortune of having supplied temporary miners to the Upper Big Branch Mine (UBB) as of the time of the April 2010 explosion. Looking for anyone and everyone on which it could place the blame for that tragedy, MSHA issued six citations to the staffing agency, two of which were deemed contributory. Civil lawsuits followed. The company was shocked. That enforcement action was, in this author's opinion, unfounded. (Full disclosure: Crowell & Moring represented the staffing company in the Commission litigation.)

The staffing company defended on the grounds that, as a provider of only temporary labor to UBB, it was not an operator and could not be cited. In support, it relied on MSHA's Part 50 reporting policy and argued that for the same reasons MSHA does not treat staffing agencies as operators for Part 50 reporting purposes they should not be treated as operators for enforcement purposes—regardless of the issue, staffing agencies do not, by their very nature, supervise or control mine operations or work or "perform services" at a mine within the meaning of the Mine Act's definition of operator. Indeed, it was the common law notion of an independent contractor controlling its own worksite and supervising its own employees at that worksite that led courts to treat independent contractors as "operators" in their own right under 1969 Act, and in turn led Congress to codify that approach in the 1977 Act. MSHA, however, opposed that position in *David Stanley* on the utterly unprincipled ground that the logic of the Part 50 PPL was not intended to apply outside of the Part 50 reporting context.

Given the agency's litigating position, the ALJ was left to effectively endorse the agency's self-serving distinction between the meaning of "operator" for enforcement purposes and for Part 50 reporting purposes (as the ALJ in *Dickenson-Russell* would later do). To her credit, though, the ALJ vacated the serious citations for the obvious reason that the staffing agency lacked control over the mine operations involving its employees which meant, under Commission precedent, it could not be held liable, notwithstanding its "operator" status.

A More Sound Position

MSHA should clear the brush as a matter of sound policy, rationality, and consistency in interpretation. It should adopt the policy that staffing agencies are not operators under Mine Act Section 3(d) because they do not supervise or control mine operations or the work of mining and, as such, do not perform services at a mine within the meaning of the Mine Act.

As recognized by the ALJ in *David Stanley*, the Commission has held that if an operator does not exercise control or supervision over a worksite, it cannot be held liable under the Mine Act. And MSHA's Part 50 reporting policy recognizes that staffing agencies do not by their very nature do this—they do not exercise supervision over the mine-related work of their employees or the mines to which their employees are detailed. Why is it, then, that in cases like *Dickenson-Russell* the agency does not just take the position that the staffing agency is not an operator, and therefore could not have possibly obviated the production operator's (or an independent contractor's) obligation to file the 7000-1 report by its own reporting of a Part 50 event?

Is it because, as suggested by the *David Stanley* case, MSHA loathes the idea of foreclosing any conceivable enforcement angle it might gin up in the event disaster strikes, as it obviously did at UBB? If that is the motivation, that is unfortunate. (To be fair, it should be noted that the staffing agency in *David Stanley* had, at other times, provided actual mining-related services to UBB (and other mines) that made it—for those *other* purposes and times—an operator. But those other services had nothing to do with the events of the UBB disaster and anyone taking an objective look at the facts would have recognized that.)

In reality, MSHA would give up nothing of substance (and would save itself the administrative frustration of having to process duplicative reports) if it adopted the policy advanced here. That is so because, as was true of the staffing agency in *David Stanley* (albeit in unrelated and immaterial circumstances), if such an entity were to perform an actual mining-related service at a mine, then it would no longer be acting merely as a staffing agency; it would be, in relation to that work, an independent contractor performing services at a mine, and thus an operator. Facts, as well as sound and consistent policies, should still matter, even to MSHA. By MSHA adopting the policy that staffing agencies are not operators, it would do much to clarify the confusion that gives rise to, and in due course is perpetuated by, cases such as *Dickenson-Russell* and *David Stanley*.

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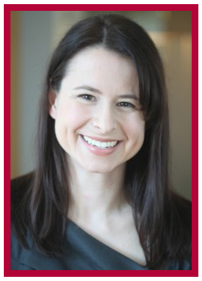

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