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Sue and Settle: Unfair "Backdoor" Legal Tactics That Cost Industry Millions

The legal phenomenon commonly referred to as "Sue and Settle" is by no means a novel tactic used by environmental advocacy groups in an effort to promote their respective agendas. However, the frequency at which we are seeing this tactic employed as a means to circumvent the legal system has increased in recent years.

Sue and Settle is a legal tactic used by environmental advocacy groups whereby they file suit against a federal regulatory agency alleging failure to enforce laws or regulations. Rather than defend such a suit in court, often times the regulatory agency engages the environmental advocacy group in closed door, private settlement negotiations. The product of these private negotiations is a settlement agreement or consent decree which is submitted to the court for approval. Once approved, the settlement agreement or consent decree is effectively binding upon the regulatory agency. Consequently, the regulated community must comply with the agreement or decree since it is an enforceable judicial determination.

As evidence of how Sue and Settle has been used nationally, on August 4, 2015, representatives from the Western Energy Alliance (WEA) stated before a Congressional panel that from January 2008 through October 2014, eighty-eight (88) sue and settle agreements have arisen under the Clean Air Act (CAA), Clean Water Act (CWA) or Endangered Species Act (ESA).[1] According to this report, seventy-nine (79) of these sue and settle agreements were the product of suits initiated by certain environmental advocacy groups.[2] The goal of these sue and settle tactics, according to the WEA, is to move the United States away from the use of natural gas, coal and oil, and ultimately end the use of fossil fuels.[3] According to a recent report provided by the U.S. Chamber of Commerce, since 2013 there have been thirty-six (36) sue and settle cases in the United States, which have resulted in hundreds of millions of dollars in increased regulatory fees and expenses.[4]

Those opposing the use of Sue and Settle negotiations cite the recent Clean Power Plan as a prime example of tactics used by certain federal regulatory agencies and private environmental advocacy groups. The Clean Power Plan provides for more stringent greenhouse gas (including primarily carbon dioxide) emission regulations on already existing power plants. It is alleged that the terms of the Clean Power Plan were negotiated behind closed doors with inadequate involvement from the general public and the regulated community. Numerous states have joined together to oppose what they perceive are unilateral enhanced regulations driven by special interest environmental advocacy groups, which have resulted in the stricter standards required by the Clean Power Plan. The success of this opposition remains to be seen.

There are numerous problems which result from the use of Sue and Settle tactics. Often times States, regulated companies and the public in general are not allowed to participate in the settlement negotiations between the advocacy groups and the regulatory agencies. The basic principles of notice and comment are largely ignored. Little notice, if any, is afforded the regulated community and often times an opportunity to be heard is not provided prior to the negotiation of a settlement agreement or consent decree. Failing to allow the public and the regulated community to participate in the settlement discussions also has the potential to open the door for poor and ineffective regulations which are promulgated and enforced against the regulated community as a whole, thus creating increased costs and expenses, as well as the inability to effectively and efficiency comply with the new regulations.

Much of the opposition aimed at Sue and Settle tactics involves what is perceived as the unchecked expansion of federal regulations into those areas which should be governed and controlled by state governments. Also, another criticism of Sue and Settle tactics is that these tactics allow private, special interest environmental advocacy groups to dictate federal environmental policy and rulemaking.

While the use of sue and settle tactics has placed great burdens on the public and the regulated community, efforts to combat these tactics are becoming more

common and other possible solutions and relief may be on the horizon. For example, in March 2014, Oklahoma Attorney General Scott Pruitt filed suit against the U.S. Department of the Interior and the U.S. Fish and Wildlife Service alleging the use of various sue and settle tactics involving a lawsuit filed by the advocacy group, Wild Earth Guardians.[5] Attorney General Pruitt noted in the complaint that the settlement negotiations in this case took place without public input and that the interests of the State of Oklahoma, its businesses and citizens were not adequately represented. This case is noteworthy as it is the first instance of a state taking legal action in opposition to alleged sue and settle tactics. At the center of this case is the autonomy of individual states to govern themselves and the burden placed upon the state economy by failing to provide the states with a voice during the settlement negotiations.[6]

Another positive step in the right direction is Senate Bill 1109, authored by Sen. Elizabeth Warren (Massachusetts). Senate Bill 1109, more commonly known as the Trust in Settlements Act of 2015, requires that federal agencies must disclose the terms of any proposed settlement that would require new rulemaking activity, or which sets a new deadline for a current rule. Also, the Sunshine for Regulatory Decrees and Settlements Act of 2015 (Senate Bill 378; Sen. Chuck Grassley, Georgia) provides for greater transparency and reporting of potential settlement agreements involving federal regulatory agencies. It is also important to note that the Environmental Protection Agency (EPA) now lists on its website each of the 'Intents to Sue' that is received from a potential plaintiff. In an effort to provide more notice and an opportunity for public comment, it is hopeful that other federal regulatory agencies will soon follow suit.

In conclusion, Sue and Settle tactics have been fostered by an environment which has allowed for inadequacies in basic legal notice principles, and inadequate representation of the public and the regulated community at the negotiating table. While these Sue and Settle tactics have contributed to burdensome rules and regulations, in addition to drastically increased costs and expenses, efforts appear to be underway in combating the continued successful use of these tactics. The use of the legal system as a means of leveling the playing field to provide adequate due process for the regulated community will most certainly be the best way to ensure fair and proper treatment when dealing with what have proven to be overly litigious environmental advocacy groups through their use of Sue and Settle tactics.

For more information or for answers to questions about Sue and Settle, please contact the authors: John Milner, MPMCSA Counsel, at jmilner@brunini.com or by phone at (601) 960-6842 or Jess New, at jnew@brunini.com or by phone at (601) 960-8733. ■

1 *Oversight of Litigation at EPA and FWS: Impacts on the U.S. Economy, States, Local Communities and the Environment August 4, 2015; Kathleen Sgamma Vice President of Government & Public Affairs Western Energy Alliance*
2 *Id.*
3 *Id.*
4 *U.S. Chamber of Commerce, A Report on Sue and Settle: Regulating Behind Closed Doors (August 5, 2015); https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors*
5 *See Oklahoma et al. v. Dept. of the Interior et al. USDC 4:14-CV-00123*
6 *Id.*