Waiting for the Dust to Settle

Mach Mining and the Future of the EEOC's Duty to Conciliate in Good-Faith Prior to Civil Litigation

By Eric E. Kinder and Gordon L. Mowen II

It is critical that employers understand that the EEOC enjoys a very wide latitude of authority in handling a discrimination charge—particularly during the post-investigation but pre-suit period.

Last year, individuals filed over 100,000 charges of Title VII violations with the Equal Employment Opportunity Commission ("EEOC" or "Commission"), thousands of which the EEOC has—and continues—to aggressively investigate and pursue. A problem arises, however, when the EEOC's zealousness translates into unreasonable conciliation demands that deadlock the potential resolution of these claims prior to the filing of a lawsuit. Specifically, this aggressiveness conflicts with the EEOC's express statutory duty to attempt to secure, in good faith, a conciliation agreement with the employer as a precondition to filing suit. *See* 42 U.S.C. §2000(e)-5(f)(1). Many employers have challenged the EEOC's filing of a lawsuit on the basis that it failed to attempt a resolution in good-faith in violation of this statutory duty.

Defense attorneys know that conciliation is the process that is to occur between the employer and the EEOC after an employee files an EEOC complaint and probable cause is found, but before the EEOC files suit. The process exists because "Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in federal court." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977).

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Title VII permits the EEOC to bring a civil lawsuit against an employer both on behalf of the alleged victim(s) of a Title VII violation and on behalf of the public. 42 U.S.C 2000(e)-(5)(f)(1). As a precondition to bringing civil action, however, Title VII requires the EEOC attempt, in good faith, to first "secure from the [employer] a conciliation agreement." *Id.* at §2000(e)-5(f)(1). Only upon the failure to reach such an agreement may the EEOC file a civil action. This is because Congress's express intent in resolving Title VII disputes was to place a "primary emphasis on conciliation[.]" *EEOC v. Zia Co.*, 582 F.2d 527, 529 (10th Cir. 1978).

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Yet, while this precondition to litigation may appear straightforward and should inure to both the EEOC's and employer's benefit, Title VII's statutory scheme does not contain any framework or instruction to determine *when* a good-faith conciliation effort has occurred (but failed). For this reason, courts have not only struggled to identify *when* the EEOC has attempted to conciliate in good-faith, but at least one court has found this requirement not to be subject to judicial review at all. The result is that the federal circuits are currently split on the judiciary's role in evaluating whether the EEOC has satisfied its statutory obligation to conciliate when faced with a lawsuit on its dockets—which culminated in the Seventh Circuit declaring, in *Mach Mining*, that the entire issue is nonjusticiable. *E.E.O.C. v. Mach Mining LLC*, 738 F.3d 171 (7th Cir. 2013) *cert. granted*, 134 S. Ct. 2872 (2014).

Further, this "judicial doubt" has led to an expanding situation where the EEOC engages in perfunctory efforts to conciliate that seem, on their face, designed to fail. Take for example, *EEOC v. Ruby Tuesday, Inc.*, where the EEOC demanded a restaurant that was the subject of a sexual discrimination charge, pay over $6 million to resolve the matter and was given less than 2 weeks to accept. 919 F. Supp. 2d 587 (W.D. Pa. 2013). The United States Supreme Court has granted *certiorari* to resolve some of these issues.

The purpose of this article is fourfold. First, it discusses the historical context of "conciliation" relating to EEOC charges under Title VII. Then, it highlights relevant judicial interpretations of the conciliation requirement. Third, it analyzes the current split on the EEOC's statutory obligation to conciliate. Finally, it explores the impending impact on the split's resolution and suggests ways in which employers may best participate in the conciliation process, while offering a realistic discussion on the future of the EEOC's statutory conciliation mandate.

Part I: Title VII, the EEOC, and the Statutory Duty to Conciliate

Congress passed Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, to advance equality of employment opportunities by prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2. The Equal Employment Opportunity Act of 1972, which amended Title VII of the Civil Rights Act of 1964 provides that a person claiming a Title VII violation may file a charge of unlawful discrimination with the Commission. *Id.* at 2000e-(5)(b). The EEOC's purpose is to enforce Title VII of the Civil Rights Act, which prohibits discrimination on the basis of race, color, religion, sex, or national origin. *Id.* at §2000(e)-2(a)(1). The Commission then notifies the employer of the charge and begins its investigation. If the Commission does not find "reasonable cause" to support the allegations, it dismisses the charge. *Id.* at §2000e-5. Upon a dismissal, the individual may file a civil lawsuit and pursue his/her claims individually. *Id.*

Alternatively, if the EEOC determines there is reasonable cause to support the charge, it pursues the complaint on its own. Title VII requires the EEOC to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* at 2000(e)-(5)(b). The EEOC may file a civil action against the employer but only after 31 days have elapsed from the filing of the charge and the EEOC has "been unable to secure from the [employer] a conciliation agreement acceptable to [it]." *Id.* at 2000e-(5)(f)(1). Conciliation is "a condition precedent to the Commission's power to sue." *E.E.O.C. v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003) (citing 42 U.S.C. §2000e–5(b)). This is because conciliation "is a policy goal of the Act itself;" it is "at the heart of Title VII." *Asplundh Tree Expert Co.*, 340 F.3d at 1260, *see also EEOC v. Radiator Specialty Co.,* 610 F.2d 178 (4th Cir. 1979). "It clearly reflects a strong congressional desire for out-of-court settlements of Title VII violations." *Id.* (citing *Culpepper v. Reynolds Metals Co.,* 421 F.2d 888 (5th Cir. 1970)).

The EEOC investigation generally begins the conciliation process by inviting the employer to contact the agency within a specified period of time to indicate whether it would like to participate. *E.g.*, *Asplundh Tree Expert Co.*, 340 F.3d at 1258. The EEOC may also include a proposed conciliation agreement with this initial contact. *Id.* EEOC regulations provide that the Commission will attempt "to obtain [an] agreement that the [employer] will eliminate the unlawful employment practice and provide appropriate affirmative relief." 29 C.F.R. §1601.24(a). The EEOC is prohibited from publicizing anything said or done during the conciliation efforts and from using any of these materials as evidence in a subsequent proceeding without written consent of the parties. 42 U.S.C. §2000e-5(b). The Act, however, does not specify how conciliation proceedings must be conducted or what information must be exchanged prior to litigation. Aside from a blanket command requiring conciliation, Congress provided no additional instruction.

If the conciliation efforts are successful, the agreement is "reduced to writing and… signed by the Commissioner's designated representatives and the parties." *Id.* If, however, the conciliation efforts are unsuccessful because the EEOC has been

"unable to obtain voluntary compliance as provided by Title VII… and it determines that further efforts to do so would be futile or nonproductive," the agency notifies the employer in writing. 29 C.F.R. §1601.25. Afterwards, the EEOC may send the charging party a right-to-sue notice or it may sue the employer on behalf of the charging party in federal district court. If the EEOC brings suit against the employer following unsuccessful conciliation efforts, two questions arise given that the duty to conciliate is a statutory precondition to litigation. First, can a court review whether the agency has satisfied its statutory duty to conciliate? Second, if so, what is the proper standard for reviewing whether the agency has satisfied the duty to conciliate?

Until 2013, every federal court to address the issue permitted some type of judicial oversight, albeit at times the oversight was extremely deferential. Then, in *Mach Mining*, the Seventh Circuit further divided the federal court system by holding that courts may not review the EEOC's compliance with its statutory obligation to conciliate discrimination claims in good faith prior to a lawsuit. On June 30, 2014, the United States Supreme Court granted Mach Mining's petition for *certioari* to address the issue of whether and to what extent courts may enforce the EEOC's duty to conciliate discrimination claims before filing suit.

Part II: Analyzing the Current State of Conciliation as a Precondition to Civil Action

While there is a circuit split as to the scope of inquiry a court may make into the EEOC's statutory conciliation obligations, all courts that have addressed the issue—United States Court of Appeals for the Seventh Circuit aside—agree that conciliation is subject to at least some level of judicial review. Admittedly, however, the circuits are spread along a continuum. At one extreme, the Seventh Circuit has held that the conciliation precondition is judicially unenforceable. *Mach Mining*, 738 F.3d at 172. In the middle, three circuits have found that the conciliation precondition is subject to judicial review, but under a deferential standard. *Radiator Specialty Co.*, 610 F.2d at 183; *Serrano v. Cintas Corp.*, 699 F.3d 884, 904 (6th Cir. 2012) *cert. denied*, 134 S. Ct. 92 (2013); *Zia Co.*, 582 F.2d at 533). The Eighth and Ninth Circuits have also subjected the EEOC's conciliation efforts to fairly strict judicial review, but neither circuit has articulated a specific standard. See, *e.g.*, *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 676 (8th Cir. 2012); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982)). Finally, on the opposite extreme from the Seventh Circuit, three circuits have held that the conciliation precondition is subject to judicial review and apply a three-factor evaluation of the EEOC's conciliation efforts. *E.E.O.C. v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009); *see also Asplundh Tree Expert Co.*, 340 F.3d at 1259; *E.E.O.C. v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996).

The Least Deferential Test Requires the Commission Prove Good-Faith

In determining whether the Commission has acted in good faith for purposes of conciliation, the Second, Fifth, and Eleventh Circuits have required that the EEOC satisfy three elements. Specifically, the Commission must: "(1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer." *Agro Distribution, LLC*, 555 F.3d at 468; *see also Asplundh Tree Expert*, 340 F.3d at 1259; *Johnson & Higgins, Inc.*, 91 F.3d at 1534-35.

"[T]he fundamental question is the reasonableness and responsiveness of the EEOC's conduct under all the circumstances." *Id.* at 1259 (citing *EEOC v. Klinger Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981)). In applying these elements, courts have required, for example, that the EEOC provide the employer with basic information about the alleged Title VII violation and to articulate what the EEOC would require the employer do to resolve the issue prior to litigation. *See, e.g.*, *Asplundh Tree Expert Co.*, 340 F.3d at 1260. In *Asplundh*, the EEOC did not conciliate in good faith where, after a three year investigation, it gave the employer less than 12 business days to respond to a proposed conciliation agreement for a nation-wide class despite the investigation only occurring at one location. *Id.* at 1258. Similarly, in *EEOC v. Sears Roebuck & Co.*, 650 F.2d 14 (2d. Cir. 1981), the United States Court of Appeals for the Second Circuit held that the EEOC's conciliation attempt was not reasonable where it demanded to conciliate a charge of race discrimination on a national geographic scope, rather than limited only to the two stores alleged to have engaged in these practices. In addition, the United States Court of Appeals for the Fifth Circuit found that the EEOC did not conciliate in good-faith where it "repeatedly fail[ed] to communicate with [the employer and] failed to respond in a reasonable and flexible manner to the reasonable attitudes of the employer." *Agro Distribution, LLC*, 555 F.3d at 468. The Court also noted that the EEOC's demand for compensatory damages in the amount of $120,000 was unsupported by the evidence gathered in its investigation. *Id.* at 469, n.5. The Court explained that this unsupported monetary demand was simply a "weapon to force settlement" and that in so doing, "[t]he EEOC abandoned its role as a neutral investigator[.]" *Id.* at 468.

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While the Eighth Circuit has not articulated a specific standard, it has found that the EEOC failed to conciliate in good-faith and affirmed a dismissal of a harassment class claim on the grounds that the EEOC did not adequately conciliate the discrimination charges. *CRST Van Expedited*, 679 F.3d at 676. Specifically, the United States

Court of Appeals for the Eighth Circuit found that the EEOC did not engage in good-faith conciliation where the EEOC only identified the purported class of individuals *after* filing suit. The Court found the statutory precondition to be violated because the employer could not have had a "meaningful opportunity to conciliate" where it had no indication of the alleged class size until the litigation began. *Id.*

At the very least, the EEOC must communicate basic information about the charge, damages, and class size and, in general, cannot demand to settle matters on a class-wide basis if they have only investigated the charge of a single employee.

In *Pierce Packing*, the EEOC entered into a pre-reasonable cause settlement agreement with an employer who was allegedly engaged in sex discrimination in violation of Title VII. *Pierce Packing*, 669 F.2d at 606. The EEOC did not conduct an investigation, instead choosing to rely on a DOL investigation that found evidence of gender discrimination at the workplace, prior to engaging in settlement negotiations with the employer. After the agreement was executed, the EEOC attempted to conduct a "compliance review," determined that discrimination was continuing to occur, and requested the employer enter into a "supplement settlement." *Id.* at 606-07. After this failed, the EEOC informed the employer that conciliation had failed and, 13 months later, filed suit. On appeal, the Ninth Circuit found that the EEOC had not satisfied the conciliation requirement through the attempted settlement discussion on the grounds that "conciliation" and settlement" are different for purposes of satisfying the statutory precondition. *Id.* at 604 (citing 42 U.S.C. s 2000e-5(b) *and* 29 CFR 1601.20(a)). The Court noted that conciliation "contemplates charge, notice, investigation and determination of reasonable cause," whereas "[a] settlement agreement may precede genuine investigation, determination of reasonable cause and conciliation, but it may not replace these preludes to a civil action." *Id.* The Court explained that the EEOC cannot attempt to "leap-frog" its statutory obligations by forcing an employer to enter into a pre-reasonable cause determination settlement agreement.

Taken together, under this standard, the EEOC may not simply make a demand and then file suit when the demand is rejected as doing so is an act "more of coercion than of conciliation." *Asplundh Tree Expert Co.*, 340 F.3d at 1260. Rather, the EEOC must engage in a give-and-take with the employer to arrive at a resolution. *Id.* At the very least, the EEOC must communicate basic information about the charge, damages, and class size and, in general, cannot demand to settle matters on a class-wide basis if they have only investigated the charge of a single employee. To meet this standard, the EEOC's conciliation efforts must be in keeping with the charge investigated and should not exceed it.

The Deferential "Good-Faith" Inquiry

The Fourth, Sixth, and Tenth Circuits have required that the EEOC's actions only meet a minimal level of good faith. Simply, these circuits ask only whether the EEOC acted "reasonably" or in "good faith," (*Radiator Specialty Co.*, 610 F.2d at 183; *Serrano*, 699 F.3d at 904, *cert. denied*, 134 S. Ct. 92 (2013); *Zia Co.*, 582 F.2d at 533), and all three circuits apply this standard in an extremely deferential manner. For instance, in *E.E.O.C. v. Keco*, the United States Court of Appeals for the Sixth Circuit noted that a district court should simply determine "whether the EEOC made an attempt at conciliation." *E.E.O.C. v. Keco Indus., Inc.*, 748 F.2d 1097, 1101 (6th Cir. 1984). Similarly, the Sixth Circuit has stated that the EEOC's conciliation obligation is minimal and that it is under no duty to engage in negotiations once an employer rejects its initial demand. *Serrano*, 699 F.3d at 905. This standard conflicts directly with the Eleventh Circuit holding that the EEOC failed to conciliate where it initiated suit after the employer rejected the "initial" demand and implying that conciliation should be collaborative between the EEOC and employer. *See Asplundh*, 340 F.3d at 1260.

While Courts applying these tests generally require the EEOC to provide a reasonable time to an employer to respond to a conciliation demand, the depth of the "good-faith" inquiry is very shallow, as courts "should only determine whether the EEOC [attempted] conciliation." *Keco*, 748 F.2d at 1002. Obviously, the "good-faith" standard appears rather easily met as it is not focused on the substance of the EEOC's conciliation demand, but instead, a topical/superficial inquiry into whether a conciliation attempt was made. *See Radiator Specialty Co.*, 610 F.2d at 183 ("The law requires, however, no more than a good faith attempt at conciliation."). In short, this standard requires the EEOC to do little more than "go through the motions" of a conciliation.

Mach Mining: Conciliation Is Non-Justiciable

Mach Mining changed the entire landscape of conciliation as it cast uncertainty over the judiciary's role in overseeing the interplay between employer and the EEOC. *Mach Mining* arose when a woman was not hired for a non-office mining position with Mach Mining Inc. after applying. *E.E.O.C. v. Mach Min., LLC*, 2013 WL 319337 (S.D. Ill. Jan. 28, 2013) (subsequent appellate history omitted). She filed a charge with the EEOC, alleging that she was not hired because of her sex and contended that Mach Mining had never previously hired a woman. The EEOC investigated, determined there was reasonable cause to support the charge and claimed it was prepared to pursue the allegations on behalf of the individual as well as a class of female applicants. In order to avoid that suit, the EEOC orally offered to conciliate on behalf of the entire class. The EEOC's conciliation demand was not written; it did not identify what evidence it believed supported the charge, and it did not identify any individual in the "class" aside from the single female applicant who filed the initial charge. Shortly thereafter, the EEOC notified the employer that it

considered the conciliation attempt to have failed and it filed suit, alleging that Mach Mining engaged in a discriminatory pattern and practice and its hiring practice had a disparate impact on women. *Id.* In answering the Complaint, Mach Mining asserted that the EEOC failed to conciliate and asked that the lawsuit be dismissed. In response, the EEOC argued that Title VII does not provide for "failure-to-conciliate" as an affirmative defense.

The United States District Court for the Southern District of Illinois believed it could review the Commission's settlement efforts to determine whether the Commission "made a sincere and reasonable effort to negotiate," but nonetheless certified the question to the court of appeals of whether and to what extent the Commission's efforts to conciliate are subject to judicial review. *Id.* at *5. The appeals court disagreed and concluded that the EEOC's conciliation efforts are non-justiciable and therefore, cannot be subject to judicial review. *Mach Mining*, 738 F.3d at 172. The United States Court of Appeals for the Seventh Circuit supported its decision to diverge from the majority of circuits fundamentally on policy grounds. The court first opined that if dismissal for failure to conciliate becomes too readily available, employers will have an incentive "to turn what was meant to be an informal negotiation into the subject of endless disputes over whether the EEOC did enough before going to court." *Id.* at 179. The court explained that, "[i]f an employer engaged in conciliation knows it can avoid liability down the road, even if it has engaged in unlawful discrimination, by arguing that the EEOC did not negotiate properly—whatever that might mean—the employer's incentive to reach an agreement can be outweighed by the incentive to stockpile exhibits for the coming court battle." *Id.* Further, the court claimed that "the cost to the employer of pursuing that defense rather than settling before suit is filed is likely to be relatively low" and "[t]he potential gains of escaping liability altogether will, in some cases, more than make up for the risks of not engaging in serious attempts at conciliation." *Id.*

In summary, the Seventh Circuit found that increased judicial review will provide incentives for employers to abuse the conciliation process, while decreased judicial review will not lead to the EEOC "abandon[ing] conciliation altogether or misuse it by advancing unrealistic and even extortionate settlement demands." *Id.* at 179. "[T]he significant social costs of allowing employment discrimination to go unaddressed in these situations are likely to outweigh any marginal gain in deterrence." *Id.* at 184. The Seventh Circuit stands alone in holding that the conciliation precondition is judicially unenforceable, and, in *Mach Mining*, it acknowledged this consensus. *Id.* at 182 ("Our decision makes us the first circuit to reject explicitly the implied affirmative defense of failure to conciliate.").

Part III: An Analysis of the Split

In comparing the tests employed among the circuits, in the "three-factor" jurisdictions, the EEOC must generally engage in a "give-and-take" bargaining process to satisfy the precondition—a simple demand without any flexibility will likely not meet the good-faith requirement. On the other hand, the EEOC will satisfy this standard in the other jurisdictions by simply giving a demand, and, upon rejection or a counteroffer that it deems unreasonable, it may file suit or issue a right to sue letter. These two distinct tests draw the line between productive negotiations and simply going through the motions. Stepping back, the three-factor test currently employed within the Second, Fifth, and Eleventh Circuits (and perhaps informally by the United States Court of Appeals for the Eighth Circuit) sets a rather exacting standard, while the simple, good-faith inquiry appears to set such a low bar for the EEOC to meet that it is surprising the Seventh Circuit did not just simply adopt this test. By adopting this good-faith standard, the court could have found that, like the United States Court of Appeals for the Sixth Circuit, a perfunctory conciliation demands satisfies this requirement. This would have permitted the court to avoid declaring the entire statutory requirement nonjusticiable.

There are strong policy reasons supporting the position that judicial review is critical to ensuring the EEOC follows its duty to conciliate. Administrative agencies are generally not successful at self-regulating. The Supreme Court has, in the past, declared that there is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *INS v. St. Cyr.* 533 U.S. 289, 298 (2001). As the Court recognized in *Bowen*, judicial review stems from *Marbury v. Madison*, a fundamental opinion in which Chief Justice Marshall opined that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Bowen*, 476 U.S. at 670 (quoting *Marbury v. Madison,* 1 Cranch 137, 163, 5 U.S. 137, 163 (1803)). In fact, the Court has further stated "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *ABBOTT Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

The appeals court disagreed and concluded that the EEOC's conciliation efforts are non-justiciable and therefore, cannot be subject to judicial review.

While Congress gave the EEOC discretion to decide whether to settle a charge or bring suit—and it is undeniable that in every circuit the EEOC maintains some discretion whether a satisfactory conciliation agreement has been reached—it seems unlikely that the Congress would have vested in the EEOC the sole discretion to make this decision. If this is truly nonjusticiable, and it falls solely to the EEOC to determine if it has met its obligation under the law, employers will find themselves at the EEOC's mercy, without recourse. In other areas of the law, the Supreme Court, when confronted with a challenge to the justifiability of administrative action, has found it to be subject to judicial review. *See generally Sackett v. EPA*, 132 S. Ct. 1367 (2012).

In *Sackett*, the Court addressed whether a jurisdictional determination of a compli-

ance order issued by the Environmental Protection Agency to a landowner pursuant to the Clean Water Act was subject to judicial review under the Administrative Procedure Act. In holding that such a situation was subject to judicial review, the Court explained that a court must look at both the express language of the statute in addition to the Administrative Procedure Act, which sets forth a presumption favoring judicial review, to determine whether Congress intended to *exclude* judicial review. *Sackett*, 132 S. Ct. at 1373. Notably, in a concurring opinion, Justice Alito opined that permitting judicial review provides only a "modest measure of relief," and, much like the instant issue with the EEOC and conciliation, the wide reach of the EPA's authority under the CWA and their "draconian penalties" leave "most property owners with little practical alternative but to dance the EPA's tune." *Id.* at 1375 (Alito, J., concurring). Like *Sackett*, *Mach Mining* deals with an administrative agency (there, the EPA, here, the EEOC) that is aggressively pursuing charges under a federal statutory scheme (there, the CWA, here, Title VII) and the Court is faced with whether its determinations (there, the EPA's review of a compliance order, here, the EEOC's conciliate efforts) are subject to judicial review. This lends credence to the position that the Seventh Circuit erred in holding conciliation to be nonjusticiable.

An obvious benefit to employers is that the alleged Title VII violations will remain confidential during the conciliation process and allow employers to maintain a positive public image while trying to resolve any issues.

Allowing substantive judicial review of the EEOC's conciliation efforts should provide an affirmative defense for employers facing an EEOC lawsuit. Congress "intended cooperation and conciliation to be the preferred means of enforcing Title VII." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983). If conciliation is a precondition for an EEOC suit and that precondition is judicially enforceable—through judicial review—it follows then that the failure to conciliate should be an affirmative defense to an EEOC suit. And courts, when faced with this defense, have sometimes imposed a stay (as opposed to outright dismissal) to give the EEOC a chance to satisfy the conciliation precondition. *See, e.g., EEOC v. Bass Pro Outdoor World, LLC*, 2014 WL 838477, at *16 (S.D. Tex. Mar. 4, 2014). This stay appears to be an easy, yet effective, solution to this issue while avoiding the "justiciability" question the Seventh Circuit embraced.

Part IV: The Future of the Conciliation Process

While it is inevitable that the Supreme Court will attempt to resolve the current split, to what extent a new standard will take root among the lower courts remains unclear. Regardless of the Supreme Court's decision in *Mach Mining*, though certainly heightened if the Court finds the issue to be subject to judicial review, there are strong reasons for employers to engage the EEOC upon receipt of a conciliation demand if there is any potential merit to the complaint. Bear in mind that all negotiations are confidential. Conciliation efforts, as well as the charge itself, may not be publicly disclosed without the consent of all parties involved (including the employer), until a lawsuit is filed. An obvious benefit to employers is that the alleged Title VII violations will remain confidential during the conciliation process and allow employers to maintain a positive public image while trying to resolve any issues. In addition, a reasonable counteroffer that is designed to address the allegations of the charging party solely may be useful in holding the potential lawsuit at bay and, depending on the eventual ruling in *Mach Mining*, offer an additional defense to the prosecution of the subsequent lawsuit.

The downside is that successful prosecution of the failure to conciliate affirmative defense may only earn the employer a brief stay in the proceedings. *See, e.g.*, *Bass Pro Outdoor World, LLC*, 2014 WL 838477 at *16. Where the EEOC is pursuing a single plaintiff claim, and offering to conciliate the charge on that basis, reliance on a failure to conciliate affirmative defense may not offer much more than a "speed bump" in the proceeding. There is merit to putting the EEOC through its paces, but the ultimate value of the defense may be minimal.

Where the EEOC is considering a class-wide charge, the value of the defense obviously becomes greater. United States District Court Judge John Darrah of the Northern District of Illinois (notably within the Seventh Circuit) recently dismissed a broad class action brought by the EEOC against CVS solely because he said the EEOC failed to conciliate with CVS before filing the complaint. *EEOC v. CVS Pharmacy, Inc.*, 2014 WL 5034657 (N.D. Ill., October 7, 2014). "[I]t is undisputed that the EEOC did not engage in any conciliation procedure. Therefore, the EEOC was not authorized to file this suit[.]" *Id.* at *4 (internal citations omitted). Obviously, the larger the stakes, the greater the value of relying on this defense.

Conclusion

Mach Mining does not change that the EEOC controls the tone and flavor of conciliation, even if it muddies the judiciary's role in this. What remains certain is that, in order to effectuate the meaning and legislative intent of Title VII, the EEOC must attempt to conciliate and that the process, when functioning properly, supports judicial economy, and works to resolve disputes confidentially and informally. 42 U.S.C. §2000e-5; *Occidental Life Ins. Co.*, 432 U.S. at 359. This process should remove the court system from the gambit. Indeed, ideally, the process would never require the EEOC to resort to civil action, and, as the Act is contemplated, seeking litigation in this context should only be a last resort. Regardless of any rule announced by the Supreme Court, and its implementation among the lower courts, it is critical that employers understand that the EEOC enjoys a very wide latitude of authority in handling a discrimination charge—particularly during the post-investigation but pre-suit period.