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PUBLIC AGENCY OR PRIVATE ENTITY? THE JANUS FACE OF THE POSTAL SERVICE

by
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Earlier this year, the United States Supreme Court unanimously ruled that United States Postal Service (USPS) is not a "person" subject to suit under federal antitrust laws because it was an independent agency within the executive branch. *USPS v. Flamingo Industries (USA) Ltd.*, 124 S. Ct. 1321 (2004). In doing so, the Supreme Court characterized the role and nature of the USPS in a way that was the polar opposite from other courts that had scrutinized and held accountable USPS's competitive market behavior in other contexts, such as being subject to suit for false or misleading advertising claims as if it were a private commercial entity. *See Federal Express Corporation v. USPS*, 151 F.3d 546 (6th Cir. 1998).

The *Flamingo* decision thus highlights the different processes by which governmental and private actors are governed with respect to their conduct. Government agencies are generally required to give prior notice and provide for public comment whenever they undertake to carry out their statutory mandate in a way that substantively affects a regulated industry or the public at large. Private entities, on the other hand, are generally allowed to act without government pre-approval, although they are subject to after-the-court review to determine the lawfulness of their conduct.

The *Flamingo* decision also underscores the notion or argument that the USPS cannot have it both ways: if it wants to enjoy the powers of a governmental agency, it cannot escape the accountability and procedures required of government agencies. In short, advance notice to the public of proposed or revised USPS activities, and similar due process procedures, should be the rule. Any relaxation or circumvention of these requirements would be a disservice to the American people, allow the USPS to compete unfairly with private commercial carriers which are subject to antitrust and a myriad of other laws, and be inconsistent with the teachings of the *Flamingo* ruling.

When Congress enacted the Postal Reorganization Act of 1970 (PRA), the essential nature of the USPS was not changed. Rather, its cabinet status was stripped and it was redesignated as "an independent establishment in the executive branch." 39 U.S.C. § 201. While the PRA did exempt the USPS from many of the laws and rules applicable to government agencies, the PRA did keep the USPS under certain key provisions of the Administrative Procedures Act (APA) that require advance notice.

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One key provision of the PRA requires the USPS to seek prior approval of a regulator — the Postal Rate Commission (PRC) — before it offers a new service, changes that service in a material way, or increases or decreases its rates for such service. *See* 39 U.S.C. §§ 3622–24. Those provisions require the proposed actions of the USPS to be scrutinized under those provisions of the APA that provide the greatest level of due process. 5 U.S.C. §§ 556, 557.

However, when it comes to offering and pricing numerous and questionable nonpostal services and products ranging from electronic bill paying services to phone cards, the USPS apparently believes that it needs no such advance approval, despite vigorous protestations to the contrary by the PRC's Office of Consumer Advocate.

At the same time, however, Congress directed in the PRA that the USPS was to conduct its operations in a business-like way. In 1988, the Supreme Court recognized that Congress also invested this hybrid entity with the "status of a private commercial enterprise," stating that "by launching 'the Postal Service into the commercial world,' and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's 'cloak of sovereignty' and given it the `status of a private commercial enterprise.'" *Loeffler v. Frank* 486 U.S. 549, 556 (1988) (citations omitted). This language has created confusion, since many have interpreted this as congressional intent that the USPS should become a business in all ways, except, of course, in the most important way — the private ownership of first-class mail delivery.

While the *Flamingo* Court did not overrule its *Loeffler* decision or cast any doubt on the validity of the Sixth Circuit's *FedEx* decision, the Court provided several reasons for its decision to treat the USPS as a public government agency:

> This conclusion is consistent with the nationwide, public responsibilities of the Postal Service, which has different goals from private corporations, the most important being that it does not seek profits, [39 U.S.C.] §3621. It also has broader obligations, including the provision of universal mail delivery and free mail delivery to certain classes of persons, [39 U.S.C.] §§3201-3405, and, most recently, increased public responsibilities related to national security. Finally, the Postal Service has many powers more characteristic of Government than of private enterprise, including its state-conferred monopoly on mail delivery, the power of eminent domain, and the power to conclude international postal agreements.

Flamingo, *supra*, at 1329. The *Flamingo* Court did acknowledge that the USPS does operate nonpostal lines of business, for which it sets prices independently of the PRC, and in which it seeks profits to offset losses for its postal business, but did not find it necessary to opine on the way the USPS establishes and operates its nonpostal lines of business. *Id*.

Now that the Supreme Court has made it clear in its *Flamingo* decision the governmental nature of the USPS, future actions with regard to reforming or changing the USPS should keep this precept in mind. Thus, certain recommendations which were issued late last year by the President's Commission on the United States Postal Service regarding ratemaking procedures for competitive products and services call for after-the-fact review. Legislation such as that proposed in the 106th Congress, H.R. 4970, similarly provided for such belated review. But none of these recommendations include changing the governmental nature of the USPS. Accordingly, because prior notice and comment in USPS ratemaking proceedings have brought abuses to light, reduced consumer burdens, and promoted healthy competition, the public interest would be best served if that same process should be used with respect to *all* operations of the USPS.