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Structuring California Attorney General Settlements to Maximize Preclusive Effect on Private Litigants

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Following the settlement of an Attorney General enforcement action, defendants often face new and expensive private lawsuits for the same conduct. These subsequent private lawsuits often result in years of additional litigation, legal fees, and further monetary penalties and damages. Due to the likelihood of follow-on suits, we suggest clients consider taking several proactive and strategic steps when structuring a settlement with the California Attorney General in order to mitigate the risk of subsequent civil lawsuits and associated penalties.

The following strategic considerations provide a general framework to consider in maximizing the possibility of barring subsequent lawsuits: (1) taking steps to negotiate which statute will be used in the complaint accompanying the consent judgment; (2) including a broad statement of facts in the settlement agreement and complaint; and (3) structuring and characterizing any settlement payment with a preclusion strategy in mind. Though courts in California ultimately engage in a case-specific inquiry as to whether private litigants' claims are barred by prior settlement of a government action, all of these factors influence the likelihood of a successful claim preclusion defense, and have important underlying strategic advantages.[1]

Statutes Underlying the Government Enforcement Action

The statutes underlying the California Attorney General's enforcement action, and identified in the settlement agreement, impact the likelihood of success of a future res judicata defense in subsequent private litigation. If the statute underlying the Attorney General's action provides a private right of action, subsequent private litigation redressing individual harms is unlikely to be barred. For example, in *CS Wang & Assoc. v. Wells Fargo Bank, N.A.*, the California Attorney General brought an enforcement action under the California Unfair Competition Laws ("UCL") asserting claims through the California Invasion of Privacy Act ("CIPA"). The government action sought to protect the public from unfair and harmful business practices resulting from Wells Fargo's alleged failure to disclose the recording of communications with California residents.[2] Despite the fact that the enforcement action sought to redress public harm, CIPA created a private right of action which allowed a subsequent class action to move forward. The inability to bar the private litigation hinged on CIPA's dual enforcement mechanism – the explicit private right of action within the statute, and the UCL's authorization to enforce CIPA on behalf of the People.[3]

To the extent possible, settling parties looking to maximize the success of precluding subsequent private suits should attempt to negotiate with the Attorney General regarding the underlying statutory basis for the enforcement action. Because certain statutes allow both private and public enforcement for the same conduct, it is advantageous to specify statutes that do not contain private rights of action in the settlement agreement in order to encompass potential private plaintiffs' claims. Although the private plaintiff may still attempt to recover under different statutes to avoid a res judicata defense, if the prior

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government action was based on the same primary right asserted by the private party, the subsequent suit is more likely to be precluded.[4]

Broadening the Statement of Facts

Parties should also consider including a broad and comprehensive statement of facts within the settlement documents in order to cover most or all claims underlying the state's investigation. The more claims and factual allegations that are encompassed in the settlement with the government, the less likely that a private plaintiff will be able to justify how their claims are sufficiently distinct from the government's case to withstand dismissal.

Illustratively, in *Villalobos*, the defendant settled the entirety of an Attorney General enforcement action that alleged poor workplace conditions and wage violations, agreeing to pay an undisclosed amount in restitution to cover all claims related to the unlawful employment practices. In precluding the subsequent private litigation, the court noted that the government action and settlement broadly addressed the terms of employment and work conditions that gave rise to the plaintiffs' new claims, despite the lack of factual specificity in the settlement and government complaint. The expansive coverage of the settlement precluded the private litigants' lawsuit because the prior action ultimately encompassed the plaintiffs' claims.[5]

This approach is not risk-free even in the context of no-admit settlements. For example, a broader statements of facts makes public, and puts potential follow-on plaintiffs on notice of, more factual allegations than necessary to effectuate the settlement. These risks should be weighed against the cost of potential follow-on private litigation due to narrow admissions that do not cover the private litigant's claims.

Paying Restitution rather than Civil Penalties

In structuring a settlement with the California Attorney General, and in cases where a settlement includes monetary payment, it is generally preferable that the payment be in the form of restitution, rather than civil penalties. In assessing the preclusive effect of a settlement reached by the state, the court pays particular attention to the specific terms of the agreement and the types of relief obtained on behalf of consumers. Courts in California look at whether or not the government properly represented a private litigant's interests in a prior action, and in that analysis courts consider the type of relief sought by the government.[6] Courts have found that in instances where the Attorney General seeks predominantly injunctive relief and civil penalties, the government action serves a law enforcement function to protect the public, rather than to vindicate the rights of private plaintiffs.[7] In such instances, a res judicata defense fails because the interests of the government and private plaintiff differ.[8]

On the other hand, when a settlement involves paying restitution and the restitution constitutes all or most of the monetary relief specified in the settlement agreement, courts are more likely to find an identity of interests between the government and private plaintiffs. However, the private plaintiffs in the subsequent litigation must fall within the class of restitution recipients as defined by the government action and settlement. The settling defendant should define the class of restitution recipients as broadly as possible to encompass future private plaintiffs, risking a greater payment to the government but potentially precluding future private lawsuits. For example, in *Villalobos*, the court barred a private lawsuit following an enforcement action partly because the Attorney General dedicated monetary relief solely to restitution and the plaintiffs fell within the class of recipients.[9] The government recovered restitution on behalf of all Calandri Sonrise Farm workers, and the private plaintiffs were eligible for such relief because of their employment at Calandri. Because the government exclusively sought restitution, the court found that government represented the private plaintiffs' interests since the Attorney General enforcement action compensated the plaintiffs for their alleged harms.

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To the extent possible, a settling defendant should negotiate restitution that encompasses potential plaintiffs over other types of relief when settling with the Attorney General to optimize the success of a future claim preclusion defense. Where restitution constitutes a small portion of the overall monetary settlement, courts are less likely to find that the government represented the private litigants' interests, whereas paying out more in restitution strengthens such a finding.[10] Thus, there is a tension between the instinct to limit the settlement amount and paying out more to the government to bar future claims. That said, if civil penalties cannot be avoided, a settling defendant should ensure that restitution relief is clearly delineated and remains a large part of the settlement to tip the scale toward the government representing the private plaintiff's interests.

Conclusion

In order to mitigate the potential risk of costly follow-on litigation after the settlement of an Attorney General enforcement action, it is important for a party to consider structuring a government settlement with an eye toward strategic factors that can impact future preclusion arguments. Engaging in negotiations with the Attorney General regarding the statute underlying the government's complaint, structuring the settlement to encompass potential private claims through a broad statement of facts, and pushing to pay restitution rather than injunctive relief or civil penalties, all bolster the efficacy of a future res judicata defense. Though such strategies may potentially increase the degree of factual disclosure and ultimate payout in settling government claims, the ability to preclude private litigation may very will lead to overall cost savings in the long term.

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[1] The California Attorney General often carves-out private litigation and private rights of action from the release of liability provision in a settlement. For example, in a recent settlement between the California Attorney General and Dermatology Industry Inc., the release of liability provision specifically excluded "any liability which any … Released Part[y] has or may have to individual consumers." *Stipulation for Entry of Final J. and Permanent Inj., Ex. 1, at 10-11, People v. Dermatology Indus., Inc., No. 37-2022-00009826-CU-MC-CTL (Cal. Super. Ct. 2022).* Though this language may leave open the possibility for private follow-on litigation, it is not dispositive. Courts ultimately assess the claim preclusive effect of a government action through a three-part test: whether there is (1) the same cause of action; (2) final judgment on the merits; and (3) privity between the parties. *Boeken v. Philip Morris USA, Inc.,* 48 Cal. 4th 788, 797 (2010).

[2] No. 16-C-11223, 2020 WL 5297045, at *6, *9 (N.D. Ill. Sept. 4, 2020).

[3] *See id.* at *9.

[4] *See Villalobos v. Calandri Sonrise Farms LP*, No. CV 12-2615, 2012 WL 12886832, at *7 (C.D. Cal. Sept. 11, 2012) (barring a plaintiffs' lawsuit for asserting injuries already redressed in a prior Attorney General enforcement action despite raising claims under different statutes).

[5] *See id.* at *5.

[6] It may also be helpful to include a provision in the agreement to demonstrate that the Attorney General provided adequate representation to the citizens it purported to represent. *See Taylor v. Sturgell*, 128 S. Ct. 2161, 2176 (2008) ("[a] party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the nonparty's interests"). This can be demonstrated by noting that the Attorney General received some preliminary discovery sufficient to assess the adequacy of any proposed relief.

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[7] See *Payne v. Nat'l Collection Sys. Inc.*, 91 Cal. App. 4th 1037, 1045 (2001).

[8] *See People v. Pac. Land Rsch. Co.*, 20 Cal. 3d 10, 17 (1977).

[9] 2012 WL 12886832, at *2, *7.

[10] *See id.*; *cf. CS Wang & Assoc. v. Wells Fargo Bank, N.A.*, No. 16-C-11223, 2020 WL 5297045, at *6 (N.D. Ill. Sept. 4, 2020) (rejecting *cy pres* restitution as an indication of privity because it "constituted a small portion" of the overall settlement).

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