

Ninth Circuit Clarifies Preclusive Effect of Private Class Action Settlement on Attorney General Enforcement Action

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A recent decision by the Ninth Circuit may make it more difficult to settle class action lawsuits where there is a potential for parallel government enforcement action.

In *California v. IntelliGender, LLC*, No. 13-56806, 2014 WL 5786718, at *1 (9th Cir. Nov. 7, 2014), **the Ninth Circuit specifically addressed the State's right to pursue a state court lawsuit** against a company that had settled a nationwide class action involving the same basic claims, though **seeking broader relief than that afforded in the settlement**. The private class settlement involved restitution payments to the settlement class and was approved by the federal court. As part of the approval process, the defendant provided notice of the proposed settlement to appropriate state and federal officials as required under the Class Action Fairness Act (CAFA). The State did not object to the settlement, but later sued the company in state court seeking civil remedies, injunctive relief and restitution. The defendant asked the federal court to enjoin the state lawsuit under the Anti-Injunction Act, 28 U.S.C. §2283, and that motion was denied.

On appeal, the Ninth Circuit engaged in a detailed analysis of the text and case law arising under the Anti-Injunction Act, concluding that the State's claims for civil penalties and injunctive relief were not barred because they did not involve "identical parties or privies." The Ninth Circuit, however, ruled that the State could not seek restitution on behalf of class members who already had settled their restitution claims, finding that allowing that relief would provide for a double recovery and would interfere with the federal court's enforcement and administration of the class action settlement. "When a government entity sues for the same relief that 'plaintiff [has] already pursued then the requisite closeness of interests for privity is present.'" *IntelliGender*, 2014 WL 5786718, at *7 (quoting *Leon v. IDX Systems Corp*, 464 F.3d 951, 962 (9th Cir. 2006)).

This case is significant and has potentially positive and negative implications for businesses settling CAFA class actions. On the one hand, it is a positive development in the law given that governmental entities lose the ability to double dip and seek the same form of recovery provided in a class settlement where, as here, they do not successfully object to the settlement. Of course, the negative corollary is that governmental entities are likely to watch these settlements more closely and may appear more frequently in the settlement approval process, perhaps even seeking some additional

compensation for the class or as attorney's fees for "improving" upon class settlements.

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