

“Settling for More” Managing an Enforcement Action to Your Agency’s Benefit

Presented by

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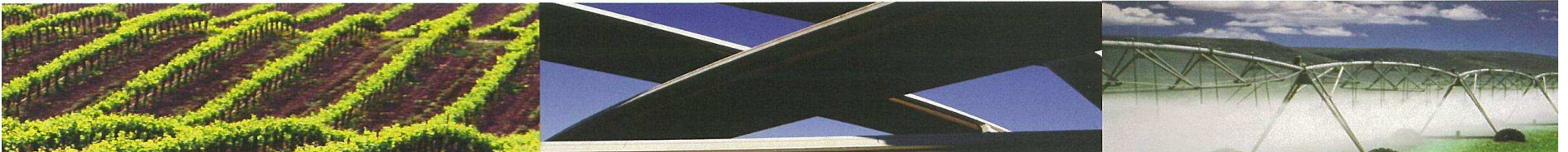
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Settlement Considerations Once A Complaint Has Been Filed



A Complaint Has Been Filed – Now What?



Settlement Considerations Once A Complaint Has Been Filed

- Filing Motion to Dismiss v. Answer
- Types of Motions to Dismiss
 - Procedural in Nature
 - Example: Standing
 - Example: Government agency enforcement that precludes citizen suit
 - Substantive issues must be argued at subsequent motion stage after discovery (*i.e.*, motion for summary judgment)



Settlement Considerations Once A Complaint Has Been Filed

- Pros and Cons of filing Motion to Dismiss
 - Pros: Eliminate or refine issues, weaken Plaintiff's position
 - Cons: Increases cost of settlement if case proceeds (fees), may only ultimately "win" amendment to Complaint
 - If settlement is ultimate goal, filing motions to dismiss discouraged unless the motion will result in dismissal of significant substantive issues.



Settlement Considerations Once A Complaint Has Been Filed

- Precluding Citizen Suit Based on Government Agency Enforcement
 - In CA, state agency enforcement must be commenced prior to Complaint being filed (33 U.S.C. §1319(g)(6)(A)(ii); *Cal. Sportfishing Protection Alliance v. City of West Sacramento*, 905 F.Supp. 792 (E.D. 1995).
 - An administrative enforcement action “commences at the point when notice and public participation protections become available to the public and interested parties.



Settlement Considerations Once A Complaint Has Been Filed

- Precluding Citizen Suit Based on Government Agency Enforcement
 - In CA, state agency enforcement must include a penalty issued under Water Code section 13385 to constitute “diligent prosecution” (*CBE v. Union Oil*, 83 F.3d 1111, 1116 (9th Cir. 1996)).
 - Alleged violations that occur after enforcement action not precluded unless long term remedial action plan included in enforcement action (*Knee Deep Cattle Co. v. Bindana Invest.*, 94 F.3d 514 (9th Cir. 1996)).



Settlement Considerations Once A Complaint Has Been Filed

- Precluding Citizen Suit Based on Government Agency Enforcement
 - Administrative enforcement actions only bar claims for civil penalties, and do not not bar citizen suits seeking injunctive or declaratory relief (33 U.S.C. §1319(g)(6); *Cal. Sportfishing Protection Alliance v. City of West Sacramento*, 905 F.Supp. 792 (E.D. Cal. 1995)).



Settlement Considerations Once A Complaint Has Been Filed

- Other Early Litigation Considerations
 - Bifurcation of Liability and Penalty Phases
 - Limits scope of discovery (exclude monetary aspects of compliance and “ability to pay” penalty factors)
 - If Plaintiff prevails on liability, can stipulated to appropriate penalty
 - If Defendant prevails on liability, obviates need for monetary discovery



Settlement Considerations Once A Complaint Has Been Filed

■ Discovery

- Expensive
- Demanding
- Unpleasant



Settlement Considerations Once A Complaint Has Been Filed

■ Discovery Issues to Consider

- Resource-Intensive
- Depositions of Staff
- Other Bad Facts
- Other Violations
 - Unknown by Plaintiff
 - Occur Post-Complaint



Settlement Considerations Once A Complaint Has Been Filed

- Discovery Issues to Consider
 - Voluntary Production of Specified Documents to Encourage Meaningful Settlement Discussions
 - Formal Discovery Stay



Settlement Considerations Once A Complaint Has Been Filed

■ What to do?

- Determine strength and weakness of case
- Hold early settlement meetings
- Identify feasible settlement options

