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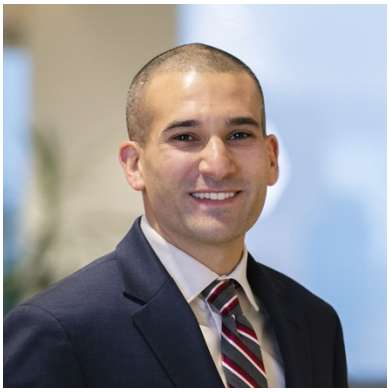

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Tenth Circuit Sua Sponte Raises Preclusive Effect of Settlement Agreement to Vacate Preliminary Injunction Relating to Denver Homeless Sweeps

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The 'Denver Homeless Out Loud' decision indicates that district courts have an obligation to consider sua sponte the preclusive effect of prior settlement agreements in class action lawsuits, which may have a significant impact on civil rights litigation in the Tenth Circuit.

In *Denver Homeless Out Loud v. Denver*, _ F.4th _, 2022 U.S. App. LEXIS 12005 (10th Cir. May 3, 2022), the Tenth Circuit, in a split decision, vacated a preliminary injunction requiring Denver officials to give advance notice of sweeps to clear out and clean up homeless encampments. In doing so, the appellate court raised sua sponte the preclusive effect of a prior settlement agreement, concluding that "special circumstances" warranted consideration of that issue and deeming the preliminary injunction granted in error because the plaintiffs were unlikely to prevail on a precluded claim. Newly appointed Judge Rossman dissented, describing the majority's approach as an "unprecedented" and "unwarranted exercise of appellate discretion."

Case Background

In response to the spread of homeless encampments throughout the city, Denver banned unauthorized camping on public or private property. *Denver Homeless Out Loud*, 2022 U.S. App. LEXIS 12005, at *2. Denver officials enforce the ban via "homeless sweeps," which involve clearing and cleaning up the encampments. *Id*. at *2–3. In 2016, some of those affected by the sweeps, including the advocacy group Denver Homeless Out Loud ("DHOL"), brought a class action lawsuit, *Lyall v. City of Denver*, 319 F.R.D. 558 (D. Colo. 2017), against Denver and various officials, alleging violations of their due process rights and other claims. *Id*. at *3–4. The *Lyall* parties eventually settled, agreeing to detailed protocols for Denver's future enforcement of the camping ban and releasing Denver and its officials from present and future liabilities. *Id*. at *5.

Post-*Lyall*, Denver officials continued to conduct homeless sweeps, and in October 2020, DHOL and other plaintiffs filed a second class action, purportedly seeking to enforce the *Lyall* settlement agreement and obtain relief under 42 U.S.C. § 1983 for alleged violations of their procedural due process rights. *Id*. at *5–11. Following limited, expedited discovery and a three-day hearing, the district court granted a preliminary injunction requiring Denver officials to satisfy certain advance-notice requirements prior to conducting future sweeps. *Id*. at *11–12. Denver did not raise the preclusive effect of the *Lyall* settlement agreement in opposition to the preliminary injunction, and so the district court did not address that issue, instead assessing only whether the procedural due process claim was likely to succeed on the merits. *Id*. Denver filed an interlocutory appeal of that ruling, then later moved to dismiss the class action, arguing, *inter alia*, that the *Lyall* settlement agreement precluded the DHOL Plaintiffs' due process claim. *Id*. at *12–13. That motion remained pending while the Tenth Circuit reviewed Denver's interlocutory appeal. *Id*.

“Special Circumstances” Warranting Sua Sponte Preclusion Analysis

Denver did not raise a claim-preclusion argument on appeal, and the district court had not addressed the preclusive effect of the *Lyall* settlement agreement in granting the preliminary injunction. Nonetheless, the Tenth Circuit majority deemed that issue worthy of sua sponte consideration. The majority began by observing that although the federal courts lacked jurisdiction to enforce the *Lyall* settlement agreement, that did not prevent the court from determining its preclusive effect. *Id*. at *14–16. The majority then discussed the propriety of addressing that issue despite Denver's failure to raise it on appeal, justifying sua sponte consideration on three bases.

First, and perhaps most importantly, the majority relied on the premise that “the Supreme Court has encouraged courts to raise preclusion sua sponte when 'special circumstances' exist.” *Id*. at *17 (quoting *Arizona v. California*, 530 U.S. 392, 412 (2000)). The majority determined that such “special circumstances” are present because “the district court may have previously resolved the instant procedural due process claim” via the *Lyall* settlement agreement. *Id*. *Second*, the majority identified the preclusion defense as “an issue antecedent to and ultimately dispositive of the dispute before [the court],” notwithstanding that it was “'an issue the parties fail[ed] to identify and brief' on appeal.” *Id*. at *17–18 (quoting *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am.*, *Inc.*, 508 U.S. 439, 447 (1993)). *Third*, the majority noted that the preclusive effect of the settlement agreement was a pure question of law, and it was clear that the settlement agreement was likely to preclude the due process claim at issue. *Id*. at *18–19. Based on these conclusions, the majority found itself “motivate[d]” to raise the preclusion defense sua sponte. *Id*. at *19.

The Preclusive Effect of the Prior Settlement Agreement

Turning to the substance of the preclusion analysis, the majority read the *Lyall* settlement agreement to include a broad release that the parties intended to have preclusive effect. *Id*. at *20–22. That release

encompassed the parties to the instant litigation because Denver was a party in both actions and the DHOL Plaintiffs were members of the plaintiff class in *Lyall*, which included "[a]ll persons in the City and County of Denver whose personal belongings *may in the future* be taken or destroyed without due process." *Id*. at *22. The majority rejected the argument that privity between Denver and the individual defendants was required, reasoning that it was "not necessary to establish privity" under either the "plain language" of the settlement agreement or applicable case law. *Id*. at *23–25 (citing *Mata v. Anderson*, 635 F.3d 1250, 1251 (10th Cir. 2011)).

The majority then held that because the DHOL Plaintiffs' procedural due process claim arose "out of the same event or series of events which concluded in a valid and final judgment" in the *Lyall* litigation, the *Lyall* settlement agreement release encompassed that claim. *Id*. at *25–27. In reaching that conclusion, the majority rejected four arguments raised by the DHOL Plaintiffs. *First*, the majority determined that, viewed pragmatically, the subject of the current litigation—Denver's custom of homeless sweeps—was the same as that in *Lyall*, despite the DHOL Plaintiffs challenging sweeps that took place after the *Lyall* settlement. *Id*. at *27–29. Because "[t]he post-*Lyall* sweeps did not create new materially operative facts," the operative event remained Denver's allegedly unconstitutional homeless-sweep custom. *Id*. at *29. *Second*, although the DHOL Plaintiffs argued that the new sweeps were different because they were motivated by different rationales and took place during the COVID-19 pandemic, the majority disagreed, noting that the sweeps were described "nearly identically" in both cases. *Id*. at *31. *Third*, the majority declined to differentiate between various aspects of the camping ban (*i.e*., "large scale encumbrance removals" versus specific "area restrictions"), because the broad language of the *Lyall* release covered "any and all" claims that "might be in any way related to" the allegedly unconstitutional custom. *Id*. at *33–34 (emphasis omitted). *Fourth*, the majority deemed it irrelevant that the DHOL Plaintiffs had alleged an Eighth Amendment violation not brought in *Lyall*, because "the inclusion of a new legal theory arising from the same facts does not rebut the Denver Defendants' preclusion defense." *Id*. at *34.

The Dissent

Judge Rossman dissented, arguing that there was "no basis" for taking "the extraordinary step of raising the affirmative defense of claim preclusion sua sponte." *Id*. at *39. Judge Rossman emphasized that preclusion is an affirmative defense, asserting that the court's discretion to reverse on a sua sponte ground involving an affirmative defense is "far more limited than the majority suggests." *Id*. at *44–47. Indeed, she described the majority's approach as "unprecedented," noting that she could find no prior case in which the court had invoked claim preclusion sua sponte to *reverse* a district court's decision. *Id*. at *43, 46. Judge Rossman also rejected the majority's reliance on *Arizona v. California* because in her view, no "special circumstances" existed because the district court had not yet decided the issue but was poised to do so in resolving Denver's pending motion to dismiss. *Id*. at *47–51.

Judge Rossman then addressed the preclusive effect of the *Lyall* settlement agreement, faulting the majority for evaluating the preclusive effect of a settlement judgment under the "traditional res judicata doctrine" instead of the "identical factual predicate test," which Judge Rossman viewed as unsatisfied. *Id*. at *52–56. Turning next to the scope of the release, Judge Rossman read it more narrowly than the majority and deemed it "at best ambiguous, making the claim preclusion question here unsuitable for resolution as a pure matter of law." *Id*. at *60. Ultimately, Judge Rossman found the majority's approach "particularly troubling" because it might expand the scope of the *Lyall* settlement agreement to encompass more than the parties intended, bestowing upon Denver and its officials "a windfall of immunity from litigation." *Id*. at *62 (quoting *Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1291 (11th Cir. 2004)).

Conclusion

The *Denver Homeless Out Loud* decision indicates that district courts have an obligation to consider sua sponte the preclusive effect of prior settlement agreements in class action lawsuits, which may have a significant impact on civil rights litigation in the Tenth Circuit.

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