Covalt and Progeny

Hartwell

In the late 1990s, the water industry pursued a well conceived and soundly executed plan to *"Covalt"* the water industry. Its intent was to insulate water utilities from suits for damages related to water quality just as *Covalt* protected electric utilities from suits by those seeking damages related to EMFs. The campaign to do so was pursued in both the Legislature and at the Commission. Industry representatives were successful in both (1) persuading the Commission to initiate the requisite Commission proceeding and (2) insuring that Commission proceedings related to water utilities remained exempt from the enlarged scope of judicial review enacted by SB 779).[54]

"In response to … lawsuits filed against the regulated utilities…"[55] the Commission opened a proceeding to consider the adequacy of current water quality standards. After a lengthy investigation, the Commission essentially found that (1) the existing standards were adequate to protect the public and (2) water utilities subject to Commission regulation had, for the preceding 25 years, provided safe water.

Following the completion of the Commission proceeding, the California Supreme Court addressed the pending suits against various public and privately owned water utilities in *Hartwell Corporation v. Superior Court,* 27 Cal. 4th 256, 115 Cal. Rptr. 2d 874 (2002).

Hartwell applied the three part Covalt test to bar damage claims against regulated public utilities that had met the water quality standards approved by the Commission.[56] The court held that the first two parts of the Covalt test had been met and that application of the third part required the court to return to the "in aid of rather than in derogation of" distinction employed in *Waters, Dyke and Vila v. Tahoe Southside Water Utility,* 233 Cal. App. 2d, 469, 43 Cal. Rptr. 654 (1965). Actions seeking damages for violations of PUC/DHS[57] standards were permitted; those deemed to effectively challenge the adequacy of those standards were not.

The aspect of *Hartwell* which has engendered significant discussion is its conclusion that certain damage actions in Superior Court, *even where arguably inconsistent with Commission decisions on the same subject matter,* do not "interfere with the PUC in implementing its supervisory and regulatory policies" if they simply seek redress for *past* violations.[58] The court stated that:

"although a jury award supported by a finding that a public water utility violated DHS and PUC standards would be contrary to a single PUC decision, it would not hinder or frustrate the PUC's declared supervisory and regulatory policies, by the reasons discussed earlier. Under the provisions of Section 1759, it would also

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[54]See Section 1756(f).

[55]*Hartwell, supra,* 27 Cal. 4th at 262.

[56]Claims that the water utilities had not complied with those standards as wells as claims against publicly owned water companies (districts) were permitted to proceed.

[57]The Commission adopted standards set by the Department of Health Services, now known as the Department of Public Health.

[58]Dicta in *Orange County* (Para. 65) is consistant with this view. See 4 Cal. 3d at 951.

continued…

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not constitute a direct review, reversal, correction or annulment of the decision itself. Accordingly, such a jury verdict would not be barred by the statute." (*Hartwell,* 27 Cal. 4th at 277-278.)

Whether this limitation on the scope of Section 1759 would have been endorsed by the *Waters* court may be open to question. But it is well to recall that the *Waters* court found that the Commission, in approving limitation of liability provisions, had taken those limitations into account in *setting ongoing* rates. However one harmonizes *Waters* and *Hartwell*, it seems clear that one cannot confidently defend a civil suit by showing that the defendant's activity finds support in some *past* Commission order. The defendant has to show that the conduct claimed to be unsafe or unreasonable meets a standard of safety or reasonableness set by the Commission *on an ongoing basis* such that an award of damages based on a theory that conduct meeting the Commission standard was not safe or reasonable would interfere with the Commission's ongoing "supervisory and regulatory policies." (An analysis of the distinction can be found in *Nwabueze v. AT&T,* 2011 U.S. Dist. LEXIS 8506).

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