Orloff and the Application of Section 1759 to Civil Enforcement Actions

In late 2003, almost two years after *Hartwell*, the California Supreme Court issued its opinion in *People ex rel Orloff v. Pacific Bell,* 31 Cal. 4th 1132; 7 Cal. Rptr. 3d 315; 2003 Cal. LEXIS 9459 (2003) (*"Orloff"*). In a long awaited decision, the Court held that the Legislature by enacting an array of consumer protection statutes to which public utilities were subject, did not intend to foreclose civil enforcement actions in the courts simply because a similar action was pending at the Commission.

In the decision under review in *Orloff,* the Court of Appeal had held that (1) the mere pendency of the enforcement action at the Commission stripped the Superior Court of jurisdiction to hear a similar action and (2) the Commission's stated view that no "interference" was caused by the Superior Court action was of no moment.

The Supreme Court reversed on both points.

The Court held that the mere possibility of an inconsistent outcome did not preclude actions before both the Commission and the Superior Court. The Court stated its expectation that (1) prosecutors could coordinate their actions with the Commission to ensure that a conflict implicating Section 1759 did not arise and (2) the Superior Court itself could "tailor its proceedings and rulings…to avoid any actual conflict." Unlike the Court of Appeal, the Supreme Court clearly relied on the Commission's amicus brief in which the Commission (1) eschewed any suggestion that the action in the Superior Court interfered with the Commission in its actions and (2) stated that civil actions such as those at issue "are an important complement to the PUC's consumer protection efforts." The Court seems to accept the possibility of "inconsistent" outcomes i.e. a finding of liability under the Public Utilities Code in the Commission proceedings but exoneration under the Business and Professions Code in the Superior Court. Indeed, the Court identifies as the "only instance" in which the facts before it would create an outcome barred by Section 1759 as the issuance of injunctive relief by the Superior Court which proscribed activity embraced within a "safe harbor" established by the Commission. Again, *the analytical framework is forward looking* rather than focused on sanctions (or the lack thereof) for past actions.

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[59]As a practical matter, it could prove difficult to convince the Superior Court to find in favor of the utility after an adverse decision by the Commission. At some point, a prosecutor will advance Section 1709 ("In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive") to argue that the Superior Court may not conclude than an advertisement was not misleading after the Commission has concluded that it was. The decisional law regarding Section 1709, however, has been very sparse over the last ten years and, particularly in light of *Covalt, Hartwell* and *Orloff,* a court, if asked, could conclude that the reach of Section 1709 extends only to the ultimate Commission order and not to the underlying factual findings. *Camp Meeker* (Para. 36 of the summary) holds that the conclusive effect of Section 1709 only applies to adjudicatory Commission proceedings. That aspect of *Camp Meeker* was not reversed by the legislature when it enacted SB779 in 1988. (See footnote 36, *supra.*)