The *Hartwell v. Superior Court* and *In Re Groundwater Cases* Decisions: Relief From Tort Liability for Drinking Water Providers

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First Suit Filed: April 24, 1997

- A complaint containing a host of theories, including wrongful death, was filed in Los Angeles Superior Court on behalf of 140 plaintiffs naming only Southern California Water Company (SCWC), a utility regulated by the California Public Utilities Commission (PUC).
- No contaminators/polluters were named as defendants.
- Two of the plaintiffs' firms involved were participants in the case made famous by the film *Erin Brockovich.*
- Case alleged contaminated water had been served to plaintiffs in San Gabriel Valley for some twenty years (Superfund Site).
- Despite numerous motions, the Court allowed water to be characterized as a product for purposes of the products liability theory. Surprisingly, only seven states do not find water to be a product.

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The Journey Begins…

- In January 1998, two cases were filed in Sacramento.
- The allegations were the same as those made in the Los Angeles/San Gabriel Basin area.
- Approximately 800 plaintiffs were named and, again, one of the Los Angeles firms involved in the *Erin Brockovich* case was the lead for one group of plaintiffs.
- These cases again named only PUC-Regulated Utilities as defendants.
- The chief consequence of which was that each water company would be forced to file cross-complaints against polluters and prove contamination was caused by them – an extremely costly process, which requires modeling by hydro-geologists to analyze sources of contamination that typically exceeds $1 million per aquifer.

- Over the next two years an additional nineteen cases were filed naming only investor-owned water purveyors and some public entity water utilities as defendants.
- Plaintiffs totaled approximately 2,000. Another firm also involved in the *Erin Brockovich* litigation joined on behalf of other plaintiffs.
- The water companies involved (except the public entities) were all Class A Regulated Utilities governed by the California Public Utilities Commission.
- The California PUC is a state agency of constitutional origin with far-reaching duties, functions, and powers. (California Constitution Article 12 §§ 1-6).

PUC Action

- On March 12, 1998, the PUC issued an Order Instituting Investigation (OII).
- Required each of the twenty-five Class A water purveyors in California to give a history of each well in its state-wide system for past twenty-five years, exercising its ongoing jurisdiction of water companies.

Tension in PUC Code

- PUC Code Section 1759 bars most lawsuits.
- PUC Code Section 2106 allows some lawsuits.
- May plaintiffs' lawsuits proceed?
- California Supreme Court addressed the relationship between PUC Code Section 1759 and Section 2106 in *Covalt v. SDGE*.

Covalt Case Requirements

- *Covalt* has three requirements:
  1. Whether the PUC has authority to adopt a regulatory policy;
  2. Whether the PUC has exercised that authority; and
  3. Whether Superior Court lawsuits would hinder or interfere with the PUC's exercise of its regulatory authority.
- If the three prongs of the *Covalt* case are met in any particular factual setting, civil cases against PUC-Regulated Utilities cannot proceed because the PUC has **exclusive jurisdiction** pursuant to Section 1759.
- If *Covalt* requirements are not satisfied, the case may proceed against the utilities pursuant to Section 2106.
- *Covalt* involved "dangers" from EMF; the PUC determined that the *Covalt* requirements were not met. Its finding precluded all civil lawsuits on that subject. If the OII reached a similar conclusion for water companies, the cases "should be" dismissed for lack of jurisdiction.

Courts React to PUC's OII

- Beginning in June 1998, Superior Courts in Los Angeles and Sacramento stayed or halted all legal proceedings against the water companies, pending outcome of the PUC's OII.
- A judge in Ventura County (where one of the cases had been transferred) dismissed the water companies on jurisdictional grounds.
- Plaintiffs appealed both sets of rulings.
- Plaintiffs finally began serving the polluters/ contaminators with suits in both Los Angeles and Sacramento.
- Approximately one-hundred polluters/contaminators were named in Los Angeles, but only two in Sacramento.

- Cases remain stayed as the appellate briefs were written and oral argument was scheduled for Summer of 1999.
- All the while, each of the twenty-five Class A utilities were immersed in filing their compliance reports with the PUC for the OII.
- For SCWC, for example, this involved tracking history of 300 wells over twenty-five years.
- Project was costly and enormously consuming of company resources and attorney time.

Objectives of PUC Inquiry

The PUC's inquiry was to determine:

- Whether current drinking water standards adequately protect the public health and safety;
- Whether the PUC-Regulated Utilities have complied with those standards;
- What remedies should apply for noncompliance with safe drinking water standards; and
- Whether the occurrence of temporary excursions of contaminant levels above regulatory thresholds are acceptable "taking into consideration economic, technological and public health and safety issues, and compliance with Public Utilities Code § 770."

PUC Conclusions

The PUC concluded in September 1999, some 18 months later, that:

- Existing DHS drinking water quality standards adequately protect the public health and safety.
- Over the past twenty-five years PUC-Regulated Utilities, including defendants in these lawsuits, had provided water that was "in no way harmful or dangerous to health."
- PUC-Regulated Utilities satisfactorily complied with DHS drinking water quality requirements.
- Unfortunately, the PUC did NOT conclude that the lawsuits would interfere with PUC policy!

- In September 1999, the California Court of Appeal ruled unanimously that the cases were preempted insofar as they seek remedies against PUC-Regulated Utilities, despite the PUC's failure to find interference with PUC authority. Justice Barbara Jones wrote the unanimous opinion of the Court.
- The victory, however, was short-lived.
- On December 15, 1999, the California Supreme Court granted review of the Court of Appeal decision.

Supreme Court Action

- On Feb. 4, 2002, the California Supreme Court issued its unanimous ruling in the case of *Hartwell v. Superior Court*, which included several significant holdings.
- The Court held that PUC § 1759 barred actions for damages against water purveyors regulated by the PUC arising out of exposure to contaminated drinking water, where such actions challenge the adequacy of drinking water standards, or sought damages for exposure to water that met applicable regulatory standards.
- The PUC provides a safe harbor for utilities meeting those water quality standards, and a holding that the existing standards were inadequate would undermine this policy by holding the utilities liable for damages caused by their failure to undertake action that the PUC had determined was not required.

Supreme Court Action *(cont'd)*

- The Court did allow plaintiffs to pursue "damage claims based on the theory that the water supplied by the defendants failed to meet federal and state drinking water standards."
- Plaintiffs won the right to replead their claims in the Superior Court on the theory that the water failed to meet federal and state safe drinking water standards.
- The cases were thereafter assigned to Superior Court Judges in Los Angeles and Sacramento to restart the litigation process in the spring of 2002.

Supreme Court
(kinda won)

Court of Appeal
(won)

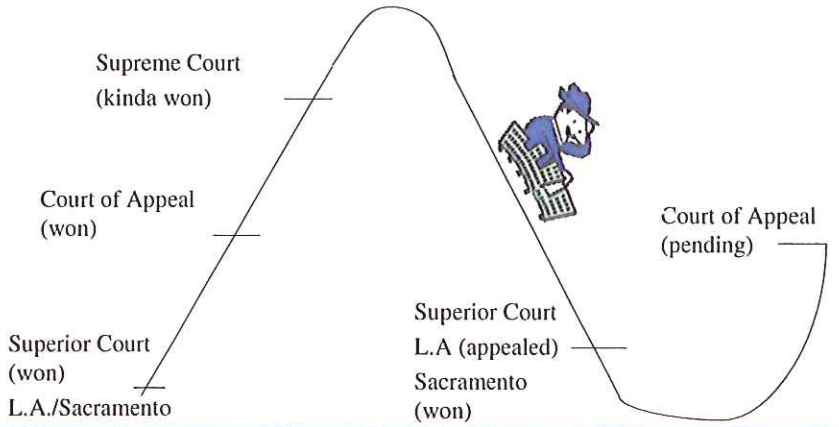
Superior Court (won)
L.A./Sacramento

Superior Court
L.A./Sacramento

Status of Cases

- From the Spring of 2002 over the course of the next 2 ½ years, the twenty-four contamination cases in Los Angeles and Sacramento proceeded.
- The Los Angeles cases were consolidated in the Los Angeles Superior Court in the complex litigation program.
- The defendants were divided up into Industrials (Polluters), PUC-Regulated Water Companies, and Non-Regulated Public Entity Water Companies. Each group had a liaison counsel.
- The Court established four phases of the case: definition of a "standard," definition of a "violation," whether or not a violation of a standard occurred, and dispositive motions.

- The Court adopted the definitions of Standard and Violation as proposed by the PUC-Regulated Utilities.
- After extensive document production, plaintiffs could find no violations on the particular wells by any of the PUC-Regulated Utilities.
- In August 2004, the Los Angeles cases were dismissed as to all of the PUC-Regulated Utilities and Public Entity Utilities on jurisdictional grounds. **This ruling was appealed.**
- In the Fall of 2004, the cases against the PUC-Regulated Utilities in Sacramento were also dismissed on jurisdictional grounds. **Those cases were not appealed.**



Sacramento Cases Conclude

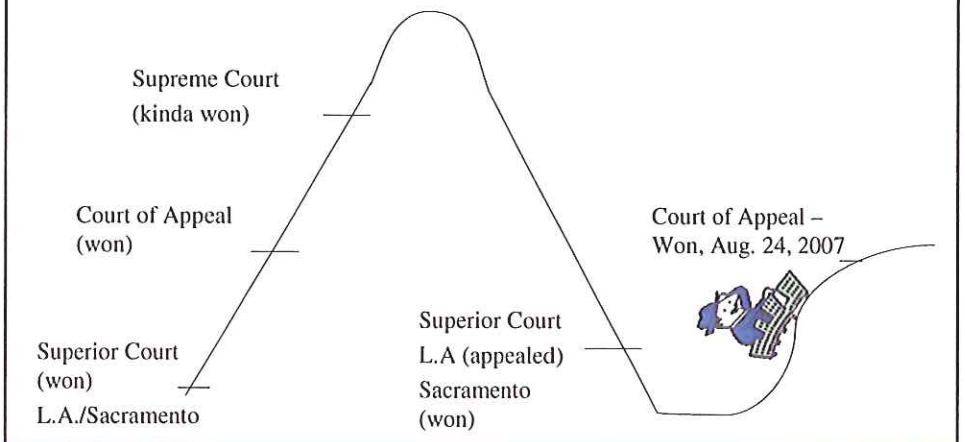
- Of the 800 plaintiffs, some 600 were dismissed by the court on motion or released by plaintiffs' counsel.
- Approximately 125 plaintiffs settled with the major polluter, Aerojet General.
- In February 2006, trial began against Aerojet for approximately fourteen plaintiffs, and twelve actually went to verdict.
- Those twelve obtained a verdict of $11 million and a jury finding that punitive damages were justified.
- Before the punitive damages phase, the twelve plaintiffs settled for a total of $25 million.

Los Angeles Cases

- In 2004 and 2005, approximately 1,800 plaintiffs settled with approximately 85 Defendants.
- Settlements paid by the polluters/contaminators totaled near $20 million.
- Only one PUC-Regulated Utility settled.
- Four PUC-Regulated Utilities and three Public Entity Utilities remained in the appeal.

Court of Appeal Opinion of *In re: Groundwater Cases*

- Oral Argument on June 20, 2007, in San Francisco went extremely well for the defendants. Court statements and questions from the bench indicated the defendants would win.
- On August 24, we received the Court's unanimous opinion, again written by Justice Barbara Jones. The case is certified for publication – this means it has precedential value.
- In a thirty-seven-page opinion, the Court affectively shot down all of plaintiffs' arguments, and at the same time found that the Trial Court had correctly interpreted the Supreme Court's decision in *Hartwell*.



Appellate History

- In September of 1999, Justice Jones wrote the first opinion holding that allowing the cases to proceed would hamper the PUC's regulation of public utility water providers, and therefore were preempted. This is the third prong of *Covalt*. (We win!)
- The California Supreme Court accepted a petition in December of 1999 and ruled on February 4, 2002. Plaintiffs were allowed to sue for violations of federal and state drinking water standards.
- The plaintiffs' cases were dismissed in the Los Angeles Superior Court and plaintiffs appealed contending that the trial court adopted overly narrow definitions of the terms "Federal and State Drinking Water Standards" and "Violations" as those terms were used in *Hartwell*.

Plaintiffs' Arguments at the Court of Appeal in 2007

- PUC-Regulated Utilities are liable for providing water contaminated with substances, which at the time of the contamination, were unregulated by DHS/PUC.
- Plaintiffs should be allowed to use the standards of PUC General Order 103 (1956) arguing that the terms "pure," "wholesome," and "potable" can be used to assess liability.
- For example, if TCE was unregulated before 1980, and yet found to be in certain wells of certain providers before 1980, what is unhealthful at that period of time would come down to "what was known and who knew it." Expert witnesses would offer testimony as to what was "healthful and what was not healthful" at that point in time.
- Plaintiffs conceded that once an MCL or AL or predecessor numerical standard is established by DHS, that constitutes the legal standard. Plaintiffs argued, however, that until a numerical standard is established they should be allowed to pursue damage claims based on the failure to provide "pure," "wholesome," and "potable" water, or simply that the water was unhealthful and the water companies knew or should have known it.

Court of Appeal Holdings

- California has imposed enforceable numerical drinking water standards since the 1940s.
- Plaintiffs' arguments run afoul of *Hartwell* because no matter how framed, it is that "in light of present day knowledge, the prior water quality standards adopted by DHS and the PUC were inadequate and insufficiently protective of public health." Such an argument would allow experts to classify as "unhealthful" water that met all applicable standards in effect **at the time the water was supplied**.
- This kind of argument would permit courts and juries to second guess carefully considered decisions of the regulatory agencies on technical water quality issues. It would in effect "flout the legislature's policy choice to entrust such matters to DHS and the PUC." (regulation by litigation)
- Water purveyors regulated by DHS/PUC might be held liable in the future for water they are currently supplying if regulatory agencies should **later** determine contaminants unregulated today present a danger.

Court of Appeal Holdings *(cont'd)*

- The words "pure," "wholesome," and "potable" are goals of California's drinking water system. These "goals" are different from drinking water standards and do not themselves establish drinking water standards.
- Isolated exceedances of numerical standards including MCLs do not constitute a violation of the regulatory scheme. In some instances, DHS regulations permit the continued delivery of water after detection of MCL exceedances.
- Finally, the Court held that the "touchstone" for determining when a violation has taken place within the meaning of *Hartwell* is whether the PUC-Regulated Utility has failed to comply with the regulatory standards and policies set by DHS/PUC.

Resolution of LA Cases

- After the decision, plaintiffs' counsel approached defense counsel about "settlement."
- Plaintiffs proposed that they would not petition the Supreme Court for review, if defendants would waive the court costs accumulated over 10 ½ years (slightly over $106,000).
- Defendants asked that plaintiffs not make any application/motion to have the opinion depublished as well. This was agreed to and the settlement was consummated on September 24, 2007.
- The cases remain dismissed and the opinion of August 24, 2007, has precedential value, and can be cited in any court in the State of California in an appropriate case.

Litigation Costs Of Defending The Twenty-Four Contamination Cases

- The litigation began on April 24, 1997 and concluded on September 24, 2007.
- Attorneys fees, expert fees, litigation expenses, and dedication of company resources totaled multiple millions of dollars.
- Insurance coverage was available and paid for the vast majority of legal fees and costs.

Prevention of Similar Suits

- How do we prevent similar suits in the future?
- Establishing "safe harbor" from suit in return for compliance with federal/state safe drinking water laws is the goal.
- A number of options are available:
  - Federal statutes.
  - State statutes.
  - Regulations from a state health or environmental regulatory authority.
  - Regulations, tariff, or advice letter from a state PUC, PSC, or similar regulatory authority.

Federal Statutes

- The breadth of these cases and the sweeping nature of the court's opinion could simplify proposed legislation.
- The goal should be a safe harbor provision for water utilities above a certain size, which comply with all federal and state safe drinking water regulations during the timeframe alleged in the complaint.

Federal Statutes *(cont'd)*

- No matter what the provisions in each individual state's tort law, as long as the utility is in compliance with all federal and state regulations, the safe harbor exists.
- If California's lead in this opinion were to be followed in federal legislation, water allegedly contaminated with unregulated contaminants will **NOT** be a basis for suit under any theory.

State Statutes

- The State of Ohio passed a bill in 2002 in recognition of the litigation in both northern and southern California. The bill presented five main reasons for its necessity, including the undermining of water quality regulations by multiple jurors in multiple jurisdictions. The bill became law in June of 2002 approximately four months after the California Supreme Court decision in *Hartwell.*
- The bill provides a safe harbor from tort liability for a water supplier that acquires ownership in an existing water system, and enters into an agreement with the Ohio Environmental Protection Agency and complies with certain conditions.
- A second, important feature of the bill provides civil immunity from tort liability for a water supplier that has **not** been found to be in significant **noncompliance** with drinking water standards, with respect to harm caused by substances for which there are drinking water standards.
- This latter point could actually be out of the decision that was rendered on August 24, 2007!

State Statutes *(cont'd)*

- State of Arizona has a statute providing a safe harbor for any actions brought against public entities or public employees. (ARS Title 12, Chapter 7, Article 2, Section 12-820.08, entitled *Potable Water Systems; Standard of Care*)
- This statute provides a safe harbor from personal injury suits as long as the water complies with "the more stringent of the primary maximum contaminant levels that are established" either pursuant to Arizona Water Quality Control law or the Federal Safe Drinking Water Act.
- There does not appear to be any "safe harbor" statutes for investor owned water companies.

State Regulations by Health or Environmental Regulatory Authority

- California Department of Health Services
- Tennessee Department of Environment and Conservation
- Other states

State Regulations, Tariff, or Advice Letter from the PUC, PSC, or Similar Regulatory Authority

- Regulations
- Tariffs
- Advice Letters

California PUC Procedure

- In California, PUC-Regulated Utilities may petition the Commission for a rulemaking – Order Instituting Rulemaking ("OIR") – regarding safe harbor. The Commission itself could issue an OIR on its own initiative.
- An advice letter may be filed with a tariff attached.
- In the context of a general rate case, a tariff may be proposed for approval.
- The public still has the opportunity to respond by filing a protest.
- Given the finality of the decision, now is the time to consider these approaches.
- In California, an additional approach may be to do nothing and rely upon the opinion, which carries its own risks.

Legal/Policy Considerations

- The initial public interest created by the filing of these cases in California has subsided.
- Though the filing of cases involving ingestion of contaminated water has decreased, so are general filings of civil litigation across the country. Is the first a consequence of the latter?
- The attorneys who filed the original suits do not seem eager to file new suits against water companies now, but what about the future?
- **NOW** is the time to attempt to get state statutes, regulations, and other mechanisms changed, because opposition may be less likely.

Legal/Policy Considerations *(cont'd)*

- Despite fewer case filings, the public still holds considerable concern over pollution of drinking water.
- Legitimate concerns (some of which were expressed in the course of the last two days) over the nation's drinking water infrastructure pose additional potential risks to water purveyors.
- Congress is focusing on water issues; the House recently created a Water Caucus to look at a variety of water-related issues.

Legal/Policy Considerations *(cont'd)*

- Congress also passed a bill including funding for water infrastructure projects; President Bush has threatened a veto.
- After 10 ½ years, California, through the legal process, has established a safe harbor.
- **How much easier and less costly would it have been if a statute or regulations had been in place in 1997?**