



Recent Decisions Applying the Covalt & Hartwell Test

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Two California Courts of Appeal recently reviewed decisions involving the California Public Utilities Commission in a pair of cases that build on the principles established by the California Supreme Court in *Covalt* and *Hartwell* regarding when California's superior courts have jurisdiction to hear a private cause of action against a public utility subject to regulation by the Commission. These cases both illustrate the essential element of the *Covalt* and *Hartwell* test – whether the court action would *hinder* or *interfere* with the Commission's exercise of its jurisdiction.

The Covalt and Hartwell Test

California's Constitution confers broad authority on the Commission to regulate utilities, including the power to fix rates, establish rules and policies, and establish its own procedures. In addition to those powers expressly conferred on the Commission, the California Constitution confers broad authority on the Legislature to regulate public utilities and to delegate regulatory functions to the Commission. (*Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 264–265.)

The Commission's actions are subject to limited judicial review. (See, Pub. Util. Code § 1759.) In particular, Public Utilities Code section 1759(a) provides that No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or . . . or to enjoin, restrain, or interfere with the commission in the performance of its official duties

However, Public Utilities Code section 2106 provides for a private cause of action to recover for loss, damage, or injury in any court of competent jurisdiction by any corporation or person against [a]ny public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this

State, or any order or decision of the commission. (*San Diego Gas & Elec. Co. v. Superior Court (Covalt)* (1996) 13 Cal.4th 893, 916.) The California Supreme Court in *Covalt* and *Hartwell* developed a test to address the apparent contradiction between sections 1759 and 2106. The three part test for analyzing whether an action pursuant to section 2106 is barred by section 1759 is (1) whether the commission had the authority to adopt a regulatory policy; (2) whether the commission had exercised that authority; and (3) whether the superior court action would hinder or interfere with the commission's exercise of regulatory authority. (*Hartwell*, 27 Cal.4th at 266.)

Lefebvre v. Southern California Edison Company, Court of Appeal, Second Appellate District, January 25, 2016

Plaintiff claimed that that Southern California Edison Company (SCE) fraudulently enrolled ineligible customers in its California Alternate Rates for Energy (CARE) program for low-income electricity and gas customers and, as a result, plaintiff and other ratepayers were allegedly assessed an excessive surcharge to fund the program. SCE file a demurrer, asserting that plaintiff's claim should be dismissed pursuant to Public Utilities Code section 532, which prohibits refunds or discounted rates without Commission permission, as well as pursuant to section 1759(a). The Superior Court held that plaintiff's claims were barred by section 532 because he sought an unlawful refund of rates approved in a tariff. The Superior Court did not address whether the action was barred by section 1759.

The Court of Appeal for the Second District affirmed, but on the basis of section 1759, not section 532. It ruled that section 1759(a) is a limit on the superior court's subject matter jurisdiction, in contrast to section 532, which is not jurisdictional. The Court then applied the test established by *Covalt* and *Hartwell*, discussed above, to determine whether entertaining plaintiff's action would hinder or contravene the Commission's jurisdiction. The Court held in the affirmative, that plaintiff's claims were barred by section 1759(a), because a judgment in plaintiff's favor would undermine a general supervisory or regulatory policy of the Commission. In particular, the Court pointed to the Commission's extensive and continuing supervision of the CARE program and established policies concerning that program to support its conclusion. The Court concluded that the Commission also monitors SCE's implementation of the program and, thus, entertaining plaintiff's claims would directly interfere with the Commission's regulatory activities. The Court of Appeal's resolution of this case was a straight-forward application of the *Covalt/Hartwell* precedents.

Seacrist v. Southern California Edison Company, Court of Appeal, Fourth Appellate District, January 27, 2016

Plaintiffs alleged stray electrical currents from SCE's substation were causing them to suffer various medical issues and sought damages from SCE for those injuries. To support their claims, plaintiffs pointed to the court of appeal decision in *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, which held that the Commission does not have the exclusive jurisdiction to regulate substation safety and entertained a claim based on injuries caused by stray electric current from a substation. The court in *Wilson* had reasoned that the Commission had not expressly investigated the underground transmission of the current at issue and that the Commission's regulations left open room for SCE to investigate and create more stringent best practices. Thus, the Court in *Wilson* concluded that the litigation would not interfere with or hinder the Commission's regulatory activities. Plaintiffs asserted that similar reasoning applied here as to why the Court was not divested of jurisdiction.

SCE demurred, asserting that the Commission has the authority to regulate substation safety and has issued safety regulations applicable to substation design and inspections and, thus, plaintiffs' claims were barred pursuant to section 1759. Acting prior to issuance of the *Wilson* decision, the Superior Court found in SCE's favor, holding that the litigation was barred by section 1759.

However, the Court of Appeal for the Fourth District analyzed the facts in light of the *Wilson* opinion and, finding the *Wilson* opinion to be well reasoned, reversed. Because the Court determined that the facts here were very similar to those at issue in *Wilson*, the Court held that the plaintiffs' claims were not barred by section 1759.

Conclusion

These decisions further refine the distinction between private actions against Commission-regulated public utilities that are permissible under section 2106 from those that are outside the jurisdiction of California trial courts pursuant to section 1759. In particular, the Court of Appeal decision in *Seacrist* is an example of litigation that was permitted to move forward because the Court found that it would not interfere with the enforcement of Commission policy. Moreover, the Court concluded that the Commission had not specifically analyzed the facts at issue in the case, but left the door open for SCE to take actions to prevent injuries due to underground transmission of electric current from substations. In contrast, a different Court of Appeal held that it lacked jurisdiction in the *Lefebvre* matter because, there, the Commission was actively monitoring SCE's implementation of the CARE program, and the litigation would interfere with Commission decisions and policies. Thus, the Court held that, unlike in *Seacrist* where the litigation would promote Commission policy and address an issue that the Commission had not specifically investigated, in *Lefebvre* the litigation would hinder and interfere with the Commission's regulatory authority.