FOCUS & FORUM • Sep. 12, 2007

Murky Waters

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By Thomas H. Clarke Jr.

Can you make more than tea or coffee from the impurities that flow from the tap? Yes, if the target is a polluter. Probably not, however, if the target is your drinking-water provider. Until recently, the potential liability of water providers was an open question, but not any more.

Toxic Tap

Water providers owned and operated by governmental entities and private water companies regulated by the Public Utilities Commission furnish the vast majority of drinking water to residents of California. These providers increasingly have been the target of toxic-tort lawsuits over the last decade, because of their provision of allegedly contaminated drinking water, riddled with contaminants that are usually derived from industrial discharges upgradient of intake wells. Until now, a key issue has been the extent to which water providers are liable for serving water from these contaminated sources.

In the first case to address the issue directly, the 1st District Court of Appeal decided in *In re Groundwater Cases*, 2007 DJDAR 3023 (Cal. App. 1st Dist. Aug. 24, 2007), that exceeding a drinking-water standard known as a maximum contaminant level is not a basis for liability. After a very detailed review of the history of drinking-water regulation in California, the court concluded that liability would occur, if at all, only with evidence that the provider violated the entirety of the drinking-water statutory and regulatory framework.

Between 1997 and 2002, six actions involving plaintiffs in the Pomona Valley and 14 actions involving plaintiffs in the San Gabriel Valley were filed by 2,100 individuals against a hundred industrial entities and 10 public (city or district) and PUC-regulated water providers. The cases were consolidated in Los Angeles County Superior Court, Central Civil West, before the Judge Carl West. Early in the proceedings, the PUC-regulated water providers from the San Gabriel Valley cases filed writs, culminating in *Hartwell Corp. v. Superior Court,* 27 Cal.4th 256 (2002). *Hartwell* addressed the theoretical tension between Public Utilities Code Sections 1759 and 2106. A good synopsis of the holding of the case can be found in *People ex rel. Orloff v. Pacific Bell*, 31 Cal. 4th 1132 (2003). The matter was remanded to the Superior Court. This article examines the proceedings and rulings following the remand.

In light of the multiplicity of parties and the complexity of the issues, West issued a number of case management orders to delineate pretrial procedures, especially pleadings and discovery. The plaintiffs filed a master complaint, to which demurrers were filed in four stages, each stage addressing specific causes of action. As against the water utilities, most of the causes of action were dismissed, though the plaintiffs were given an opportunity to amend if they could prove violations, as defined by the court (see below for more detail). Discovery was undertaken thereafter.

Hearing Liability

The court developed a unique four-phase process to hear the fundamental legal issues of liability and jurisdiction. In Phase 1, the Superior Court tried to identify which standards

applied to the PUC-regulated water providers under *Hartwell* and, concomitantly, which mandatory duties were applicable to the public water companies under Section 815.6 Government Code. In Phase 2, the court tried to define what constituted a violation of the standards and duties. In Phase 3, the plaintiffs were permitted to conduct discovery to ascertain whether violations of the standards and duties had occurred. Finally, in Phase 4, dispositive motions on these issues were entertained. West granted the defendants' dispositive motions, and judgment was entered in favor of the water companies. All of the industrial defendants in the consolidated matter either settled or were dismissed because they no longer existed and had no assets. One PUC-regulated water provider and a mutual water company also chose to settle. This appeal followed.

In Phase 1, West ruled that the numerical standards, in the form of the maximum contaminant levels and the action levels of the Department of Health Services, were the applicable standards and duties. Action levels are guidance for recommended action and are not binding as a matter of law.

For periods before the use of those numerical standards, the court held that the existing numerical standards were the applicable standards and duties. On appeal, the plaintiffs argued that the vague policy language of Health and Safety Code Section 116270(e) (drinking water is to be pure, wholesome and potable) and its predecessors controlled whenever no numerical standard existed.

The Court of Appeal reviewed the history of drinking-water regulation. The court noted that numerical standards existed at the federal level as early as 1914 and were part of California's regulatory apparatus as early as the 1940s. Thus, contrary to the impression that the plaintiffs tried to create, numerical standards were a long-used vehicle for establishing drinking-water standards. The court noted that nine of the 12 contaminants at issue in the case were subject to current numerical standards.

The Court of Appeal further explained that drinking-water standards not only reflect a scientific evaluation of the potential for harm from long-term consumption of contaminated water (for instance, consuming two liters per day for 70 years) but also take into account the technical feasibility and cost of achieving those standards. Water must be not only safe but also available at reasonable cost. The court noted that it is to the regulatory agencies (such as the Department of Health Services) that the law entrusts the evaluative process, not to the potentially divergent and inconsistent views of juries, litigation experts and courts.

The court held that to the extent the plaintiffs tried to challenge the numerical standards vis-Ã -vis the PUC-regulated water companies by arguing for the vague phrasing of Section 116270 (e) (pure, wholesome and potable), they ran afoul of *Hartwell* and Public Utilities Code Section 1759. Likewise, as noted in a number of preceding cases, the vague "standard" advocated by the plaintiffs could not form the basis for a mandatory duty under Government Code Section 815.6 with regard to the public water companies. Thus, the reliance on the vague policy language of Section 116270(e) availed the plaintiffs naught.

Actionable Violations

The plaintiffs next challenged West's holding that actionable "violations" occurred only if the commission or department ordered a water company to cease delivery of water from a particular source (such as a well) and the water company refused to obey. The Court of Appeal held that the ruling below was correct.

Why is exceeding a numerical standard not actionable? A review of the statutes and regulations makes clear that merely exceeding a numerical standard is not the end of the

process but only the beginning. When a standard is exceeded (except in those cases in which an organic pollutant exceeds the maximum contaminant level by a factor of 10 or greater), both the water provider and the department have a menu of options for addressing the problem. These range from further testing over time (often many months) to confirm that the standard was exceeded, to the installation of wellhead treatment, to the use of blending plans to dilute the pollutant, among many other options. Again, maximum contaminant levels are very conservative indeed. They assume a 70-year exposure to contaminated water at a rate of 2 liters per day. Thus, transient exposures are, in reality, well below any realistic threat level.

As part of discovery, the plaintiffs were provided with the extensive water company testing records and correspondence with the department over many decades. Because the plaintiffs admitted in response to discovery, following review of these records, that they had no evidence of any "violation" as defined by the Superior Court and approved by the Court of Appeal, the court upheld the dismissals. The court gave short shrift to the complaints of the plaintiffs about the discovery process because the plaintiffs themselves agreed to its nature, scope and execution.

Sacred Numbers

Thus, whether viewed as a jurisdictional issue under *Hartwell* and Public Utilities Code Section 1759 or a mandatory duty issue under Government Code Section 815.6, the conclusion is the same. Only numerical standards are important; vague policy goals are just that. Violations create the potential for liability only if the water provider disobeys the orders of the department and refuses to shut down water-intake sources. As long as public or private water providers abide by the rules and carry out their duties in an appropriate manner, the threshold for liability is never crossed.

Even if a violation, as defined, is found to exist, plaintiffs have the burden of proving causation, namely that the exposure caused the personal injury or property damage alleged.

The opinion in *In re Groundwater Cases* thus puts the onus where it should be: on those entities that caused the contamination by their discharges and releases. Trying to drag water providers that carry out their mandated statutory and regulatory duties into the quagmire of litigation will be ineffective.

Thomas H. Clarke Jr. and **Terry P. Anastassiou** of Ropers, Majeski, Kohn & Bentley and **W. Keith Lemieux** of Lemieux & O'Neil represented the public water companies in the case. **Mary Hulett** of Ragsdale Liggett, **Paul R. Fine** of Daniels Fine Israel & Schonbuch, **Michael K. Stagg** and **William K. Koska** of Waller, Lansden Dortch & Davis and **Gary C. Ottoson** of Bacalski, Koska & Ottoson represented most of the PUC-regulated water companies in the case.

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