

LEAGUE OF CALIFORNIA CITIES
CITY ATTORNEYS' CONFERENCE
SPRING 2021

EMERGING TRENDS IN CLASS ACTION CHALLENGES TO REVENUE MEASURES

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1

RECENT CLASS ACTIONS

Plaintiffs challenge municipal utility rates set to cover "general fund transfers," which can amount to 10 percent of total revenues or more. Plaintiffs seek refunds for classes of all ratepayers for multiple years.

Plaintiffs sue in "reverse validation" to set aside \$3.50 user fee intended to fund new car rental facility. Two sets of class counsel file "me, too" refund cases for putative classes of customers seeking refunds for several years of fees.

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RECENT CLASS ACTIONS

Plaintiffs challenge a “franchise surcharge” paid by an investor-owned utility to a charter city, which the utility collects as a line item on customer bills. Plaintiffs seek annual refunds of approximately \$700,000.

One class action firm sues over 80 municipal water utilities from around the State in one lawsuit, claiming a defendant class of all municipal water utilities. Complaint lists few facts, but class counsel seeks refunds for overpayments by all customers.

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3

FOUR QUESTIONS

- How did we get here?
- What have we learned since *Ardon* and *McWilliams*?
- What can we do about it?
- Where are we headed?

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4

HOW DID WE GET HERE?

- Before Proposition 13
 - Assessments and taxes were understood to be legislative choices voters could correct by electing different legislators
 - Separation of powers limited judicial review to fundamental fairness and abuse of discretion
- Proposition 13 (1978) (Cal. Const., art. XIII A)
 - Limited ad valorem property taxes to 1 percent of assessed value
 - Required two-thirds voter approval for “special taxes”

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HOW DID WE GET HERE?

- Proposition 62 (1986) (Gov. Code, § 53720 et seq.)
 - Required voter approval of general taxes in general law cities and counties
- Proposition 218 (1996) (Cal. Const., arts. XIII C, XIII D)
 - Additional limitations, voter approval requirements for taxes, assessments, and “property related fees”
 - Local general taxes require majority vote; local special taxes require two-thirds vote
- Proposition 26 (2010) (Cal. Const., art. XIII C, § 1, subd. (e))
 - Defines “tax” in the negative

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HOW DID WE GET HERE?

- Conclusion: **ALL levies** (taxes, assessments, fees, etc.) **now vulnerable to challenge UNLESS:**
 - Levy obtains voter approval; or
 - Levy clearly falls within obvious exception to voter approval requirements

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HOW DID WE GET HERE? ARDON

- *Pre-Ardon*
 - Most levies understood to be subject to administrative claiming procedures
 - Class actions understood to be unavailable for tax refunds (*Woosley v. State of California* (1992) 3 Cal.4th 758)

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HOW DID WE GET HERE? *ARDON*

- *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241
 - Held: Class refunds available in challenge to Los Angeles's collection of telephone users' tax
 - Class refunds prohibited only "where the Legislature has explicitly set forth procedures for obtaining ... refunds and ... refused to authorize class claims under those procedures." (*Id.* at p. 249)
 - Where no statutory refund exhaustion requirements, Gov. Code, § 910 allows class claims (*Id.* at p. 251)

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HOW DID WE GET HERE? *MCWILLIAMS*

- *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613
 - Filed by same firm that filed *Ardon* on same grounds
 - Held: Long Beach's municipal code provision barring class claims not a "statute" prescribing procedures for refunds under Gov. Code, § 905, and thus did not bar class refunds (*Id.* at p. 621)
 - Cities left to mercy of Legislature to amend Government Claims Act and allow local measures to bar class actions

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WHAT HAVE WE LEARNED?

Class action bar now interested in municipal revenues

- Writ cases have become class actions
- Opponents are more often class action firms, not Howard Jarvis and taxpayer groups

Class counsel often unfamiliar with municipal law

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WHAT HAVE WE LEARNED?

Opposing counsel pushing back against procedural limitations

- Refuse to litigate on administrative records
- Push for discovery-heavy litigation

Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559 under attack

- Limits evidence to that available to agency when it set rates
- Requires challengers to present evidence at time of decision
- Streamlines challenges to revenue measures in writ proceedings

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12

WHAT HAVE WE LEARNED?

Class counsel may not need to exhaust administrative remedies

- *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372
- *Malott v. Summerland Sanitary District* (2020) 55 Cal.App.5th 1102, review den. Feb. 10, 2021
- *Hill RHF Housing Partners v. City of Los Angeles* (2020) 51 Cal.App.5th 621, review granted Sept. 16, 2020
- **RESULT:** Cities set rates and fees only to have them challenged later on arguments they did not and could not have considered

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WHAT HAVE WE LEARNED?

Oposing counsel are motivated by attorney fees

- Writ cases: Fees limited to lodestar and “multiplier” under Code Civ. Proc., § 1021.5

Class counsel will seek fees from “common fund” rather than by lodestar

- Class counsel often request one-third (or more) of “common fund”
- *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480 – courts should cross-check percentage awards with lodestar

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WHAT HAVE WE LEARNED?

Legislature reluctant to help

- 2020: Gov. Code, § 53750.5 says providing water to fire hydrants a “property related service”
- Sen. Bill No. 323 (2021-2022 Reg. Sess.)

Proposition 218 Omnibus Implementation Act (Gov. Code, § 53750 et seq.) offers some relief

- Gov. Code, § 53758 – “specific benefit” and “specific government service” in Prop. 26 defined

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WHAT CAN WE DO ABOUT IT?

- **Prevent challenges to revenue sources**
 - Get lawyers involved early in rate-making
 - Retain consultants on work product basis
 - Stay on top of new developments

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WHAT CAN WE DO ABOUT IT?

- **Consider challenging use of class action mechanism**
 - Is there a well-defined community of interest represented by an adequate class action plaintiff?
 - Are there substantial benefits to proceeding by a class action rather than a writ action?
- **Consider stipulating to class certification**
- **Consider stipulating to writ action with class-wide relief**
 - Code Civ. Proc., § 1095

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WHAT CAN WE DO ABOUT IT?

- **Raise standing defenses, if available**
 - *County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354
- **Raise short statutes of limitation, if available**
 - Municipal electric rates: 120 days (Pub. Util. Code, § 10004.5; *Webb v. City of Riverside* (2018) 23 Cal.App.5th 244, 255)
 - Municipal assessments: 30 days (Sts. & Hy. Code, § 10400)
 - BID assessments: 30 days (Sts. & Hy. Code, § 36633)

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WHAT CAN WE DO ABOUT IT?

- **Settle, if you can**
- **Adopt a new rate to cut off liability**
 - Liability continues to accrue until levy replaced (*Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809, 825)
 - Stipulate to toll challenge to new rates, if necessary

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WHERE ARE WE HEADED?

Class action bar will continue to learn

- Several firms very active in marketplace; more are likely to explore it
- Most firms have more class action experience than municipal revenue experience

Class action bar will continue to collaborate to share risk and pursue windfalls

- Three, four, five or more firms collaborate to file class actions
- Will claim common fund fee awards supported by bloated lodestars and above-market rates

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WHERE ARE WE HEADED?

Legislative assistance will be hit and miss

- Hits: Proposition 218 Omnibus Implementation Act
- Misses: Legislative fix for *McWilliams*

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WHERE ARE WE HEADED?

Class action bar will continue to push expert involvement

- Experts may or may not testify at trial
 - *Malott, supra*, 55 Cal.App.4th at pp. 1111-1112

Class action bar will continue to seek more comfortable forums

- More discovery, experts; less record-based litigation

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WHERE ARE WE HEADED?

Class action bar will coordinate their challenges and focus on hot issues

- Previous:
 - Utility franchise fees (*Jacks*)
 - General fund transfers (*Redding*)
 - Tiered water rates (*San Juan Capistrano*)
- Current: Funding fire hydrant water service with user rates
 - *Kessner v. City of Santa Clara* (Super Ct. Santa Clara County No. 20CV364054)

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WHERE ARE WE HEADED?

More voter appetite for approval of revenue measures?

- *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373
- *Komesar v. City of Pasadena* (Super Ct. Los Angeles County, No. BC677632)

Initiative special taxes

- Require one-half voter approval rather than two-thirds if proposed by City Council (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924)

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WHERE ARE WE HEADED?

Continuing uncertainty

- Reluctance from rate consultants
- Legislative fixes?
- Supreme Court review of *Hill RHF*, more review of substantive Prop. 218/26 cases?

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OUR RECOMMENDATIONS

- Be actively involved in ratemaking
- Evaluate cases earlier; settle or moot the losers
- Stay on top of class action developments, network with peers
- Stay in touch with Cal Cities committees (Legal Advocacy Committee, Municipal Finance Committee)

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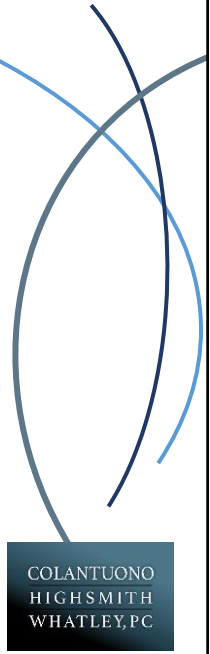
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