Emerging Trends in Class Action Challenges to Revenue Measures

Friday, May 7, 2021

Ryan Dunn, Senior Counsel, Colantuono Highsmith & Whatley

LEAGUE OF CALIFORNIA CITIES
CITY ATTORNEYS' CONFERENCE
SPRING 2021

EMERGING TRENDS IN CLASS ACTION CHALLENGES TO REVENUE MEASURES

Ryan Thomas Dunn, Senior Counsel
rdunn@chwlaw.us

COLANTUONO, HIGHSMITH & WHATLEY, PC
790 E. Colorado Blvd., Suite 850
Pasadena, CA 91101-2109
Phone: (213) 542-5700
Fax: (213) 542-5710

Consider these recent examples of class actions challenging vital public revenue streams:

- Plaintiffs challenge municipal utility rates set at amounts sufficient to fund "general fund transfers," or transfers required by local authorities (usually a City Charter) to help replace revenues other cities receive from investor-owned utilities, such as property taxes and franchise fees. Plaintiffs seek refunds of several years of alleged overpayment from these cities — claiming seven- and eight-figure annual overpayment amounts — and orders that the cities cease these transfers. (E.g., *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1 [seeking writ relief only]; *Green v. City of Palo Alto* (Super. Ct. Santa Clara County, No. 16CV300760 [seeking refunds and writ relief].)

- Plaintiffs seek refunds on behalf of a putative class of thousands who paid a $3.50 user fee each time they rented a car, which the plaintiffs alleged was actually a special tax. A trial court invalidated the fee in a previous "reverse validation" lawsuit that resulted in invalidation of the fee only; multiple sets of class counsel then filed class actions seeking refunds. (*Enterprise Rent-A-Car Co. of Los Angeles, LLC v. San Diego Unified Port District* (Super Ct. San Diego County, No. 37-2018-00028276-CU-MC-CTL [reverse validation]; *Garvin v. San Diego Unified Port District* (Super. Ct. San Diego County, No. 37-2020-00015054-CU-MC-CTL [refunds for a class].)

- Plaintiffs challenge a "franchise surcharge" an investor-owned power utility collects on its bills and remits to a charter city. The charter city charges a franchise fee higher than any of its neighbors and all other cities in the utility's service area, but it is authorized to do so under State law. Plaintiffs claim entitlement to annual refunds of approximately $700,000, which continue to accrue each year until the dispute is finally resolved. (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 (Super Ct. Santa Barbara County, No. 1383959).)

- One class action attorney sues over 80 municipal water utilities from around the State in one lawsuit. He alleges a defendant class of these water agencies and all others in the State which are similarly situated, claiming they all set water rates in violation of Proposition 218. His complaint does not identify specific facts, but he seeks refunds on behalf of plaintiffs representing classes of each defendant's customers. Some of the defendant agencies set rates four or five years before class counsel sued; some have successfully defended the challenged rates in other class actions. Class counsel raised no objection to

any defendant's rates during their rate-setting processes. (*Kessner v. City of Santa Clara* (Super Ct. Santa Clara County, No. 20CV364054).)

This paper will address how we arrived here, where cities and other public agencies now face myriad class action challenges to vital funding streams from fee-seeking class counsel more accustomed to suing large corporations in consumer class actions, what we have learned from the initial set of class action challenges filed after *Ardon v. City of Los Angeles* and *McWilliams v. City of Long Beach*, and where class action challenges to revenue measures may be headed.[1]

PART I: HOW DID WE GET HERE?

A. 13, 62, 218, 26, Hike!

Before the adoption of Proposition 13 in 1978, taxes and other municipal revenue sources, such as assessments, were governed by authorizing statutes and cases construing them in light of the broad fiscal management and taxing powers our Constitution affords local agencies. (E.g., *Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832, 839–840.) Laws governing municipal levies and judicial decisions interpreting them reflected two fundamental principles: (1) levying assessments and taxes were understood to be primarily legislative choices voters could correct by voting for different legislators; and (2) the Constitution's commitment to separation of powers allowed judicial review only for fundamental fairness or abuse of discretion. (*Maxwell v. City of Santa Rosa* (1959) 53 Cal.2d 274, 277–278.)

As stagflation took hold in the 1970s and assessed property values skyrocketed, Howard Jarvis and Paul Gann led a backlash to the increasing burden of property taxes and proposed Proposition 13 in 1978 to limit the ad valorem property tax to 1 percent of assessed value. (Cal. Const., art. XIII A, § 1.) Proposition 13 also required two-thirds voter approval for "special taxes" (*id*. at § 4), an undefined term the Legislature later defined in the negative to exclude fees which "do not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes" (Gov. Code, § 50076).

Proposition 62 followed eight years later, requiring voter approval of general taxes in general law cities and counties. (Gov. Code, § 53720 et seq.) The Court of Appeal initially invalidated Proposition 62 as requiring illegal referenda on taxes (*City of Woodlake v. Logan* (1991) 230 Cal.App.3d 1058, 1064–1069); the Supreme Court belatedly upheld it in *Santa Clara County Local Transportation Authority v. Guardino* (1995)

[1] I am grateful for Michael Colantuono's comments on an initial outline of this paper.

11 Cal.4th 220, 229, which undermined a half-percent County sales tax intended to fund transportation projects. It was ultimately found to not apply to charter cities (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 48–49), a point *Guardino* did not reach, but plaintiffs still cite its dollar-for-dollar offset of property tax revenues as a remedy for over-collection of taxes (Gov. Code, § 53728), but which has not, to our knowledge, ever been awarded.

Eighteen years after Proposition 13, and in response to the flaws courts identified in Proposition 62, the Howard Jarvis Taxpayers Association proposed, and voters approved, Proposition 218, adding two new articles to our Constitution to impose additional restrictions on taxes, assessments, and "property related fees." (Cal. Const., arts. XIII C, XIII D.) The Constitution now holds new local general taxes require majority vote and special taxes intended for a specific purpose require a two-thirds vote. (Cal. Const., art. XIII C, § 2, subds. (b) & (d).) Assessments and property related fees, too, must be either approved by a majority of those who would pay them (Cal. Const., art. XIII D, §§ 4 [assessments]; 6, subd. (c) [some property related fees]) or noticed for their objection (*id*. at § 6, subd. (a) [sewer, water, refuse collection fees]). Proposition 218 transfers certain burdens of persuasion to public agencies, too, a drastic change from courts' hands-off approach to evaluating revenue measures. Local governments must now prove challenged assessments benefit those who pay them and are assessed proportionally (Cal. Const., art. XIII D, § 4, subd. (f)) and that "property related fees" comply with article XIII D, section 6.

Proposition 26 (Cal. Const., art. XIII C, § 1, subd. (e)) followed in 2010, defining "tax" in the negative to exclude seven categories of revenue sources and extending local governments' burden to show challenged levies are not taxes (*id*. at last unnumbered para.). Implementing legislation also requires public agencies to show that levies are reasonably allocated among payors. (Gov. Code, § 53578, subd. (c).) Now, under Proposition 26, "any levy, charge, or exaction of any kind imposed by a local government" is a tax requiring voter approval (Cal. Const., art. XIII C, § 1, subd. (e)) unless it falls into one of several Constitutional exceptions.

Thus, in the 43 short years since Howard Jarvis became a household name, the script has flipped. Nearly every public revenue measure is now vulnerable to challenge unless it: (1) obtains voter approval or (2) clearly falls within an obvious exception.

B. *Ardon* and *McWilliams*

Before *Ardon* and *McWilliams*, most, if not all, challenges to municipal revenue streams like taxes and assessments created little risk of backward-looking financial

exposure for three reasons: (1) some revenue streams, like local property taxes and assessments, are subject to strict administrative remedy procedures required for refunds (e.g., Rev. & Tax. Code, § 5141); (2) courts had held class actions for tax refunds were unavailable under the Government Claims Act as barred by article XIII, section 32 of our Constitution (*Woosley v. State of California* (1992) 3 Cal.4th 758, 792; *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65); and (3) some cities' municipal codes barred class action refund claims.

The Supreme Court began its reexamination of these issues in 2011 in *Ardon v. City of Los Angeles*. There, a plaintiff challenged Los Angeles's telephone users' tax ("TUT") on behalf of a class of tens of thousands of others, seeking refunds for two years of alleged overcollections of TUT (and, obviously, a handsome fee award for his counsel). ((2011) 52 Cal.4th 241, 245.) The trial court granted Los Angeles's motion to strike the class allegations, and the Court of Appeal affirmed under *Woosley*, holding each member of the class was required to exhaust his or her administrative remedies under the Government Claims Act.

In reversing the order striking *Ardon*'s class action allegations, the Supreme Court read *Woosley* narrowly, limiting its holding to the statutes at issue there and in circumstances "where the Legislature has explicitly set forth procedures for obtaining … refunds and … refused to authorize class claims under those procedures." (*Ardon*, *supra*, 52 Cal.4th at p. 249.) In situations where plaintiffs pursued refund claims not subject to statutory exhaustion requirements (primarily those applicable to certain tax refund claims), the Supreme Court held Government Code section 910 in the Government Claims Act allows class claims. (*Id*. at p. 251 [citing *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 456–457].) In rejecting Los Angeles's reliance on article XIII, section 32 of the Constitution, which prohibits injunctions on the collection of taxes, the Supreme Court found the city's fear of "a potentially huge liability in the form of a class action" did not "justify precluding legitimate class proceedings for the refund of allegedly illegal taxes[.]" (*Id*. at p. 252.)

Two years later, the Supreme Court took aim at local ordinances that prohibited class refund claims in *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613. *Ardon* suggested that the Legislature could limit the types of refunds subject to class claims in finding Government Code section 910 allowed them (*Ardon*, *supra*, 52 Cal.4th at p. 251), and the charter City of Long Beach argued that its municipal code's bar on class refund claims was also subject to judicial deference, an issue *Ardon* did not decide (*id*. at p. 246, fn. 2). But in *McWilliams*, a challenge to Long Beach's TUT filed by the same firm that challenged Los Angeles's on the same grounds in *Ardon*, the Supreme Court held Long Beach's municipal code provision barring class claims was not a "statute" prescribing

procedures for tax refunds under Government Code section 905 and thus could not bar class refund claims. (*McWilliams*, *supra*, 56 Cal.4th at p. 621.) Cities were, and are, left to the mercy of the Legislature to amend the Government Claims Act and allow local measures to bar refund class actions. (*Id*. at pp. 628–629 & fns. 6, 7 [noting ten states allow tax refund class actions and six states prohibit them].) The Legislature has not yet seen fit to do so.

PART II: WHAT HAVE WE LEARNED SINCE *ARDON* AND *MCWILLIAMS*?

Since *Ardon* and *McWilliams* opened the door to class action refund challenges to local agency levies, trends have emerged.

A. Writ Actions Become Class Actions and Draw Attention of Class Action Bar

The most obvious trend since *Ardon* and *McWilliams* is the transformation of what were once writ actions filed for one plaintiff by counsel skilled in municipal law to class action claims for classes of hundreds or thousands of plaintiffs by counsel more accustomed to pursuing consumer class actions. Our adversaries are increasingly less likely to be groups like the Howard Jarvis Taxpayers Association, which have a long history of challenging local government levies — often successfully (e.g., *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637; *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 917) — and more likely to be class counsel working on a contingency basis who are unfamiliar with municipal law fundamentals. They find cases in daily reports and legal newspapers; some have been tipped off by clients motivated more by political philosophy than the promise of a modest refund.

Litigating against class counsel unfamiliar with municipal law presents unique challenges. These opposing counsel are often educable, presenting the question of whether to litigate demurrers and other dispositive motions aggressively, which runs the risk of informing them how to amend their complaints to state viable claims. Many counties in California also lack judges dedicated to hearing writs and other complex matters, meaning counsel defending class action refund cases filed by class counsel unfamiliar with municipal law must both educate a judge unfamiliar with that law and try to avoid overeducating opposing counsel eager for a payday.

B. Plaintiff Class Action Bar Pushes Against Procedural Limitations

Plaintiffs' class action attorneys unfamiliar with the procedural limitations the municipal defense bar has relied on for decades have invited busy trial court judges who are often similarly unfamiliar with this law to reconsider these limitations. For

decades, municipal litigators have relied on *Western States Petroleum Assn. v. Superior Court*, which holds that challenges to local legislative actions such as CEQA determinations are limited to the administrative record of those actions. ((1995) 9 Cal.4th 559, 573–574.) *Western States* cites several reasons for this rule, including the need to avoid infringing on constitutional separation of powers principles and that public policy favors requiring those who would challenge local legislative actions to first allow local governments to consider objectors' arguments and reconsider their actions or tailor their findings accordingly. (*Id*. at p. 578.)

Hundreds of published appellate decisions have cited *Western States* in the 26 years since it was decided and its effect is at least threefold: (1) it limits evidence available to challenge revenue measures to that before the agency when it took the action; (2) it requires challenging parties to present contrary evidence at the time of the local government's legislative decision they would challenge; and (3) it streamlines litigation challenging local government's legislative acts into writ procedures, which limits expenses for all concerned and expedites a final decision. Class counsel more familiar with consumer class actions, who are unfamiliar with *Western States* and unaccustomed to allowing their adversaries a chance to remedy the deficiencies they later hope to litigate, have pushed back against *Western States*' limitations with some success. (E.g., *Malott v. Summerland Sanitary District* (2020) 55 Cal.App.5th 1102, 1111, rev. denied Feb. 10, 2021 [finding error in trial court's refusal to admit expert declaration prepared after rate-setting without discussing or distinguishing *Western States*].) Should this trend continue, what were once writ cases governed by streamlined procedures and a limited evidentiary record will become actions subject to full discovery, with depositions of local government officials and the full gamut of expert discovery more typical of other civil cases.

The Supreme Court has suggested that the principle of exhaustion of administrative remedies familiar to all municipal litigators might also have limited application in challenges to local government revenue measures. Several authorities require those challenging local government levies to exhaust their administrative remedies, whether by presenting challenges to the decision-maker before the decision is made through statutory procedures (e.g., *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, 732–734) or participating in local government hearings (*Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist*. (2001) 87 Cal.App.4th 878, 883–884).

In *Plantier v. Ramona Municipal Water Dist*., an owner of commercial property sued on behalf of a putative class to set aside a wastewater service charge alleged to violate Proposition 218. ((2019) 7 Cal.5th 372.) The class sought to challenge the method by which the local government agency allocated the fee — how many sewer servicing

units, or "Equivalent Dwelling Units," each commercial property was allocated — **not** the amount of the per-EDU fee. (*Id*. at pp. 376–377.) The Supreme Court held the putative class representative was not required to participate in the Proposition 218 hearings related to the new fee structure, as the fee hearings were not intended to address the wastewater district's EDU-allocation method. (*Id*. at pp. 384–385.) Class counsel now cite *Plantier* to argue that because the Proposition 218 administrative remedy identified in that case — a hearing on the amount of new rates, not the basis for allocating EDUs — was found insufficient, no hearing on rates could ever be an effective administrative remedy. As *Plantier* did not address this issue, we anticipate future litigation to address whether, and to what extent, the hearings Proposition 218 requires provide an administrative remedy class counsel must exhaust before suing. Class counsel usually, if not always, sue on a contingency basis, and thus the reasons for their reticence in informing their adversaries of issues they might later sue upon should be obvious.

On the other hand, the Court of Appeal has held that — at least in the Proposition 218 assessment context (Cal. Const., art. XIII D, § 4) — assessment challengers must present their substantive challenges to assessments before suing. In *Hill RHF Housing Partners, L.P. v. City of Los Angeles*, the owners of senior housing facilities located within the boundaries of business improvement districts, or BIDs, sued to challenge the BIDs' reformation, claiming they received no benefit from the BID. ((2020) 51 Cal.App.5th 621.) These owners did not participate in the BID formation proceedings other than voting against their formation; the *Hill RHF* court found this simple act of voting insufficient, as it did not allow the administrative body proposing the BID to respond to the objector's criticisms. (*Id*. at pp. 633–634.) Although *Hill RHF* may be limited by its facts to the BID assessment context, the same principles underlying that decision are applicable in other municipal revenue contexts and should require municipal revenue challengers to identify and exhaust their arguments before suing. The Supreme Court granted review of *Hill RHF* in September 2020, and we expect clarification on whether, and to what extent, class counsel must identify their challenges to municipal revenues before they are levied.

C. Class Counsel Seek Eye-Popping Common-Fund Fee Awards

Before *Ardon* and *McWilliams*, counsel successfully challenging local government levies in writ actions often claimed attorney fees under Code of Civil Procedure section 1021.5. Section 1021.5 allows courts to grant fees to counsel litigating cases which have "resulted in the enforcement of an important right affecting the public interest" if certain criteria are met, with those fee awards based on a "lodestar" amount of a reasonable number of hours to litigate the case and a reasonable hourly rate. (*Graham v.*

DaimlerChrysler Corp. (2004) 34 Cal.4th 553, 579.) Courts sometimes increase this lodestar in section 1021.5 cases by a multiplier to account for certain factors, such as counsel working on a contingency basis and employing great skill. (*Id*. at pp. 581–582.)

Class actions, by contrast, present opportunities for a much greater windfall for plaintiffs' counsel challenging revenue measures, as courts allow fee awards to be calculated as a percentage of the "common fund" awarded to the class. The Supreme Court authorized such awards in *Laffitte v. Robert Half Internat. Inc*., but also strongly suggested that courts should compare a percentage award to the lodestar to avoid windfalls to class counsel. ((2016) 1 Cal.5th 480, 503, 505.) In *Laffitte*, the Supreme Court upheld a class counsel fee award of one-third of a common fund — in a case involving extensive discovery — and thus class counsel often seek awards of one-third of a common fund. The fee award of one-third of the common fund in *Laffitte* resulted in a "multiplier" of about two times a reasonable lodestar, and little, if any, authority supports a multiplier much higher than that except in the most exceptional cases. (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 255, disapproved on other grounds in *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 269 [claiming "[m]ultipliers can range from 2 to 4 of even higher"].)[2]

Large class counsel fee awards paid from common funds do not increase a public entity's exposure, and thus public entities may not be particularly motivated to oppose them. (*Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 263 [city lacks standing to appeal common-fund fee award].) On the other hand, public entities also bear at least some responsibility for representing their constituents — even when those constituents sue them — and ensuring that more of a class action award ends up in the hands of those constituents and not class counsel.[3]

---

[2] It bears noting that the two cases *Wershba* cites for these multipliers involve unique facts showing why counsel were entitled to several times what a paying customer might have paid. The first, a 1977 Court of Appeal decision, awarded a multiplier of 2.04 after "extensive discovery and following a ten-day trial" for a case that invalidated an amendment to Los Angeles County's General Plan which would have redesignated 178 square miles. (*Coalition for L. County Planning etc. Interest v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 244–245, 251.) The second is a 1974 federal antitrust case from the Northern District of Illinois awarding a multiple of 4 for settlement of "one of the most significant pieces of litigation pending in the Northern District of Illinois, if not the United States." (*Arenson v. Board of Trade of City of Chicago* (N.D. Ill. 1974) 372 F.Supp. 1349, 1352.)

[3] In one particularly egregious fee motion still pending as this paper is published, class counsel sought fees of one-third of a $12.6 million refund award against a public entity, or approximately $4.2 million, in a case involving no pre-trial law and motion proceedings and a stipulation to class certification where class counsel lost on a significant portion of their claims, obtaining nothing for the class on those claims. Class counsel nevertheless claimed over 1,000 hours of work on the case, and their fee request calculated

D. The Legislature Offers Limited Help

The Legislature has offered local governments some help in responding to the double whammy of Propositions 218 and 26's burden-shifting and increased exposure from the class actions authorized by *Ardon* and *McWilliams*. It adopted the Proposition 218 Omnibus Implementation Act in 1997, the year after voters adopted Proposition 218, and steadily amended it to clarify, and in some cases limit, public agencies' burdens under Propositions 218 and 26. (Gov. Code, § 53750 et seq.; *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 762–763 [applying Implementation Act].)

Soon after voters adopted Proposition 26 in 2010, the Legislature added Government Code section 53758 to define the terms "specific benefit" and "specific government service," which Proposition 26's drafters did not define in identifying express exceptions to the definition of "tax." (Cal. Const., art. XIII C, § 1, subds. (e)(1) & (e)(2).) The Implementation Act's definitions of these terms state that assessments and other charges that "incidentally" create "indirect" effects on others at no additional cost to those paying these charges do not become taxes for that reason. No published appellate authority has yet applied or discussed this section, but it limits public entities' potential exposure to claims that certain levies broadly benefit the general public and thus must be considered taxes — and refunded — for that reason. Many agencies have avoided assessment financing due to the uncertainty of how to satisfy the proportionality and benefit requirements of Proposition 218, and thus agencies may look to the Legislature to reinvigorate this tool by protecting it from challenges by fee-seeking class counsel.

In 2020, the Legislature adopted Government Code section 53750.5, stating that water providers may include the costs of providing water to fire hydrants in their water rates, finding this service to be part of the "property related service" defined in article XIII D, section 2, subdivision (h). Because this water service is a "property related service" identified in article XIII D, section 6, it is not a "general government service … available to the public at large" identified in the same section, which property related fees cannot fund. Class counsel pursuing a class action in Santa Clara County against more than 80 public entity defendants statewide has argued that water agencies may not include the costs of servicing hydrants in water rates because it provides a benefit to the general public. (*Kessner v. City of Santa Clara*, *supra*.) The parties litigating *Kessner*

---

on the percentage method amounted to nearly $4000 per hour of work and a lodestar multiplier of almost five.

will likely litigate whether Government Code section 53750.5 bars this claim if the case proceeds to the merits.

PART III: WHAT CAN WE DO ABOUT IT?

As we have defended class action challenges to public entities' revenue measures, we have identified several strategies to consider.

A. Bulletproof the Challenged Revenue Source

The best (and most obvious) strategy in defending class action challenges to revenue measures is to prevent them from happening in the first place. Preventing class action challenges might require counsel experienced in class actions and Proposition 218 and 26 cases to identify potential vulnerabilities in new levies and, as all good municipal lawyers already know, staying on top of new developments. It may also involve hiring a rate-making consultant on a work product basis, which protects the consultant's communications with your client pertaining to rates that might be challenged and allows honest critiques of initial rate proposals. Class counsel aware of the current uncertainties regarding whether and to what extent they must create a record of their challenges before the public entity adopts a levy will often give at least boilerplate notice of an impending challenge; coordinating with experienced defense counsel upon receipt of such a letter and before adopting rates that might be challenged in court may be critical to later success.

B. Consider Challenging Use of the Class Action Mechanism

While *Ardon* and *McWilliams* authorized use of the class action aggregate litigation tool, they do not hold that every challenge to a local government measure may or must be certified as a class action. Class action challenges to local government measures must meet the same requirements as any other class action, meaning plaintiffs seeking to certify a class must establish three elements: (1) an ascertainable and sufficiently numerous class; (2) a well-defined community of interest; and (3) substantial benefits from class certification that render proceeding as a class superior to the alternatives. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.)

Challenges to fees or other levies a public entity collects from many people, such as utility rates, will nearly always meet the first element. On first glance, the second element, too, may seem a poor choice to challenge in opposing a class certification motion, but in certain cases, public entities may argue there is no common question of law or fact among all members of the class and class counsel's representative lacks

claims typical of the class and cannot adequately represent them. (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) Class counsel must identify a class representative with claims typical of the class and not, for example, a very large water user who pays much more than a typical residential customer. Class counsel must also be careful to tailor their class definitions; they cannot, for example, claim a class of all utility customers if they argue one group of customers pay too much and subsidize rates others pay. (E.g., *Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 475–476 [noting possibility of conflict of interest among class members].)

The third element of the class certification test, too, presents opportunities for challenge. Class counsel must show that proceeding by class action is superior to all alternatives, but Code of Civil Procedure section 1095 allows courts to award monetary damages and other relief in writ of mandate actions. We have had some success arguing that writ proceedings — to which public entities are subject but which many defendants against whom class counsel litigate are not — may offer the same class-wide relief class counsel may obtain in a certified class action. Litigating facial challenges to legislation as writ proceedings instead of class actions presents some procedural advantages and potential cost savings, but defense counsel will likely be asked to stipulate that any relief awarded in a writ proceeding would flow to the same plaintiffs that would have been part of a certified class when proposing to proceed by writ action.

Where all elements of the class certification test are present, public entities may wish to stipulate to class certification. Doing so avoids the financial and political costs of challenging certification and allows the parties to proceed to determination of the merits more quickly. Counsel defending public entities in class actions may attain the same result by stipulating with class counsel to decide the merits first and delay a class certification determination until after the merits are decided. It is a defendant's right to have a class certified before the merits are decided, and a defendant may waive that right and have the merits tried first. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1083; see *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 256 [putative class action resolved on dispositive motions before class certification].) Where a cutting-edge legal or factual question is present, or where a public entity client hopes to avoid the political costs of giving notice of a class certification motion to constituents, the entity may seek to try the merits issues first. Class counsel, too, may agree to this sequence, by which they might defer the costs and hassles of notifying a class that might number in the thousands before a court determines whether they have a good case.

C. Pursue Other Defenses

Public entities facing challenges to public revenues may pursue any number of other defenses unrelated to the merits of the underlying charge. In *Jacks v. City of Santa Barbara*, the city raised standing as a defense, as it was Southern California Edison that received the challenged fee from members of the putative class, not the city, but the Supreme Court addressed the merits, creating a new test applicable to challenges to franchise fees under Proposition 218. ((2017) 3 Cal.5th 248, 271.) Defense counsel found more success raising standing in *County Inmate Telephone Service Cases*, where a putative class of county inmates challenged fees private telecommunications companies charged them for phone calls under Proposition 26, arguing the fees counties charged these companies, which the companies passed through to customers, amounted to taxes because they exceeded the reasonable cost of the phone calls. ((2020) 48 Cal.App.5th 354.) Because the telephone companies, and not a public agency, received the fees, the plaintiffs lacked standing. (*Id*. at p. 361; see also *Jacks*, *supra*, 3 Cal.5th at p. 271 ["Valid fees do not become taxes simply because their cost is passed on to the ratepayers."].)

Many short statutes of limitations trip up class counsel unfamiliar with litigating against public entities. The statute of limitations to challenge power rates charged by municipal utilities is 120 days after the "effective date" of those rates under Public Utilities Code section 10004.5. (*Webb v. City of Riverside* (2018) 23 Cal.App.5th 244, 255.)[4] Municipal assessments under the Municipal Improvement Act of 1913 are subject to a 30-day statute triggered by levy, not collection, of the assesesment. (Sts. & Hy. Code, § 10400.) Many business improvement district assessments, too, must be raised within 30 days of the resolution levying the assessment. (Sts. & Hy. Code, § 36633.) The validation statutes (Code Civ. Proc., § 870 et seq.) apply to challenges to certain public revenue streams, and there remains an open question whether charter cities may require their use by those who would challenge certain levies (*Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 373–374 [affirming dismissal of putative class action on demurrer based on 30-day statute in charter city ordinance]).

D. Negotiate a Favorable Settlement or Cut Off Liability

When a public entity is confident the levy class counsel is challenging may not meet the relevant legal standard, or where a client is uncomfortable with the possibility of a large judgment against it, as in any other litigation, the proper course of action is to negotiate a settlement. In class actions, this will mean a joint motion to certify a settlement class and giving notice to the class to allow those who want to opt out of the

[4] The State Legislature is considering a similar statute that would apply to challenges to water rates, which have been the target of class actions around the state. (Sen. Bill No. 323 (2021–2022 Reg. Sess.).)

judgment to do so. (Cal. Rules of Court, rule 3.769; *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 266–267.)

Even in public revenue class actions that proceed to trial, the best course of action in many of them is to limit potential exposure by adopting a new measure to replace the measure being challenged or re-adopt the existing measure on a more complete and defensible record. Class claims under the Government Claims Act will continue to accrue unless and until the public agency withdraws the challenged rate. (See *Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809, 825.) By adopting a replacement rate or re-adopting the challenged levy on a new record, public agencies can stop accrual of damages in the current case while the merits of the levy are determined by the trial court (and, in many cases, an appellate court), a process which may take several years. Public agencies may stipulate with class counsel to toll any challenge to the new or re-adopted rate until the existing litigation is resolved.

PART IV: WHERE ARE WE HEADED?

We can observe some trends in class action challenges to local government revenue measures, but it is more difficult to predict where we may be headed. Below are some educated projections based on the last decade of class action challenges since *Ardon*.

Prediction 1: The class action bar will develop and continue to collaborate to share the risk of unsuccessful contingency cases and pursue windfalls when they are successful. There are a handful of firms that have developed an expertise in challenging local government revenue measures as class actions, and to date they have maintained a low profile, gaining expertise from their unsuccessful challenges and developing best practices they have recently employed successfully in litigating these issues around the State. We have observed a growing number of class action firms more accustomed to litigating other types of cases — food labeling, securities, and so forth — entering this space and teaming up to share the risk of unsuccessful challenges. It is not uncommon for four or more firms to team up in one class action to challenge one agency's rates, whether as educational endeavors for their attorneys or to lard the support for their inevitable fee demand if they are successful. These firms often do not employ associates or paralegals and instead seek hourly rates of $1000 or more — even before lodestar multipliers — for all attorney work on a case.

Prediction 2: Legislative assistance will be hit and miss. While the Legislature has extended some relief to public agencies in adding clarifications in the Proposition 218 Omnibus Implementation Act, such relief is hard-fought and often unavailable

given the plaintiff class action bar's access to the Assembly and Senate Judiciary Committees. We expect further legislative help to come in fits and starts, if at all, and it will likely require extensive lobbying and well-documented overreach by the plaintiff class action bar. The 80-defendant water rate class action pending in Santa Clara Superior presents such an opportunity, as some of the rates at issue there were set three or four years before plaintiffs' counsel sued. (*Kessner v. City of Santa Clara*, *supra*.)

Prediction 3: The plaintiffs' class action bar will continue to develop experts adept in identifying weaknesses in rate studies and other documents supporting revenue measures. As part of their education in municipal rate-making, the class action bar has employed experts and others with expertise in reviewing voluminous rate studies and other supporting documents to identify flaws in these studies. These plaintiffs then offer reports by these experts at trial, or, in record cases, identify deficiencies in these records to exploit. Unfortunately, published authority from the Court of Appeal might be read to authorize the submission of expert reports at trial of a challenge to a municipal revenue source. (*Malott*, *supra*, 55 Cal.App.5th at pp. 1111–1112.) This published authority leaves a public entity facing a similar challenge with the Hobson's choice of standing on the record it created to support the challenged rate or offering new expert opinions to rebut a plaintiff's showing, potentially waiving its argument under *Western States* that trial evidence should be limited to that which was available to it when it set the challenged rate.

Prediction 4: The plaintiffs' class action bar will coordinate challenges to public revenue measures on similar topics, whether formally or informally. Many charter cities faced lawsuits challenging their practices of transferring funds from their utilities to their general funds in the wake of the Court of Appeal's decision in *Citizens for Fair REU Rates v. City of Redding*, which invalidated the procedure over a strong dissent (and which the Supreme Court later reversed [(2018) 6 Cal.5th 1]). These challenges were all filed by the same law firm, which then began filing class action challenges to rates incorporating these "general fund transfers," associating a firm with more class action experience. We expect more coordination of this type as the plaintiffs' public revenue class action bar continues to develop expertise in this area.

The plaintiffs' class action bar is not without its turf wars, however. As noted throughout this paper, one small firm in the Bay Area, which gained notoriety in challenging how dozens of school districts scheduled physical education classes, filed a putative class action in February 2020 against more than 80 public entity water retailers, alleging in vague terms that the rate-setting practices of these water agencies violate Proposition 218. (*Kessner et al. v. City of Santa Clara et al.*, *supra*.) When some defendants argued that they were facing, or had already faced, class actions challenging these rates,

putative class counsel sought to coordinate these other actions so that he could control them all. (*Water Rate Cases*, JCCP No. 5103.) Plaintiffs' counsel in these other class actions were understandably displeased by the *Kessner* class counsel's attempt to hijack their cases, but this sequence underscores the competition among the class action bar and the creativity they will likely continue to employ in search of a large fee award.

Prediction 5: More voter appetite for approval of revenue measures. To date, many municipal lawyers' focus has been on avoiding the need to go to voters to approve revenue measures and structuring their proposed revenue measures accordingly. That calculus may be changing, as the decades of increasing difficulties raising public revenues since Proposition 13 has resulted in massive structural deficits for some public agencies, which voters are beginning to notice. In Sacramento, voters approved its municipal utilities' practice of transferring 11 percent of utility revenues to its general fund in 1998, soon after Proposition 218. The Court of Appeal upheld this practice against a Proposition 218 challenge filed two decades later. (*Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373, petn. for review pending.)[5] In Riverside, more than two-thirds of voters approved a similar general fund transfer from its water utility to its general fund in 2013 to end litigation challenging that transfer. A Los Angeles County judge found Pasadena's ballot question authorizing its general fund transfer practices, which was also intended to retroactively validate previous transfers, entitled it to summary judgment on a Proposition 26 challenge to electric rates which included amounts to fund those transfers. (*Komesar v. City of Pasadena* (Super Ct. Los Angeles County, No. BC677632.)

Elections consultants advising public agencies looking to increase revenues now advise that such ballot questions may be successful if they are linked to important public services and timed to reach voters most likely to approve them. Several Court of Appeal decisions have affirmed initiative special taxes approved by a bare majority of voters, as authorized by *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924; the Supreme Court has denied review in all these cases, suggesting that voters may safely propose and approve special taxes through the initiative process that public entities may not. (E.g., *City of Fresno v. Fresno Building Healthy Communities* (2021) 59 Cal.App.5th 220; *City and County of San Francisco v. All Persons Interested in Matter of Proposition C* (2020) 51 Cal.App.5th 703.)

[5] *Wyatt* is a writ case, but the same counsel representing the writ petitioner there also filed a class action on the same theory and are frequent challengers to municipal revenues. It bears noting that counsel for the *Wyatt* petitioner has petitioned for Supreme Court review and also requested *Wyatt*'s depublication. While the *Wyatt* petition for review was filed for the *Wyatt* petitioner, the request for depublication was filed on counsel's behalf, not their client's.

Prediction 6: The uncertainty will continue. As our courts and Legislature continue to grapple with the fallout from the taxpayer revolution Howard Jarvis started — and as public agencies continue to grapple with how to plug holes in their budgets — the next decade will likely be as eventful as the decade since *Ardon* has been. The work of utility rate consultants is under increasing scrutiny, and some have suggested they may stop pursuing rate study work to avoid the hassles of litigation. The Supreme Court may address whether, and to what extent, plaintiffs must exhaust their administrative remedies before suing to obtain millions in refunds for large classes of plaintiffs, as in *Hill RHF*. To date, the Supreme Court has taken a hands-off approach on whether *Western States* still limits facial challenges to legislative acts like rate-setting to the administrative record of those acts, but the consequences of chipping away at *Western States* are dire. If courts continue to second-guess legislative acts under the guise of applying the "independent judgment" Proposition 218 requires (*Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 449–450), fights over municipal revenues will look less like the streamlined writ challenges of decades past and more like typical civil cases with extensive written discovery, competing experts, and much higher budgets than public entities are used to seeing from litigators.

To protect our clients and guide the law in a favorable direction, we recommend doing several things:

- **Be actively involved in ratemaking**. The plaintiffs' class action bar is watching our every move, and they know they will be handsomely rewarded if they identify a revenue source that does not meet all of the myriad requirements we must satisfy. This means decision-makers should get attorneys involved in the rate-setting process early and heed their advice as the process progresses.

- **Evaluate cases earlier and settle or moot the losers**. Given the consequences of a judgment requiring refunds of revenues collected from thousands of people over several years, the need to evaluate cases early and settle them if necessary should be obvious.

- **Stay on top of class action developments and network with peers facing similar challenges**. Many of our clients share rate consultants and rate-setting practices, and many are challenged by the same opposing counsel.

Networking with each other to identify best practices and informing others of new challenges by the plaintiffs' bar will benefit all of us.

- **Stay in touch with Cal Cities' Municipal Finance and Legal Advocacy Committees so every case which might make law has free and able amicus support**. Tell your regional Legal Advocacy Committee representative and Cal Cities staff about cases where Cal Cities could make a difference by contributing amicus support, including those not defended by attorneys active in the public law community.