Covalt and Progeny

Covalt

Twenty-two years after the *Waters* case was decided, the California Supreme Court issued its decision in *San Diego Gas & Electric Company v. Superior Court (Martin Covalt, Real Party In Interest),* 13 Cal. 4th 893, 55 Cal. Rptr. 2d 724 (1996). *Covalt* barred a suit against an electric utility in which the plaintiffs claimed to have suffered personal injuries and property damage from electromagnetic radiation from the utility's power lines.

The Court looked first to find some Commission activity with which the suit might "interfere." It found that notwithstanding the Commission's finding that a significant uncertainty existed as to whether electromagnetic fields (EMFs) caused harm, the Commission *had adopted a policy* on electromagnetic fields arising from the operations of electric utilities; the Court noted that the Commission had stated a continuing interest in the subject and directed utilities to implement "low cost EMF mitigation measures" in new projects. The Court determined that the suit in Superior Court, if pursued, would interfere with the Commission in its exercise of an ongoing and continuing supervisory and regulatory policy regarding EMFs. While Justice Mosk's opinion is lengthy, subsequent decisions have described the *Covalt* analysis as embracing a three part test stated as follows:

"(1) Whether the PUC *had authority* to adopt a regulatory policy on whether EMFs are a public health risk and what steps the utility should take, if any, to minimize the risks;

(2) Whether the PUC *had exercised that authority;* and

(3) Whether the Superior Court action *would hinder or interfere with the PUC's exercise of regulatory authority* with respect to EMFs." (Emphasis supplied.)

Due to the broad sweep of the Commission's authority, part (1) of the test is typically not an issue in 1759 cases[53] and most turn on part (3) (as set forth later in this analysis). Part (2) however, cannot be ignored; the actual "exercise of ongoing PUC authority" is a clear predicate.

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[53]There are, of course, exceptions. In *Stepak v. AT&T,* 186 Cal. App. 3d 633 (1986), the Court of Appeal reversed the dismissal of a shareholder complaint in Superior Court. The complaint asserted that the parties to a merger approved by the Commission under Section 854 had violated their fiduciary duty to the plaintiff. The Court of Appeal held that because the Commission was not charged with protecting the rights of *minority shareholders,* "we cannot conceive of how the …award of damages…would 'hinder or frustrate' declared Commission policy." (See Para. 80 in the appellate review summary for a similar holding related to *creditors.*) (*Stepak* may explain why *Greyhound* deference (Par. 24 and Para. 68) is inappropriate with respect to Commission determinations (explicit or implicit) related to its own jurisdiction. (See Para. 23.)