Metropolitan Cases

Cadiz, Inc. v. Metropolitan **(Los Angeles County Superior Court)**

After two days (September 23 and October 7) of hearings on Metropolitan's motion for judgment on the pleadings, Judge Jane Johnson indicated that she would grant the motion. Counsel for Cadiz requested that the Court allow it leave to amend its complaint to cure the errors identified in the current pleading. The law provides that leave to amend should be liberally granted to afford plaintiffs a full opportunity to make their best case. Before ruling on this request, the Court asked for additional briefing limited to the issue of leave to amend.

The hearing on this issue was scheduled for October 30, but rescheduled by the Court to November 5. This continuance allowed Metropolitan to file a letter brief on October 31 regarding a decision by the California Supreme Court in the case of *Save Tara v. City of West Hollywood*. This new decision was issued on October 30 and holds that public agencies cannot make any binding commitment to a private developer to approve a project without first completing CEQA compliance. Metropolitan's brief argued that this decision supports its position that Metropolitan could not have made any binding commitment to Cadiz to approve its project.

On November 6 the Court issued its ruling granting Cadiz leave to amend its complaint within 20 days. In the ruling, the Court expressed doubt that Cadiz would be able to state a cause of action for a breach of fiduciary duty, but found that since Cadiz had not had a previous opportunity to re-plead this particular cause of action, leave to amend was appropriate.

After the amended complaint is filed, Metropolitan will have 30 days to file its demurrer and, with the applicable notice requirements, a hearing on the demurrer will likely occur in mid-January. (See General Counsel's April and August 2008 Monthly Activity Reports)

Alameda County Flood Control & Water Conservation District, Zone 7, et al. v. California Department of Water Resources, et al., etc. **(Sacramento Superior Court)**

This litigation involves allocation of revenues from energy generated at the Hyatt-Thermalito power facility under the State Water Contract. As reported to the Board in May, all parties filed motions for summary judgment seeking to have the case decided as a matter of law. The court denied these motions, finding that there were disputed issues of material fact that warranted trial. Accordingly, over the past six months the focus has been on completing discovery and preparing for the first phase of trial on contract interpretation. Among other things, legal staff assisted outside counsel in: (1) completing all written discovery; (2) preparing, defending and/or taking 16 additional depositions in May, June and July; (3) drafting a joint statement of undisputed facts; (4) preparing lists of trial witnesses, exhibits and demonstratives; and (5) drafting Intervenors' 50-page Opening Trial Brief, which summarizes our case in chief.

In addition, legal staff assisted outside counsel in preparing or responding to four separate motions aimed at limiting the presentation of certain evidence at trial. All of these motions were decided favorably to Intervenors. In particular, we were successful in our motion to exclude the Plaintiffs' proposed use of expert testimony at this phase of the litigation. The court agreed that it was not relevant or appropriate for an economics expert to opine on the meaning of certain terms in the contract, such as the term "revenues." Likewise, we defeated the Plaintiffs' motion that sought to exclude all post-1983 evidence of the parties' conduct. The Plaintiffs had argued that as of 1983 a "dispute" has arisen and, therefore, evidence of the parties' conduct was not probative in determining how the parties construed the terms of the contract. Siding with us, the court ruled that this evidence was relevant and admissible. This represented a significant win, since an unfavorable ruling would have seriously undermined our case.

Finally, legal staff assisted outside counsel in preparing Intervenors' Opening Statement and the accompanying PowerPoint presentation, which is anticipated to take 2 to 3 hours to present. Likewise, legal staff and our outside counsel spent several days with DWR's counsel and the Attorney General reviewing and editing DWR's opening presentation. Legal staff also assisted outside counsel, DWR and the Attorney General in preparing 14 witnesses that will appear live at trial. Of those witnesses, 3 will be called by the Attorney General as part of DWR's case in chief and 11 will be called by the Intervenors as part of its case in chief.

Trial began on November 5 and is expected to last for 12-15 court days. The parties have the option of submitting post-trial briefs within 60 days after completion of trial. In light of this, a final decision on this first phase of the litigation is not anticipated until February or March, at the earliest. (See General Counsel's March 2008 Monthly Activity Report and October 9, 2007 Board Letter 8-8)

Metropolitan v. Inland Empire Utilities Agency, et al. **(San Bernardino Superior Court)**

This property damage (inverse condemnation/ trespass) action was filed by Metropolitan on January 30, 2008 against Inland Empire Utilities Agency, Boyle Engineering Corporation, Converse Consultants Inc. and Layne Christensen Company to recover damages to Metropolitan's Rialto Feeder. This matter has been settled for $1,000 within the General Manager's settlement authority pursuant to MWD's Administrative Code § 6433(a).

Metropolitan's Rialto Pipeline is approximately 120-inch inside-diameter, 10.5-inch thick pre-stressed concrete cylinder pipe, a portion of which is located in the City of Rancho Cucamonga in San Bernardino County. On February 7, 2007, an electromagnetic inspection identified a significant number of broken steel wires. To prevent further damage or catastrophic failure, Metropolitan determined that the pipe segment needed to be replaced. During April 2007, Metropolitan used a contractor to complete the repairs at a cost of approximately $1.2 million.

During the repairs, Metropolitan conducted an investigation to determine the cause of the damage. Records indicated that defendant Converse Consultants, via its subcontractor Layne Christensen, conducted borings in the area where the Rialto Pipeline was damaged in December 2004. Further research revealed that IEUA contracted with defendant Boyle Engineering for a study of a work of public improvement. Boyle Engineering contracted with Converse Consultants for borings as part of this study, and Converse Consultants sub-contracted this work to defendant Layne Christensen. Deposition testimony confirms that one of Layne Christensen's borings damaged Metropolitan's Rialto Pipeline.

The DigAlert statute (Gov. Code §§ 4216 – 4216.9) sets forth responsibilities for "excavators" and "operators" of subsurface facilities such as Metropolitan. According to the statute, excavators must call DigAlert and give at least two working days notice prior to excavating and delineate (outline) their job in white paint. Operators, such as Metropolitan, must mark or locate their lines within two working days of the start of construction, use the proper color code to mark their subsurface facilities, and be accurate within 24 inches either side of the buried facility (tolerance zone).

Importantly, compliance/noncompliance with these requirements impacts liability in the event damage occurs. That is, if a subsurface installation is damaged by an excavator due to failure to comply with the requirements, the excavator is liable to the operator of the subsurface installation for all damages, costs and expenses proximately caused by the excavator's failure to comply. Likewise, if an operator such as Metropolitan fails to comply with the requirements, the operator ". . . shall forfeit his or her claim for damages to his or her subsurface installation, arising from the excavation, against an excavator who has complied . . . " with the requirements.

During discovery it became evident that Metropolitan's patrollers marked the location of our pipeline at general, regular intervals, rather than within delineated areas as required by the DigAlert law. Because the evidence indicates that Converse Consultants complied with the DigAlert statute and that Metropolitan did not, Metropolitan cannot recover its damages.

We were served with a § 998 offer in the amount of $1,000. This meant that if Metropolitan did not prevail in trial, it would be liable to the defendants for costs and fees, including expert

witness fees – a likely scenario given our liability analysis. Therefore, in Metropolitan's best interests, the § 998 offer was accepted.

Colorado River QSA Coordinated Cases **(Sacramento Superior Court)**

The superior court held a hearing on October 30, 2008 on various pretrial matters including challenges to Imperial Irrigation District's proof of service of its validation complaint, whether to remove certain parties from the service list, the status of discovery, and the parties' statements of issues for trial. The court later issued two pre-trial orders on these matters. The court instructed the parties to resubmit statements of issues for trial, and file motions to challenge the statements of issues with which they disagree. This is intended to help narrow the issues for trial. The hearing on these motions as well as a further status conference is set for January 22, 2009. (See General Counsel's August and September 2008 Monthly Activity Reports)

Bisharat v. Kostelecky; Metropolitan **(Pasadena Superior Court)**

This personal injury (automobile) lawsuit was served on Metropolitan and its employee on August 26, 2008 and an Answer was filed on September 19, 2008. The case arises out of a September 7, 2007 traffic collision at Michillinda Avenue and Mariposa Avenue in Sierra Madre. The investigating officer from the Sierra Madre Police Department found that both parties were at fault. The moderate collision resulted in plaintiff's vehicle being totaled at $5,500 (Metropolitan's vehicle incurred $3,570.04 in damages).

Although discovery has just begun, and we do not yet know the full magnitude of Plaintiff's damages, we do have some early indications. Plaintiff may have been momentarily knocked out by the force of the collision. He claims substantial memory loss, visual disturbance, difficult concentrating and other indications of neurological injuries. We have not yet secured plaintiff's medical records in response to our subpoenas, but we are aware that he continues to receive neurological care.

Gregg Whittlesey v. Metropolitan **(Los Angeles County Superior Court)**

On December 7, 2007, Metropolitan was served with a summons and complaint for damages by Gregg Whittlesey, a former Metropolitan employee who was released during his probationary period. Plaintiff alleged three causes of action: wrongful termination in violation of public policy, defamation, and intentional infliction of emotional distress. Metropolitan filed its answer, containing a general denial and affirmative defenses. The parties participated in a mediation in August 2008, but did not resolve the case. In August 2008, Metropolitan filed a motion for summary judgment or, alternatively, summary adjudication, requesting dismissal of part or all of the case, which was scheduled for hearing on October 31, 2008. In October 2008, the Court granted Plaintiff's request to continue the motion hearing to December 15, 2008 to permit Plaintiff to conduct further discovery, and the Court rescheduled the trial to begin on January 23, 2009. In October 2008, the parties agreed to a settlement of the case. The Court dismissed the case with prejudice on November 6, 2008. (See General Counsel's September 2008 Monthly Activity Report)

Lollett Jones-Boyce v. Metropolitan **(Public Employment Relations Board)**

On November 28, 2007, Lollett Jones-Boyce, a former employee of Metropolitan, filed an unfair practice charge with the Public Employment Relations Board (PERB). Ms. Jones-Boyce amended her charge on December 6, 13, 17, 27, and 31, 2007, and January 16 and February 13, 2008. Ms. Jones-Boyce alleged Metropolitan violated the Myers-Milias-Brown Act (MMBA) by retaliating and discriminating against her because of her "disability, including but not limited to complaining and blowing the whistle." In response, Metropolitan sought a dismissal on the basis Ms. Jones-Boyce did not establish a *prima facie* case of discrimination or retaliation. On October 17, 2008, a Regional Attorney from PERB dismissed the charge after determining Ms. Jones-Boyce could not establish a *prima facie* case of a violation of the MMBA or of PERB's regulations.

Cases to Watch

EPA Water Transfer Rule Litigation

On June 9, 2008 the U.S. Environmental Protection Agency (EPA) issued its final Water Transfer Rule exempting transfers from one body of water to another from National Pollutant Discharge Elimination System (NPDES) permitting requirements as long as the transferred water is not subjected to any intervening industrial, municipal, or commercial use that would result in introduction of a pollutant to the transferred water. Under the rule, according to EPA, individual states remain able to regulate water transfers within their boundaries.

Since the Rule became effective August 12, 2008, several parties have filed lawsuits challenging its validity in the Eleventh U.S. Circuit Court of Appeals in Florida. An initial motion to intervene in the case, brought by several parties that support the rule, including the Western Urban Water Coalition, was unsuccessful. For western water interests, intervention is seen as preferable because it provides an active opportunity to participate in the case and the ability to appeal any adverse decision. The court ultimately allowed only one party, the South Florida Water Management District, located within the court's jurisdictional area, to intervene.

Additional actions challenging the rule have been filed in the Second and Third Circuit Courts of Appeal. Although it is anticipated that these actions will soon be consolidated with the Eleventh Circuit action, there is an opportunity to intervene in the Third Circuit case before it is transferred. ACWA, with Metropolitan's support, encouraged Governor Schwarzenegger to authorize a motion to intervene. The California Attorney General filed the motion to intervene on November 7. Even if attempts to intervene are unsuccessful, however, the parties supporting the rule will have the opportunity to file *amicus* briefs at a later date.

The case is important to Metropolitan and other California water agencies that rely on imported water because the Transfer Rule as promulgated exempts the majority of those water transfers from NPDES permitting requirements. If the rule is overturned, many sources relied on by Metropolitan for its supply may well be required to obtain NPDES permits, an expensive process that could potentially limit imported water supplies. (See General Counsel's June 2008 Monthly Activity Report)

Items of Interest

Finances

Metropolitan filed its claim for the payment of corporate notes issued by Lehman Brothers Holdings, Inc. and acquired as part of Metropolitan's investment portfolio with United States Bankruptcy Court for the Southern District of New York on October 27, 2008. The Lehman Brothers bankruptcy is the largest in U.S. history. Lehman is the focus of grand jury investigations being conducted by the U.S. attorneys in Manhattan, Brooklyn and Newark, New Jersey. In addition, the Federal Bureau of Investigation is investigating the mortgage lending and securitization practices of 26 firms, including Lehman. Legal Department and Finance staff is monitoring these investigations. The statute of limitations for a securities fraud action is the earlier of two years after discovery of the securities violation or five years after the violation.