Metropolitan Cases

***Foli v. Metropolitan* (United States District Court, Southern District of California)**

On February 20, 2013, plaintiffs filed a Notice of Appeal to the Ninth Circuit Court of Appeals. Plaintiffs are appealing the January 2013 Order which granted Metropolitan's Motion to Dismiss plaintiffs' First Amended Complaint, as well as the April 2012 Order which granted Metropolitan's Motion to Dismiss plaintiffs' original Complaint. Plaintiffs alleged in their Complaints that Metropolitan's fluoridation process is an unlawful and unconstitutional medication of the plaintiffs. As reported last month, on January 25, 2013, Judge Janis Sammartino dismissed with prejudice plaintiffs' federal law claims, and dismissed without prejudice plaintiffs' state law claims. Plaintiffs' opening brief must be filed with the Ninth Circuit by May 31, 2013, and Metropolitan's answering brief is due by July 1, 2013. (See General Counsel's January 2013 Activity Report.)

***In Re Insurance Brokerage Antitrust Litigation* (U.S. District Court, District of New Jersey)**

This class action antitrust litigation was filed in August 2004 against various insurance brokers and insurers associated with Marsh & McLennan Companies, Inc. ("Marsh Defendants"). Plaintiffs alleged that the Marsh Defendants engaged in an insurance brokerage scheme involving receipt of undisclosed payments or kickbacks from insurance carriers, steering insurance policyholders to carriers paying the most in contingent commissions, and rigging bids for insurance policies, all in violation of the law and to the detriment of insurance policyholders.

Metropolitan was a member of the class due to transactions associated with the Owner Controlled Insurance Program (OCIP) for the Eastside Reservoir and Inland Feeder Projects involving Marsh Risk & Insurance Services, Inc. (brokerage services) and underwriters, including Hartford Insurance Companies and Lloyd's of London.

In 2009, Metropolitan was notified of the pendency of this action and submitted a claim form to the court-appointed settlement fund administrator. Metropolitan's Risk Management staff provided significant assistance with filing the claim. The same year, the district court approved a class action settlement requiring defendants to pay $62 million into an interest-bearing account to settle all class claims.

After review of Metropolitan's submissions, the settlement administrator determined that Metropolitan was entitled to payment of $859,641.05 from the settlement fund. On February 21, Metropolitan received payment of the above amount.

***San Gabriel Basin Water Quality Authority v. Aerojet-General Corp., et al.* (SEMOU matter) (U.S. District Court, Central District of California)**

This case involves groundwater contamination in the San Gabriel basin, in the South El Monte area. Metropolitan was brought into the case in 2004 as an alleged source of perchlorate in the basin by virtue of deliveries of untreated Colorado River water to its member agencies. As reported in prior monthly reports, all claims had tentatively settled, including cross-claims against Metropolitan for contribution related to Colorado River water supplies. On February 21, 2013, the district court entered final judgment and order closing the case. The court retains jurisdiction to enforce settlement terms such as waiver of all contribution claims against Metropolitan, Upper San Gabriel MWD, Main San Gabriel Basin Watermaster, and Los Angeles County Flood Control District. (See General Counsel's October and November 2012 Activity Reports.)

Matters Involving Metropolitan

Water Transfer Rule Litigation

The Clean Water Act of 1972 (CWA) was enacted to restore the quality of the nation's waters. One of the central enforcement mechanisms of the CWA is the National Pollutant Discharge Elimination System. This program requires a party that discharges pollutants into surface waters to obtain a permit that limits the type and quantity of pollutants. The Environmental Protection Agency (EPA) has focused on direct discharges into water bodies and does not require NPDES permits for the movement of polluted water from one water body to another. The EPA reasoned that the statutory authority for requiring permits applied only to initial discharges into a specific body of water, and not to the movement of pollutants within the waters of the United States in general.

The EPA's position was repeatedly challenged and rejected by federal and state courts around the country. However, in 2004, the United States Supreme Court reversed such a ruling by the Eleventh Circuit Court of Appeals and remanded the case for further proceedings, including a determination of the validity of EPA's position. *Miccosukee Tribe of Indians v. South Florida Water Management District* (2004) 541 U.S. 95. In the meantime, EPA proceeded to adopt its interpretation as a formal regulation and claimed that its position is entitled to deference from the courts. 73 Fed. Register 33697 – 33708 (June 13, 2008), codified at 40 Code of Fed. Regs. § 122.3(i). This formal rule, known as the Water Transfer Rule, exempts from the NPDES permitting process any conveyance of water between water bodies without subjecting the water to intervening industrial, municipal, or commercial use, and without introducing any new pollutant to the waters in the process.

The Water Transfer Rule is important for public water agencies. The Supreme Court recognized that requiring an NPDES permit for engineered diversions of water could result in "thousands of new permits … particularly by western states, whose water supply networks often rely on engineered transfers among various natural water bodies." *Miccosukee Tribe*, *supra*, 541 U.S. at 108. However, the Water Transfer Rule came under sustained legal attack by environmental groups that object to the movement of polluted waters into relatively clean water bodies.

The Water Transfer Rule was upheld by the Eleventh Circuit Court of Appeals in another challenge involving South Florida's water management system. *Friends of the Everglades v. South Florida Water Management District* (11th Cir. 2009) 570 F.3d 1210. But there are two additional legal challenges that are pending in other circuits. The district court for the district of Oregon followed the Eleventh Circuit and upheld the Water Transfer Rule despite a 2003 Ninth Circuit decision that rejected the EPA reasoning underlying the rule. *ONRC Action v. U. S. Bureau of Reclamation* (D. Ore. 2012) Case No. Civ. 97-3090-CL, 2012 U.S.Dist.LEXIS 114295, 118153. This decision has been appealed to the Ninth Circuit, but a stay has been issued pending the outcome of another challenge pending in federal court in New York.

The district court for the southern district of New York is hearing two consolidated challenges to the Water Transfer Rule. *Catskill Mountains Chapter of Trout Unlimited v. U. S. EPA*, Case No. 08-CV-5606 (KMK)(GAY), and *New York v. U. S. EPA*, Case No. 08-CV-8430 (KMK) (GAY). Metropolitan, in conjunction with the Western Urban Water Coalition and other western water agencies, including San Diego County Water Authority and San Francisco Public Utilities Commission, has been granted leave to intervene in these consolidated cases in support of the Water Transfer Rule. These entities are represented in the case by Peter Nichols of Berg, Hill, Greenleaf & Ruscitti LLP, of Boulder, Colorado. Summary judgment motions by intervenors are due to be filed on May 22, with briefing completed on July 12.