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Flint Residents Can Sue Feds Over Water Debacle

By **Mike LaSusa**

Law360 (April 19, 2019, 7:44 PM EDT) -- Residents of Flint, Michigan, beat back an attempt by the federal government to kill their case in Wolverine State federal court, alleging the U.S. Environmental Protection Agency acted negligently during the lead-poisoning crisis that started in 2014 after the city switched drinking water systems.

U.S. District Judge Linda Parker on Thursday shot down the federal government's argument that it should be immune from the suit under a provision of the Federal Tort Claims Act that exempts the government from liability for actions that are "discretionary in nature."

The EPA's allegedly deficient response to the Flint water crisis was indeed discretionary, Judge Parker said, pointing to provisions of the Safe Drinking Water Act that give the agency the authority — but don't force it — to step in when local water management authorities fail to fulfill their duties.

However, the judge said, the exercise of that discretion during the Flint debacle couldn't be chalked up to legitimate public policy considerations.

"The EPA's failure to warn Flint residents of the severe health risks the city's water supply posed to them cannot be justified by any permissible exercise of policy judgment," Judge Parker said.

The judge cited evidence that the EPA knew state environmental regulators and city officials weren't telling residents the truth about lead contamination in their drinking water.

"Quite to the contrary, the EPA learned that state and local officials were misleading residents to believe that there was nothing wrong with the water supply and that the lead levels in some homes resulted from the interior plumbing," she said. "These lies went on for months while the people of Flint continued to be poisoned."

Judge Parker also swept aside the government's claims that the suit should be barred by an FTCA provision exempting it from liability for claims stemming from misrepresentation. That exemption only applies to economic issues, the judge said.

"Moreover, the gravamen of plaintiffs' complaint is that the EPA was negligent in its performance of operational tasks, that being to respond to residents' complaints and provide them with guidance," she said.

Representatives for the plaintiffs didn't respond to requests for comment on Friday. The EPA referred a request for comment to the Justice Department, which did not respond.

The case against the federal government, first filed in April 2017, is one of a number of legal actions related to the crisis triggered by city officials' 2014 decision to source their water from the Flint River rather than from Lake Huron. Residents and experts claim the corrosive Flint River water wasn't properly treated and scratched lead pipes along its way into residents' homes, poisoning many of them, including children.

Some of the Flint water crisis cases have **made their way** to the Supreme Court, though the justices **have declined** to weigh in.

On the other hand, in January, the Sixth Circuit **kept alive** a suit by Flint residents alleging state and city officials violated the bodily integrity of residents by exposing them to contaminated water.

The appeals panel in a 2-1 published opinion rejected arguments that certain state and city officials were protected by qualified immunity. However, the judges declined to dismiss claims against the former Flint Department of Public Works Director Howard Croft and two emergency managers for the city, Darnell Earley and Gerald Ambrose, saying they were among the "chief architects" of the city's decision to switch Flint's water source to the Flint River and use a plant they knew wasn't ready to safely process the water.

Although it's been nearly five years since the start of the crisis, the issue of water quality remains high on the agenda for citizens and policymakers alike.

In March, EPA Administrator Andrew Wheeler, speaking at a conference of the American Bar Association's Section of Environment, Energy and Resources, **reiterated his belief** that water quality issues are the most important threats to human health right now, outweighing those posed by climate change.

The agency has a slew of water-quality-related initiatives on tap, Wheeler said, trumpeting plans to revamp regulations for lead and copper in drinking water later this year and touting new efforts to reduce the amount of trash that ends up in the ocean.

The plaintiffs are represented by Pitt McGehee Palmer & Rivers PC, the Law Offices of Deborah LaBelle, Goodman & Hurwitz PC, Trachelle C. Young & Associates PLLC, McKeen & Associates PC, the Law Offices of Teresa A. Bingman, and Cynthia M. Lindsey and Associates.

The government is represented by Joseph H. Hunt of the Justice Department's Civil Division, and Tomas G. Ward, J. Patrick Glynn, Christina M. Falk, Michael L. Williams and Eric A. Rey of the DOJ's Torts Branch.

The case is Jan Burgess, and all 2,959 individuals identified in the Burgess FTCA Administrative Complaint v. United States of America, case number 4:17-cv-11218, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Juan Carlos Rodriguez and Emily Field. Editing by John Campbell.