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## EPA Forced To Face Flint Residents' \$4.5B Water Crisis Claims

By **Michael Phillis**

Law360 (October 1, 2019, 5:00 PM EDT) -- A Michigan federal judge refused to let the federal government go to the Sixth Circuit to argue it had immunity from claims brought by thousands of residents of Flint, Michigan, seeking roughly \$4.5 billion over allegations that the government acted negligently during the city's lead in the water crisis.

U.S. District Judge Linda Parker said Friday that there were too many factual issues in play to certify the U.S. Environmental Protection Agency's request for an interlocutory appeal — a step reserved for "a controlling question of law."

The federal government won't be able to argue on appeal that it has immunity from suit under a provision of the Federal Tort Claims Act that exempts the government from liability for actions that are "discretionary in nature."

Judge Parker also said the government might be forced to seriously engage in mediation now that it has received a final answer denying its request for an interlocutory appeal on immunity.

"The United States has been unwilling to fully engage in those discussions while its motion to dismiss was pending," Judge Parker wrote. "Denying the government's request for interlocutory appeal may advance those discussions and an ultimate resolution of, not only this case, but the numerous additional lawsuits arising from this tragic crisis."

The EPA asked for a certification for interlocutory appeal in June, saying that doing so would avoid a protracted legal battle involving more than 9,000 tort claims across multiple cases that totaled "more than \$8.9 billion in alleged damages." The federal government said all of that could be taken care of much more quickly with an appeal so the Sixth Circuit could have a chance to declare the federal government was immune. This order dealt with two cases involving roughly 5,000 plaintiffs.

**In April**, Judge Parker said the EPA's allegedly deficient response to the Flint water crisis was discretionary, pointing to provisions of the Safe Drinking Water Act that provided the agency with full authority — but doesn't force it — to step in when local water management authorities fail to fulfill their duties. She said, however, that the exercise of that discretion during the crisis couldn't be chalked up to legitimate public policy considerations, as required for immunity.

Judge Parker cited evidence that the EPA knew state environmental regulators and city officials weren't telling residents the truth about lead contamination to their drinking water. She also rejected the EPA's claims that the suit should be barred by an FTCA provision exempting it from liability for claims stemming from misrepresentation, which Judge Parker said applied only to economic issues.

The EPA countered in June by saying the discretionary function issue is based on "several conclusions where reasonable judges might differ." The government said public policy considerations were at play in its decision of whether to intervene, including "the effectiveness of state and local authorities" and "whether informal assistance and advice was likely to achieve better or faster results."

The cases are some of several 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.

Michael Pitt, a Pitt McGehee Palmer & Rivers PC attorney representing certain plaintiffs, said the order was important.

"All indications are that EPA wants to litigate the issues, so there is going to be an enormous amount of work that is going to be put into developing the case [for] trial," Pitt told Law360. "Judge Parker herself has addressed some of the issues in very strong language so there is quite a bit of background already developed that strongly implicates the EPA's negligence in this whole disaster."

A representative for the EPA did not immediately return a request for comment Tuesday.

The plaintiffs are collectively represented by Michael L. Pitt, Cary S. McGehee, Beth M. Rivers and Peggy G. Pitt of Pitt McGehee Palmer & Rivers PC, and Hunter J. Shkolnik of Napoli Shkolnik PLLC.

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 cases are Jan Burgess et al. v. United States of America, case number 4:17-cv-11218, and William Thomas et al. v. United States of America, case number 4:18-cv-10243, both in the U.S. District Court for the Eastern District of Michigan, Southern Division.

--Additional reporting by Juan Carlos Rodriguez and Emily Field. Editing by Stephen Berg.

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