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Can Victims Find Success Against Lead Poisoning Through Class Action Suits?

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A CLASS ACT: Lead poisoning in Flint and Beyond: Can Victims Find Success Against Lead Poisoning Through Class Action Suits?

On April 25, 2014, the Detroit Water and Sewage Department switched the city of Flint, Michigan's water supply from Lake Huron to the Flint River, which the department described as a cost saving measure for the poor, black majority city.¹ Soon after, residents began to complain about the color, taste and odor of the water, while some residents reported a number of health related issues after drinking the water.² Initially, the local government authorities assured residents that the water was safe to drink, and that there was no imminent health threat.³ A consulting group hired by the city even found that the water met federal and state standards (the group did not test for lead contamination.)⁴

It was not until October 2015, after months of playing down residents' complaints, that Flint city officials finally advised residents not to drink the water because of high levels of lead contamination and prompted city, state, and federal officials to tackle the problem.⁵ After a scathing report by a task force created by Michigan Governor Dan Snyder to investigate the lead contamination, Governor Snyder placed the blame on the State Department of Environmental Quality and Control and its director, Dan Wyant, who later resigned after Wyant admitted that his Department was confused about federal regulations for making water less corrosive.⁶ As media reports have begun to highlight the alleged role of state officials in ignoring early signs of lead contamination, some of those affected by the lead contamination have sought relief through various lawsuits.⁷

Class Action

Many residents have opted to file a class action lawsuit against the local and state governments, as well as state government officials in their individual capacity.⁸ The Federal Rules of Civil Procedure lists the requirements necessary to create a class:

- (a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
- (1) the class is so numerous that joinder of all members is impracticable;
 - (2) there are questions of law or fact common to the class;
 - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
 - (4) the representative parties will fairly and adequately protect the interests of the class.⁹

The class must also be certified if it falls within three different scenarios: (1) separate actions would create the risk of incompatible standards of adjudication or impair the interests of class members;¹⁰ (2) the class shares a general claim against the opposing party;¹¹ and (3) if questions of law or fact that are common to the class predominate questions affecting individual members, and a class action would be the superior method of bringing about a fair and efficient adjudication of the controversy.¹² However, a significant hurdle for residents who wish to sue state and local officials is the doctrine of sovereign immunity.¹³ The doctrine grants immunity to a State from suit, while “governmental immunity” involves the similar immunity that is enjoyed by state’s political subdivisions.¹⁴ More specifically, the chief question of liability against a municipality operating a water system is whether it is performing a governmental function, which would grant it immunity from tort liability, or a private/proprietary function, which would open it to liability.¹⁵ The state can only waive its immunity from suit through the legislature and an amendment to the state constitution, which resulted in many states passing laws waiving liability for certain enumerated torts.¹⁶ The U.S. Congress can also abrogate a States’ immunity pursuant

to the 14th Amendment in a federal statute.¹⁷ However, some residents have looked for ways to overcome that hurdle by filing suit under § 1983, alleging violations of residents' rights under the 14th Amendment.¹⁸ Other residents have also tried to allege gross negligence, which is another exception to governmental immunity.¹⁹ In one particular class action lawsuit filed against 14 government officials, including Governor Snyder, residents alleged that they were exposed to contaminated water and suffered physical and emotional loss in the form "high levels of lead and copper in their bloodstreams, brains, bones and other organs, skin lesions and hair loss, chemical induced hypertension, autoimmune disorder, neurological disorders such as "brain fog", seizure like convulsions, vision loss, and memory loss, psychological disorders such as depression, chronic anxiety, post-traumatic stress disorder and inability to cope with normal stress."²⁰ The parties sought class certification, an order declaring the conduct of the defendants unconstitutional, equitable relief in the form of repairs or property, and monitoring of the water operations of Flint, as well as compensatory, punitive damages, and an award of attorneys fees.²¹ Still, the defense of sovereign immunity proves to be a powerful deterrent for many of these residents seeking relief.²²

Safe Drinking Water Act

Residents could also try to sue local water suppliers under the Safe Drinking Water Act of 1974 (SDWA).²³ The Act establishes uniform quality standards for public water systems in the United States and places a duty on public water suppliers to meet those standards.²⁴ These standards can be enforced by private citizens through the SDWA's citizen's suits provisions, which state:

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf--

- (1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the

- eleventh amendment to the Constitution) who is alleged to be in violation of any requirement prescribed by or under this subchapter;
- (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this subchapter which is not discretionary with the Administrator; or
 - (3) for the collection of a penalty by the United States Government (and associated costs and interest) against any Federal agency that fails, by the date that is 18 months after the effective date of a final order to pay a penalty assessed by the Administrator under section 300h-8(b)¹ of this title, to pay the penalty.²⁵

However, this does not create a private cause of action for victims to recover damages for violating provisions of the SDWA.²⁶ This act can only force entities to comply with the quality standards set forth in the SDWA and initiate cleanup efforts.²⁷ However, the SDWA does not “affect or the liability of any person under any other provision of state or federal law or restrict any right and remedies available under statutory or common law for damages, injury or loss suffered as a result of unsafe drinking water.”²⁸ In order to have standing to sue under SDWA, plaintiffs must show that a case or controversy exists by showing that violation of the SDWA resulted in some injury in fact against the plaintiffs, which can include actual injury or a threat of actual injury.²⁹ While SDWA does not preempt states in the field of regulation of public drinking water; the federal government preempts states regarding the standards for safe public drinking water.³⁰ However, the enforcement of those standards is specifically left to the states.³¹ A recent example of a cause of action under the SDWA was a lawsuit filed by Flint resident, Melissa Mays, along with the American Civil Liberties Union of Michigan, Concerned Pastors for Social Action and the Natural Resources Defense Council, Inc. against Michigan state officials.³² The plaintiffs seek injunctive and declaratory relief under the SDWA, including ordering the Defendants to repair and replace all lead service lines at no cost to customers.³³

Relief Fund

Another form of relief for victims of Flint's water crisis could come in the form of compensation similar to methods used for victims of the September 11th terrorist attacks.³⁴ A few days after the 9/11 terrorist attacks, the United States Congress passed the September 11th Victim Compensation Fund, which authorized the United States Attorney General to issue regulations regarding compensation for those injured in the attacks or the personal representative of those killed.³⁵ The Attorney General also designated a Special Master to administer the compensation to victims.³⁶ The Special Master gave victims two options: either waive all civil actions in return for a guaranteed recovery from a special fund or initiate a special cause of action in the United States District Court for the Southern District of New York.³⁷ The Special Master created loss ranges based on the victims' income up to the 98th percentile, which also factored in "extraordinary circumstances."³⁸ The fund was praised for providing a great deal of transparency, which included daily updates by the Special Master of median and average awards.³⁹ A relief fund could be an efficient way to compensate victims since the claims would be limited to just the city of Flint.⁴⁰ However, unlike the 9/11 Victim Fund, there would be a much larger variety of claims related to property damage and personal injury.⁴¹ The fund could also be beneficial for state officials, who would forego a lengthy discovery process, which could reveal further damaging details of their alleged role in the Flint Water Crisis.⁴²

As local, state and federal agencies look for ways to fix Flint's water supply, the lingering specter of mass tort litigation hang over the head of Governor Snyder and other state and local officials. But this problem is not limited to Flint, as reports uncover other cities with similar problems with lead contamination in their water supply.⁴³ This only adds to the urgency in finding a legal avenue for victims to receive just compensation and/or injunctive relief for the egregious actions of state and local officials.⁴⁴

¹ Jeremy C.F. Lin, Jean Ruttter and Haeyoun Park, *Events That Led to Flint's Water Crisis*, N.Y. TIMES (Jan. 21, 2016) http://www.nytimes.com/interactive/2016/01/21/us/flint-lead-water-timeline.html?_r=0.

² *Id.*

³ See Julia Lurie, *A Toxic Timeline of Flint's Water Fiasco*, MOTHERJONES (Jan. 26, 2016, 7:00AM), <http://www.motherjones.com/environment/2016/01/flint-lead-water-crisis-timeline> (describing how for much of 2015, the governor's office repeatedly assured Flint residents that its water supply was safe to drink, despite concerns about the level of lead in the water supply.); See also *id.*

⁴ LIN ET AL., *supra* note 1.

⁵ *Id.* (noting that in December, the city of Flint declared an emergency. On January 5, 2016, the state of Michigan later declared a state of emergency for the county of Genesee, which includes Flint. On January 16, 2016, President Obama declared a state of emergency).

⁶ Emily Lawler, *Director Dan Wyant resigns after task force blasts MDEQ over Flint water crisis*, MLIVE MEDIA GROUP (Dec. 29, 2015, 6:51PM), http://www.mlive.com/lansing-news/index.ssf/2015/12/deq_director_dan_wyant_resigns.html.

⁷ Mike Martindale and Jennifer Chambers, *Class-Action lawsuits filed over Flint water crisis*, THE DETROIT NEWS (Jan. 19, 2016, 3:53 PM), <http://www.detroitnews.com/story/news/local/michigan/2016/01/19/flint-lawsuits/79016968/>.

⁸ Josh Sanburn, *How Flint Residents Are Fighting the Water Crisis in Court*, TIME, (Jan. 28, 2016), <http://time.com/4198671/flint-water-crisis-lawsuits/>.

⁹ Fed. R. Civ. P. 23(a).

¹⁰ Fed. R. Civ. P. 23 (b)(1).

¹¹ Fed. R. Civ. P. 23 (b)(2).

¹² Fed. R. Civ. P. 23 (b)(3)(a)–(d) (highlighting certain factors courts use, such as “(a) the class members’ interests in individually controlling the prosecution of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of claims in the particular forum; and (d) the likely difficulties in managing a class action”).

¹³ Brendan Pierson, *Plaintiffs’ lawyers wary of taking on Flint water scandal*, REUTERS (Jan. 25, 2016, 6:35PM), <http://www.reuters.com/article/us-michigan-water-lawsuits-insight-idUSKCN0V32O9> (surveying large plaintiffs’ law firms who are wary of suing state officials due to sovereign immunity.).

¹⁴ *Cty. Rd. Ass’n of Michigan v. Governor*, 287 Mich. App. 95, 782 N.W.2d 784 (2010) (holding that a suit against the Michigan governor, state and state agencies for transferring funds in violation of a provision of the State Constitution was barred under sovereign immunity). See *Ross v. Consumers Power Co.*, 420 Mich. 567, 592, 363 N.W.2d 641 (1984) (finding that executive officers of government enjoy absolute immunity from all tort liability when acting under executive authority.).

¹⁵ Anthony J. Bellia, Jr., *Lead Poisoning in Children: A Proposed Legislative Solution to Municipal Liability for Furnishing Lead-Contaminated Water*, 68 Notre Dame L. Rev. 399, 409–10 (1992) (noting that courts have found municipal water suppliers to perform both governmental and proprietary actions).

¹⁶ *Cty. Rd Ass’n of Michigan*, 287 Mich. App. at 119.

¹⁷ *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327, 1333 (2012) (citing *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (holding that Congress must make abrogation of state immunity undeniably clear in a federal statute.))

¹⁸ 42 U.S.C.A. § 1983

¹⁹ See M.C.L. § 691.1407 (1964) (listing gross negligence as an exception to immunity for all government employees).

²⁰ *Mays, et. al. v. Snyder et. al.*, 2015 WL 7175656, at 11, 32(a)–(f) (E.D. Michigan, filed Nov. 13, 2015).

²¹ *Id.* at 27 (referring to section labeled “Relief Requested”).

²² Brendan Pierson, *Plaintiffs’ lawyers wary of taking on Flint water scandal*, REUTERS (Jan. 25, 2016, 6:35PM), <http://www.reuters.com/article/us-michigan-water-lawsuits-insight-idUSKCN0V32O9> (surveying large plaintiffs’ law firms who are wary of suing state officials due to sovereign immunity.).

²³ 42 U.S.C. §300f (1974).

²⁴ Robert W. Vinal, *Citizens’ Suits Under the Safe Drinking Water Act*, 67 Am. Jur. Proof of Facts 3d §95 (2016).

²⁵ 42 U.S.C. § 300j–8 (1974).

²⁶ VINAL, *supra* note 24.

²⁷ *Id.*

²⁸ *Id.*

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- ²⁹ *Id.* (citing *Mattoon v. City of Pittsfield*, 980 F.2d 1, 24 (1st Cir. 1992) and *Jones v. Dow Chemical Co.*, 885 F. Supp. 905 (M.D. La. 1994)).
- ³⁰ Romualdo P. Eclavea, J.D., 78 Am. Jur. 2d Waterworks and Water Companies § 42 (2016).
- ³¹ *Id.*
- ³² Complaint at 1, *Concerned Pastors for Social Action, et. al. v. Nick A. Khouri, et. al.*, No. 16-10277, 2016 U.S. Dist. Lexis 70470, at *3 (E.D. Mich. Jan. 27, 2016).
- ³³ *Id.* at 55.
- ³⁴ Jennifer Dixon, *Flint lawsuits could cost Michigan taxpayers millions*, DETROIT FREE PRESS (Feb. 21, 2016, 7:49AM), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/02/20/flint-water-crisis-lawsuits/80514276/>.
- ³⁵ *Schneider v. Feinberg*, 345 F.3d 135, 138 (2d Cir. 2003).
- ³⁶ 198 A.L.R. Fed. 103 (2004).
- ³⁷ *Id.*
- ³⁸ SCHNEIDER, *supra* note 35.
- ³⁹ Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 214 (2005).
- ⁴⁰ Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility As A Means for Resolving Mass Tort Claims – A Fund Too Far*, 71 LA. L. REV. 819, 829 (2011) (offering criticism of the relief fund created after the BP oil spill and contrasting it to the effectiveness of the 9/11 victim fund).
- ⁴¹ *Id.*
- ⁴² DIXON, *supra* note 34.
- ⁴³ Sarah Frostenson, *18 cities in Pennsylvania reported higher levels of lead exposure than Flint*, VOX MEDIA (Feb. 3, 2016, 10:30 AM), <http://www.vox.com/2016/2/3/10904120/lead-exposure-flint-pennsylvania>.
- ⁴⁴ DIXON, *supra* note 34.