Flint Water Crisis Ruling May Signal Broader EPA Liability

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In what could be another groundbreaking case arising from the Flint, Michigan, drinking water crisis, the U.S. Environmental Protection Agency failed to secure a dismissal in Walters v. Flint, or In re: Flint Water Cases, based upon sovereign immunity protection for its actions.

The U.S. District Court for the Eastern District of Michigan, Southern Division, held that the plaintiffs' Federal Tort Claims Act action against the EPA survived the EPA's motion to dismiss and rejected the EPA's arguments that FTCA exceptions should control the outcome.[1]

Subject to correction by the U.S. Court of Appeals for the Sixth Circuit, this case signals a potential new era in government liability and an increased risk to unappropriated public funds.

The Walters case is one in the long line of litigation to arise from the Flint water crisis, but it has a novel twist. The plaintiffs successfully claimed that the EPA, in accordance with Michigan's good Samaritan doctrine, undertook action to render services to Flint's residents, but was negligent in its undertaking, and thereby increased Flint's residents' risk of harm.

The FTCA waives immunity from suits for injuries caused by the negligent or wrongful act, or omission, of a government employee in the same manner that a private person would be held liable under state law.

In a very similar case, Burgess v. U.S.,[2] the same district court rejected the EPA's motion to dismiss the plaintiffs' FTCA claims, as well as the EPA's effort to secure an interlocutory appeal to the Sixth Circuit. Should these rulings hold, the EPA's actions will be open to a level of scrutiny and risk of potential damages that it has never before seen.

Under the FTCA, a court must look to the law of the state where the alleged wrong occurred to determine the liability.[3] In this case, the applicable state law is the good Samaritan doctrine.[4]

In Fultz v. Union-Commerce Association, the Michigan Supreme Court warned that Michigan's good Samaritan doctrine cannot be "invoked uncritically or without regard to limiting principles within [Michigan's] case law."

The Fultz case goes on to explain that if "one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner." And because Michigan is not alone in having negligence-grounded good-Samaritan laws, the reach of Walters and Burgess may extend well beyond the state of Michigan.

The EPA countered the voluntary-undertaking allegations with arguments that it acted according to its obligations under the Safe Drinking Water Act, which is the exact opposite of a voluntary undertaking. Typically, courts are hesitant to open the public purse further than intended, and when there is doubt, they will limit any perceived waiver of sovereign immunity.

Under well-established and familiar principles of sovereign immunity, the [U.S.] may not be sued without its consent, and the terms of this consent define the jurisdiction of the courts to entertain a suit against the [g]overnment.[5]

Without this typical protection, the court could open the courthouse doors wider than intended, and subject the government, and thereby the taxpayer, to large damage awards and defense costs.

In its motion to dismiss in Walters, the EPA provided multiple examples of why the court should not be so quick to dismiss a government agency's sovereign immunity.

By way of example, the EPA argued that without the proper application of sovereign immunity to tort-related claims, the Federal Aviation Administration could be held liable for a pilot's death in a plane crash,[6] or customs officials could be subject to liability for stolen property sold at auction.[7] Such results clearly were not intended, argued the EPA.

In addition to arguing that it did not act voluntarily, the EPA contended that two exceptions to the FTCA applied in Walters. The discretionary-function exception exempts:

> [a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the [g]overnment, whether or not the discretion involved be abused.[8]

The EPA argued that the discretionary function exception deprived the court of jurisdiction because the EPA's conduct allows for judgment and is susceptible to policy analysis.

Typically, the EPA's discretionary authority shields the agency from liability. For example, previously, the Eastern District of Michigan found that the citizen suit provision of the Clean Water Act does not waive the EPA's sovereign immunity because the EPA was not required to perform or refuse to perform the discretionary act of taking enforcement action under the Clean Water Act.[9]

Applying the discretionary-function exception is a two-pronged test. The first prong is satisfied if no specific mandatory statute, rule or regulation removed discretion from the EPA in responding to the drinking water crisis in Flint.

The EPA argued that Section 1431 of the Safe Drinking Water Act is facially discretionary and that Section 1414 of the act is premised on a discretionary finding.

The Walters court held that Section 1431 is discretionary because under this section the EPA administrator may, but is not required to, take actions that he deems necessary to protect public health from contamination in the public water system. But the Walters court went on to hold that Section 1414 was nondiscretionary. Section 1414 states that the EPA administrator shall issue an order or commence a civil order after it notifies a state of its noncompliance with the act.

Prong two of the discretionary-function test determines whether an agency's judgment is the kind of discretion that is subject to public policy. The EPA argued that the second prong was satisfied because the EPA's decisions about how to respond to the Flint water crisis were subjected to policy analysis, including decisions relating to how to balance Michigan's enforcement authority with public safety and the agency's own enforcement discretion.

The court did not agree. Instead it stated that the EPA's continued inaction in the face of a clear environmental crisis could not be "grounded in, or calculated to advance the policies of the [Safe Drinking Water Act], or any reasonable or legitimate public policy."

Strikingly, evidence as to why the EPA may not be protected by sovereign immunity included its own admission of failure. The EPA's July 19, 2018, office of inspector general report titled, "Management Weaknesses Delayed Response to Flint Water Crisis," outlines the EPA's failure in Flint, explaining:

> The agency retains oversight and enforcement authorities to provide assurance that States with primacy comply with Safe Drinking Water Act requirements, such as those in the Lead and Copper Rule. However, Region 5 did not implement management controls that could have facilitated more informed proactive decision-making when Flint and the [Michigan Department of Environmental Quality] did not properly implement the Lead and Copper Rule. While Flint residents were being exposed to lead in drinking water, the federal response was delayed, in part, because the EPA did not establish clear roles and responsibilities, risk assessment procedures, effective communication and proactive oversight tools.

Both the Burgess and the Walters courts repeatedly cite to the EPA's admission of oversight failure as support for the plaintiffs' negligence claims.

If Walters and Burgess are upheld, the EPA's willingness to conduct constructive self-review like that of the inspector general's report, may be chilled.

In holding the EPA accountable to a standard that it argues it did not know existed, the court may inadvertently encourage the EPA to be less forthcoming with information and less introspective.

The second FTCA exemption is the misrepresentation exception. The misrepresentation exception bars claims "arising out of negligent, as well as intentional, misrepresentation."

The EPA's argument is: If the good Samaritan doctrine applies to the EPA, then under the exemption the EPA cannot be held liable for any alleged misrepresentation made by the EPA about the perceived safety of the Flint water supply. Basically, the government can make misstatements and face no repercussions if people rely on its misrepresentations.

Following Burgess, the Walters court rejected this argument and determined that this exception is limited to commercial or financial misrepresentations. It remains to be seen if, on appeal, the Sixth Circuit will address this exception.

Instead of delving into whether the government may be liable for presenting what some may consider so-called alternative facts, the Sixth Circuit may instead choose to leave this exception untouched, and focus on the more plausible off ramp for the EPA, the discretionary function exception.

Historically, courts have favored the application of sovereign immunity. If history has taught us anything, it is that the Sixth Circuit may take a narrow view of immunity waiver where the public purse is at risk.[10] However, after the EPA's admitted mishandling of the Flint drinking water crisis, Walters and Burgess may promote the old adage that hard cases make bad law.

At minimum, the Walters and Burgess rulings on the EPA's motions to dismiss suggest that

the EPA's future actions, and inactions, may be subject to stricter scrutiny, especially following its own self-analysis, and highlight the EPA's potential vulnerability to liability. These are definitely cases to watch closely, not only for impacts in the Sixth Circuit, but nationally, where good Samaritan laws may be a basis for tort liability.

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[1] Walters v. Flint (In re Flint Water Cases), No. 17-10164, 2020 U.S. Dist. LEXIS 154736 (E.D. Mich. Aug. 26, 2020).

[2] Burgess v. U.S., 375 F. Supp. 3d 796 (E.D. Mich. 2019).

[3] Himes v. U.S., 645 F. 3d 771, 777-778 (6th Cir. 2011).

[4] Restatement (Second) of Torts Section 324A which has been recognized under Michigan law. See, Fultz v. Union-Commerce Assoc. 470 Mich. 460, 683 N.W.2d 587, 590-91 (Mich. 2004).

[5] See, Stocker v. U.S., 705 F.3d 225, 230 (6th Cir. 2013) (citing U.S. v. Testan, 424 U.S. 392, 399, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976)).

[6] Stables v. U.S., 366 F. Supp. 2d 559 (S.D. Ohio 2004).

[7] Fla. Auto. Auction v. U.S., 74 F.3d 498 (4th Cir. 1996).

[8] 28 U.S.C. § 2680(a).

[9] See e.g. City of Highland Park v. EPA, No. 2:16-cv-13840, 2018 U.S. Dist. LEXIS 168565 (E.D. Mich. Sep. 29, 2018). See also, Lockett v. U.S., 938 F.2d 630 (6th Cir. 1991) finding EPA was not subject to the FTCA because EPA's decision on whether and/or when to act at a scrap yard impacted by PCB chemicals was discretionary.

[10] See e.g., Sellfors v. U.S., 697 F.2d 1362, 1365 (11th Cir. 1983); accord Vega Alta v. Caribe Gen. Elec. Prod. Inc., 31 F.Supp.2d 226, 238 (D.P.R.1998) explaining that, "[t]he FTCA was not intended to redress breaches of federal statutory duties."