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What Happened In Flint: Trial To Pull Back Curtain On Crisis

By **Cara Salvatore**

Law360 (February 11, 2022, 7:15 PM EST) -- The first civil trial over the Flint water crisis begins Tuesday in Michigan, where a federal jury will weigh claims that two water engineering companies neglected their duty to urgently warn that pipe corrosion could send lead into homes.

Flint's switch to a new water supply in April 2014 became the subject of national outrage after it was discovered that the new Flint River water, inadequately treated for its alkalinity, leached lead from the pipes it traveled through to get to the homes of Flint residents.

Water engineers Veolia North America LLC and Lockwood Andrews & Newnam PC, or LAN, refused to participate in a \$626 million settlement ending claims against Flint and the state of Michigan and will go to a first bellwether trial brought by four children, referred to as E.S., A.T., R.V., and D.W.

The companies will tell an Ann Arbor jury they did nothing wrong as they helped Flint assess its water infrastructure in 2014 and 2015. The children say the engineering firms were bound to help protect them from lead-tainted water and brain damage.

Each side will draw on a small army of experts in the marathon professional negligence trial, setting up a five-month-long public airing of the details of a catastrophic public health scandal perpetrated on a low-income, majority-Black population. According to the Census Bureau, the median income in Flint is \$32,200, about half that of the state, and nearly 55% of Flint residents under the age of 18 live in poverty.

Observers say these realities are inseparable from what happened in Flint. Regardless of the outcome of the case, the trial could offer painful lessons on how to avoid such disasters.

"It's another opportunity to have a public discussion about what happened in Flint and to talk about why it's important to be very aware of the public health implications of decisions like this," said Lance Gable, a law professor at Wayne State University in Detroit. "To not neglect the planning and thinking about how different governmental decisions are going to impact public health and, in a broader sense, all of our communities."

The Children's Case

The single claim in the suit is for professional negligence, and a judge has outlined that each engineering company was obligated to take reasonable care to avoid foreseeable physical harms. Under Michigan

law, the plaintiffs must show the defendants owed a duty of care and breached that duty, that plaintiffs were injured, and that the defendants' breach caused the injuries.

Notably, the companies cannot fall back on their contracts to claim innocence, the judge wrote in a recent order.

The major breach that LAN and Veolia supposedly committed is failing to warn that anti-corrosion agents called orthophosphates were needed for corrosion control and that residents' health would be endangered if they weren't used.

A key plaintiffs' expert, Richard Humann, will testify that LAN should have told Flint the water was going to be unsafe. Humann and another expert, John Hoaglund, will both discuss the professional standard of care in the water engineering industry.

They are just two of numerous experts on the plaintiffs' side. Economist Gary Crakes will testify that children's lifetime earning capacity was diminished; epidemiologist Joseph Graziano will discuss environmental lead levels; and main causation expert William Bithoney, a pediatrician and toxicologist, will discuss the effects of lead exposure on children.

The children's lawyer, Corey Stern of Levy Konigsberg LLP, said in a statement they have waited seven years for their day in court.

"We are eager for their stories to be told, publicly, and for LAN and Veolia to serve as examples of what happens when greed invades the public space typically reserved for those entities and institutions not generally associated with profiting from social services," Stern said.

The children and their immediate environments have undergone extensive testing, including bone scans, soil tests and scrutiny of the water going to their schools.

The trial will put in the public eye copious information about the chain of events, said Gable.

When big or notorious cases settle before trial, it avoids "all of the really public airing and attention on details causing the public to really grapple with the situation as it occurred," Gable said. This can "deprive the public of a real, full disclosure and full discussion of the impact."

The Companies' Defense

While state and city officials involved in the crisis aren't parties in this trial, their actions will still loom over the proceedings. Veolia and LAN are expected to argue that any harm was the fault of officials — some of whom now face criminal charges.

Each defendant has filed a lengthy "notice of nonparties at fault" listing others they say were culpable, including the Michigan Department of Environmental Quality, the Michigan Department of Treasury, the Michigan Department of Health and Human Services, "and all current and former employees" of each of those — plus "[t]he Governor's Office, former Governor Richard Snyder and all former staff members."

LAN's lead lawyer, Wayne Mason of Faegre Drinker Biddle & Reath LLP, said the crisis "caused a heartbreaking human tragedy and the folks at LAN were and are both outraged and saddened about it.

It is now known that, at every level, the governmental entities in charge put principles and decency aside and have made politics and personal gain the priority."

The company "looks forward to cutting through the histrionics and showing the jury the truth of what really happened in Flint," Mason added.

Veolia counsel Dan Stein of Mayer Brown LLP said Friday there was "something odd" about the situation. "This is the first trial coming out of the Flint water crisis and it doesn't involve any of the people that were responsible, it involves these contractors ... that had such a tiny role," Stein said.

Beyond that, VNA's list of expert witnesses suggests the company will leave no fact undisputed. VNA expert David Duquette, a specialist in corrosion science, "will testify that there is no evidence that the shift from [Detroit Water and Sewerage District] water to Flint River water affected the corrosion behavior of Flint's distribution system infrastructure," the company said in a filing.

Water chemistry engineer Graham Gagnon, who studies metal release and transport in water systems, will talk about the possibility that lead was released from a different source, called pipe scale, and about industry standards for corrosion control.

Epidemiologists Stacey Benson and Doug Weed will discuss environmental and seasonal lead levels and the effects of lead on children, as well as the company's argument that the children's neurological difficulties arose from other sources.

Also on the list are a geospatial mapping expert, an environmental specialist who inspected the four children's houses, and other experts in neuropsychology, pediatric neurology, psychology, toxicology, vocational potential and earning capacity. VNA has also retained law professor Lawrence Friedman to testify on government officials' legal authorities under statute, precedent and the U.S. Constitution.

Jeffrey Karp, an environmental litigator at Sullivan & Worcester, said the case is highly important to government contractors like the two on trial here, both of which made the unusual move to set up websites defending their actions.

"If the consulting firms are found liable, that's going to be a big deal in the community of environmental consultants. It's going to be a major risk issue that will have to be confronted on a going-forward basis," he said.

Karp said contractors in the environmental field work hard to protect themselves with "limitation-on-liability provisions, indemnity provisions — their contracts are so one-sided, at least as a starting point." A trial nullifying all of that protective groundwork is bound to scare them, Karp said, calling the case "dire" and an unusual "black mark" for an environmental-consulting company.

The Larger Context

This trial is by no means the finale of the litigation involving Flint water. The four children were selected from among hundreds following last year's settlement, in which Michigan agreed to pay more than \$600 million.

Elsewhere, there's also a suit pending against the U.S. Environmental Protection Agency, also by Flint

residents, and the criminal indictments in Genesee County court against officials including former Gov. Rick Snyder.

Snyder spokesman Jason Brown told Law360 on Friday: "The legal team has been informed that a subpoena is forthcoming from the defense in the civil trial, but they have not received it yet. It would be premature to comment before that occurs."

According to representatives for Veolia, the company plans to call a number of officials as witnesses, but it believes some of those witnesses may seek to plead the Fifth Amendment.

The nature of who was most affected — largely poor Black children — makes the trial a flashpoint in the expanding national discussion about environmental justice, the subject of one of President Joe Biden's first executive orders when he took office, Karp said.

The trial, he said, concerns a "severe impact on a minority community, which is often the case in environmental matters, health and safety matters."

Lathrop GPM's Matthew Walker agreed, saying issues like this are priorities throughout the Biden administration, including new EPA guidance on incorporating environmental-justice principles in cleanups and enforcement. There's also "significant funding allocated in the recent bipartisan infrastructure act specifically for lead-related issues," Walker said. "This case is taking place against the backdrop of all of this."

The four children are represented by Corey Stern and Moshe Maimon of Levy Konigsberg LLP.

Veolia is represented by James Campbell of Campbell Conroy & O'Neil PC, Cheryl Bush of Bush Seyferth PLLC, and Daniel Stein and Marcus Christian of Mayer Brown LLP. LAN is represented by Wayne Mason, David Kent, Travis Gamble, Jude Hickland and Tory Finley of Faegre Drinker Biddle Reath LLP and Philip Erickson of Plunkett Cooney.

The case is Walters et al. v. Flint et al., case number 5:17-cv-10164, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Morgan Conley, Max Jaeger, Dave Simpson and Juan Carlos Rodriguez. Editing by Philip Shea.