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MIRS Capitol Capsule Headlines

Dismissal Of Federal Flint Suits Reversed By Sixth Circuit

A major hurdle for civil federal Flint water crisis suits was cleared today, when the U.S. Court of Appeals for the Sixth Circuit ruled that the claims of constitutional violations brought by the plaintiffs in two major suits are not blocked by measures written into the Safe Drinking Water Act (SDWA).

The two suits had originally been dismissed by federal district Judge John Corbett **O'MEARA**, who ruled mechanisms in the SDWA prevented the plaintiffs from bringing claims of constitutional violations (See "[Federal Court Cleaning House In Number Of Flint Suits](#)," 2/7/17).

The three-judge federal appellate panel unanimously reversed that determination.

"In the context of the SDWA and its text and legislative history, we find that the remedial schemes in the SDWA are not so comprehensive as to demonstrate congressional intent to preclude remedies under § 1983 for constitutional violations," federal appellate Judge Jane **STRANCH** wrote in the opinion, joined by Judges R. Guy **COLE** and Bernice **DONALD**.

Not all their claims survived, though. The state along with its officials and departments remain off the hook for monetary restitution in the *Boler v. Earley* case. But the *Mays v. Snyder* case, which is seeking "relief to the Plaintiffs through compensatory education, medical monitoring, and evaluation services," survived the test of Eleventh Amendment immunity.

"Eleventh Amendment sovereign immunity does not apply to municipalities; thus, the *Boler* Plaintiffs' claims against the City Defendants -- (Darnell) **EARLEY** and (Gerald) **AMROSE**, former Emergency Managers of Flint; (Dayne) **WALLING**, former Mayor of Flint; and the City of Flint -- remain," she wrote. "Similarly, the *Mays* Plaintiffs' claims against all Defendants except the State of Michigan remain."

It means that claims against Gov. Rick **SNYDER** and other former and current state employees were not dismissed from the *Mays* case. A Snyder spokesperson declined to comment.

QUOTE OF THE DAY

"That and \$3.2 million will get you a day of headlines. What he needs are votes."

- Democratic political consultant Angela **VASQUEZ-GIROUX** responding to deep-pocketed gubernatorial candidate Shri **THANEDAR** responding to questions about his background as a Democrat.

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Michael **PITT**, an attorney representing the *Mays* plaintiffs, who was also recently appointed interim co-lead counsel for all the class-action suits in federal district court (see related story), told *MIRS* the ruling "is really the locomotive now that is going to drive this litigation to a successful conclusion."

"The people of Flint have a great victory today and we're proud and happy that the people of Flint are finally going to get some justice out of this situation," Pitt said.

Pitt declined to speculate on whether the ruling could mean the state might seek to resolve the case out of court.

"There's always the possibility of a settlement and I'm hopeful that this will be an icebreaker," he said. "But we're prepared to litigate this as long and as hard as necessary to get to the result that we anticipate."

A key finding from the panel was that the SDWA was underpinned by the Constitution's Commerce Clause, and not the Fourteenth Amendment's Equal Protection Clause, paving the way for the plaintiffs' claims.

"In a wide variety of circumstances, conduct that violates the SDWA might not violate the Equal Protection Clause, and vice versa," Stranch wrote. "For example, a government entity could provide water through a public system with contaminant levels in excess of national drinking water standards without infringing on any equal protection principles. Likewise, a government entity could provide some customers with water that meets the requirements of SDWA standards, but that is nonetheless dirtier, smellier, or of demonstrably poorer quality than water provided to other customers. The water also could be polluted by a contaminant not regulated by the SDWA. Even though not violating the SDWA, these situations could create an equal protection issue, particularly if such distinction were based on intentional discrimination or lacked a rational basis."

Stranch noted that the ruling is not an admission that Flint residents' constitutional rights were violated, but it still implies that the unequal availability of potable water by a governmental unit could mean an Equal Protection violation -- a crucial affirmation.

Pitt had a simple analysis of its meaning.

"She is referencing the racial animus that is really at the heart of this whole mess," Pitt said.

The case had been argued last month in Cincinnati before the appellate panel, which another attorney for the *Mays* plaintiffs, Julie **HURWITZ**, was on hand for (See "[Future Of Several Flint Water Litigation Efforts Rests On 6th Circuit Decision](#)," 6/15/17).

Hurwitz saw the court's ruling, and that passage, as rebuffing the state's argument.

"Under the defendant's analysis, that plaintiff would be S-O-L," she said, saying that framing is "ludicrous."

The cases will return to federal district court, now being overseen by district Judge Judith **LEVY**, whose previous ruling departed starkly from O'Meara's -- and was cited by the panel in their ruling today (See "[Flint Suit Ruling Opens Door To Litigation Against Officials Over Lead](#)," 6/5/17).

Hurwitz said the opinion is vindication of Levy's earlier decision.

"What this 6th circuit ruling does is it firmly embeds these claims in the trial court without the looming possibility of more appeals or a bad precedent," she said. "We now have the precedent we need in order for Judge Levy to go forward with the confidence that her analysis was correct."

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Thanedar Questioned Party Affiliation With Biz Group

Before he made himself known to the media at the Detroit Regional Chamber of Commerce event at Mackinac Island, Shri **THANEDAR** spoke with Rob **FOWLER** and the folks the Small Business

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