The Flint water crisis was one of the more notable events of the last decade. Unsurprisingly, it led to litigation. So far, the Sixth Circuit has refused to dismiss the case against a number of the state and local government officials who were sued. This week the Supreme Court refused to hear their case challenging the Sixth Circuit decision.

The Sixth Circuit describes succinctly what happened: “As a cost-saving measure until a new water authority was to become operational, public officials switched the City of Flint municipal water supply from the Detroit Water and Sewerage Department (DWSD) to the Flint River to be processed by an outdated and previously mothballed water treatment plant.” The Flint River water was 19 times more corrosive than the water pumped from Lake Huron by the DWSD, and chemicals weren’t added to “counter the river water’s known corrosivity.” People got sick.

In a 2-1 decision the Sixth Circuit held that litigation could proceed against a number of the state and local government officials involved in the crisis. The court first held that it is plausible that some government officials violated plaintiffs Fourteenth Amendment Due Process right to bodily integrity. The court also ruled that the right violated was “clearly established,” meaning the officials could not receive qualified immunity.

Judge McKeague dissented finding no Due Process violation “because the Due Process Clause has never before been recognized as protecting against government conduct that in some way results in others being exposed to contaminated water.” Regardless, according to Judge McKeague, the government officials should be granted qualified immunity because the “mere fact that no court of controlling authority has ever recognized the type of due process right that plaintiffs allege in this case is all we need to conclude the right is not clearly established.”

The reason the Supreme Court may have not gotten involved in this case at this time may be the same reason the entire Sixth Circuit likely refused to rehear the case after it was decided by the three-judge panel. It is only at the motion to dismiss stage meaning a court has not determined the facts of the case.

As Judge Sutton put it: “In their complaint, the plaintiffs in this traumatic case plant the seeds of two potential stories. One speaks of local officials who bungled their response to a water crisis and in the process inadvertently polluted the water supply for the people of Flint, Michigan. The other speaks of local officials who intentionally poisoned Flint’s water supply. Each story leads to a different end. Negligent, even grossly negligent, conduct by local officials does not generally violate citizens’ substantive due process rights. But an intentional or reckless effort to poison Flint’s water supply is another matter. If that’s what happened, the case must proceed. So which account is the right account? It’s too early to say. At the pleading stage of a case, plaintiffs are entitled to make plausible allegations in their complaint and use the discovery process to ferret out support for their preferred account through depositions, emails, and documents.”

The entire three-judge panel agreed that the City of Flint couldn’t get out of the lawsuit claiming sovereign immunity. While municipalities generally can’t claim sovereign immunity, Flint argued it
was an arm of the state because the state had taken over the city due to financial distress. According to the Sixth Circuit, “the foremost consideration— the state’s potential liability for judgment—counsels against a finding of Eleventh Amendment immunity”; Flint must pay judgments against the City regardless of the state takeover.

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