SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

JOHN PARKHURT AS PARENT AND NEXT FRIEND OF J.D.P. AND J.T.P., MINORS, ON BEHALF THEMSELVES AND ON BEHALF OF OTHER MINORS SIMILARLY-SITUATED	:	CA No. 2009 CA 000971 B
Class Representatives,	:	
v.	:	Judge Anita Josey-Herring Calendar 11
DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,	:	
Defendant.	:	

ORDER

This matter is before the Court on Defendant's Motion to Dismiss Class Representatives' First Amended Complaint and Class Representatives' opposition. The Class Representatives filed a Complaint in this matter on February 17, 2009 and filed an Amended Complaint on June 9, 2009.

Procedural and Factual History

From 2001-2004, elevated levels of lead contaminated the drinking water in Washington, DC. (The Class Representatives' First Am. Compl. ("Am. Compl.") ¶ 2.) Drinking water is provided to city residents by the D.C. Water and Sewer Authority ("WASA"), the defendant, a semi-autonomous water and sewer authority whose general purpose is to "plan, design, construct, operate, maintain, regulate, finance, repair, modernize, and improve water distribution and sewage collection, treatment, and disposal systems and services, and to encourage conservation." (Id. at ¶ 22 (*citing* D.C. Code § 34-2202.02 (2001)).) By law, WASA is

responsible for the repair and maintenance of all water pipes, conveyances, and service lines within the District. (Am. Compl. ¶ 26.)

In 1991, the Environmental Protection Agency ("EPA") issued regulations that require municipal water systems to test the lead levels in their drinking water. (Am. Compl. ¶ 28.) Additionally, the EPA adopted a "Lead Action Level" ("LAL") of 15 parts per billion ("ppb"). (Am. Compl. ¶ 29.) If drinking water lead levels exceed this mark on more than 10% of tests, the EPA requires the municipality supervising the water system to take immediate remedial action and conduct public education campaigns regarding the negative health effects of lead exposure. (Am. Compl. ¶ 30-31.)

The Class Representatives allege that in November 2000, WASA began using a new purification chemical, chloramines, which led to the corrosion of lead and copper pipes within the water delivery system. (Am. Compl. ¶¶ 32-36.) The Class Representatives further maintain that in 2001, WASA discovered elevated levels of lead in a number of water samples taken throughout the District. (Am. Compl. ¶ 37.) The Class Representatives assert that WASA, upon discovering the contamination, falsely reported the results of the tests to the EPA, thereby avoiding any remedial action or public education requirements. (Am. Compl. ¶ 38.) The Class Representatives further contend that WASA not only failed to report or address the issue of elevated lead levels in the drinking water, but also actively covered up that information until January 31, 2004 when the Washington Post published an article regarding the elevated lead levels, discovered by WASA as early as 2001, and WASA's alleged response to that information. (Am. Compl. ¶ 62.)

In January 2009, researchers at Virginia Tech and Children's National Medical Center published a study linking the elevated lead levels in the District's drinking water from 2001 to

2004 with elevated blood lead ("EBL") in toddlers and other young children within the District. (Am. Compl. ¶¶ 70, 73.) The study claims that EBL can cause "irreversible loss and development delays" in toddlers and infants. (Am. Compl. ¶ 72.)

Class Representatives are two young boys, born in 2001. By way of Parent and Next friend, their father John Parkhurst, they contend that beginning in July 2001, they consumed and were harmed by lead contaminated water, delivered through a lead service line connected to their residence. (Am. Compl. ¶¶ 77, 79.) From July 2001 until the end of 2002, the Class Representatives consumed formula and food "prepared exclusively with tap water." (Am. Compl. ¶ 78.) During a November 2002 physical examination, the Class Representatives displayed evidence of lead poisoning. (Am. Compl. ¶¶ 80, 81.) Their father asserts that because he had not received any notice regarding lead levels in the drinking water, his children continued to consume WASA-supplied water. (Am. Compl. ¶ 82.) In 2007, neuropsychological evaluations of the Class Representatives showed significant problems in their attention, learning, and executive functions and resulted in continued psychiatric therapy and medication. (Am. Compl. ¶¶ 86-89.)

Based on the above-mentioned facts, Class Representatives brought the following claims against WASA: negligence, fraudulent misrepresentation, violation of the D.C. Consumer Protection Procedures Act ("DCCPPA"), breach of express and/or implied warranty, and strict liability. For their negligence claim, Class Representatives assert that WASA owed a duty to (a) deliver safe drinking water; (b) provide timely and accurate information concerning the known or potential dangers of its drinking water; (c) undertake comprehensive remedial action where 10% or more of the water samples showed evidence of dangerously high lead levels; and (d) educate the public about the presence of lead, its negative effects, the measures taken to

ameliorate the problem, and what consumers could do to minimize exposure to the lead. According to the Class Representatives, WASA's alleged failure to execute any of these duties was the proximate and legal cause of the injuries to the Class and Class Representatives. (Am. Compl. ¶¶ 106-111.)

In the claim of fraudulent misrepresentation, the Class Representatives assert that WASA knowingly made false representations regarding the safety of their water with the intent to deceive and induce Class Representatives and the Class to consume contaminated water. The Class Representatives and the Class, to their detriment, reasonably relied on these material misrepresentations of fact, thereby sustaining damages. (Am. Compl. ¶¶ 112-119.)

The Class Representatives base the third cause of action in an alleged violation of the D.C. Consumer Protection Procedures Act. D.C. Code §§ 28-3901, *et seq.* (2001). They contend that WASA supplied drinking water, constituting a "good or service" and engaged in a "trade practice" as required by the statute. The Class Representatives and Class, who are persons among the class of people the DCCPPA is designed to protect, suffered damages as a direct and proximate result of the alleged deception, fraud, false pretense, false promise, misrepresentation, concealment, suppression and/or omission of material facts related to the promotion and sale of water, which all constitute acts in violation of the statute. (Am. Compl. ¶¶ 121-130.)

The fourth cause of action, breach of express and/or implied warranty, alleges that WASA marketed and promoted their drinking water accompanied by express and/or implied warranties and representations that the water was safe for unborn children and young children if used for its intended purpose. Further, WASA knew or should have known that young children, including the Class Representatives and Class, were relying on these representations to their

detriment, even though WASA's drinking water was, in fact, not safe for children to consume. (Am. Compl. ¶¶ 130-134.)

Finally, Class Representatives assert a claim of strict liability. In support, they claim that (a) the water provided by WASA was at all times unreasonably dangerous and defective, (b) WASA knew or should have known that the Class Representatives and the Class would be unable to detect the dangerous nature of the water, (c) WASA should have, but did not, provide clear warnings as to the dangers associated with the drinking water, and (d) as a result of WASA's marketing and promotion of the defective and dangerous drinking water, the Class Representatives and Class suffered irreparable injury. (Am. Compl. ¶¶ 135-141.)

Standard of Review

WASA asks the Court to dismiss all five claims of the Amended Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the D.C. Superior Court Rules of Civil Procedure (2009). (Def.'s Mot. to Dismiss Class Representatives' First Am. Compl. ("Mot. to Dismiss") 5.) The Court will grant a Rule 12(b)(6) motion when the factual allegations made within the Complaint, when viewed in the light most favorable to the nonmoving party, are legally insufficient to warrant the claim. *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005). In order to survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007).

Analysis

1. Negligence

Under the common law claim of negligence, a plaintiff must plead the elements of (a) a duty of care by the defendant, (b) breach of that duty, (c) damages to the plaintiff, and (d) that

the breach was the proximate causation of those damages. *See Mixon v. Wash. Metro Area Transit Auth.* 959 A.2d 55, 58 (D.C. 2008). WASA contends that the Class Representatives failed to adequately plead all elements, specifically that they failed to adequately plead causation, a key element of a negligence claim.

While the Class Representatives alleged that EBL discovered in the children is directly correlated to the amount of lead contained within District drinking water, WASA notes that the Amended Complaint fails to allege that the water consumed by the Class Representatives caused their specific attention, learning, and behavior problems. WASA further asserts that the Class Representatives failed to allege specific facts regarding the Class Representatives' personal consumption (such as the amount of water they consumed and the levels of lead in *their* water). (Def.'s Mot. to Dismiss 5-6)

In response, the Class Representatives cite to both the Superior Court and Federal Rules of Civil Procedure, noting that under Superior Court Rule 8(a) D.C. is a notice pleading jurisdiction and a plaintiff's complaint must only give the defendant fair notice of what the claim is and on what grounds it rests. *See Taylor v. D.C. Water and Sewer Auth.* 957 A.2d 45, 50 (D.C. 2008); *See also Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002) (under the Federal rule, a party alleging negligence is only required to plead "a short and plain statement of the claim showing the pleader is entitled to relief."). (Class Representatives' Mem. in Opp'n to Def.'s Mot. to Dismiss First Am. Compl. ("Opp'n") 2, 5.) Specifically, to support their theory of causation, Class Representatives allege that (a) in July 2001 they resided at a home with a lead water service pipe, (b) at the time they resided at this location they were between the ages of eight months and three years, (c) they consumed tap water on a regular basis, (d) they did not receive

any notice about possible or actual lead contamination in the water, and (e) they showed signs of lead poisoning. (Am. Compl. ¶¶ 77-82.)

As the Class Representatives note, the pleading standards set out in Superior Court Civil Rule 8 constitute a "low threshold." (Opposition 3.) In order to satisfy this standard, a claimant must simply and plainly state the claim showing that the claimant is entitled to relief. Super. Ct. Civ. R. 8(a). In the case at hand, the Class Representatives allege facts that sufficiently plead the causation requirement of the negligence claim. Specifically, they state that from 2001 to 2004, when WASA-supplied water exhibited high concentrations of lead, i.e., more than 10% of tests yielded results higher than 15 ppb, the Class Representatives consumed WASA's water. The Class Representatives have allegedly displayed evidence of lead poisoning and injuries comparable to those characteristic of young children with prolonged lead exposure. At this preliminary stage of the lawsuit, such a pleading is sufficient to establish a prima facie claim of negligence. As such, WASA's motion to dismiss the claim of negligence is denied.

2. Fraudulent Misrepresentation

In order to sufficiently plead fraudulent misrepresentation, a plaintiff must establish (a) a false representation, (b) made in reference to a material fact, (c) with the knowledge of its falsity, (d) with the intent to deceive, and (e) an action taken by the plaintiff in reliance on that representation. *See In re Estate of McKenney*, 953 A.2d 336, 342 (D.C. 2008). Additionally, in cases of fraud, the complaint must be pleaded with particularity. *See D'Ambrosio v. Colonnade Council of Unit Owners*, 717 A.2d 582 (D.C. 1976).

WASA asserts that in order to properly claim fraudulent misrepresentation, the harmed party must sufficiently plead first-party reliance and not reliance by a third party, such as a parent. (Mot. to Dismiss 8.) While D.C. law is silent on the issue of third party reliance, WASA provides examples of other courts that have found first party reliance necessary. For example, in *Hodge v. D.C. Hous. Fin. Agency* 1993 U.S. Dist. LEXIS 14567, at *4 (D.D.C. Oct. 15, 1993) the court states that "courts will dismiss a claim that . . . allege [*sic*] reliance by a party other than the plaintiff."

Furthermore, the Maryland District Court in *Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 429 (D. Md. 2000) found that a plaintiff's fraudulent misrepresentation claim must fail where there is no evidence that the plaintiff themselves "ever saw or heard the defendant's representations." As WASA notes, in cases where the D.C. common law is silent, this court should look to Maryland common law for guidance. Id. at 7 (*citing Solid Rock Church v. Friendship Pub. Charter Sch., Inc.*, 925 A.2d 554, 561 (D.C. 2007)). WASA also draws the Court's attention to the Ohio Court of Appeals' finding in *Hahn v. Wayne County Children Servs.*, C.A. No. 00CA0029, 2001 Ohio App. LEXIS 2060, at *5-7 (Ct. App. Ohio May 9, 2001), dismissing a minor's fraud claim because the misrepresentations were made to his parents and not to him.

The Class Representatives agree that there is no controlling law in the District on whether first-party reliance is required where a minor child alleges common law fraud. (Opp'n 8.) The Class Representatives, however, argue that other jurisdictions have supported the imputation of parental reliance onto minor children for the purposes of a fraud claim. *See Williams v. Dow Chemical Co.*, No. 01 Civ. 4307(PKC), 2004 WL 1348932, at *21 (S.D.N.Y. June 16, 2004) (rejecting defendant's argument that plaintiffs, who suffered harm as a result of a chemical in

their home prior to their birth, could not maintain an action due to a lack of reliance on misleading statements), *Ruffing v. Union Carbide Corp.*, 764 N.Y.S.2d 462, 464-67 (N.Y. App. Div. 2003) (permitting child-plaintiff to claim fraudulent misrepresentation even though it was the mother, not the minor child-plaintiff, who relied on representations made by defendant company), *Nosbaum v. Martini*, 726 N.E.2d 84 (Ill. App. Ct. 2000) (holding that if an infant-plaintiff is incapable of relying on defendant's misrepresentations, then the reliance of the father establishes implied reliance), *Doe v. Roe School*, No. CL04-103, 2005 WL 1321599 (Va. Cir. Ct. June 3, 2005) (allowing a child-plaintiff to recover based on her parent's reliance on misrepresentations made by the defendant). Additionally, Class Representatives assert that the Court should look to two provisions of the Restatement (Second) of Torts, §§ 310, 311, which provide that in cases where an actor makes false representations to a party, liability should be imposed on the actor for harm resulting to a third party as a result of the misrepresentations to the first party. *See* Restatement (Second) of Torts §§ 310, 311 (1965).

Dismissal under Superior Court Civil Rule 12(b)(6) is impermissible unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief. *See Atkins v. Industrial Telecommunications Ass'n*, 660 A.2d 885 (D.C. 1995). In the instant case, it appears that the common law of D.C. is, at best, unclear on whether or not first-party reliance is required where a minor child alleges common law fraud. The cases cited by WASA are not dispositive. As it is not clear that Class Representatives would be barred from relief for a claim of third party reliance, it would be inappropriate to dismiss the claim at this juncture.

Further, as the Court weighes the alleged facts in the light most favorable to the non-moving party, here the Class Representatives, the Court finds that there is a basis for third party

reliance on these facts. Specifically, Class Representatives allege that in 2003, after WASA had allegedly known about the lead contamination for some time, WASA continued to supply the public, including Class Representative's parent, with materials espousing the safety and purity of their water. (Am. Compl. ¶ 56.) Additionally, Class Representatives assert that had their father known of the lead contamination, he would have stopped supplying the water to them. (Am. Compl. ¶ 82.) It is clear that dismissal at this juncture would be inappropriate, therefore, WASA's motion to dismiss the claim of fraudulent misrepresentation is denied.

3. The District of Columbia Consumer Protection Procedures Act ("DCCPPA")

The purpose of the DCCPPA, in part, is to "assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices." D.C. Code § 28-3901(b)(1). As such, the DCCPPA creates a private right of action for any person "seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia …." D.C. Code § 28-3905(k)(1).

i. Whether the DCCPPA Applies to WASA

WASA asserts that any DCCPPA claim against them is statutorily barred. In support, they primarily cite *Snowder v. D.C.*, 949 A.2d 590 (D.C. 2008) in support of their claim that DCCPPA claims are limited to merchants only and do not extend to organizations "motivated by a public purpose." (Mot. to Dismiss 9.) In *Snowder*, the D.C. Court of Appeals refused to permit automobile owners' DCCPPA claims against the District for the recovery of damages for towing and storage fees allegedly imposed without proper notice or consent. *Snowder*, 949 A. 2d at 599-

600. The court held that even though the Metropolitan Police Department was involved in the towing of cars in the District, it did not supply the towing or storage services or enter into any consumer-merchant relationship with the car owners. Therefore, the key consumer-merchant relationship in a DCCPPA claim did not exist.

In response to WASA's first contention, that they are not subject to the DCCPPA as they are "motivated by a public purpose," Class Representatives concede that prior to 2007, nonprofit organizations were exempt from the DCCPPA even if they engaged in a consumer-merchant relationship. (Opp'n at 16.) Noting WASA's use of *Snowder*, Class Representatives assert that WASA never qualified as a nonprofit organization, nor as an arm of the District government, and therefore was never exempt from the DCCPPA. (Opp'n at 16 (*citing D.C. Water and Sewer Auth. V. Delon Hampton & Assocs.*, 851 A.2d 410, 416 (D.C. 2004) (noting that WASA's fuctions and activities constitute a separate corporate body from the District and are proprietary in nature).)

Further, Class Representatives note that according to the legislative history of the 2007 amendments to the DCCPPA only three types of nonprofits exist: religious nonprofits organized for religious purposes; public benefit nonprofits organized as charitable groups or other tax exempt entities; and mutual benefit nonprofits that are corporations such as fraternal organizations or homeowners associations. Comm. On Pub. Safety & the Judiciary, Comm. Report, Report on Bill 17-53, at 1 (Feb. 28, 2007). Class Representatives note that WASA does not qualify under any of these and therefore never was exempt from the DCCPPA prior to 2007.

ii. Whether the DCCPPA Permits Recovery for Personal Injuries of a Tortious Nature

WASA further asserts that even if the DCCPPA extends to them, the Act does not permit recovery for personal injuries of a tortious nature. (Mot. to Dismiss 11.) WASA cites to *Childs v. Purll*, 882 A.2d 227, 238-39 (D.C. 2005), a case in which the D.C. Court of Appeals held that the private right of action under the DCCPPA, prior to 2000, was limited to violations within the purview of the D.C. Department of Consumer and Regulatory Affairs ("DCRA") and did not include the ability to order damages for personal injuries of a tortious nature. (Mot. to Dismiss 11.)

Noting this, WASA also cites *Gomez v. Independence Mgmt. of Del., Inc.*, 967 A.2d 1276 (D.C. 2009) and *Parker v. Martin*, 905 A.2d 756, 764 (D.C. 2006) for the combined proposition that the 2000 amendment did not extend the DCCPPA private right of action to actions outside the DCRA's jurisdiction. (Mot. to Dismiss 12). In *Gomez*, the court refused to extend the reach of the DCCPPA to cover claims arising out of a landlord-tenant relationship. *Gomez*, 967 A.2d at 1286. The court in *Parker* denied relief under the DCCPPA because the transaction arose under a landlord-tenant relationship and was for damages for personal injury of a tortious nature arising before the 2000 amendment.

Class Representatives, in opposition to WASA's second contention that even if the DCCPPA applies to WASA claims for tortious personal injury are barred, assert that WASA's position is contrary to the established case law. (Opp'n 19.) Citing to *Parker*, Class Representatives note that the Court of Appeals specifically stated that the DCCPPA "was amended in October 2000 to permit actions for damages for personal injury of a tortious nature." *Parker*, 905 A.2d at 764. Class Representatives then distinguish *Gomez*, noting in that case that the court did not directly address the issue of personal injury tort claims under the DCCPPA and

limits its holding to exclude claims arising under the landlord-tenant relationship, despite the 2000 amendment. *Gomez*, 967 A.2d at 1288.

The Court does not find WASA's assertion of a DCCPPA exemption to be persuasive. At best, there exists a genuine question of material fact as to whether or not WASA qualified as a nonprofit organization prior to 2007. Therefore, dismissal on this ground would be inappropriate. Further, the Court does not find, given the holding of *Parker*, that Class Representatives' DCCPPA claims would be barred. In *Parker*, The Court of Appeals found that the 2000 amendment to the DCCPPA permits actions for damages for personal injury of a tortious nature. *Parker*, 905 A.2d at 764 (citing *Caulfield v. Stark*, 893 A.2d 970, 977 (D.C. 2006).) Therefore, WASA's motion for dismissal of claims arising under the DCCPPA is denied.

4. Breach of Express or Implied Warranty

As previously mentioned, a Motion to Dismiss under Superior Court Civil Rule 12(b)(6) is impermissible unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief. *See Atkins v. Industrial Telecommunications Ass'n*, 660 A.2d 885 (D.C. 1995). Further, as noted, the facts alleged must be viewed in the light most favorable to the non-moving party. *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005).

i. Breach of Express Warranty

In order to sufficiently plead breach of express warranty, a plaintiff must establish that (a) the defendant made an express warranty as to the safety of the product, (b) that the defendant breached the warranty, and (c) that this breach was the proximate cause of the plaintiff's injuries. D.C. Stand. Civ. Jury Instr. 23.06 (LexisNexis 2008).

Here, Class Representatives contend that WASA through the mailers included with customers' water bills, as well as other sources, expressly warranted the safety of its water. For example, Class Representatives allege that in the Winter of 2002, after WASA allegedly had notice of the lead contamination in their water, WASA placed a recipe for cranberry tea in their "On Tap" newsletter, which was mailed to all of WASA's customers. (Am. Compl. ¶ 55.) This recipe called for the use of WASA tap water. *Id.* These materials, Class Representatives claim, constituted express warranties that WASA consequently breached proximately causing the injury to the Class Representatives. (Am. Compl. ¶¶ 130-34.)

WASA, however, asserts that marketing and promotional materials offered to the public do not, in and of themselves, constitute an express promise regarding the safety of their water. *See Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 465 (D.D.C. 1997) (applying D.C. law). The District Court in *Witherspoon*, addressing a breach of express warranty claim based on the nondisclosure of the known addictiveness of nicotine, held that a plaintiff could not claim a "warranty of omission." *Id.* In essence, the nondisclosure of a fact did not constitute an express warranty. *Id.* (acknowledging that such an argument "is at odds with the definition of express warranty.").

Under *Witherspoon*, WASA argues that broad claims presented in promotional materials, in and of themselves, cannot constitute express warranties. (Mot. to Dismiss 14.) Further, WASA asserts to the extent that Class Representatives base their claim on a failure by WASA to notify residents of possible lead contamination, this claim fails under *Witherspoon*'s prohibition on "warranties of omission." *Id.* Furthermore, even if WASA had made an express warranty, WASA contends that Class Representatives have failed to sufficiently plead that the breach of that warranty proximately caused their injuries. *Id.* at 15. WASA argues that Class

Representatives' injuries occurred in November 2002 and that none of the "alleged warranties were made by WASA *until 2003 at the earliest*" and therefore not until after the Class Representatives were already injured. (Mot. to Dismiss 15 (emphasis added).) The Class Representatives' Amended Complaint, however, alleges express warranties dating back to 2002. (Am. Compl. ¶ 55.) Therefore, WASA's assertion that proximate cause was not sufficiently plead here is incorrect.

Class Representatives, in their Opposition, do not address WASA's Motion to Dismiss the breach of express warranty claim. Viewing the alleged facts in the light most favorable to the nonmoving party, the Court is not convinced that the Class Representatives are barred from relief under this claim. It remains a question as to whether WASA's alleged assertions constitute express warranties to which WASA was bound. Further, it is possible that a trier of fact might find that assertions made in mailers that accompanied water bills were not solely promotional materials or "mere puffery" that might be excluded under *Witherspooon*. As such, the Court believes it would be premature to dismiss the breach of express warranty claim at this time and therefore WASA's motion to dismiss the claim of breach of express warranty is denied.

ii. Breach of Implied Warranty

In order to recover under a common law tort cause of action for breach of implied warranty, a plaintiff must establish that the product was defective (in that was is not reasonably fit for its intended usage or not of "merchantable quality") and that as a result of the defect, the product caused injury to the plaintiff. *See Payne v. Soft Sheen Prods.*, 486 A.2d 712, 720 (D.C. 1985).[1]

[1] In their Motion to Dismiss, WASA questions whether Class Representatives' claim for breach of implied warranty arises under the common law or the Uniform Commercial Code ("UCC"). As there is nothing in the Amended Complaint to indicate that Class Representatives are pleading anything but a common law claim, the Court presumes that Class Representatives have brought a common law claim and does not address any potential UCC claims.

In support of their argument, WASA asserts that Class Representatives failed to plead that either the water was unfit to drink or that it proximately caused their injuries. They note that while the Class Representatives allege the lead water levels exceeded the EPA 15 ppb Lead Action Level ("LAL"), these LALs did not render the water *per se* defective. (Mot. to Dismiss 18.) Further, WASA notes that the EPA "has not set a maximum contaminant level for lead in drinking water." *Id.* (*citing* Am. Compl. ¶ 29.) WASA also contends that, in any event, Class Representatives failed to adequately plead causation. (Mot. to Dismiss 5-6.)

In response, Class Representatives point out that the EPA regulations regarding lead contamination were created pursuant to the Safe Drinking Water Act, whose purpose is to protect the public from contaminated drinking water. (Opp'n at 21 (*citing* 42 U.S.C. § 300f (2006).) Further, they note in their Amended Complaint that the EPA set the LAL at 15 ppb "based on data showing that prolonged exposure to lead in drinking water at this level correlates to elevated blood levels in infants, small children and adults that can pose a serious risk of adverse health risks." (Am. Compl. ¶ 29.)

Based on the above discussion, the Court does not find that Class Representatives would be barred from relief on their claim for breach of implied warranty. The Class Representatives have sufficiently plead implied warranty and there is an issue here regarding whether water exceeding the EPA LAL of 15 ppb would be considered defective. Also, for reasons discussed above in regard to the negligence claim, Class Representatives have adequately pled causation. Therefore, WASA's motion to dismiss the claim of breach of implied warranty is denied.

5. Strict Liability

In order to succeed on a claim for strict liability, a plaintiff must prove that (a) the seller was engaged in the business of selling the product that caused the harm; (b) the product was sold

in a defective condition unreasonably dangerous to the consumer or user; (c) the product was one that the seller expected to and did reach the plaintiff consumer or user without any substantial change from the condition in which it was sold; and (d) the defect was a direct and proximate cause of the plaintiff's injuries. *See Warner Fruehauf Trailer Co. v. Boston*, 654 A.2d 1272, 1274 (D.C. 1995). In order to prove that a product was defective, a plaintiff must prove that the product (a) had a manufacturing defect, (b) an absence of sufficient warnings or instructions, or (c) an unsafe design. *Id.* Therefore, a plaintiff may assert one or more of these three theories of recovery.

Specifically, WASA argues that Class Representatives failed to allege that the product was sold in a defective condition or that it proximately caused their injuries. (Mot. to Dismiss 19.) In part, WASA reasserts their argument against Class Representatives' breach of implied warranty claim, arguing the defective nature of the product was insufficiently pled. *Id.* at 20. Therefore, WASA argues, Class Representatives cannot recover under a theory of manufacturing defect.

WASA further contends that on the alternate theory of failure to warn, Class Representatives have mischaracterized their case. *Id.* WASA cites *Payne*, for the proposition that "in a failure to warn case . . . the problem is not the product itself, which was designed and manufactured as intended. The defect is the failure to attach adequate warnings to a product that, as designed and manufactured, may in certain circumstances cause injury." 486 A.2d at 725. Due to the fact that the Class Representatives claim a problem with the product itself, WASA contends, this is not a failure to warn case. (Mot. to Dismiss 20.) WASA asserts that even if Class Representatives properly pled a failure to warn theory of strict liability, such a claim is

defeated by the many instances in which WASA attempted to warn the public of lead contamination levels in drinking water. *Id.*

On the other hand, Class Representatives contend that WASA misconstrues the law of strict liability. (Opp'n 24.) They point out that the Amended Complaint alleges two theories of strict liability, both design defect and failure to warn. Rehashing arguments made under their claim of breach of implied warranty, Class Representatives assert that they have satisfied the standard under *Warner* that the defendant sold the product in a defective and unreasonably dangerous condition. (Am. Compl. ¶¶ 32, 48, 136-39.) Further, under their theory of failure to warn, Class Representatives also cite to *Payne*, noting that in a failure to warn case, "[t]he defect is the failure to attach adequate warnings to a product that, as designed and manufactured, *may in certain circumstances* cause injury." 486 A.2d at 725 (emphasis added). Likewise, Class Representatives, in their Amended Complaint, make several allegations regarding the clarity and sufficiency of warnings provided by WASA regarding the safe use of their water. (Am. Compl. ¶¶ 39, 41, 46, 50-52, 138.)

Given that the alleged defective nature of WASA's water and WASA's alleged failure to warn are both questions of fact, dismissal on the issue of strict liability would be inappropriate at this time. It does not appear that, under the circumstances, Class Representatives would be barred from relief and therefore WASA's motion to dismiss the claim of strict liability is denied.

Conclusion

For the above mentioned reasons, WASA's motions to dismiss Class Representatives' claims of negligence, fraudulent misrepresentation, violation of the D.C. Consumer Protection Procedures Act ("DCCPPA"), breach of express and/or implied warranty, and strict liability are denied.

Therefore it is by the Court, this 23rd day of October, 2009, hereby:

ORDERED that Defendant's Motion to Dismiss Class Representatives' First Amended Complaint is denied.

Anita Josey-Herring
Associate Judge
(Signed in Chambers)

Copies to:

David W. Sanford
Stefanie Roemer
Felicia Medina
Sanford, Wittels & Heisler, LLP
2121 K Street N.W. Suite 700
Washington, DC 20037
Counsel for Class Representative

Steven L. Wittels
Jeremy Heisler
Sanford, Wittels & Heisler, LLP
950 Third Avenue, 10th Floor
New York, NY 10022
Counsel for Class Representative

Thomas M. Dibiagio
William N. Sinclair
Beveridge & Diamond, P.C.
1350 I Street N.W., Suite 700
Washington, DC 20005
Counsel for Defendant

Avis Marie Russell
General Counsel
District of Columbia Water and Sewer Authority
5000 Overlook Avenue, S.W.
Washington, DC 20032
Counsel for Defendant