

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**RICHARD JEFFRIES, individually
and on behalf of all others similarly situated,
and COLOURS BEAUTY
SALON, LLC,**

Plaintiffs,

v.

Civil Action No. 17-C-765

webster

**WEST VIRGINIA AMERICAN WATER
COMPANY,**

Defendant.

COMPLAINT

Plaintiffs bring the instant civil action against Defendant West Virginia American Water Company (“WVAW”), on behalf of themselves and a class of all others similarly situated, to recover damages and all other legally cognizable relief stemming from the loss of potable tap water to approximately 25,000 customers in late June 2015. The loss of the tap water service was due to the well-known inadequacy of WVAW’s transmission and distribution system to the western portion of what it calls the Kanawha Valley District. Specifically, WVAW’s transmission and distribution system to the western portion of the Kanawha Valley District is overly dependent on a single large-diameter main, which is known to be unreliable and prone to serious breaks. Plaintiffs, customers of WVAW, suffered losses as a consequence of the loss of tap water service, including but not limited to substantial annoyance and inconvenience, out-of-pocket expenses for replacement water and tap water-dependent services, and lost profits.

Parties and Jurisdiction

1. Plaintiff Richard Jeffries resides at #1 Truett Street, Poca, Putnam County, West Virginia. On and around June 23, 2015, Plaintiff was a resident of Putnam County, West

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Virginia. Mr. Jeffries was one of the approximately 25,000 WVAW customers who lost water in late June 2015 as a result of the main break in Dunbar, West Virginia.

2. Plaintiff Colours Beauty Salon, LLC, is a West Virginia business with its principal place of business in Cross Lanes, Kanawha County, West Virginia. Plaintiff Colours Beauty Salon was one of the approximately 25,000 WVAW customers that lost water in late June 2015 as a result of the main break in Dunbar, West Virginia.

3. Defendant West Virginia American Water Company (“WVAW”) is a West Virginia business with its principal place of business in Charleston, Kanawha County, West Virginia. WVAW operates a regulated for-profit water utility that supplies potable tap water under contract to thousands of customers in West Virginia.

4. Jurisdiction is proper in the State of West Virginia.

5. Venue is proper in Kanawha County, West Virginia, because the defendant Is headquartered in Kanawha County, the main break occurred in Kanawha County, and many of the 25,000 customers who lost water in June 2015 as a result of the main break reside or operate in Kanawha County.

Factual Allegations

6. On or about Tuesday, June 23, 2015, a 36-inch concrete water main, located in Dunbar, West Virginia, suffered a serious but not unforeseen break.

7. WVAW uses this transmission main, which varies in diameter as it runs from the Kanawha Valley Treatment Plant (“KVTP”) to the western edges of the service district, to supply water to approximately 25,000 customers in the western portion of its Kanawha Valley District.

8. The break caused outages and inadequate water pressure to approximately 25,000 WVAW customers.

9. The initial repair attempts over the next several days were unsuccessful. Regular service was not restored until June 27, 2015.

10. On or about June 29, 2015, another problem developed at the site of the initial break, which required an additional interruption in service to thousands of the same customers.

11. Upon information and belief, following this June 29, 2015 failure, full service with adequate pressure was not restored to all customers until July 1, 2015.

12. Upon information and belief, the 36-inch transmission main that failed on or about June 23, 2015, was installed in 1971 and 1972.

13. Upon information and belief, the transmission main that failed on or about June 23, 2015, had experienced a disproportionately high number of breaks and leaks over the course of its service time prior to June 23, 2015.

14. Upon information and belief, WVAW knew or should have known that this transmission main was failure-prone because of its construction, joints, layout, and usage characteristics.

15. Upon information and belief, WVAW knew or should have known that failures along this transmission main could take days to repair because of the size of the main and its other characteristics.

16. Upon information and belief, WVAW knew or should have known this transmission main supplied approximately 25,000 customers, with no available back-up supply line, redundant mains, or infrastructure reinforcements through which to furnish tap water from the KVTP or

any other water treatment plant to those customers in the event of an extended outage of the single main.

17. Upon information and belief, WVAW knew or should have known that it did not have adequate treated water storage in the areas served by this main to maintain continuous tap water service to customers during an extended outage of the single main.

18. Upon information and belief, WVAW knew or should have known that one or more of the following improvements were necessary to fulfill its legal and contractual obligations to its customers to ensure adequate service: developing a significant interconnection with the neighboring water system in Huntington, West Virginia; reinforcing the existing westward transmission and distribution system from the KVTP through additional large capacity mains that would be able to supply water in the event of a main break on the 36-inch concrete main (and would have the secondary benefit of improving the quality of service in those areas); and increasing treated water storage in the western portion of the Kanawha Valley District in order to be able to withstand longer outages of the concrete transmission main.

19. Upon information and belief, WVAW was indifferent to the risks to which its customers were exposed because it was indifferent to its legal and contractual obligations and the needs of its customers, and believed itself to be immune (effectively if not legally) from any of the consequences of a large outage to 25,000 customers.

20. Upon information and belief, WVAW willfully neglected its transmission and distribution system infrastructure for many years preceding the June 2015 main failure in the belief that the emerging infrastructure crisis would enable it to extract better rates and more favorable capital expenditure-recovery terms from regulators. WVAW and its predecessors in interest have operated the tap water distribution system in the Kanawha Valley for over a

century. Ongoing maintenance and infrastructure upgrades were routinely neglected for much of this period and culminated in investigative proceedings before the WV Public Service Commission and its order of October 13, 2011. That Order required WVAW to increase its main replacement rate, finding that its then-existing 950-year main replacement rate was “unacceptable.” For years, WVAW believed that it could extract more profits in the long-term by having an unreliable system, because it believed that its customers would have no alternative but to cave in and pay rates that guaranteed higher profits in exchange for reliable service.

Count I – Breach of Contract – Duty to Supply Water

21. Plaintiffs re-allege and incorporate by reference paragraphs 1–20 as though separately set forth herein.

22. WVAW had a contract with the customers who lost tap water pressure and service in June 2015. The express terms of that contract were set forth in its tariff, which specifically incorporates by reference the West Virginia Public Service Commission’s regulations or “water rules.” Those “PSC water rules” are part of the contract because of their express incorporation in the tariff.

23. One of the PSC water rules incorporated into the contract that WVAW had with all of its customers in June 2015 provides: “The utility’s approval of an application for water to be supplied to any premises shall constitute a right to the customer to take and receive a supply of water for said premises for the purposes specified in such application (i.e. Residential, Commercial, and Industrial) subject only to the fulfillment of the conditions of these rules by the customer.” W. Va. C.S.R. § 150-7-4.1.e.4.

24. WVAW failed to perform that contractual obligation in June 2015 when it failed to supply usable tap water or adequate water pressure to approximately 25,000 customers for a period of three or more days.

25. WVAW breached its contract with its customers, including Plaintiffs, and its customers are entitled to damages, including foreseeable consequential damages, resulting from that breach.

26. WVAW's customers, including Plaintiffs, are entitled to all consequential damages, including but not limited to damages for annoyance and inconvenience, their out-of-pocket expenses associated with obtaining substitutes, and loss of profits.

Count II – Breach of Contract – Duty to Maintain Facilities to Provide Adequate and Continuous Service

27. Plaintiffs re-allege and incorporate by reference paragraphs 1–26 as though separately set forth herein.

28. Another of the PSC water rules incorporated into the contract that WVAW had with all of its customers in June 2015 provides: “Each utility shall at all times construct and maintain its entire plant and system in such condition that it will furnish safe, adequate and continuous service.”

29. Whether one interprets that provision literally, to mean uninterrupted service, as Plaintiffs believe it should be interpreted, or as a duty to provide service with “reasonable continuity,” as WVAW will no doubt argue, WVAW clearly failed to fulfill that contractual promise to its customers, including Plaintiffs, when 25,000 customers lost water for three or more days in June 2015.

30. Moreover, upon information and belief, WVAW knew or should have known for many years prior to the June 2015 main break that its “entire plant and system” were not

constructed and maintained “in such condition that it will furnish safe, adequate and continuous service,” however generously “continuous service” may be defined. WVAW was aware or should have been aware, for many years prior to June 2015, that approximately 25,000 customers in the western portion of the Kanawha Valley District were dependent on a single, faulty, break- and leak-prone transmission main; that a break in that transmission main might take days to repair; that it did not have adequate storage to supply water to those customers for the duration of such a repair; that it had no alternative mains by which to supply adequate water to those customers from the KVTP; and that it lacked an interconnection with neighboring systems sufficient to supply water from other treatment plants.

31. WVAW was also in violation of water utility industry standards concerning the adequacy of facilities in at least the following ways: through the faulty construction of the concrete main and its joints; the transmission main’s break rate or frequency of breaks was unacceptably high; and, especially, because 25,000 customers depended on a single, large main—with expected extended repair time—with inadequate or no infrastructure reinforcements or redundancy, with inadequate storage reserves, and with no (or only a grossly inadequate) alternative means of supplying those customers from a different treatment plant.

32. WVAW’s service, in this respect, was not reasonable and the “continuity” of service was completely absent and clearly unreasonable.

33. WVAW breached its contract with its customers, including Plaintiffs, and its customers are entitled to damages, including foreseeable consequential damages, resulting from that breach.

34. WVAW's customers, including Plaintiffs, are entitled to all consequential damages, including but not limited to damages for annoyance and inconvenience, their out-of-pocket expenses associated with obtaining substitutes, and loss of profits.

Count III – Violation of Statutory Obligations

35. Plaintiffs re-allege and incorporate by reference paragraphs 1–34 as though separately set forth herein.

36. West Virginia Code § 24-3-1 provides, in relevant part: “Every public utility subject to this chapter shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public.”

37. Any person damaged by a water utility's breach of that duty stated in § 24-3-1 has a right of action for damages under West Virginia Code § 24-4-7.

38. WVAW clearly violated its statutory duty to its customers, including Plaintiffs, when 25,000 customers lost water for three or more days in June 2015.

39. However generously one may interpret that section of the West Virginia Code, an outage impacting 25,000 customers for at least three days does not comport with the duty to provide service that is “reasonable.”

40. However generously one may interpret that section of the West Virginia Code, an outage impacting 25,000 customers for at least three days does not comport with the duty to provide service that is “sufficient.”

41. WVAW's facilities, as established and maintained, were not “adequate.”

42. WVAW's facilities, as established and maintained, were not “suitable.”

43. Upon information and belief, WVAW was aware or should have been aware, for many years prior to June 2015, that approximately 25,000 customers in the western portion of the Kanawha Valley District were dependent on a single, faulty, break- and leak-prone transmission main; that a break in that transmission main might take days to repair; that it did not have adequate storage to supply water to those customers for the duration of such a repair; that it had no alternative mains by which to supply adequate water to those customers from the KVTP; and that it lacked an interconnection with neighboring systems sufficient to supply water from other treatment plants.

44. WVAW was also in violation of water utility industry standards concerning the adequacy of its facilities in at least the following ways: through the faulty construction of the concrete main and its joints; the transmission main's break rate or frequency of breaks was unacceptably high; and, especially, because 25,000 customers depended on a single, large main—with expected extended repair time—with inadequate or no infrastructure reinforcements or redundancy, with inadequate storage reserves, and with no (or only a grossly inadequate) alternative means of supplying those customers from a different treatment plant.

45. WVAW's service, in this respect, judged from industry standards, was not reasonable or sufficient, and its facilities were not adequate.

46. WVAW violated its statutory duty to its customers, including Plaintiffs, and its customers are entitled to all damages that resulted from that violation, including but not limited to damages for annoyance and inconvenience, out-of-pocket expenses associated with obtaining substitutes, and loss of profits.

47. Plaintiffs also seek punitive damages for WVAW's calculated indifference to the risks it was creating for its customers.

Count IV – Negligence

48. Plaintiffs re-allege and incorporate by reference paragraphs 1–47 as though separately set forth herein.

49. Under the common law, WVAW has a duty to exercise reasonable care in its undertakings.

50. WVAW failed to exercise reasonable care in at least the following ways: through its faulty design and construction of the concrete main and its joints; through its failure to address the transmission main's unacceptably high break rate; and, especially, through its calculated and greedy indifference to 25,000 customers whom it left dependent on a single, large main—with expected extended repair time—with inadequate or no infrastructure reinforcements or redundancy, with inadequate storage reserves, and with no (or only a grossly inadequate) alternative means of supplying those customers from a different treatment plant.

51. All of the conduct described in the preceding paragraph was in violation of industry standards.

52. All of the conduct described in the preceding two paragraphs was also in violation of the PSC water rules, including but not limited to W.Va. C.S.R. § 150-7-5.1.a, and was therefore unreasonable *per se*.

53. WVAW's customers, including Plaintiffs, are entitled to all damages that proximately resulted from that violation of the common-law duty of reasonable care, including but not limited to damages for annoyance and inconvenience, out-of-pocket expenses associated with obtaining substitutes, and loss of profits.

54. Plaintiffs also seek punitive damages for WVAW's calculated indifference to the risks it was creating for its customers, through the actions described in detail in paragraphs 1–53, above.

Class Allegations

55. Plaintiffs re-allege and incorporate paragraphs 1–54 as though separately set forth herein.

56. Plaintiffs bring this suit for themselves and for a class consisting of WVAW's residential and business customers and other households and businesses supplied tap water in the West Virginia counties of Kanawha and Putnam that lost water pressure and the tap water service in late June 2015 as a result of the Dunbar main break.

57. Plaintiffs adequately represent the class of persons defined above. First, they are members of the class of residential and business customers in the West Virginia counties of Kanawha and Putnam who lost water in June 2015 due to the Dunbar main break. Second, Plaintiffs do not have any potential conflict of interest with the proposed Class as herein defined.

58. The Class is objectively defined by the boundaries of the WVAW service area served by the 36-inch water main. Those boundaries are known to WVAW, and may be established by modeling, if need be. The Class can and will be further defined by maps that will be prepared outlining the precise geographical boundaries of the affected customers.

59. The proposed class has been estimated, based on the areas affected and available data, as consisting of approximately 25,000 customers.

60. This action may be properly prosecuted as a class action under Rule 23 of the West Virginia Rules of Civil Procedure. The persons constituting the Class—an estimated 25,000 customers (without even counting the non-customer class members)—in this case are so numerous

as to make it impractical to bring them all before this Court. Thus the “numerosity” requirement of Rule 23(a) is satisfied.

61. There are many common questions of law and fact affecting the rights of each member, and common relief is sought by the Class members, and thus the “commonality” requirement of Rule 23(a) is satisfied. The questions of whether the Defendants violated their contracts, acted negligently or non-negligently, reasonably or unreasonably, in the events leading up to and following the Dunbar main break are common to the class as a whole, and do not turn on any particular aspect of any individual Class member’s situation. WVAW acted in a manner that affected all of them similarly.

62. The theories of relief are identical for all members of the Class, and all members of the Class are alleged to have suffered a similar kind of damages—the loss of the use of their tap water.

63. The named Plaintiffs’ claims are typical of the claims of the other members of the Class, and thus the “typicality” requirement of Rule 23(a) is satisfied.

64. The undersigned counsel are experienced in the prosecution of class actions and have adequate resources to prosecute this class action. The work done by the undersigned to date shows that the undersigned can adequately represent the class, which fulfills the first part of the “adequacy” requirement of Rule 23(a). *See In re Rezulin Litigation*, 214 W. Va. 52, syl. pt. 13 (2003) (breaking adequacy requirement into two parts).

65. The named Plaintiffs do not have any potential conflict of interest with the proposed Class as herein defined. Thus, the second part of the “adequacy” requirement of Rule 23(a) has been satisfied. *See In re Rezulin Litigation*, 214 W. Va. 52, syl. pt. 13 (2003) (breaking adequacy requirement into two parts).

66. The class action may be maintained because the prosecution of separate actions by individual members of the Class would create a risk of inconsistent and varying adjudications, which would establish incompatible standards of conduct for the Defendant and Class members. Adjudication with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of other members of the Class not parties to such adjudications, thereby impairing or impeding their interests. Thus the Class may be maintained under Rule 23(b)(1).

67. The class action may also be maintained because, as noted above, the many questions of law and fact that are common to the class clearly predominate over questions, if any, affecting only individual members of the Class, and a class action is superior to other available means for the fair and efficient adjudication of the controversy. With respect to other potential means—such as traditional individual tort cases, mass action consolidation, or traditional consolidation—those are not practical, since the damages claimed by individual members of the this class are likely to be exceeded by the costs of prosecuting any individual class member’s claim, even in a consolidated proceeding. Thus the Class may also be maintained under Rule 23(b)(3).

68. The named Plaintiffs and clearly more than two-thirds of the members of all proposed classes—all or nearly all of the Class members as defined—and the sole Defendant are citizens of the State of West Virginia. Therefore, the instant action may not be removed to federal court pursuant to the Class Action Fairness Act.

Prayer for Relief and Demand for Jury Trial

WHEREFORE, the Plaintiffs, individually, and as Class representatives, pray for the following relief:

A. That the Court certify the Class under Rule 23 of the West Virginia Rules of Civil Procedure and appoint the Plaintiffs as class representative and The Calwell Practice, LC;

Bonnett, Fairbourn, Friedman & Balint, P.C.; and Thompson Barney Law Firm as Class counsel.

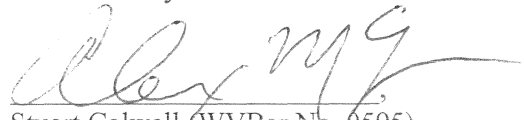
B. An award of punitive damages for the Plaintiffs and members of the Class based on the willful, reckless, and wanton behavior of the Defendants in refusing to address the known inadequate and unacceptable risk of pipe failure and a massive outage to thousands of customers in order to extract better expenditure recovery terms from rate-payers.

C. That the Court order the Defendants to pay damages to the Plaintiffs in compensation for the harms and injuries they have suffered as a result of the Defendants' breach of contractual promises and tortious conduct, including, but not limited to:

- (1) Damages for loss of use of residential tap water;
- (2) Damages for annoyance and inconvenience occasioned by the outage and delay in restoration of water service, including but not limited to incidental expenses occasioned by the loss of use of tap water;
- (3) Damages for lost profits; and
- (4) Such other relief as may be just and equitable.

The Plaintiffs and class members demand a trial by jury as to all issues so triable.

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