



**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**IN RE: OPIOID LITIGATION**

**CIVIL ACTION NO. 19-C-9000**

**THIS DOCUMENT APPLIES TO ALL CASES**

**ORDER**

Pending before the Mass Litigation Panel (“Panel”) is *Plaintiff City of Beckley’s Motion for Leave to File Second Amended and Class Action Complaint and to Sever* (Transaction ID 67008463) filed in Civil Action No. 20-C-34 MSH. Also pending before the Panel is *Distributor Defendants’<sup>1</sup> Amended Motion for Clarification of the Panel’s September 30, 2021 Order and Motion to Enforce July 20, 2020 and July 23, 2020 Orders to Correct Signature Block* (Transaction ID 67033978) filed in numerous civil actions.<sup>2</sup> The Panel has reviewed the motions and the parties’ responses.<sup>3</sup> Because the pending motions impact the entire Opioid Litigation the Panel files and serves this Order in the Opioid Litigation Master Case File.

**PROCEDURAL BACKGROUND**

On August 4, 2021, the Panel granted the State of West Virginia’s motion to sever three cases filed by the State against certain opioid manufacturers (“Manufacturer Defendants”)<sup>4</sup> in

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<sup>1</sup> Distributor Defendants are AmerisourceBergen Drug Corporation; Cardinal Health, Inc.; and McKesson Corporation.

<sup>2</sup> Civil Action Nos. 17-C-248 MSH through 17-C-255 MSH; 18-C-222 MSH; 18-C-233 MSH through 18-C-236 MSH; 19-C-4 MSH through 19-C-9 MSH; 19-C-96 MSH through 19-C-108 MSH; 19-C-69 MSH through 19-C-88 MSH; 19-C-134 through 19-C-139 MSH; 19-C-215 MSH through 19-C-239 MSH; 19-C-259 MSH through 19-C-266 MSH; 20-C-16 MSH through 20-C-27 MSH; 20-C-34 MSH; 20-C-55 MSH; 20-C-31 MSH; 20-C-52 MSH through 20-C-54 MSH; and 20-C-79 MSH through 20-C-81 MSH.

<sup>3</sup> Plaintiffs’ Coordinator’s Response to City of Beckley’s Motion (Transaction ID 67012251); Defendants’ Opposition to City of Beckley’s Motion (Transaction ID 67046147); Defendant Bypass Pharmacy, Inc.’s Supplemental Response in Opposition to City of Beckley’s Motion (Transaction ID 67046296); Plaintiffs’ Coordinators’ and Co-Lead Counsel’s Response to Distributor Defendants’ Amended Motion for Clarification (Transaction ID 67046239).

<sup>4</sup> *State of West Virginia, ex rel. Patrick Morrissey, Attorney General v. Teva Pharmaceutical Industries, Ltd, et al.*, Civil Action No. 19-C-104 BNE; *State of West Virginia, ex rel. Patrick Morrissey, Attorney General v. Janssen*

connection with their manufacture, promotion, and distribution of prescription opioids in West Virginia.<sup>5</sup> The Panel ordered an expedited bench trial of the State’s public nuisance and WVCCPA claims against the Manufacturer Defendants to begin on April 4, 2022.<sup>6</sup> A case management order for discovery and trial of those cases was entered on October 6, 2021.<sup>7</sup>

During the September 10, 2021 Status Conference, the Panel also ordered an expedited bench trial of the State’s public nuisance and WVCCPA claims against certain national pharmacies (“Pharmacy Defendants”)<sup>8</sup> to begin on September 12, 2022.<sup>9</sup> The State and the Pharmacy Defendants were ordered to meet and confer with the Discovery Commissioner to resolve any disputes regarding a proposed case management order for those cases.<sup>10</sup>

On September 30, 2021, the Panel ordered an expedited bench trial to begin on July 5, 2022, against the Distributor Defendants for all City/County and Hospital Plaintiffs which have voluntarily dismissed, without prejudice, their legal claims in accordance with *State ex rel. AmerisourceBergen Drug Corporation v. Moats*, 859 S.E.2d 374 (W. Va. 2021).<sup>11</sup>

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*Pharmaceutical, Inc., et al.*, Civil Action No. 19-C-105 BNE; and *State of West Virginia, ex rel. Patrick Morrissey, Attorney General v. Endo Health Solutions, Inc., et al.*, Civil Action No. 19-C-151 BNE.

<sup>5</sup> *Order Granting Plaintiff’s Motion to Sever Cases for Bench Trial on Expedited Basis* (Transaction ID 66821121).

<sup>6</sup> *Id.*

<sup>7</sup> *Case Management Order Relating to the State Opioid Manufacturer Proceedings* (Transaction ID 66992975).

<sup>8</sup> *State of West Virginia, ex rel. Patrick Morrissey, Attorney General v. Walgreens Boots Alliance, Inc., et al.*, Civil Action No. 20-C-82 PNM; *State of West Virginia, ex rel. Patrick Morrissey, Attorney General v. Rite Aid of Maryland, Inc. d/b/a Rite Aid Mid-Atlantic Customer Support Center*, Civil Action No. 20-C-83 PNM; *State of West Virginia, ex rel. Patrick Morrissey, Attorney General v. CVS Pharmacy, Inc.*, Civil Action No. 20-C-131 PNM; and *State of West Virginia, ex rel. Patrick Morrissey, Attorney General v. Walmart, Inc. f/k/a Wal-Mart Stores, Inc.*, Civil Action No. 20-C-132 PNM.

<sup>9</sup> *Order Regarding Rulings Issued During September 10, 2021 Status Conference* (Transaction ID 66922721).

<sup>10</sup> *Id.*

<sup>11</sup> *Order Regarding Voluntary Dismissal of Legal Claims Discussed During September 10, 2021 Status Conference* (Transaction IDs 66980151). *See also, Amendment to Order Regarding Voluntary Dismissal of Legal Claims Discussed During September 10, 2021 Status Conference* (Transaction ID 6692889).

All City/County Plaintiffs voluntarily dismissed all claims for relief, without prejudice, with the express exception of their equitable claims for public nuisance.<sup>12</sup> The Hospital Plaintiffs voluntarily dismissed all claims for relief, without prejudice, “with the express exception of the Hospitals’ claims for nuisance and all remedies which the Hospitals may recover from any Defendant upon proof of nuisance liability.”<sup>13</sup> The Panel intends to conduct expedited bench trials and conclude the liability phase of all public nuisance cases by the end of 2022.<sup>14</sup>

The City of Beckley (“Beckley”) has filed a motion for leave to file its Second Amended and Class Action Complaint, and to sever its case from the July 5, 2022, trial against the Distributor Defendants and create a separate Class Action Track while class proceedings are undertaken.<sup>15</sup> Beckley’s proposed amended class action complaint proposes to bring before the Panel the claims of eighty-eight (88) West Virginia counties and cities asserting equitable claims for public nuisance in both State and Federal Court under Rule 23 of the West Virginia Rules of Civil Procedure.<sup>16</sup>

Distributor Defendants have also filed a motion to (1) seek clarification that the Panel’s September 30, 2021 Order setting the July 5, 2022 trial did not alter the Panel’s previous ruling that the Phase I trial for public nuisance liability will include causation and (2) request that the

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<sup>12</sup> See Orders granting Rule 41(a)(2) motions to dismiss certain claims (Transaction IDs 66936677, 66940716, 66942534, 66951004 and 66987420).

<sup>13</sup> *Order Granting Hospital Plaintiffs’ Rule 41(a)(2) Motion to Dismiss Certain Claims* (Transaction ID 66922936).

<sup>14</sup> *Order Regarding Voluntary Dismissal of Legal Claims Discussed During September 10, 2021 Status Conference* (Transaction ID 66980151), entered September 30, 2021.

<sup>15</sup> Motion (Transaction ID 67008463) p. 1

<sup>16</sup> *Id.* p. 2.

Panel enforce its previous ruling that Distributors are entitled to conduct discovery on the issue of liability from all Plaintiffs.<sup>17</sup>

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. West Virginia Trial Court Rule 26.05(a) requires the Panel to “develop and implement case management and trial methodologies to fairly and expeditiously resolve Mass Litigation referred to the Panel by the Chief Justice.”<sup>18</sup> The Panel is further required to “take such action as is reasonably necessary and incidental to the powers and responsibilities conferred by this rule or by the specific directive of the Chief Justice.”<sup>19</sup>

2. “Consistent with this broad grant of authority” the Supreme Court of Appeals of West Virginia has held that ““management of [mass tort] cases cannot be accomplished without granting trial courts assigned these matters significant flexibility and leeway with regard to their handling of these cases.””<sup>20</sup> Therefore, “[a] creative, innovative trial management plan developed by a trial court which is designed to achieve an orderly, reasonably swift and efficient disposition of mass liability cases will be approved so long as the plan does not trespass upon the procedural due process rights of the parties.”<sup>21</sup>

3. When the Supreme Court referred the Opioid Litigation to the Panel, it authorized the Panel to transfer and join with the existing Mass Litigation “any civil actions involving the same or similar questions of law or fact subsequently filed in any circuit court of West Virginia” and

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<sup>17</sup> Motion (Transaction ID 67033978) p. 1.

<sup>18</sup> T.C.R. 26.05(a).

<sup>19</sup> T.C.R. 26.05(f).

<sup>20</sup> *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 859 S.E.2d 374, 397 (W. Va. 2021) (Wooton, J. concurring in part and dissenting in part) (quoting *In re: Tobacco Litig.*, 218 W. Va. 301, 306, 624 S.E.2d 736, 743 (2005) (citing *State ex rel. Mobil Corp. v. Gaughan*, 211 W. Va. 106, 111, 563 S.E.2d 419, 424 (2002))).

<sup>21</sup> Syllabus Point 3, *State ex rel. Appalachian Power Co. v. Macqueen*, 198 W. Va. 1, 479 S.E.2d 300 (1996).

“any civil actions involving the same or similar common questions of law or fact . . . that are remanded to any circuit court in West Virginia from federal court.”<sup>22</sup>

4. Rule 42(a) of the West Virginia Rules of Civil Procedure provides that:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.<sup>23</sup>

5. The Panel finds that all cases filed by the City/County Plaintiffs involve common questions of law or fact such that consolidation of these cases for trial is appropriate under Rule 42(a). As the Supreme Court recognized, “plaintiffs are asking solely for a determination of whether the defendants created a public nuisance, which is broadly defined as ““an unreasonable interference with a right common to the general public.””<sup>24</sup>

6. When exercising discretion in deciding consolidation issues under Rule 42(a), the trial court should consider:

“(1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy; (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives. When the trial court concludes in the exercise of its discretion whether to grant or deny consolidation, it should set forth in its order granting or denying consolidation sufficient grounds to establish for review why consolidation would or would not promote judicial economy and convenience of the parties and avoid prejudice and confusion.”<sup>25</sup>

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<sup>22</sup> Administrative Order of the Supreme Court of Appeals of West Virginia entered on June 7, 2019.

<sup>23</sup> W.V.R.C.P. 42(a).

<sup>24</sup> *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 859 S.E.2d at 396 (Hutchison, J. concurring) (quoting *Restatement (Second) of Torts* § 821B (1) (1979). See also, *Hark v. Mountain Fork Lumber Co.*, 127 W.Va. 586, 595-96, 34 S.E.2d 348, 354 (1945) (“A public nuisance is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons.”).

<sup>25</sup> Syllabus Point 1, *State ex rel. Appalachian Power Co. v. Macqueen*, 198 W. Va. 1, 479 S.E.2d 300 (1996) (quoting Syllabus 2, *State ex rel. Appalachian Power v. Ranson*, 190 W. Va. 429, 438 S.E.2d 609 (1993)).

7. The City/County Plaintiffs contend the opioid crisis that is the subject of this Mass Litigation is a public nuisance for which the Distributor Defendants should be held liable. The opioid crisis is ubiquitous. It knows no boundaries and is not limited to a specific city or county in West Virginia. The Panel finds that a consolidated bench trial to determine whether the Distributor Defendants are liable to the City/County Plaintiffs for public nuisance will promote judicial dispatch and economy, while avoiding the prejudice and confusion of multiple, single-plaintiff trials. It will also promote convenience of the parties and witnesses, conserve available judicial resources, and substantially decrease the length of time, amount of expense, and burden on all parties of trying multiple lawsuits to determine whether the Distributor Defendants are liable for public nuisance as to each city or county.

8. Rule 42(c) provides that:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by Article III, Section 13 of the West Virginia Constitution or as given by a statute of this State.<sup>26</sup>

9. Pursuant to Rule 42(c), the Panel further finds that a separate trial of the Hospital Plaintiffs' "claims for nuisance and all remedies which the Hospitals may recover from any Defendant upon proof of nuisance liability"<sup>27</sup> will avoid prejudice to the City/County Plaintiffs and the Distributor Defendants.

10. The Panel intends to conduct a series of expedited bench trials and conclude the liability phase of all public nuisance cases by the end of 2022. If the Panel were to allow Beckley to

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<sup>26</sup> W.V.R.C.P. 42(c).

<sup>27</sup> *Order Granting Hospital Plaintiffs' Rule 41(a)(2) Motion to Dismiss Certain Claims* (Transaction ID 66922936).

amend its complaint to add class action allegations, sever its case from the July 5, 2022, trial against the Distributor Defendants, and create a separate Class Action Track while class proceedings are undertaken, it would most likely delay the July 5, 2022, trial, negatively impact the progress of the litigation, and cause unnecessary cost and delay.

11. The Panel’s September 30, 2021 Order setting the July 5, 2022 bench trial states:

The Panel intends to conduct expedited bench trials and conclude the liability phase of all public nuisance cases by the end of 2022 including the Manufacturer Cases, the Distributor Cases, and the Dispenser Cases. If one or more Defendants are found to be liable, the Panel will then set an expedited bench trial on causation and abatement. The Panel intends to hear evidence on a single, state-wide abatement remedy and will consider allocation of fault amongst those Defendants found liable for purposes of inchoate contribution. If abatement is warranted, the Panel will consider an award of attorney fees as a component of any equitable remedy which will replace enforcement of contingency fees.<sup>28</sup>

That Order is not inconsistent with the Panel’s prior ruling that liability for public nuisance includes causation:

As the Supreme Court has recognized, West Virginia’s definition of public nuisance – “an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons” – is consistent with the *Restatement (Second) of Torts* § 821B(1)(1979), which defines a public nuisance as “an unreasonable interference with a right common to the general public.” *Duff v. Morgantown Energy Associates*, 187 W.Va. 712, 716, 421 S.E.2d 253, 257 (1992) and footnote 6. Under either definition, liability for public nuisance, by necessity, includes a determination of causation because these elements are interrelated.<sup>29</sup>

12. Both Orders are correct because causation must be bifurcated. General causation will be addressed in the Phase I trials of liability for public nuisance against the Manufacturers, Distributors and Pharmacies. If general causation is proved in any of the Phase I trials, then specific causation will be addressed in a Phase II, statewide abatement trial. Phase I general

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<sup>28</sup> *Order Regarding Voluntary Dismissal of Legal Claims Discussed During September 10, 2021 Status Conference* (Transaction ID 66980151), p. 1.

<sup>29</sup> *Order Denying Certain Defendants’ Motions for Reconsideration* (Transaction ID 65792140), p. 8:

causation will address whether Defendants’ conduct caused the oversupply and diversion of opioids in West Virginia. Phase II will address causation of opioid epidemic harms in Plaintiffs’ communities that relate to the equitable remedy of abatement.

13. The Panel finds that it would be unduly burdensome, expensive, and cumulative to allow liability discovery from the individual City/County Plaintiffs to determine general causation – whether Defendants’ conduct caused the oversupply and diversion of opioids in West Virginia – therefore, the Panel will allow discovery in the aggregate in Phase I.

14. In addition to seeking equitable abatement of a public nuisance, the State seeks civil penalties, disgorgement, and injunctive relief against the Manufacturer and Pharmacy Defendants pursuant to W. Va. Code §§ 46A-7-108 and -111(2) for violation of the West Virginia Consumer Credit and Protection Act (“WVCCPA”), W.Va. Code §§ 46A-1-101 *et seq.* Because there is no causation requirement for the State’s WVCCPA claims,<sup>30</sup> the Panel finds that WVCCPA liability, civil penalties, disgorgement, and injunctive relief based upon the Manufacturer and Pharmacy Defendants’ alleged violations of the WVCCPA should be decided in Phase I of those respective trials.

### **ORDER**

Based on the findings of fact and conclusions of law, as set forth above, the Panel **DENIES** *Plaintiff City of Beckley’s Motion for Leave to File Second Amended and Class Action Complaint and to Sever* (Transaction ID 67008463). Allowing the City of Beckley to file its Second Amended and Class Action Complaint, sever its case from the July 5, 2022, trial against the Distributor Defendants, and create a separate Class Action Track while class proceedings are

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<sup>30</sup> *State of West Virginia ex rel. McGraw v. Johnson & Johnson*, 226 W. Va. 677, 684, 704 S.E.2d 677, 684 (2010): “To enforce the provisions of this Act, the attorney general may bring a civil action to restrain a defendant from engaging in such unfair or deceptive acts. *Id.* at § 46A-7-107. If the attorney general can prove that a defendant has engaged in a course of repeated and willful violations of the Act, then a court may assess a civil penalty of no more than five thousand dollars for each violation. *Id.* at § 46A-7-111(2).”



undertaken would most likely delay the July 5, 2022, trial, negatively impact the progress of this litigation and cause unnecessary cost and delay.

Pursuant to Rule 42(a) of the West Virginia Rules of Civil Procedure, the Panel **ORDERS** consolidation of the City/County Plaintiffs' cases against the Distributor Defendants for purposes of conducting an expedited bench trial of liability for public nuisance on July 5, 2022.

Pursuant to Rule 42(c) of the West Virginia Rules of Civil Procedure, the Panel **ORDERS** a separate trial of the Hospital Plaintiffs' nuisance claims will be scheduled for trial on a date to be determined.

The Panel further **ORDERS** that general causation will be addressed in the Phase I trials of liability for public nuisance against the Manufacturers, Distributors and Pharmacies. If general causation is proved in any of the Phase I trials, then specific causation will be addressed in a Phase II, statewide abatement trial. Phase I general causation will address whether Defendants' conduct caused the oversupply and diversion of opioids in West Virginia. Phase II specific causation will address the opioid epidemic harms in Plaintiffs' communities that relate to the equitable remedy of abatement.

The Panel further **ORDERS** that liability discovery from the individual City/County Plaintiffs will not be allowed to determine Phase I general causation of liability for public nuisance – whether Defendants' conduct caused the oversupply and diversion of opioids in West Virginia. The Panel will allow discovery in the aggregate in Phase I.

The Panel further **ORDERS** that WVCCPA liability, civil penalties, disgorgement, and injunctive relief based upon the Manufacturer and Pharmacy Defendants' alleged violations of the WVCCPA should be decided in Phase I of those respective trials.

The Panel directs Lead Counsel for the City/County Plaintiffs and the Distributor Defendants to meet and confer with Discovery Commissioner Wilkes to resolve any disputes regarding a proposed case management order for the July 5, 2022 trial of liability for public nuisance against the Distributor Defendants. The Discovery Commissioner shall submit the proposed case management to the Panel for approval.

All objections and exceptions are noted for the record. A copy of this Order has this day been electronically served on all counsel of record via File & Serve*Xpress*.

It is so **ORDERED**.

**ENTERED:** October 27, 2021.

/s/ Alan D. Moats  
Lead Presiding Judge  
Opioid Litigation

/s/ Derek C. Swope  
Presiding Judge  
Opioid Litigation