



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 DENYING PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

WV MLP DISCOVERY RULING NO. 1

The undersigned has received and reviewed Plaintiffs' Motion for Protective Order, together with all pleadings in response and reply along with the supplemental pleadings to the instant motion as well as the transcript of the March 13, 2020 status conference and subsequent Order dated March 20, 2020. Having reviewed carefully the parties' positions, the Discovery Commissioner now enters the following discovery ruling.

APPLICABLE LAW

Rule 26(c) of the West Virginia Rules of Civil Procedure provides:

"Upon motion by a party or by the person from whom discovery is sought, including a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, ... (2) [t]hat the discovery may be had only on specified terms and conditions, including a designation of the time or place."

W. Va. R. Civ. P. 26(c)(2).

Our Supreme Court has held that the provisions of West Virginia Rule 26(c) provide a general authorization to the trial court to assure that the conduct of discovery does not result in annoyance, harassment, embarrassment, or in undue burden or expense. *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920, 927 (1988) (quoting Olson, *Modern Civil Practice in West Virginia*,

§ 7-1 1 (1984)). Rule 26(c)(2) further permits a trial court to issue a protective order requiring that discovery occur only on specified terms and conditions. *See, e.g., State ex rel. Nationwide Mut. v. Kaufman*, 222 W.Va. 37, 658 S.E.2d 728, 735 (2008) (quoting Cleckley et al., *Litigation Handbook*, § 26(c)(2), p. 758).

RULING

In the present case, Plaintiffs contend the MLP limited the scope of permissible discovery that could be served upon Plaintiffs in connection with Phase 1 of the Public Nuisance trial to Harrison County, the City of Clarksburg, and United Hospital Center. Plaintiffs position is that for those three Plaintiffs, only discovery relating to the cost of abatement can be had. Defendants' contend that they are entitled to conduct discovery on the issue of liability along with the cost of abatement. The Discovery Commissioner finds Defendants' position is correct in that they may conduct discovery on the issue of liability from all Plaintiffs but the discovery requests regarding abatement costs must be limited to Harrison County, City of Clarksburg and United Hospital Center. The March 20, 2020 MLP Order clearly sets out the limits of discovery allowed in Phase One of the litigation recognizing "Plaintiffs' allegations of public nuisance are not confined. They affect the entire State of West Virginia." In the MLP Order setting the trial date the Court stated "the parties have one year to conduct discovery regarding liability for public nuisance." This contemplates that discovery on the issue of liability may be had from all Plaintiffs who allege to be harmed by the Defendants conduct. Further the MLP went on to limit the discovery for determining abatement costs to Harrison County, the City of Clarksburg and United Hospital.

Plaintiffs assert that the following discovery requests served upon and directed to Harrison County, Clarksburg, and United Hospital are also outside the scope of permissible discovery and request they be stricken as they do not relate to the cost of abatement:

- (a) Requests for Production Requests For Production Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 16, 17, 18, 19, 20, 28, 29, 30, 33, 34, 35, and 36 within Distributor Defendants' First Set of Requests for Production on Abatement to Harrison County Commission and The City of Clarksburg;
- (b) Interrogatories Nos. 3, 9, 12, and 13 contained within Defendant AmerisourceBergen Drug Corporation's First Set of Interrogatories on Abatement to Harrison County Commission and The City of Clarksburg;
- (c) Interrogatories Nos. 1, 2, 3, 4, and 5 within Defendant Cardinal Health, Inc's First Set of Interrogatories on Abatement to Harrison County Commission and The City of Clarksburg;
- (d) Interrogatories Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11 within Defendant McKesson Corporation's First Set of Interrogatories on Abatement to Harrison County Commission and The City of Clarksburg;
- (e) Requests For Production Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37 within Distributor Defendants' First Set of Requests for Production on Abatement to United Hospital Center;
- (f) Interrogatories Nos. 1, 11, and 13 within Defendant AmerisourceBergen Drug Corporation's First Set of Interrogatories on Abatement to United Hospital Center;
- (g) Interrogatories Nos.1, 3, 4, 5, 7, 8, 9, 10 and 13 within Defendant Cardinal Health, Inc's First Set of Interrogatories on Abatement to United Hospital Center; and
- (h) Interrogatories Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 11 within Defendant McKesson Corporation's First Set of Interrogatories on Abatement to United Hospital Center.

The gist of Plaintiffs argument is that the above requests are “merely a guise to conduct improper, backdoor liability discovery”. In that the Discovery Commissioner finds that liability discovery is appropriate the request for a protective order is denied.

Plaintiffs in a footnote point out by example RFP 29 requests information reimbursement from insurers and Medicaid and/or Medicare and argue that this information does not reasonably relate to the costs of abatement. Absent a specific objection to a specific request the Discovery Commissioner cannot rule on the objection, further the request for a protective order is not the proper mechanism to rule on objections to individual discovery requests.

Therefore, the Motion for Protective Order is **Denied**.

Submitted: June 3, 2020.

Christopher C. Wilkes
Discovery Commissioner