



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 19-C-9000

THIS DOCUMENT RELATES TO:

STATE OF WEST VIRGINIA, *ex rel.*
PATRICK MORRISEY, Attorney General

Plaintiff,

v.

Civil Action No. 19-C-104 BNE

TEVA PHARMACEUTICAL INDUSTRIES, LTD, *et al.*,

Defendants.

STATE OF WEST VIRGINIA, *ex rel.*
PATRICK MORRISEY, Attorney General

Plaintiff,

v.

Civil Action No. 19-C-105 BNE

JANSSEN PHARMACEUTICALS, INC., *et al.*,

Defendants.

**ORDER REGARDING THE STATE'S MOTION TO STRIKE
DEFENDANTS' NOTICES OF NON-PARTY FAULT**

Pending before the Mass Litigation Panel is *The State's Motion to Strike the Defendants' Notices of Non-Party Fault* (Transaction ID 65751035) ("Motion"), which as Defendants have recognized in their Responses, is "nearly-identical," to the *Motion to Strike the Defendants' Notices of Non-Party Fault* (Transaction ID 65695012) filed by the City, County and Hospital Plaintiffs. The State's Motion has been fully briefed by the parties.

Having reviewed the State's Motion, Defendants' Opposition (Transaction ID 65789012 and 65788591) and the State's Reply (Transaction ID 65806293 and 65806377), the Presiding Judges **GRANT** the States' Motion because W. Va. Code § 55-7-13d (the "2015 Act") and its

predecessor, W. Va. Code § 55-7-24 (the “2005 Act”) (collectively, the “Apportionment Statutes”) are not applicable to the State’s claims, which are limited to equitable claims for abatement of public nuisance and claims for equitable relief and civil penalties for violations of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101, *et seq.* (the “WVCCPA”).

With respect to the State’s public nuisance claims, the Panel adopts and incorporates by reference as if fully set forth herein, the findings of fact and conclusions of law set forth in the Panel’s *Order Regarding Plaintiffs’ Motion to Strike Defendants’ Notices of Non-Party Fault* (Transaction ID 65807300), entered on July 29, 2020.

In addition, the Panel makes the following findings and conclusions with respect to the State’s claims for equitable relief and civil penalties for violations of the WVCCPA:

1. The State contends the 2015 Act applies only to claims seeking damages, which the State does not assert. Motion, p. 5. Because the State has brought “equitable claims for abatement of a public nuisance and equitable claims and claims for civil penalties for violations of the WVCCPA” against Defendants, the 2015 Act does not apply.¹ *Id.* These claims do not seek damages, even if Defendants are required to pay money.² *Id.*
2. Defendants contend the 2015 Act applies and the State’s Motion must be denied because the State’s public nuisance and WVCCPA claims are claims that seek damages. Opposition, p. 3. Defendants assert, “the monetary recovery the State seeks on its public nuisance and WVCCPA

¹ See First Am. Compl., *West Virginia ex rel. Morrissey v. Janssen Pharms., Inc.*, Civil Action No. 19-C-105 (Cir. Ct. Boone Cty., filed December 20, 2019) (“Janssen Compl.”), at ¶¶ 136-161; First Am. Compl., *West Virginia ex rel. Morrissey v. Teva Pharms. Indust., Ltd.*, Civil Action No. 19-C-104 (Cir. Ct. Boone Cty., filed December 20, 2019) (“Teva Compl.”), at ¶¶ 124-149.

² See *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (“The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as ‘money damages.’”).

claims plainly constitute ‘damages’ regardless of how the State wishes to label it.” *Id.*, pp. 3-4. As such, Defendants are entitled to file notices of non-party fault under the 2015 Act.

3. The 2015 Act provides that “[i]n assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the *alleged damages* regardless of whether the person was or could have been named as a party to the suit.”³

4. However, “[t]he State seeks only a prospective, equitable abatement remedy in connection with its public nuisance claim, and civil penalties and other equitable relief under the WVCCPA, not damages within the meaning of the 2015 Act. The State has waived all claims for damages (compensatory or punitive). *See* Teva Compl. ¶¶ 133, 149 (Trans. ID 64835533) Janssen Compl. ¶¶ 145, 161 (Trans. ID 64835879).” Reply, p. 7.

4. The Legislature has authorized the Attorney General to enforce the WVCCPA by bringing civil actions for injunctions and “other appropriate relief.”⁴ Motion, p. 9. The Supreme Court of Appeals of West Virginia (“Supreme Court”) has found that use of the phrase “other appropriate relief” indicates the Legislature intends the “full array of equitable relief” to be available in suits brought by the Attorney General to enforce the WVCCPA.⁵ *Id.*

5. Defendants contend the civil penalties and other equitable relief the State seeks, including disgorgement and restitution, are plainly damages. Opposition, p. 12. However, the Supreme Court – like numerous other courts – has made it clear that civil penalties and damages are not the same.⁶ *Id.*, pp. 9-10. As explained in *Vanderbilt*,

³ W. Va. Code § 55-7-13d(a)(1)(emphasis added).

⁴ W. Va. Code § 46A-7-108.

⁵ *See State ex rel. McGraw v. Imperial Mktg.*, 203 W. Va. 203, 215-216, 506 S.E. 2d 799, 811-812 (1998).

⁶ *Vanderbilt Mortg. & Fin., Inc. v. Cole*, 230 W.Va. 505, 512, 740 S.E.2d 562, 569 (2013); *Ellett Bros. v. U.S. Fid. & Guar. Co.*, 275 F. 3d 384, 388 (4th Cir. 2001)(“civil penalties, likewise, are not ‘damages’ payable to the victim, but fines or assessments payable to the government”); *Fortie v. Wal-Mart Stores, Inc.*, 780 F.3d 272, 282 (5th Cir.

While punitive damages are related to and conditioned on actual harm suffered, a civil penalty is conditioned only on a violation of a statute. Similarly, while the question of the amount of punitive damages to award may be submitted to a jury, the amount of a civil penalties award is within the sole province of the trial judge. Civil penalties are their own separate class of damages, taking on both compensatory and punitive characteristics. *See, e.g., DirectTV, Inc.*, No. SA-04-CV-136-RF, 2004 WL 2623932, at *4 (“Statutory damages serve the purpose of deterring the public harm associated with the activity proscribed, rather than seeking to compensate each private injury caused by a violation.”); *In re Hobbs*, No. 10-42736, 2012 WL 4434469 (“The statutory damages available ... are of a generally compensatory nature, even if not designed to compensate for any particular, actual harm....”).

230 W.Va. 505, 512, 740 S.E.2d 562, 569 (2013).

Because the State seeks abatement of a public nuisance and civil penalties and equitable relief under the WVCCPA, not damages, the Panel finds and concludes that the 2015 Act is not applicable and, therefore, the State’s Motion is **GRANTED**.

All objections and exceptions to the Panel’s Order are noted and preserved for the record. A copy of this Order has this day been electronically served on all counsel of record via File & ServeXpress.

It is so **ORDERED**.

ENTERED: August 4, 2020.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation

2015)(“statutory civil penalties are a unique breed of remedies that are not damages as the term is commonly understood”); *Travelers Ins. Co. v. Waltham Indus. Labs Corp.*, 883 F.2d 1092, 1099 (1st Cir. 1989)(“We agree with and adopt fully that portion of the district court opinion holding that because the amount paid by the defendants in the Commonwealth suit was for ‘civil penalties’ not ‘damages’ the payment was not covered by the insurance policy’s ‘damages’ clause.”).