



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

**IN RE: OPIOID LITIGATION**

**CIVIL ACTION NO. 21-C-9000-PHARM**

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

**Plaintiff,**

**v.**

**CIVIL ACTION NO. 22-C-111 PNM**

**THE KROGER CO., et al**

**Defendants.**

**ORDER DENYING KROGER'S MOTION TO CONSOLIDATE  
PHASE I AND PHASE II OF TRIAL AND/OR RECONSIDER ORDER  
AFFIRMING IN PART AND MODIFYING IN PART  
JANUARY 4, 2022 AND JANUARY 12, 2022 DISCOVERY ORDERS**

Pending before the Mass Litigation Panel ("Panel") is a *Motion to Consolidate Phase I and Phase II of Trial and/or Reconsider Order Affirming in Part and Modifying in Part January 4, 2022 and January 12, 2022 Discovery Orders* filed by The Kroger Co., et al. ("Kroger") (Transaction ID 68740475). Having reviewed Kroger's Motion, the Opposition of Plaintiff, the State of West Virginia, acting through its Attorney General, Patrick Morrissey (the "State") (Transaction ID 68849302), and Kroger's Reply (Transaction ID 68904242), the Panel finds that oral argument will not aid in the decisional process. Therefore, the Panel makes the following findings of fact and conclusions of law in support of its decision to **DENY** Kroger's Motion.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The State filed suit against Kroger on August 23, 2022. The State claims that Kroger engaged in unlawful and/or unreasonable conduct in connection with its wholesale distribution and retail dispensing of prescription opioids in West Virginia, which contributed to a

public nuisance and constituted unfair practices in violation of the West Virginia Consumer Credit and Protection Act (“WVCCPA”), W. Va. Code §§ 46A-6-101 *et seq.*

2. Specifically, the State alleges that Kroger acted unlawfully and unreasonably by breaching its statutory, regulatory, and common law duties to maintain effective controls against diversion in distributing opioids, including by failing to maintain systems to detect, report, and block shipment of suspicious orders, Complaint (Transaction ID 68310197), ¶ 44 (citing 21 U.S.C. § 823; 21 C.F.R. §§ 1301.71, 1301.74; W. Va. Code § 60A-3-303; W. Va. C.S.R. § 15-2-5.3), and in dispensing opioids, including by failing to hold “red flag” prescriptions unless and until diligent investigation resolved suspicion of diversion. *Id.*, ¶ 57 (citing, *inter alia*, 21 C.F.R. §§ 1301.71, 1306.04); *see also* W. Va. C.S.R. § 15-2-8.4.1.

3. In the interests of judicial economy and because of the State’s recent filing of a similar civil action against Kroger, the Panel continued the September 26, 2022, Phase I liability trial of the State’s case against Walgreens Boots Alliance, Inc., et al. (“Walgreens”) and ordered a Phase I liability trial of the State’s cases against Walgreens and Kroger to commence on June 5, 2023. *Order Continuing September 26, 2022, Trial of the State of West Virginia’s Cases Against Pharmacies* (Transaction ID 68120458) (“Trial Order”), entered on September 19, 2022.<sup>1</sup>

4. Kroger subsequently moved to vacate the Trial Order. *See Defendant Kroger’s Motion to Vacate the Sua Sponte Order Dated Sept. 19, 2022, to Join the Kroger Action and Walgreens Action, or, in the Alternative, to Sever the Actions, and Memorandum of Law in Support Thereof* (Transaction ID 68303851). The Panel denied Kroger’s motion. *Order*

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<sup>1</sup> On January 18, 2023, the Attorney General announced that a settlement has been reached between the State and Walgreens. Consequently, Kroger is the only remaining Pharmacy Defendant.

*Denying Defendant Kroger's Motion to Vacate Order Joining Kroger and Walgreens Actions for Trial or, in the Alternative, to Sever the Actions* (Transaction ID 68424342).

5. Kroger filed separate motions to dismiss the State's claims for failure to join indispensable party (Transaction ID 68486143) and to continue the June 5, 2023, trial date (Transaction ID 68685982). The Panel denied the motions. *Order Denying Defendants' Motion to Dismiss for Failure to Name Indispensable Party or, in the Alternative, Motion to Require the State to Join the Unnamed Parties* (Transaction ID 68877876) and *Order Denying Kroger's Motion to Continue Trial Date of June 5, 2023* (Transaction ID 68849044).

6. Kroger's instant Motion requests the Panel vacate its prior Orders in which public nuisance liability and WVCCPA liability and remedy as to each Defendant are decided in Phase I, and the equitable remedy of abatement as to any Defendant found liable for public nuisance is decided in Phase II, and instead consolidate all liability and remedy issues for a single unitary trial. The Panel **DENIES** Kroger's Motion for the following reasons.

7. The Supreme Court of Appeals of West Virginia established the Mass Litigation Panel as part of a "process for efficiently managing and resolving mass litigation[.]" T.C.R. 26.01. The West Virginia Trial Court Rules authorize 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[.]" T.C.R. 26.05(a). The Panel is accorded broad discretion in carrying out this charge. Syl. pt. 3, *State ex rel Appalachian Power Co. v. MacQueen*, 198 W. Va. 1, 479 S.E.2d 300 (1996) (a trial plan "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.").

8. The Opioid Litigation provides a compelling example of the need for the Panel's authority and discretion in managing Mass Litigation cases. Judge Dan Aaron Polster has described the federal multidistrict opioid litigation as "the most complex and important group of cases ever filed," addressing a public health crisis in which "more Americans died from drug overdoses in 2016 than the number of American lives lost in the entirety of the Vietnam War, which totaled 58,200." *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804, 2019 WL 4686815, at \*1 (N.D. Ohio Sept. 26, 2019); *Id.* ("The magnitude and significance of the 'opioid crisis' and the Opioid Litigation cannot be overstated.").

9. Likewise, the Panel recognizes the West Virginia Opioid Litigation is the most complex Mass Litigation it has had occasion to handle. The Panel has exercised its authority and discretion to implement fair and efficient trial methodologies by ordering bifurcated trials in which public nuisance liability and WVCCPA liability and remedy as to each Defendant are decided in Phase I, and the equitable remedy of abatement as to Defendants found liable for public nuisance is decided in Phase II. *See Order Regarding Rulings Issued During September 10, 2021 Status Conference* (Transaction ID 66922721) at 2, ¶ 4; *Order Affirming in Part and Modifying in Part January 4, 2022 and January 12, 2022 Discovery Orders* (Transaction ID 67261539) ("1/25/22 Order") at 2-3, *writ of prohibition denied sub nom. State of West Virginia ex rel. Walmart, Inc. v. Moats*, No. 22-0080 (W. Va. March 17, 2022).

10. Kroger first argues that, although the bifurcated trial Orders made sense when all opioid Manufacturer, Distributor, and Pharmacy Defendants were part of this Mass Litigation, now, "with only two Defendants, Kroger and Walgreens, left in this action, bifurcating the trial no longer expedites the process." Motion at 3. This is incorrect.

11. Preparation for and trial on equitable abatement of the alleged public nuisance harms of the opioid epidemic in West Virginia are substantial matters. Deciding how these harms will be abated involves fact-laden determinations that are different from those that underpin public nuisance liability. In MDL Case Track 3 (“CT3”), after a jury found three Defendants liable for public nuisance, Judge Polster scheduled additional discovery, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio Dec. 10, 2022) (Doc. 4188) (State Ex. A), and up to ten days of trial on abatement. *Id.* (N.D. Ohio March 23, 2022) (Doc. 4322) (State Ex. B). In the remanded MDL Case Track 4 (“CT4”), after entering findings and conclusions holding the Defendant liable for public nuisance, Judge Charles R. Breyer scheduled up to twelve days of trial on abatement. *City and Cnty. of San Francisco v. Purdue Pharma L.P.*, No. 3:18-cv-07591-CRB (N.D. Cal. Oct. 11, 2022 (Doc. 1589) (State Ex. C).

12. The additional time and resources of the parties and of the Panel that would be expended on discovery and trial on public nuisance abatement in advance of a determination of public nuisance liability undercuts Kroger’s argument that consolidating the trial phases would be more efficient than proceeding in accordance with the Trial Order.

13. This conclusion is underscored by the fact that Kroger did not move to consolidate the two trial phases until three months into discovery on liability-only. The Panel ordered the bifurcated trial on September 19, 2022. The parties then commenced fact discovery exclusive of abatement, which is due to be completed on January 27, 2023. *Case Management Order Relating to the Kroger and Walgreens Cases* (Transaction ID 68269611) (“CMO”) at 10, ¶4. Consolidation of trial on liability and abatement would necessitate continuance of the fact and expert discovery deadlines and the June 5, 2023, Phase I trial date. For this additional

reason, the Panel finds that consolidating the trial phases at this stage of the proceedings would forestall rather than expedite the resolution of this matter.

14. Kroger separately argues that all the Panel’s Orders for bifurcated trials impermissibly abridge the causation elements and proof that are required for the State to establish Kroger’s liability for public nuisance. Motion at 5 (“Holding a ‘liability’ trial without deciding causation would amount to a trial on whether Kroger is culpable in the abstract.”); *id.* at 6 (determining liability without deciding causation “would also deprive Kroger of the opportunity to fully present its defenses, which would violate its due process rights.”). This argument misapprehends the Panel’s Orders.

15. With respect to public nuisance causation, the Trial Orders direct that “‘Phase I general causation will address whether Defendants’ conduct caused the oversupply and diversion of opioids in West Virginia[,]’” while “Phase II specific causation will address the opioid epidemic harms in Plaintiffs’ communities that relate to the equitable remedy of abatement.” *1/25/22 Order* at 2 (quoting *Oct. 27, 2021 Order* (Transaction ID 67047934) at 7-8, ¶12). The Orders then specify that the Phase I liability determinations include both “[w]hether the Defendants engaged in wrongful conduct which caused the alleged oversupply and diversion of opioids throughout West Virginia?” (“*Factual Issue #1*”), and “[w]hether the alleged oversupply and diversion of opioids throughout West Virginia is a public nuisance, which is broadly defined as an unreasonable interference with a right common to the general public—public health and safety?” (“*Factual Issue #2*”). *1/25/22 Order* at 3.

16. The Phase I conduct and causation determinations track the elements of the State’s public nuisance claim. Under West Virginia law, a public nuisance is “‘an unreasonable interference with a right common to the general public.’” *Duff v. Morgantown Energy Assoc’s*,

187 W. Va. 712, 716 n.6, 421 S.E.2d 253, 257 n.6 (1992) (quoting *Restatement (Second) of Torts*, § 821B(1) (1979)). The ordered Phase I liability determinations—on the Pharmacy Defendants’ alleged conduct and its alleged causation of an oversupply and diversion of opioids, and on whether the alleged opioid oversupply and diversion created an unreasonable interference with the public health and safety in West Virginia—map squarely onto the unreasonable conduct and causation of interference elements that determine liability for public nuisance.

17. The separate placement into Phase II of causation of “opioid epidemic harms in Plaintiffs’ communities that relate to the equitable remedy of abatement[.]” *1/25/22 Order* at 2, does not “cordon[e] off” public nuisance causation “for a later proceeding” or “not require[e] the State to prove the essential element of causation at all[.]” *Motion* at 6. The Trial Orders explicitly require the State to prove causation of both opioid oversupply and diversion and of interference with public health and safety in Phase I. What the Orders reserve for Phase II is the full and particularized extent of the public nuisance harms in West Virginia communities that are to be abated, which involves distinct factual determinations that are most efficiently addressed only after the State has established the public nuisance liability elements in Phase I.

18. The question presented by Kroger’s motion is not whether this is the only way the Panel might have ordered the trial proceedings in this complex Mass Litigation. Rather, the question is whether this approach falls within the broad discretion the Panel is afforded to make just this type of determination. It plainly does.

19. Kroger argues the Panel exceeded and abused its discretion to manage these proceedings, because “[h]olding a liability trial without deciding causation would amount to a trial on whether Kroger is culpable in the abstract.” *Motion* at 5. This argument is inapposite because, as set forth above, the Panel’s Orders require the State to prove that Kroger’s conduct

caused both an oversupply and diversion of opioids and an unreasonable interference with public health and safety in West Virginia.

20. Kroger argues alternatively that the “question of any Defendant’s liability for public nuisance cannot be determined without the trier of fact hearing evidence relating to other potential causes of the State’s alleged harm.” Motion at 5-6; *see also id.* at 5 (“Therefore, any Phase I ‘liability’ trial must address the element of causation, including defenses involving the alternate, intervening, and/or superseding causes.”). This argument suffers from two flaws.

21. First, the reference to “alternate” causes does not invoke a defense to liability. West Virginia law does not require a plaintiff to prove that a defendant’s conduct is the only factual cause of its injury. Rather, West Virginia recognizes that “[w]here two or more persons are guilty of separate acts” that “together proximately cause injury to another, they are guilty of concurrent negligence for which they may be held jointly and severally liable.” *Marcus v. Staubs*, 239 W. Va. 127, 139, 736 S.E.2d 360, 372 (2012) (internal quotation marks and citation omitted). In other words, the “plaintiff’s burden of proof is to show that a Petitioner’s breach of a particular duty of care was a proximate cause of the plaintiff’s injury, not the sole proximate cause.” *Stephens v. Rakes*, 235 W. Va. 555, 775 S.E.2d 107, 117 (2015) (internal quotation marks and citation omitted). The fact that another entity might also have contributed to the alleged public nuisance harms is not a defense to Kroger’s liability and need not be addressed in Phase I.

22. As the Panel has previously held:

Defendants’ fault-shifting defenses—*contributory negligence, comparative fault, contributory fault, failure to enforce the law, and failure to mitigate*—are inapplicable to the State’s public nuisance claim because comparative fault is not an element of the liability phase (Phase I) of this public nuisance case. *Manufacturer Cases Order* at 3 (citing *City of Huntington v. AmerisourceBergen Drug Corp.*, 2021 WL 1711382, at \*2 (S.D. W. Va. Apr.



29, 2021))”. Similarly, Defendants’ fault-shifting defenses do not apply to the State’s WVCCPA claims, because the State seeks only civil penalties, injunctive and equitable relief. Under that claim, the fault of the State or anyone else is irrelevant. *Id.* (citing *State ex rel. 3M v. Hoke*, 244 W.Va. 299, 313, 852 S.E.2d 799, 813 (2020)).

*Amended Rulings Order and Findings of Fact and Conclusions of Law Regarding Motions for Summary Judgment, Motions to Exclude Expert Testimony, and Motions in Limine* (Transaction ID 68198574) at 3, entered on October 1, 2022, in the State’s cases against Pharmacy Defendants CVS, Walgreens and Walmart.

23. Second, as to “intervening” and allegedly “superseding” causes, this involves a limited range of actors’ conduct that occurred subsequently to Kroger’s own alleged conduct. The Supreme Court of Appeals recently summarized the concepts of proximate, intervening, and superseding cause as follows:

Proximate cause . . . is that which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred. An intervening cause, however, may jump in, break that chain of causation, and so constitute the new, effective cause of the injury. We have held that an intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new and effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury. But not every intervening event wipes out another’s preceding negligence. In fact, a tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct.

*Wal-Mart Stores East, L.P. v. Ankrom*, 244 W. Va. 437, 450, 854 S.E.2d 257, 270 (2020) (internal citations and quotation marks omitted).

24. The defense of superseding causation does not require consideration of any actor’s preceding or concurrent conduct. Rather, it concerns only some subsequently-acting entities’ conduct that was not reasonably foreseeable. The limited scope of actors and conduct relevant to Kroger’s invocation of this defense is underscored by Judge Breyer’s recognition that

dispensing “[p]harmacies are the ‘last line of defense’ against the diversion of controlled substances.” *City and Cnty. of San Francisco v. Purdue Pharma L.P.*, \_\_\_ F. Supp. 3d \_\_\_, 2022 WL 3224463 (N.D. Cal. Aug. 10, 2022) (quoting expert witness declaration).

25. Since the Panel’s Trial Orders do not impermissibly truncate the causation element or any other element of the State’s public nuisance liability case, Kroger’s motion to vacate these Orders is **DENIED**.

For all of the foregoing reasons, it is **ORDERED** that *Kroger’s Motion to Consolidate Phase I and Phase II of Trial and/or Reconsider Order Affirming in Part and Modifying in Part January 4, 2022 and January 12, 2022 Discovery Orders* (Transaction ID 68740475) is **DENIED**; and

Kroger’s objections are noted 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:** January 23, 2023.

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

/s/ Derek C. Swope  
Presiding Judge  
Opioid Litigation