



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 21-C-9000-PHARM

THIS DOCUMENT APPLIES TO:

**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 GRANTING PLAINTIFF'S MOTION TO
STRIKE DEFENDANTS' JURY TRIAL DEMAND**

Pending before the Mass Litigation Panel ("Panel") is the *Motion to Strike Defendants' Jury Trial Demand*, filed by Plaintiff, the State of West Virginia, acting through its Attorney General, Patrick Morrisey (the "State") (Transaction ID 68339782). Upon review of the State's Motion, Kroger's Response (Transaction ID 68396162), and Plaintiff's Reply (Transaction ID 68407629), 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 **GRANT** Plaintiff's Motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Rule 12(f) of the West Virginia Rules of Civil Procedure provides that "if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any . . . immaterial [or] impertinent . . . matter."

2. Rule 39(a) of the West Virginia Rules of Civil Procedure provides in relevant part that, where a party demands a trial by jury, the “trial of all issues so demanded or requested shall be by jury, unless . . . the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the State.”

3. On August 23, 2022, the State filed its Complaint against Kroger (Transaction ID 68310197) seeking equitable abatement of a public nuisance and civil penalties and other equitable remedies pursuant to the West Virginia Consumer Credit and Protection Act (“WVCCPA”). The State’s complaint does not contain a jury demand.

4. On September 14, 2022, the Panel transferred *State of West Virginia ex rel. Patrick Morrisey, Attorney General v. The Kroger Co., et al.*, Civil Action No. 22-C-111 PNM (“the Kroger Action”) and joined it with *In Re: Opioid Litigation*, Civil Action No. 19-C-9000. *See Order of Transfer to the Mass Litigation Panel* (Transaction ID 68102889).

5. On September 19, 2022, the Panel continued the trial of the State’s claims against Defendant Walgreens that had been set to begin on September 26, 2022¹, and set both the Walgreens Action and the Kroger Action for a Phase I liability trial to begin June 5, 2023. *See Order Continuing September 26, 2022, Trial of the State of West Virginia’s Cases Against Pharmacies* (Transaction ID 68120458) (“Trial Order”).

6. On September 23, 2022, Kroger filed and served its Answer to the State’s Complaint in Putnam County Circuit Court. Kroger’s Answer was docketed in this Court on September 28, 2022 (Transaction ID 68182043). The Answer does not contain a jury demand.

7. On October 13, 2022, Kroger filed an Amended Answer (Transaction ID 68252580) through File & Serve Express without leave of the Panel. The Amended Answer

¹ *State of West Virginia ex rel. Patrick Morrisey, Attorney General v. Walgreens Boots Alliance, Inc., et al.*, Civil Action No. 20-c-82 PNM (“the Walgreens Action”).

contains a jury demand. *See* Amended Answer at 37 (“Kroger asks for a jury trial in this matter for all actions triable before a jury.”).²

8. On October 18, 2022, the Panel issued its *Order Regarding the Kroger Defendants’ Motion to Dismiss Complaint* (Transaction ID 68267930). The Panel denied Kroger’s motion to dismiss and specifically rejected Kroger’s argument that the State’s public nuisance abatement and WVCCPA public enforcement claims are governed by the Medical Professional Liability Act (“MPLA”), W. Va. Code §§ 55-7B-1 *et seq.* The Panel held in relevant part that “the State does not seek damages as required under the MPLA. W. Va. Code § 55-7B-2(i). The State seeks injunction, civil penalties, and disgorgement for the Kroger Defendants’ alleged violations of the WVCCPA, and equitable abatement of the alleged public nuisance it claims the Kroger Defendants caused.” Order at 2.

9. The Supreme Court of Appeals of West Virginia has long recognized and recently reaffirmed that “[t]he merger of law and equity, effected by Rule 2, W. Va. R. Civ. P., abolished the *procedural* distinctions between law and equity. However, it did *not* extend the right of jury trial to civil cases that, before the merger, would have been in equity.” *East Shepherdstown Developers, Inc. v. J. Russell Fritts, Inc.*, 183 W. Va. 691, 694-95, 398 S.E.2d 517, 521-22 (1990) (emphasis in original); *see also State ex rel. AmerisourceBergen Drug Corp. v. Hon. Alan D. Moats*, 245 W. Va. 431, 440, 859 S.E.2d 374, 383 (2021) (quoting *East Shepherdstown*). Instead, “[s]ince equitable issues are generally determined by a court without a jury, one is not entitled, as a matter of right under the law, to a jury trial of such issues....” *East Shepherdstown*, 183 W. Va. at 695, 398 S.E.2d at 521 (quoting Syl. Pt. 1, *West Virginia Human Rights Comm’n v. Tenpin Lounge, Inc.*, 158 W. Va. 349, 211 S.E.2d 349 (1975)).

² Kroger also filed a Civil Case Information Sheet on October 6, 2022 (Transaction ID 68222554) in which it checked the “Yes” box for “Jury Demand”.

10. The Panel followed and applied this precedent in holding that it has authority to order Phase I, non-jury trials on the issue of public nuisance liability in this litigation. *See Order Regarding Trial of Liability for Public Nuisance*, Feb. 19, 2020 (Transaction ID 64739341) at 6 (“[T]he Court finds that it has authority to conduct a Phase I, non-jury trial on the issue of liability for a public health nuisance.”) Specifically, the Panel held that “Plaintiffs’ claims for abatement of public nuisance are equitable claims to which a right to jury trial does not attach.” *Id.* at 9.

11. The Panel again ruled that the State’s claim for public nuisance abatement is equitable, not legal, in nature and ruled the same with respect to the State’s WVCCPA claim for an injunction, civil penalties, and equitable relief in striking certain Defendants’ Notices of Non-Party Fault. *See Order Regarding the State’s Motion to Strike Defendants’ Notices of Non-Party Fault* (Transaction ID 65820504)(Aug. 4, 2020) at 4 (“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 [Apportionment] Act is not applicable and, therefore, the State’s Motion is granted.”); *see also Id.* at 3 n.6 (“[C]ivil penalties, likewise, are not ‘damages’ payable to the victim, but fines or assessments payable to the government.”) (quoting *Ellett Bros. v. U.S. Fid. & Guar. Co.*, 275 F.3d 384, 388 (4th Cir. 2001)). The Supreme Court of Appeals declined to disturb the Panel’s analysis on these points:

[W]e cannot say now that the Panel’s ruling – that Plaintiff’s public nuisance claims are not legal claims for damages that would trigger the constitutional jury right, or that are subject to the 2015 Act – is so clear-cut, or so plainly in contravention of a clear legal mandate as to merit issuance of the extraordinary remedy of prohibition on those grounds.

State ex rel. AmerisourceBergen Drug Corp. v. Hon. Alan D. Moats, 245 W. Va. 431, 442, 859 S.E.2d 374, 385 (2021).

12. The Panel reaffirmed its holdings that the State’s public nuisance abatement and WVCCPA public enforcement claims are equitable, not legal, in nature in denying Kroger’s motion to dismiss. *Order Regarding the Kroger Defendants’ Motion to Dismiss Complaint* (Transaction ID 68267930) (Oct. 18, 2022) at 2 (“[T]he State does not seek damages as required under the MPLA. W.Va. Code § 55-7B-2(i). The State seeks injunction, civil penalties, and disgorgement for the Kroger Defendants’ alleged violations of the WVCCPA, and equitable abatement of the alleged public nuisance it claims the Kroger Defendants caused.”).

13. The Panel’s ruling that the State’s public nuisance abatement and WVCCPA claims against Kroger are equitable, not legal, in nature is law of the case and binding on Kroger. *See, e.g. State ex rel. TermNet Merchant Servs., Inc. v. Hon. Philip B. Jordan*, 217 W. Va. 696, 702 n.14, 619 S.E.2d 209, 215 n.14 (2005) (“The law of the case doctrine provides that a prior decision in a case is binding upon subsequent stages of litigation between the parties in order to promote finality.”). Supreme Court of Appeals precedent holding that “‘since equitable issues are generally determined by a court without a jury, one is not entitled, as a matter of right under the law, to a jury trial of such issues....’” *East Shepherdstown*, 183 W. Va. at 695, 398 S.E.2d at 521 (quoting Syl. Pt. 1, *Tenpin Lounge, Inc., supra*), also is binding on Kroger. For both of these reasons, Kroger does not have a right to a jury trial on any of the issues raised by the State’s claims in this action.

14. The Panel’s Order denying Kroger’s motion to dismiss and finding that the State does not seek damages was issued on October 18, 2022, and Kroger has not submitted any new evidence or an intervening change of law by a controlling authority that would warrant an exception to the law of the case doctrine. *See Bass v. Rose*, 216 W. Va. 587, 590 n.6, 609 S.E.2d 848, 851 n. 6 (2003)(recognizing exceptions to the law of the case doctrine where: “(1) The

evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice.”)(internal quotation marks and citations omitted.)

15. Although Kroger relies on *City of Huntington v. AmerisourceBergen Drug Corp.*, 2022 WL 2399876 (S.D. W. Va. July 4, 2022), the Panel has twice rejected *City of Huntington’s* treatment of abatement, and the Supreme Court of Appeals has declined to review the Panel’s analysis. See *Findings of Fact and Conclusions of Law in Support of Order Denying Kroger’s Motion to Dismiss Plaintiff’s Complaint* (Transaction ID 68388011) (Nov. 15, 2022) at 7-8, ¶¶ 19-20; and *Findings of Fact and Conclusions of Law on Order Denying Pharmacy Defendants’ Motions to Dismiss Complaints and Amended Complaints* (Transaction ID 67895252)(Aug. 3, 2022) at 7-8¶¶ 19-20, writ refused, *State of West Virginia ex rel. CVS Pharmacy, Inc., et al. v. Hon. Alan D. Moats*, No. 22-C-635 (Transaction ID 68065888) (W. Va. Sept. 8, 2022).

16. Absent any ground for reconsideration, the Panel’s rulings that the State’s public nuisance claim is equitable, not legal, in nature are the controlling law of the case and Kroger’s jury trial demand must be stricken.

17. Likewise, Kroger has not demonstrated any grounds for reconsideration of the Panel’s rulings that the State’s WVCCPA claim is equitable, not legal, in nature. Kroger’s reliance on the U.S. Supreme Court’s holding in *Tull v. United States*, 481 U.S. 412 (1987), that the Seventh Amendment to the U.S. Constitution provides a jury trial right for claims in federal court by the Environmental Protection Agency for civil penalties under the federal Clean Water Act is misplaced. *Tull* is not new authority. It was decided in 1987. Second, *Tull* is not controlling authority. See *Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 76, 380 S.E.2d 238, 243 (1989) (“The seventh amendment of the *U.S. Constitution* is not applicable to the states.”); cf. *Id.*

at 77, 380 S.E.2d at 244 (citing *Atlas Roofing Co., Inc. v. OSHA Rev. Comm'n*, 430 U.S. 442, 450 (1977), as rejecting Seventh Amendment jury trial right for OSHA “abatement orders or civil money penalties as sanctions for violations of the act”). Absent any new authority, new evidence, or clear error, the Panel’s rulings that the State’s WVCCPA claim is equitable, not legal, in nature are controlling law of the case and Kroger’s jury trial demand must be stricken.

18. Additionally, Kroger has not established grounds for reconsideration of the Panel’s rulings based on its reference to unspecified claims against purportedly “indispensable” third parties. Kroger’s argument lacks any factual specificity, and Kroger’s deadline for filing a motion to dismiss for failure to join indispensable parties under Rule 12(b)(7) has passed. *See* W. Va. R. Civ. P. 12(a)(1) and (b) (20 or 30 day deadline to answer Complaint by pleading or motion).

19. Because the Panel has determined that Kroger does not have a constitutional right to a jury trial of the State’s public nuisance abatement and WVCCPA public enforcement claims because they are equitable, not legal, in nature the Panel need not address Kroger’s procedural arguments.

For all of the foregoing reasons, it is **ORDERED** that the State’s Motion to Strike Kroger’s Jury Demand from the Amended Complaint and Civil Case Information Sheet be and hereby is **GRANTED**.

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: November 22, 2022.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation