



**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.**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF  
ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION  
OF THE COURT'S NOVEMBER 22, 2022, ORDER GRANTING PLAINTIFF'S  
MOTION TO STRIKE DEFENDANTS' JURY TRIAL DEMAND**

Pending before the Mass Litigation Panel ("Panel") is *Kroger's Motion for Reconsideration of the Court's November 22, 2022, Order Granting Plaintiff's Motion to Strike Defendants' Jury Trial Demand* (Transaction ID 68878379) ("Motion for Reconsideration"), which the Panel reviewed, considered, and denied. *See* Order entered on January 13, 2023 (Transaction ID 68881412) ("January 13, 2023, Order"). Shortly thereafter, Kroger gave the Panel notice it intends to seek an extraordinary writ challenging the Panel's Order denying Kroger's motion to continue the June 5, 2023, trial date and the Panel's denial of Kroger's Motion for Reconsideration of the Panel's Order granting Plaintiff's motion to strike Defendants' jury trial demand and moved the Panel for an Order setting forth findings of fact and conclusions of law regarding those orders. (Transaction ID 68881568) filed on January 13, 2023. The State filed a Response and submitted proposed findings of fact and conclusions of law regarding the January 13, 2023, Order. (Transaction ID 69011626) filed on January 27, 2023. Kroger filed a

Reply objecting to the State’s proposed findings of fact and conclusions of law on February 1, 2023 (Transaction ID 69048356).

Having reviewed and considered the arguments set forth in each of these filings and having determined oral argument will not aid in the decisional process, the Panel makes the following findings of fact and conclusions of law in support of its decision to **DENY** *Kroger’s Motion for Reconsideration of the Court’s November 22, 2022, Order Granting Plaintiff’s Motion to Strike Defendants’ Jury Trial Demand* (Transaction ID 68878379).

### **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. (“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 68120548) (“Trial Order”), entered on September 19, 2022.<sup>1</sup>

4. Kroger moved to dismiss on September 23, 2022, arguing *inter alia* that the State’s claims were barred by the Medical Professional Liability Act (“MPLA”), W. Va. Code §§ 55-7B-1 *et seq.* Motion to Dismiss (Transaction ID 68182043) at 6-8. The State opposed the motion (Transaction ID 68247888).

5. The Panel denied Kroger’s Motion to Dismiss on October 18, 2022 (Transaction ID 68267930) and issued Findings of Fact and Conclusions of Law (“*FOFCOL-Kroger MTD*”) on November 15, 2022 (Transaction ID 68388011). The Panel held in relevant part that the MPLA applies only to claims for damages and therefore does not apply to the State’s public nuisance claim for equitable abatement and WVCCPA claim for an injunction, civil penalties, and other equitable relief. *Id.* at 5-8, ¶¶ 10, 15-20.

6. Kroger also filed its original Answer to the State’s Complaint (Transaction ID 68182043) on September 23, 2022. The Answer did not contain a jury demand.

7. On October 13, 2022, Kroger filed an Amended Answer (Transaction ID 68252580), which contained a jury demand. *Id.* at 37.

8. On November 2, 2022, the State moved to strike Kroger’s jury demand (Transaction ID 68339782). Kroger opposed the motion (Transaction ID 68396162).

9. On November 22, 2022, the Panel granted the State’s motion and struck Kroger’s jury demand. *Order Granting Plaintiff’s Motion to Strike Defendants’ Jury Demand*

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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.

(Transaction ID 68421842) (“*Jury Demand Order*”). Among other things, the Panel found and concluded that under controlling West Virginia law, there is no right to a jury trial on claims seeking only equitable relief, *id.* at 5, ¶13 (citing *East Shepherdstown Developers, Inc. v. J. Russell Fritts, Inc.*, 183 W. Va. 691, 695, 398 S.E.2d 517, 521 (1990)), and that the prior Order denying Kroger’s motion to dismiss on the ground that the State seeks only equitable relief, not damages, is law of the case and binding on Kroger absent new evidence or a change in controlling law. *Jury Demand Order* at 5, ¶¶ 13-14.

10. The Order striking Kroger’s jury demand based on the absence of any legal claim by the State also is law of the case. *State ex rel. TermNet Merchant Servs., Inc. v. 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.”). To obtain reconsideration, Kroger must demonstrate that “(1) [t]he evidence . . . is substantially different; (2) there has been an intervening change of law by a controlling authority; [or] (3) the earlier decision is clearly erroneous and would work a manifest injustice.” *Bass v. Rose*, 216 W. Va. 587, 590 n.6, 609 S.E.2d 848, 851 n.6 (2003) (internal quotation marks and citations omitted).

11. Kroger argues that two pieces of what it deems new evidence demonstrate that the relief the State seeks for its public nuisance and/or WVCCPA claims is not equitable in nature, but is legal damages, so Kroger’s jury demand should not have been stricken. Motion at 3-5, ¶¶ 8-16. The Panel addresses each piece of evidence in turn.

12. First, Kroger argues the West Virginia First Memorandum of Understanding (“MOU”) among the State and Local Government Plaintiffs—which provides procedures for approval and use of funds obtained through judgments and settlements in the Opioid Litigation—

shows that the State is seeking damages because the MOU discusses recovery and expenditure of money. Motion at 3-4, ¶11 (“In other words, the MOU . . . makes clear that the State is not actually seeking equitable abatement (or any other equitable remedy) at all. Instead, *the State itself* . . . through the ‘Opioid Abatement Foundation,’ intends to engage in abatement activities. The State is simply seeking ‘West Virginia Opioid Funds,’ i.e., monetary damages, from Kroger and others to fund the foundation.”) (emphasis in original). This argument is incorrect.

13. The fact that judgment relief or settlement consideration takes the form of payments of money does not mean that the money is *damages*. If money is paid *not* to compensate a party for a prior injury, but to remediate a *present* public harm like the alleged public health and safety harms of the opioid epidemic in West Virginia, then it is a form of abatement that is equitable in nature. *See, e.g., State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 243 n.26, 488 S.E.2d 901, 923 n.26 (1997) (“[A] nuisance is temporary or continuing where it is remediable, removable, or abatable, or if abatement is reasonably and practicably possible, or, according to some cases, *where it is abatable at a reasonable cost, or by the expenditure of labor or money, by the defendant[.]*”) (emphasis added); *Witteried v. City of Charles Town*, No. 17-0310, 2018 WL 2175820, at \*3 (W. Va. May 11, 2018) (affirming final judgment in bench trial finding condition of home to constitute a public nuisance and awarding city plaintiff, *inter alia*, “a lien upon the real estate for the actual cost of the renovations or the cost that the City might have incurred by getting a building loan and doing the renovations itself”); *see also United States v. Apex Oil Co.*, 579 F.3d 734, 736 (7th Cir. 2009) (“That equitable remedies are always orders to act or not to act, rather than to pay, is a myth; equity often orders payment.”); *United States v. Price*, 688 F.2d 204, 212 (3d Cir. 1982) (“A request for funds for a diagnostic study of the public health threat posed by the continuing

contamination and its abatement is not, in any sense, a traditional form of damages. The funding of a diagnostic study in the present case, though it would require monetary payments, would be preventive rather than compensatory.”); *People v. ConAgra Grocery Prods Co.*, 17 Cal. App. 5th 51, 132 (2017) (“The abatement fund was not a ‘thinly-disguised’ damages award. The distinction between an abatement order and a damages award is stark.”).

14. The federal multidistrict litigation (MDL) court for prescription opiate litigation recently explained the difference between equitable abatement cost-payment and legal damages:

If the offending party is unable or unwilling to abate, the harmed party can, when appropriate, abate the nuisance themselves or ask the court for the right to do so, and then seek compensation for the costs of abating the nuisance. This compensation is equitable in nature. The goal is not to compensate the harmed party for harms already caused by the nuisance. That would be an award of damages. Instead, an abatement remedy is intended to compensate the plaintiff for the costs of rectifying the nuisance, going forward.

*In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804, \_\_\_ F. Supp. 3d \_\_\_, 2022 WL 3443614, at \*3 (N.D. Ohio Aug. 17, 2022); *see also id.* at \*2 (ordering defendants to pay specified dollar amounts into opioid epidemic Abatement Fund).

15. This Panel long has recognized exactly the same—that the mere fact that an equitable abatement remedy involves payment of money to fund the cost of abatement does not transform the remedy into legal damages. *FOFCOL-Kroger MTD* at 7, ¶20 (“Thus, the Court, exercising its equitable powers, has the discretion to craft a remedy that will require Defendants, if they are found liable, to pay the prospective costs that will allow Plaintiffs to abate the opioid crisis.”) (quoting *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804, 2019 WL 4043938, at \*2 (N.D. Ohio Aug. 26, 2019)).

16. This also is exactly what the West Virginia First MOU does. *See* MOU (Transaction ID 68760098) at 4, § B.3 (“All Net Opioid Funds, regardless of allocation, shall be

used in a manner consistent with the Approved Purposes Definition.”); *id.* at A.1 (“‘Approved Purpose(s)’ shall mean evidence-based strategies, programming and/or services used to expand the availability of treatment for individuals affected by substance use disorders and/or addiction, to develop, promote and provide evidence-based substance use prevention strategies, to provide substance use avoidance and awareness education, to engage in enforcement to curtail the sale, distribution, promotion or use of opioids and other drugs, to decrease the oversupply of licit and illicit opioids and to support recovery from addiction[.]”).

17. Since the West Virginia First MOU does what this Panel long has held that an equitable abatement fund is intended to do—fund abatement of the public health and safety harms of an alleged public nuisance condition—there is nothing new in the MOU that could warrant reconsideration of the Order striking Kroger’s jury demand on the ground that the State seeks only equitable relief.

18. Second, Kroger also argues that the State’s service of a settlement demand seeking a payment of money is likewise new evidence showing that the State’s claims are legal claims for damages. Motion at 4, ¶15 (“The State’s January 4, 2023 settlement offer, consisting solely of a demand that Kroger pay money, when considered in conjunction with the MOU laying out how that money will be used by the State’s ‘Opioid Abatement Foundation’ to conduct abatement activities, demonstrates unequivocally that this is in fact a claim for monetary damages and not one for equitable relief.”). This, too, is incorrect.

19. The State’s alleged settlement demand, *see* Kroger Affidavit of Ronda L. Harvey, Esq. at 1, ¶4, when considered in conjunction with the West Virginia First MOU, demonstrates exactly the opposite of what Kroger contends it does. The State’s alleged settlement demand is for a payment of money to resolve claims for equitable abatement and statutory relief, not

damages. *Jury Demand Order* at 5, ¶¶12-13. The West Virginia First MOU obligates the State to commit settlement funds recovered to the MOU’s forward-looking abatement measures. *See* MOU at 2, § A.9 (defining “Opioid Funds” to include “Settlement” recoveries); *id.* at 5, § B.3 (requiring “Opioid Funds” to be used for “Approved Purposes”); *id.* at 1, § A.1 (defining “Approved Purposes” to cover opioid epidemic remediation or abatement measures).

20. Again, there is nothing new in the State’s demand that would warrant reconsideration of the Order striking Kroger’s jury demand on the ground that the State seeks only equitable relief.

21. Finally, Kroger identifies no new legal authority, controlling or otherwise, that could warrant reconsideration. Instead, it relies on the same authority as in its Opposition to the State’s Motion to Strike, which either is inapposite, *see Realmark Devel., Inc. v. Ranson*, 214 W. Va. 161, 164, 588 S.E.2d 150, 153 (2003) (unjust enrichment claim seeking “payment for value of goods and services received” is based on “contract implied in law” or “quasi-contract” theory that “is the product of a long tradition in law, and is an action at law”) (internal quotation marks and citation omitted); *cf. State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 245 W. Va. 431, 441, 859 S.E.2d 374, 384 (2021) (citing and analyzing *Realmark*); *id.* at 442, 859 S.E.2d at 385 (holding that Panel did not contravene controlling authority in holding that Plaintiffs’ public nuisance claims are not legal claims for damages), or else is not controlling and is unpersuasive on the question presented. *See City of Huntington v. AmerisourceBergen Drug Corp.*, No. 3:17-01362, \_\_\_ F. Supp. 3d \_\_\_, 2022 WL 2399876 (S.D. W. Va. July 4, 2022); *cf. Jury Demand Order* at 6, ¶ 15 (“[T]he 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.”).



22. Since Kroger's motion presents no new authority, controlling or otherwise, and relies on purported evidence that at best underscores the Panel's ruling striking Kroger's jury demand based on the equitable nature of the State's claims, the Motion for Reconsideration is **DENIED**.

For all of the foregoing reasons, it is **ORDERED** that *Kroger's Motion for Reconsideration of the Court's November 22, 2022, Order Granting Plaintiff's Motion to Strike Defendants' Jury Trial Demand* (Transaction ID 68878379) is **DENIED**.

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:** February 7, 2023.

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

/s/ Derek C. Swope  
Presiding Judge  
Opioid Litigation