



**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**  
**IN RE: OPIOID LITIGATION** **CIVIL ACTION NO. 19-C-9000**

**THIS DOCUMENT APPLIES TO:**

**THE CITY OF BECKLEY, WEST VIRGINIA,**

**Plaintiff,**

**v.**

**Civil Action No. 20-C-34 MSH**

**ALLERGAN PLC F/K/A ACTAVIS PLC F/K/A ALLERGAN INC., et al.,**

**Defendants.**

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON  
ORDER DENYING DEFENDANTS BYPASS PHARMACY, INC.'S  
AND RHONDA'S PHARMACY, L.L.C.'S MOTIONS TO DISMISS**

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The Mass Litigation Panel ("Panel") previously entered an Order (Transaction ID 68171315) which denied Defendants Bypass Pharmacy, Inc.'s and Rhonda's Pharmacy, L.L.C.'S motions to dismiss (Transaction IDs 66005900 and) and directed the City of Beckley to file and serve a detailed proposed Order with findings of fact and conclusions of law, consistent with the Panel's August 3, 2022, *Findings of Fact and Conclusions of Law on Order Denying Pharmacy Defendants' Motions to Dismiss Complaints and Amended Complaints* (Transaction ID 67895252). Having reviewed the submission and objections thereto, the Panel hereby makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The City of Beckley is one of several West Virginia political subdivisions which have brought public nuisance actions against the manufacturers, distributors and dispensers of prescription opioids now pending before the Panel. Plaintiff alleges that Bypass Pharmacy and Rhonda's Pharmacy engaged in unlawful and/or unreasonable conduct which contributed to the opioid epidemic within the City of Beckley.

2. The Panel notes at the outset that the City of Beckley has dismissed all claims for relief with the express exception of its equitable claims for public nuisance. *Order Granting Plaintiffs' Rule 41(a)(2) Motion to Dismiss Certain Claims* (Transaction ID 66942534).

3. Defendants move to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure. Defendants argue the Panel lacks subject matter jurisdiction over the City of Beckley's claims based on opioid dispensing because the claims are governed by the Medical Professional Liability Act ("MPLA"), W. Va. Code §§ 55-7B-1 et seq., and the City of Beckley has not complied with the MPLA's pre-suit notification requirement. Further, Defendants argue that Plaintiff's public nuisance claims fail as a matter of law and are barred by the Pharmacy Immunity Statute. As set forth below, the Panel concludes that the MPLA does not apply to the City of Beckley's claims of public nuisance, the complaint states a claim for relief under West Virginia public nuisance law, and the Defendants are not immune from liability.

### **The Legal Standard**

4. As explained by the Court in *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 604-606, 245 S.E.2d 157, 158-159 (1978):

The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the formal sufficiency of the complaint. For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true. Since common law demurrers have been abolished, pleadings are now liberally construed so as to do substantial justice. W.Va. R.C.P. 8(f). The policy of the rule is thus to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied.

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In view of the liberal policy of the rules of pleading with regard to the construction of plaintiff's complaint, and in view of the policy of the rules favoring the determination of actions on the merits, the motion to dismiss for failure to state a claim should be viewed

with disfavor and rarely granted. The standard which plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it. The plaintiff's burden in resisting a motion to dismiss is a relatively light one. *Williams v. Wheeling Steel Corp.*, 266 F.Supp. 651 (N.D.W.Va.1967).

5. A trial court considering a motion to dismiss under Rule 12(b)(6) must “liberally construe the complaint so as to do substantial justice.” *Cantley v. Lincoln Co. Comm’n.*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007) and West Virginia Rule of Civil Procedure, Rule 8(f), “The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at Syl. pt. 2, quoting Syl. pt. 3, *Chapman v. Kane Transfer Company*, W.Va., 236 S.E.2d 207 (1977).

### **Application of Standard**

#### **A. Medical Professional Liability Act and Opioid Dispensing-Based Claims**

6. The MPLA’s prerequisites to suit apply only to a “medical professional liability action.” W. Va. Code § 55-7B-6(a). “Medical professional liability” is a defined term:

“Medical professional liability” means any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.

W. Va. Code § 55-7B-2(i).

7. The MPLA defines “Plaintiff” as “a patient or representative of a patient who brings an action for medical professional liability under this article,” W. Va. Code § 55-7B-2(n), and “Patient” as “a natural person who receives or should have received health care from a licensed health care provider under a contract, express or implied.” W. Va. Code § 55-7B-2(m).

8. The MPLA also defines “health care” services to include, in relevant part, “[a]ny

act, service or treatment provided under, pursuant to or in the furtherance of a physician's care, a health care facility's plan of care, medical diagnosis or treatment[.]" W. Va. Code § 55-7B-2(e)(1).

9. Thus, for the MPLA to apply, the plaintiff must be a "patient or representative of a patient" who is or was a "natural person" who suffered "death or injury" from the provision of or failure to provide "health care services" that are in furtherance of medical treatment, for which the plaintiff seeks tort or breach of contract damages and related relief. The City of Beckley is not such a plaintiff covered by the MPLA for at least three independent reasons.

10. First, the City of Beckley is not a patient, or a representative of a patient as required by the MPLA for its provisions to apply. W.Va. Code§ 55-7B-2(n). Rather, the City of Beckley is a political subdivision and filed this lawsuit as proper public officials to vindicate the rights of the public and to provide for the elimination of hazards to public health and safety and to abate or cause to be abated a public nuisance. W.Va. Code § 8-12-5(13), (23) and (44). Since the City of Beckley brings its public nuisance claim as a political subdivision vindicating the interests of the public, not as an injured patient or representative of an injured patient, the MPLA does not apply to this claim.

11. Second, the City of Beckley does not seek damages as required under the MPLA. W.Va. Code § 55-7B-2(i). The City of Beckley has dismissed all claims for relief with the express exception of its equitable claims for abatement of a public nuisance. *Order Granting Plaintiffs' Rule 41(a)(2) Motion to Dismiss Certain Claims* (Transaction ID 66942534). This Panel has consistently held that the public nuisance remedy of prospective, equitable abatement is not damages. *Order Granting Plaintiffs' Motion to Strike Defendants' Notices of Non-Party Fault* ("Cities-Counties NNPF Order") (Transaction ID 65807300) at 4-5 ("[T]he 'distinction

between abatement of nuisances and recovery of damages for injuries occasioned by wrongful acts constituting nuisances’ is both ‘apparent’ and ‘vast.’”) (quoting *McMechen v. Hitchman-Glendale Consol Coal Co.*, 88 W. Va. 633, 107 S.E. 480, 482 (1921)).

12. The Panel finds the discussions by the court in the federal multidistrict litigation (MDL) and in the Restatement (Second) of Torts’ regarding the nature and scope of public nuisance abatement persuasive and applicable to this case. See *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804, 2019 WL 4043938, at \*2 (N.D. Ohio Aug. 26, 2019) (“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.”); *id.*, \_\_\_ F. Supp. 3d \_\_\_, 2022 WL 671219, at \*27 (N.D. Ohio March 7, 2022) (“Even if as Defendants assert, they discontinued the conduct that led to the existence of the nuisance, they are still subject to liability for abatement of any ongoing consequential effects of the nuisance.”); RESTATEMENT (SECOND) OF TORTS (1979), § 834 cmt. e (“[I]f the activity has resulted in the creation of a physical condition that is of itself harmful after the activity that created it has ceased, a person who carried on the activity that created the condition or who participated to a substantial extent in the activity is subject to the liability for a nuisance, for the continuing harm.”). The remedy the City of Beckley seeks here is not damages, but equitable abatement to which the MPLA does not apply. The recent decision, holding to the contrary, in *City of Huntington v. AmerisourceBergen Drug. Corp.*, No. 3:17-01362, \_\_\_ F. Supp. 3d \_\_\_, 2022 WL 2399876 (S.D. W. Va. July 4, 2022) is neither predictive nor consistent with West Virginia law and, therefore, does not warrant reconsideration of the Panel’s prior rulings.

13. Third, the City of Beckley's public nuisance claims are not based on health care services rendered in furtherance of a physician or health care facility's plan of care, medical

diagnosis, or treatment. W.Va. Code § 55-7B-2(i) and 2(e)(l). The City of Beckley's claims are based on Bypass Pharmacy's and Rhonda's Pharmacy's alleged failure to discharge their duties as DEA registrants under the federal and West Virginia Controlled Substances Acts to maintain “effective controls against diversion of controlled substances into *other than* legitimate medical, scientific, and industrial channels.” 21 U.S.C. § 823(b)(1) (emphasis added); see also W. Va. Code § 60A-3-303(a)(1) (same), 21 C.F.R. § 1301.71(a), W. Va. C.S.R. § 15-2-5.1.1. This includes the requirement that dispensing pharmacies operate systems to detect and block medically *illegitimate* prescribing. See 21 C.F.R. § 1306.04(a), W. Va. C.S.R. § 15-2-8.4.1. The City of Beckley alleges that Defendants violated these duties by, *inter alia*, failing to use their own dispensing data to identify doctors with prescribing patterns that present red flags for diversion and *nonmedical* use.

14. The federal and state regulations that the City of Beckley alleges Defendants failed to comply with provide specifically that:

A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription . . .

21 C.F.R. § 1306.04(a); see also W. Va. C.S.R. § 15-2-8.4.1 (same). The alleged failure of Defendants to prevent diversion by failing to investigate red flags of diversion and illegitimate prescribing does not fall under the MPLA's protections. *Cf. East Main St. Pharmacy; Affirmance of Suspension Order*, 75 FR 66149-01, 66157, 2010 WL 4218766 (D.E.A. Oct. 27, 2010) (“[A] pharmacist can know that prescriptions are issued for no legitimate medical purpose without his needing to know anything about medical science.”) (quoting *U.S. v. Hayes*, 595 F.2d 258, 261

n.6 (5th Cir. 1979)). Since the duties underpinning the City of Beckley's public nuisance claims are not performed in furtherance of patient treatment, but pursuant to registrants' duties to prevent diversion outside of legitimate patient care, the MPLA does not apply to these claims.

15. Finally, the Panel adopts herein the holdings in its August 3, 2022, *Findings of Fact and Conclusions of Law on Order Denying Pharmacy Defendants' Motions to Dismiss Complaints and Amended Complaints* (Transaction ID 67895252) related to the MPLA and notes the Supreme Court of Appeals of West Virginia refused a petition for writ of prohibition challenging the same. *See State of West Virginia ex rel. CVS Pharmacy, Inc., et al v. Hon. Alan D. Moats, et al*, No. 22-635 (W.Va. Sept. 8, 2022) (Transaction ID 68065888).

16. The Panel holds that the MPLA does not apply to the City of Beckley's public nuisance claims for equitable abatement because these claims are not brought by or on behalf of a patient and do not seek damages for a patient's death or injury in receiving medical services.

**B. West Virginia public nuisance law applies to the manufacture, distribution and dispensing of prescription opioids.**

17. Defendants argue that "the West Virginia Supreme Court of Appeals has never recognized a public nuisance claim arising out of a defendant's distribution of a lawful product. Public nuisance law was designed to protect the public's rights to use and enjoy public lands. The West Virginia Supreme Court of Appeals has never upheld a common law public nuisance claim that sought to vindicate anything other than an interest in property or the environment." *See Defendants' Memo.* at pp. 13-14. Defendants move this Panel to dismiss the public nuisance claim as a matter of law for failure to state a claim for relief under W.V.R. Civ. Proc. 12(b)(6).

18. The Panel has consistently issued orders in this mass litigation denying motions by the Pharmacy, Distributor, and Manufacturer Defendants for dismissal of or

summary judgment on the State’s or City and County Plaintiffs’ public nuisance claims. *See* October 31, 2019, *Order Denying Pharmacy Defendants’ Motion to Dismiss Plaintiffs’ Complaint*, Civil Action Nos. 18-C-222 MSH and 18-C-233 through 18-C-236 MSH (“Pharmacies Order”) (Transaction ID 64374772), at 3 and Ex. A pp. 11-12; October 31, 2019, *Order Denying the Distributor Defendants’ Motion to Dismiss Plaintiffs Complaint*, Civil Action Nos. 18-C-222 MSH and 18-C-233 MSH through 18-C-236 MSH (“Distributors Order”) (Transaction ID 64374611) at 3 and Ex. A pp. 13-14, *writ refused*, *State ex. rel. AmerisourceBergen Drug Corp. v. Hon. Alan D. Moats*, No. 19-1051 (W. Va. Jan. 30, 2020); October 31, 2019, *Order Denying Manufacturer Defendants’ Joint Motion to Dismiss Plaintiffs’ Complaint* (“Manufacturers Order”) (Transaction ID 64374079) at 2-3 and Ex. A p. 12; August 31, 2020, *Order Denying Allergan and Teva Defendants’ Motions to Dismiss State’s First Amended Complaint* (“Teva Order”) (Transaction ID 65887418) at 2-3; September 2, 2020, *Order Denying Janssen Defendants’ Motion to Dismiss State’s Complaint* (“Janssen Order”)(Transaction ID 65899715) at 1-4; and May 23, 2022, *Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* (“Manufacturers MSJ Order”) (Transaction ID 67650385) at 4 (denying summary judgment for Manufacturer Defendants on State’s public nuisance claims).

19. The Panel recently set forth comprehensive findings and legal conclusions concerning the application of public nuisance to governmental opioid claims. *See Findings of Fact and Conclusions of Law and Order Denying Defendants’ Motion for Summary Judgment re “Factual Issue #2”* (“Distributors MSJ Order 2”) (Transaction ID 67786397) at 1-9 (denying summary judgment for Distributor Defendants on City and County Plaintiffs’ public nuisance claims). That decision outlined the historical background of



public nuisance claims in West Virginia and in nationwide opioid litigation and explained why contrary decisions are unpersuasive. *Id.* at 1-6. The Panel reaffirmed those conclusions in its August 3, 2022, *Findings of Fact and Conclusions of Law on Order Denying Pharmacy Defendants' Motions to Dismiss Complaints and Amended Complaints* (Transaction ID 67895252) *writ refused, State of West Virginia ex rel. CVS Pharmacy, Inc., et al v. Hon. Alan D. Moats, et al*, No. 22-635 (W.Va. Sept. 8, 2022) (Transaction ID 68065888), and does so again here.

20. The decision in *City of Huntington, supra*, does not warrant reconsideration of the Panel's rulings that public nuisance does not require harm to real property or of the authority on which they are based. In *City of Huntington*, the court found that "the West Virginia Supreme Court has only applied public nuisance law in the context of conduct that interferes with public property or resources" and the "extension of the law of nuisance to cover the marketing and sale of opioids is inconsistent with the history and traditional notions of nuisance." 2022 WL 2399876 at \*57. The Panel is not persuaded by this finding.

21. The *City of Huntington's* placement of an artificial external constraint on the common law cause of action for public nuisance is inconsistent with the Supreme Court of Appeals' longstanding recognition that a public nuisance is any act or condition that "operates to hurt or inconvenience an indefinite number of persons[,]" *Duff*, 18 W. Va. at 716, 421 S.E.2d at 257 (quoting *Hark*, 127 W. Va. at 595-96, 34 S.E.2d at 354), and that "nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations." *Sharon Steel*, 175 W. Va. at 483, 334 S.E.2d at 621. The holding in *City of Huntington* is neither predictive nor consistent with West Virginia law on public nuisance and, therefore, does not warrant reconsideration of the Panel's prior rulings.

**C. Plaintiff's claims are not barred by the Pharmacy Immunity Statute.**

22. Defendants argue they are immune from liability under W. Va. Code § 30-5-21(a) (“All persons, whether licensed pharmacists or not, shall be responsible for the quality of all drugs, chemicals and medicines they may sell or dispense, with the exception of those sold in or dispensed unchanged from the original retail package of the manufacturer, in which event the manufacturer shall be responsible.”).

23. This Panel has rejected the argument that the Pharmacy Act bars common law claims addressing prescription opioid distribution, holding that the Act's provision addressing responsibility for dispensed drugs focuses on the quality of drugs, but says nothing about duties to prevent their diversion. *See* “Distributors Order”, *supra*, at 3 and Ex. A at 11 (adopting and incorporating as law of the case *Brooke County Commission et al v. Purdue Pharma L.P.*, Civil Action No. 17-C-248, *Order Denying AmerisourceBergen Drug Corporation, Cardinal Health, Inc., and McKesson Corporation's Motion to Dismiss*, (Marshall Cty. December 28, 2018 – “West Virginia Code §30-5-21(a) does not apply to the instant claims because [the] claims against Defendants arise out of their duties to prevent diversion as distributors of controlled substances rather than the ‘quality’ of the drugs sold at retail.”). The same analysis applies here. Beckley bases its claims on the pharmacies' duty to prevent diversion, not the quality of the drugs they dispensed. The Pharmacy Act thus does not preclude these claims.

**ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, and in accordance with this Panel's previously entered Order (Transaction ID 68171315), the Motions to Dismiss

filed by Defendants Bypass Pharmacy, Inc.'s And Rhonda's Pharmacy, L.L.C.'S motions to dismiss (Transaction IDs 66005900 and 67235324) are **DENIED**.

The objections of Defendants Bypass Pharmacy, Inc. and Rhonda's Pharmacy, L.L.C. are noted for the record.

A copy of this Order has this day been electronically served on all counsel of record via File & Serve*Xpress*.

It is so **ORDERED**.

**ENTERED:** October 18, 2022.

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

/s/ Derek C. Swope  
Presiding Judge  
Opioid Litigation