No. 19-3827

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 10, 2019
DEBORAH S. HUNT, Clerk

In re: NATIONAL PRESCRIPTION OPIATE LITIGATION

In re: STATE OF OHIO,

Petitioner.

O R D E R

Before: NORRIS, SILER, and MOORE, Circuit Judges.

The State of Ohio ("Ohio") petitions for a writ of mandamus compelling the district court to dismiss or postpone a consolidated bellwether trial scheduled to begin on October 21, 2019, in this multidistrict litigation (MDL) case brought against manufacturers, distributors, and other entities alleged to be responsible for the nation's opiate epidemic. By order entered on September 25, 2019, this court directed that responses be filed. *See* Fed. R. App. P. 21(b)(1). Thirteen States and the District of Columbia, the Chamber of Commerce of the United States, and two MDL plaintiffs move for leave to file amicus briefs in support of Ohio's petition. The plaintiffs in the bellwether trial, Cuyahoga County and Summit County, Ohio (the "Counties"), and the MDL judge respond in opposition. Ohio moves for leave to file a reply and tenders its reply. Four MDL defendants move to intervene and for an emergency stay pending our ruling on Ohio's mandamus petition.

"The writ of mandamus is a 'drastic and extraordinary remedy reserved for really extraordinary causes.' Mandamus should issue only in 'exceptional circumstances' involving a

'judicial usurpation of power' or a 'clear abuse of discretion.'" *In re United States*, 817 F.3d 953, 959–60 (6th Cir. 2016) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)). To obtain the writ here, Ohio must have no other adequate means to obtain the relief it desires and show that its right to issuance of the writ is clear and indisputable. Furthermore, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381.

Ohio argues that, as a sovereign, it has sole authority to assert *parens patriae* claims for harms to its citizens' health and welfare, and that the Counties' claims, and their requested relief, go far beyond direct injuries to the Counties and duplicate the much more expansive relief that Ohio seeks in its own lawsuits pending in state court. We note, however, that on December 19, 2018, the district court entered an opinion and order rejecting a similar argument made by the MDL defendants. Despite having notice that the Counties' claims would proceed to trial, Ohio made no attempt to intervene in the MDL proceeding for the limited purpose of raising the issues that it now asks us to decide by extraordinary means.

Ohio claims that if it moved to intervene it would be required to subject itself to federal jurisdiction and pursue its claims in federal court. It is Ohio's burden to show that it lacks other adequate means to obtain the relief it seeks, and the cases it relies on are not on point. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 53 (1996), *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 329 (1934), and *Thomas v. FAG Bearings Corp.*, 50 F.3d 502 (8th Cir. 1995), the States did not move to intervene. Instead, they were sued or involuntarily joined in federal court proceedings. The Supreme Court will find that a State waived its constitutional protections only "where stated by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651,

673 (1974); *see In re Dep't of Energy Stripper Well Exemption Litig.*, 956 F.2d 282, 286 (Temp. Emer. Ct. App. 1992) (finding that New Mexico neither expressly nor impliedly waived its Eleventh Amendment immunity when it intervened to participate in the distribution of an escrow fund); *Marx v. Govt of Guam,* 866 F.2d 294, 301 (9th Cir. 1989) (finding that Guam did not waive its immunity when it appeared and moved to intervene solely for the purpose of challenging the district court's jurisdiction). These cases weigh against a finding that intervention would force Ohio to litigate its claims in federal court. Additionally, if intervention is denied, an immediate appeal can be taken. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987).

Neither are we satisfied that the writ is appropriate in this case. Ohio did not object when the Counties' cases were first removed and transferred for coordination with the MDL litigation. Since that time, Ohio has moved the MDL court for a protective order, joined with the amici States in opposing plaintiffs' motion to certify a negotiation class, and appeared and argued against certification at an August 6, 2019 hearing. The parties have conducted extensive discovery, filed numerous pleadings and, in some cases, reached settlements. In view of these circumstances, we decline to exercise our discretion to deploy one of "the most potent weapons in the judicial arsenal." *Will v. United States*, 389 U.S. 90, 107 (1967).

The motions to file a reply and to file amicus briefs are **GRANTED**. The petition for a writ of mandamus is **DENIED**. The defendants' motions to intervene and for an emergency stay are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk