

21-BCD-18

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

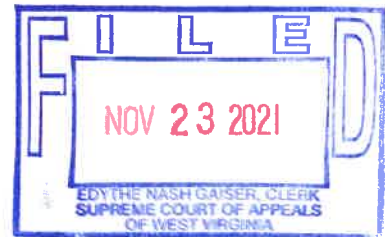
**AMERISOURCEBERGEN DRUG
CORPORATION and BELLCO DRUG
CORPORATION,**

Plaintiffs,

CIVIL ACTION NO. 17-C-36

v.

**ACE AMERICAN INSURANCE
COMPANY, ACE PROPERTY AND
CASUALTY INSURANCE COMPANY,
AMERICAN GUARANTEE &
LIABILITY INSURANCE COMPANY,
ENDURANCE AMERICAN INSURANCE
COMPANY, and ST. PAUL FIRE AND
MARINE INSURANCE COMPANY,**



Defendants.

PLAINTIFFS' MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

Plaintiffs AmerisourceBergen Drug Corporation and Bellco Drug Corporation (collectively, "ABDC") move to refer the above-captioned insurance coverage action to the Business Court Division of the West Virginia Circuit Courts. This suit is pending in the Circuit Court of Boone County, West Virginia. In support of this Motion, ABDC states as follows:

1. This insurance coverage action has been pending since March 2017.
2. This Court has already determined that "the courts of this state have a compelling interest" in the timely resolution of this dispute. *See Exhibit A (St. Paul Fire and Marine Insurance Company v. AmerisourceBergen Drug Corporation, No. 21-36) at 21.*
3. That is because this case concerns insurance coverage for prescription opioid lawsuits that have been filed against ABDC by the State of West Virginia, its political subdivisions, third party payors, and individual plaintiffs, including cases consolidated in a West Virginia Prescription Opioid Mass Litigation Panel and the National Prescription Opioid MDL.

4. As a result, the case will address the scope of insurance coverage for thousands of prescription opioid lawsuits and the availability of insurance proceeds to contribute to a resolution of those suits.

5. In addition to the direct impact on the parties to this dispute, the resolution of these coverage issues will have broad implications for coverage for all participants in the prescription drug supply chain that, like ABDC, have been named as defendants in thousands of prescription opioid lawsuits in West Virginia and around the country, including the defendants in prescription opioid lawsuits from the National Prescription Opioid MDL that have recently gone to trial in the Southern District of West Virginia (J. Faber).

6. On June 1, 2017, Defendants filed a Joint Motion in this Court to refer this matter to the Business Court Division. *See* Exhibit B (June 1, 2017 Joint Motion to Refer Case Business Court Division).

7. ABDC opposed the referral at that time because the case had been assigned to Judge William S. Thompson, who had unique expertise and experience handling cases concerning prescription opioid liabilities and who (at the time Defendants made the motion) had handled more insurance coverage cases than the entirety of the Business Court Division.

8. Judge Thompson ably presided over and managed this complex case for several years, including by resolving the threshold insurance coverage issue of whether the underlying case involves “bodily injury,” deciding voluminous complex discovery disputes, and guiding the case through Phase 1 fact discovery, which closed on October 29, 2021.¹ *See* Exhibit C (Third Amended Scheduling Order).

¹ Judge Thompson bifurcated this dispute, with Phase 1 focused on insurance coverage for the lawsuit styled *State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General v. ABDC, et al.*, Civil Action No. 12-C-141 (Circuit Court, Boone County, West Virginia) (the “WVAG Lawsuit”), and with the determination of coverage for all remaining prescription opioid lawsuits stayed until Phase 2

9. However, Judge Thompson has now been required to step down from the bench, due to his nomination by the President of the United States to serve as United States Attorney for the Southern District of West Virginia.

10. With Phase 1 fact discovery now closed, Phase 1 of this dispute is now set for trial on October 4, 2022, which is the fourth trial date set for this matter that was originally scheduled to be tried on January 29, 2019. *Compare* Exhibit C (Third Amended Scheduling Order), *with* Exhibit F (Scheduling Order).

11. At this time, referral to the Business Court Division is proper because: (1) the scope of the case has expanded significantly since the case was first filed and requires the expertise and experience of a judge of the Business Court Division to bring the case to an efficient and timely resolution, both through the handling of Phase 1 dispositive motions and trial and also by applying Phase 1 decisions to craft a resolution of all Phase 2 issues; and (2) the principal claims involve matters of significance between business entities, *i.e.*, insurance coverage impacting thousands of lawsuits regarding a subject in which the State of West Virginia, through this Court, has expressed a compelling interest.

12. The Defendants previously requested to transfer venue to the Business Court Division, and the arguments expressed in that motion now apply with greater effect today due to Judge Thompson's unique expertise and knowledge no longer being available to the litigants and the exponential increase in volume of prescription opioid lawsuits for which ABDC is seeking insurance coverage in this case.

of the litigation. *See* Exhibit D (February 22, 2018 Bifurcation and Stay Order). The Stay Order was entered to efficiently resolve the coverage issues for all prescription opioid lawsuits by using the coverage dispute regarding the concluded WVAG Lawsuit as a bellwether to address the core legal issues. Once coverage for the WVAG Lawsuit is resolved, the rulings in Phase 1 can be applied to the remaining prescription opioid lawsuits, facilitating resolution through mediation as contemplated in the prior Scheduling Orders or trial, if necessary.

13. For these reasons, and the reasons stated more fully herein, ABDC respectfully requests this case be transferred to the Business Court Division.

I. Overview of the Coverage Litigation.

14. On June 26, 2012, the West Virginia Attorney General filed the WVAG Lawsuit in the Circuit Court for Boone County, West Virginia, against ABDC and other pharmaceutical distributors, alleging that the pharmaceutical distributors negligently distributed prescription opioids, causing bodily injury and death to West Virginia residents and creating a public nuisance. In that suit, the State of West Virginia sought damages to reimburse costs that it allegedly paid to address these injuries and deaths, including its costs of providing medical care, treatment, and services to West Virginia residents.

15. Judge Thompson oversaw the WVAG Lawsuit, which was resolved by a settlement that was finalized in January 2017. He also oversaw two other lawsuits filed by the State of West Virginia against pharmaceutical distributors, bringing each of those complex cases to a conclusion.

16. Since the WVAG Lawsuit was resolved, thousands of state and local government entities, third party payors, individual and putative class action plaintiffs, and Native American Tribes have filed prescription opioid lawsuits against ABDC, including thousands of prescription opioid lawsuits that are currently consolidated in the National Prescription Opioid MDL and scores more consolidated in a West Virginia Mass Litigation Panel proceeding.

17. All of the Defendants have denied coverage for the defense and indemnification of the WVAG Lawsuit and all other prescription opioid lawsuits.

18. On March 16, 2017, ABDC filed its complaint for breach of contract and declaratory judgment against the Defendants seeking insurance coverage for the defense and indemnification of the WVAG Lawsuit and all other then-pending prescription opioid lawsuits in

the Circuit Court for Boone County, West Virginia, and the action was assigned to Judge Thompson.

19. Discovery in this case has been ongoing since 2017.

20. Under the Third Amended Scheduling Order, Phase 1 fact discovery closed on October 29, 2021.

21. In total, ABDC has made 30 productions of documents totaling over 10.5 million pages, including production of all the documents produced in the National Prescription Opioid MDL through September 28, 2020. The trial court found those productions satisfied all of ABDC's document production obligations based on the court's orders resolving discovery disputes.

22. In addition ABDC has made 23 current or former ABDC employee or consultant witnesses available for depositions (plus four depositions of ABDC's insurance broker witnesses), produced an additional 83 fact witness deposition transcripts to the Insurers from various prescription opioid lawsuits, and produced an additional 26 expert witness transcripts of depositions taken in the prescription opioid lawsuits.

23. ABDC's efforts have taken place amidst protracted litigation regarding the scope of discovery.

24. This matter was effectively stayed for approximately eighteen months – between January 2019 and September 2020 – while the Court and its appointed Discovery Commissioner worked through voluminous discovery motions.

25. Between June 2 and June 9, 2021, the parties filed fourteen additional motions addressing fact discovery disputes.

26. The Court heard argument on the parties' additional discovery motions on June 16, 2021.

27. On June 22, 2021, the Court resolved all of the additional discovery motions, including specifically ruling that written discovery is concluded and will not be re-opened.

28. At the June 16, 2021 hearing, the Court directed the parties to propose a revised scheduling order to complete Phase 1 Discovery and prepare this matter for a final resolution.

29. On August 18, 2021, the Court entered its Third Amended Scheduling Order, adopting the Defendants' proposed fact discovery deadline of October 29, 2021, with a May 27, 2022 expert discovery deadline, a July 8, 2022 dispositive motion deadline, and an October 4, 2022 trial date. *See* Exhibit C ¶¶ 2, 9.

30. The Court's Third Amended Scheduling Order provides that "[u]nless authorized by the Court, the ... dates and requirements of this Order are FINAL." *Id.* at ¶ 18 (emphasis supplied by Judge Thompson).

31. Following the October 4, 2022 trial, this matter will proceed to Phase 2 for purposes of applying the Phase 1 rulings to resolve ABDC's claims for coverage for all other prescription opioid lawsuits.

32. The expertise and experience of the Business Court Division is critical to ensuring that the resolution of this case is not mired in further delay.

33. Indeed, this dispute has already spawned both an interlocutory appeal as well as a petition for extraordinary writ to this Court by the Defendants, and Defendant St. Paul Fire and Marine Insurance Company ("St. Paul") filed what this Court described as a "competing, parallel litigation in California" that "overlapped and competed with the issues pending in West Virginia" that "violated the terms and spirit of the circuit court's stay order and was effectively a

means of litigating the coverage questions stayed by the circuit court,” that Judge Thompson “fairly concluded . . . was filed for improper purposes, namely forum shopping and the disruption of the orderly resolution of the West Virginia suit.” *See* Exhibit A at 19-22.

II. This Suit Is A Business Litigation Within the Meaning of Rule 29 and Requires the Expertise of the Business Court Division to Bring this Case to a Timely Resolution.

34. As all Defendants previously argued, this action is a “Business Litigation” within the meaning of Rule 29 of the West Virginia Trial Court Rules. *See* Exhibit B ¶¶ 13-18.

35. The dispute does not involve any individual consumers and does not include any non-commercial insurance disputes described in Rule 29.04(a)(3). *See* W.Va.T.C.R. 29.04(a)(3).

36. All parties are sophisticated commercial entities. The Defendants are among the largest, most sophisticated insurers in the world. ABDC is one of the largest wholesale pharmaceutical distributors in the United States. *See* Exhibit B ¶ 13.

37. Moreover, this action fits squarely within the scope of Rule 29.04(a)(1)-(2), because it relates to matters of significance with respect to transactions between business entities and presents commercial issues for which specialized treatment is required to determine a fair and reasonable resolution of the controversies. *See* W.Va.T.C.R. 29.04(a)(1)-(2).

38. The circumstances presented by this case go to the heart of why the Business Court Division was created.

39. As explained by Judge Wilkes shortly after the Business Court Division was established, the court was established to “handle complex commercial litigation cases between businesses” and to ensure a “process for efficiently managing and resolving litigation involving commercial issues and disputes.” *See* Exhibit E (Hon. Christopher Wilkes, *West Virginia’s New Business Court Division: An Overview of The Development and Operation of Trial Court Rule 29*, *The West Virginia Lawyer*, Jan-March 2013) at 40-43.

40. The resolution of this coverage action will decide – or at least inform – the scope of insurance coverage for thousands of prescription opioid lawsuits, including lawsuits filed in the West Virginia Mass Litigation Panel proceeding and the National Prescription Opioid MDL.

41. The complexity, scope, and importance of this litigation is evident from the dozens of attorneys who have entered their appearances in this case, the millions of pages of documents that have been produced, the dozens of depositions taken, and the multiple appeals already taken to this Court.

42. Phase 1 of this case has been pending for four-and-a-half years, with fact discovery finally coming to a close on October 29, 2021. *See* Exhibit C ¶¶ 2, 9.

43. Now that the parties have lost the benefit of Judge Thompson’s unique experience and expertise in these issues, this case requires the expertise of the Business Court Division to bring Phase 1 of this case to a timely completion and then to manage Phase 2 of this case in a way to ensure that any remaining coverage issues – in which this Court has expressed a “compelling interest,” *see* Exhibit A at 21 – are promptly and efficiently resolved.

44. The Insurers have previously requested this matter be transferred to the Business Court Division. In the four-and-a-half years since they did so, this litigation has only become more complex and the parties have lost the benefit of Judge Thompson, who was uniquely situated to resolve this dispute given his experience with the issues and parties.

45. In fact, this case is of greater size and complexity than cases this Court routinely refers to the Business Court Division. *See, e.g., West Virginia Investment Management Board v. Variable Annuity Life Insurance Co.*, 766 S.E.2d 416, 432 (W. Va. 2014) (concluding a declaratory judgment action between an insurer and two public entities with respect to coverage rights under two annuity contracts was appropriate for transfer because of “the admitted

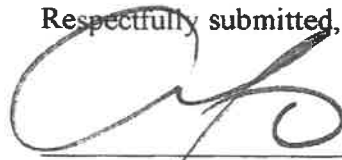
complexity of the issues presented”); *American Bituminous Power Partners, L.P. v. Horizon Ventures of West Virginia, Inc.*, No. 14-0446, 2015 WL 2261649, at *7 (W. Va. May 13, 2015) (holding transfer was warranted because of “the complexity of the contractual agreements governing this dispute” which involved a trust indenture, a lease agreement, and an agreement to resolve pending litigation).

CONCLUSION

Accordingly, ABDC respectfully requests that the Court grant ABDC’s Motion to Refer and transfer this civil action to the Business Court Division.

November 23, 2021

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Todd A. Mount, do hereby certify that service of the foregoing has been made upon the Circuit Clerk of Boone County, the Judge of the Circuit Court of Boone County and all responsible local counsel via West Virginia e-file; by first class U.S. Mail to the Central Office of the Business Court Division; and by stipulation has also been served upon other counsel of record via e-mail on this 23rd day of November, 2021, addressed as follows:

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EXHIBIT A

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2021 Term

No. 21-0036

FILED

November 15, 2021

released at 3:00 p.m.
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Defendant Below, Petitioner**

v.

**AMERISOURCEBERGEN DRUG CORPORATION, and
BELLCO DRUG CORPORATION,
Plaintiffs Below, Respondents**

v.

**ACE AMERICAN INSURANCE COMPANY and
ACE PROPERTY AND CASUALTY INSURANCE COMPANY,
Defendants Below, Intervenor-Petitioners**

**Appeal from the Circuit Court of Boone County
The Honorable William S. Thompson, Judge
Civil Action No. CC-03-2017-C-36**

**AFFIRMED, IN PART, REVERSED, IN PART,
AND REMANDED**

**Submitted: September 29, 2021
Filed: November 15, 2021**

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JUSTICE HUTCHISON delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. “*West Virginia Constitution*, article VIII, section 3, which grants this Court appellate jurisdiction of civil cases in equity, includes a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief.” Syl. pt. 2, *State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W. Va. 438, 582 S.E.2d 885 (2003).

2. “The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.” Syl. pt. 4, *State v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932).

3. “In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, *West v. National Mines Corp.*, 168 W.Va. 578, 590, 285 S.E.2d 670, 678 (1981), we review the circuit court’s underlying factual findings under a clearly erroneous standard, and we review questions of law de novo. Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178,

469 S.E.2d 114 (1996).” Syl. pt. 1, *State By & Through McGraw v. Imperial Mktg.*, 196 W. Va. 346, 472 S.E.2d 792 (1996).

4. “When the jurisdiction of a court is asserted over a cause of action, it embraces everything in the case and every question arising which can be determined in it; and, until thus exhausted, or in some way relinquished, the jurisdiction is exclusive and cannot be encroached upon by any other tribunal.” Syl. pt. 1, *State v. Fredlock*, 52 W. Va. 232, 43 S.E. 153 (1903).

5. “A court having jurisdiction *in personam*, may require the defendant to do, or refrain from doing, beyond its territorial jurisdiction, anything which it has power to require him to do or omit within the limits of its territory.” Syl. pt. 2, *State v. Fredlock*, 52 W. Va. 232, 43 S.E. 153 (1903).

6. An anti-suit injunction is an order barring parties to an action in this state from instituting or prosecuting substantially similar litigation in another state. Whether the foreign state action is substantially similar involves assessing (1) the similarity of the parties; (2) the similarity of the issues; and (3) the capacity of the action in this state to dispose of the foreign state action.

7. The principle of comity requires that a circuit court enter an anti-suit injunction cautiously and with restraint.

8. An anti-suit injunction is an exceptional remedy but is appropriate when equity compels the circuit court: (1) to address a threat to the court's jurisdiction; (2) to prevent the evasion of an important public policy; (3) to prevent a multiplicity of suits that result in delay, inconvenience, expense, inconsistency, or will be a "race to judgment"; or (4) to protect a party from vexatious, inequitable or harassing litigation.

HUTCHISON, Justice:

Over the last two decades, the United States has experienced an epidemic of overdose deaths involving prescription and illicit opioid medications. Governments, businesses and individuals have sued the pharmaceutical distributors that sold prescription opioid medicines and “seek to recover billions in governmental and economic costs allegedly incurred in providing a wide array of public services in response to the influx of opioids into their communities such as increased expenses for first responders, autopsies, morgues, drug rehabilitation, foster care, and drug-related criminal activity.”¹ In response, the pharmaceutical distributors have filed suits against their liability insurers seeking to recover, from the insurance policies they purchased over the years, their defense expenses as well as indemnification for settlements.

In this appeal from the Circuit Court of Boone County, we consider the powers of a circuit court to manage a lawsuit by a pharmaceutical distributor against the insurance companies which provided it with liability insurance. Specifically, the circuit court entered an “anti-suit injunction” prohibiting the insurance companies sued in West Virginia from pursuing parallel litigation against the distributor in California. As set forth below, we affirm the circuit court’s power to enter an order precluding a party to a West Virginia lawsuit from instituting or prosecuting collateral litigation in a sister state.

¹ *Rite Aid Corp. v. ACE Am. Ins. Co.*, 2020 WL 5640817, at *2 (Del. Super. Ct., Sept. 22, 2020).

However, because an anti-suit injunction must be narrowly tailored to protect the court's authority while respecting the sister state court, we reverse the circuit court's injunction order and remand the case to permit the circuit court to reconsider the breadth of its order.

I. Factual and Procedural Background

Plaintiff AmerisourceBergen Drug Corporation ("ABDC") is a wholesale distributor of prescription opioid medication in West Virginia and across the United States.² In 2012, the West Virginia Attorney General filed a lawsuit seeking to hold ABDC liable for the prescription opioid epidemic in West Virginia. After the Attorney General reached settlements in the suit in late 2016, a host of state agencies, counties, cities, hospitals, individuals, and others named ABDC as a defendant in as many as 165 similar prescription opioid lawsuits in West Virginia courts. *See generally, State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 859 S.E.2d 374, 378 (W. Va. 2021) (discussing the more than eighty opioid lawsuits pending before the West Virginia Mass Litigation Panel). Nationwide, thousands of comparable lawsuits are pending in state and federal courts.

The instant case derives from ABDC's efforts to establish that these prescription opioid lawsuits, nationwide and in West Virginia, are covered under primary,

² Plaintiff Belco Drug Corporation also distributes pharmaceutical opioids. Belco has been a subsidiary of ABDC since October 2007, and it conducts all of its operations through ABDC. We therefore refer to both plaintiffs jointly as "ABDC."

umbrella, and excess commercial general liability policies purchased by ABDC (or its predecessors or affiliates). On March 17, 2017, ABDC filed a complaint in the Circuit Court of Boone County, West Virginia, against five insurance companies seeking to establish coverage under sixteen policies issued between 2006 and 2013.³ ABDC subsequently amended its complaint to refine its claims. The complaints generally alleged that the West Virginia opioid lawsuits raised claims within the scope of policy coverage but that the insurance companies had breached the sixteen insurance contracts when they refused to provide defense costs or liability coverage to ABDC.⁴

³ The circuit court case is styled *AmerisourceBergen Drug Corporation v. Ace American Insurance Company*, Civil Action No. 17-C-36.

⁴ The record reflects that the defendant insurance companies refused to provide coverage or a defense because ABDC was sued, not by people who had consumed opioid medications, but by government agencies. ABDC could not identify by name any specific person for whom the government agency had incurred losses in connection with a bodily injury, physical harm, sickness or disease, and also could not identify each person's particular bodily injury. Hence, the insurance companies argued ABDC had failed to allege the occurrence of a "bodily injury" sufficient to trigger indemnification or a defense.

Significantly, the record also reflects that the Attorney General's 2012 lawsuit included as a defendant another pharmaceutical distributor, H.D. Smith, L.L.C., which thereafter sought indemnification and a defense to the Attorney General's suit from its liability insurer. However, the insurer refused coverage for reasons similar to those given to ABDC, prompting a lawsuit by H.D. Smith. On July 19, 2016, the United States Court of Appeals for the Seventh Circuit ruled against the insurer and found no policy requirement that H.D. Smith identify the people harmed or their specific injuries in order to obtain coverage. The court ruled that because the Attorney General's lawsuit alleged losses to government agencies "because of" or "resulting from" bodily injuries, despite those injuries occurring to unknown citizens, the pharmaceutical company was entitled to a defense under the insurance policy. *See Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771, 774 (7th Cir. 2016). Nine days after the Seventh Circuit's decision, on July 28, 2016, ABDC made demands for indemnification and defense upon the defendant insurers,

Continued . . .

ABDC's insurance coverage lawsuit specifically sought a declaratory judgment from the circuit court construing primary, umbrella and excess comprehensive general liability policies issued by defendant St. Paul Fire & Marine Insurance Company ("St. Paul") and by defendants Ace American Insurance Company and Ace Property and Casualty Insurance Company ("Ace American").⁵ ABDC requested an order requiring the defendants "to pay for the past, present and future defense costs and liability in connection with prescription opioid lawsuits filed against [ABDC] in this state[.]"

Over the next three-and-a-half years, ABDC and the insurer-defendants participated in extensive discovery. At one point, ABDC produced over ten million pages of documents in response to requests made by the insurer-defendants (because the defendants had sought all documents ever produced by ABDC in all federal and state prescription opioid lawsuits nationwide). After the resolution of numerous discovery disputes by the circuit court, defendant St. Paul filed a motion for summary judgment

demands that formed the basis for the instant case. *See also, Giant Eagle, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 499 F. Supp. 3d 147 (W.D. Pa. 2020) (opioid lawsuit by county alleged bodily injuries sufficient to trigger duty to defend); *Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co.*, 410 F. Supp. 3d 920 (C.D. Ill. 2019) (finding insurer had a duty to indemnify pharmaceutical distributor for the entire amount of its settlement with the State of West Virginia); *Acuity v. Masters Pharm., Inc.*, 2020 WL 3446652 (Ohio App. 2020) (finding insurer had duty to defend opioid distributor in lawsuits); *Rite Aid Corp. v. ACE Am. Ins. Co.*, 2020 WL 5640817 (Del. Super. Ct. Sept. 22, 2020) (same); *Cincinnati Ins. Co. v. Discount Drug Mart, Inc.*, 2020 WL 6706791, at *10 (Ohio Com. Pl., Sep. 09, 2020) (same).

⁵ ABDC's complaint also named as defendants American Guarantee & Liability Insurance Company and Endurance American Insurance Company.

contending that, as a matter of law, the West Virginia opioid lawsuits did not properly allege damages arising from a “bodily injury” covered by a St. Paul policy. The parties briefed the motion. In early 2020, the circuit court heard argument on St. Paul’s summary judgment motion but requested further briefing. Moreover, in an order dated September 28, 2020, the circuit court resolved the last outstanding discovery dispute between the parties.

Then, on November 5, 2020, St. Paul filed a competing insurance coverage action in California state court against ABDC and its corporate subsidiaries and affiliates.⁶ In the California complaint, St. Paul alleged that ABDC has been “named in more than 80 lawsuits originally filed in California state and federal court *and hundreds more in other states seeking to hold them responsible for contributing to the opioid crisis in the United States* (the ‘Opioid Lawsuits’).” (Emphasis added.) St. Paul noted that while several opioid lawsuits nationwide had settled, even after those settlements are concluded,

there will be hundreds of pending Opioid Lawsuits brought by individuals, companies or governmental entities seeking to hold [ABDC and its affiliates] liable for their role in the opioid crisis, and for which [ABDC and its affiliates] have sought

⁶ See Complaint, *St. Paul Fire and Marine Ins. Co., et al. v. AmerisourceBergen Corporation, et al.*, No. 30-2020-01168930-CU-IC-CXC (Super. Ct. of Orange Cty, Cal., Nov. 5, 2020). The California complaint recites that, in 2001, AmeriSource Health Corporation merged with Bergen Brunswig Corporation (then based in Orange County, California) to form AmerisourceBergen Corporation. The California complaint thereafter refers to ABDC and its various subsidiaries and affiliates as the “Bergen Brunswig Affiliates,” despite Bergen Brunswig ceasing to exist as an independent corporate entity in 2001. For the sake of clarity, we continue to refer to mentions of AmerisourceBergen in the California complaint as “ABDC.”

insurance coverage from the St. Paul Insurers . . . among others ('Remaining Suits').

St. Paul's California complaint alleged that St. Paul issued various insurance policies to ABDC, but sought a declaratory judgment that St. Paul had no duty to defend or indemnify ABDC in any opioid lawsuit filed against ABDC nationwide. Alternatively, St. Paul's complaint named as defendants seventy insurance companies (including companies such as ACE American) "who, on information and belief, issued insurance policies to [ABDC] Affiliates covering periods between 1995 and 2018[.]" The complaint asked the California court to issue a declaratory judgment that, if St. Paul had some obligation to provide coverage for any opioid lawsuit, established the scope and amount of coverage required to be provided by each insurance company to ABDC.

On November 19, 2020, ABDC filed a motion with the West Virginia circuit court seeking an "anti-suit injunction." At the beginning of its motion, ABDC sought injunctive relief solely against St. Paul, asking the circuit court to enjoin St. Paul "from pursuing collateral declaratory judgment litigation in California or elsewhere against ABDC regarding the disputes currently pending" before the West Virginia court. However, ABDC's final request for relief was substantially broader. At the end of its motion, ABDC asked the circuit court to "enjoin St. Paul, *and all other parties to this lawsuit*" from proceeding with the California lawsuit or from "instituting any further collateral lawsuits regarding the issues pending" before the circuit court. (Emphasis added.)

St. Paul contended that no injunction was necessary because the California complaint exempted the West Virginia lawsuit. St. Paul cited to footnote 11 on page 17 of its California complaint which reads:

In 2017, [ABDC] settled an opioid-related lawsuit brought against it by the Attorney General of West Virginia. Coverage for that settlement and cases brought by certain West Virginia governmental entities against [ABDC] and its affiliates is the subject of litigation pending in West Virginia, styled *AmerisourceBergen Drug Corp., et al. v. ACE American Insurance Co., et al.*, No. 17-C-36 (W. V. Cir. Ct., Boone Cty.), and is not intended to be the subject of this action.

In response to St. Paul's footnote, ABDC argued that the broad language of the California complaint necessarily subsumed and addressed the coverage questions pending in West Virginia. Further, ABDC argued that the California footnote did not say St. Paul carved out the West Virginia cases, rather, it said St. Paul "intended to" carve them out of the California action.

In the interim, the circuit court made progress toward resolving the West Virginia insurance coverage lawsuit. On November 23, 2020, after months of supplemental briefing, the circuit court entered an order denying St. Paul's motion for summary judgment. The circuit court ruled in favor of ABDC and found that "insurance coverage is available under the general liability insurance coverage section of the St. Paul Policy for lawsuits by government entities seeking damages for injuries suffered by their citizens."

In an order dated January 7, 2021, the circuit court granted ABDC's motion for an anti-suit injunction and prevented all of the parties from pursuing collateral insurance litigation involving ABDC, in California or elsewhere. After reviewing the record, the circuit court determined that the California action involved the same parties as the West Virginia action (including ABDC, St. Paul, and ACE American), and involved the same policy language contained in the sixteen insurance policies at issue in West Virginia. The circuit court found:

Whatever differences exist between this action and St. Paul's California Coverage Action, at a minimum, St. Paul is asking the California court to issue declarations governing the parties already before this Court, interpreting the exact same insurance policy language already before this Court, regarding the same type of cases already before this Court, and regarding the same cases on which this Court permitted the Insurer Defendants to take discovery, raising the identical coverage issues already pending before this Court, including coverage issues on which this Court has already issued rulings.

Additionally, the circuit court examined St. Paul's "carve-out" footnote stating that the prescription opioid lawsuits before the circuit court were "not intended to be the subject of" the California action. The circuit court said it was "unpersuaded that this carve-out creates a meaningful distinction between these disputes[] or would meaningfully protect the jurisdiction of [the circuit court] and the orderly resolution of this dispute." The circuit court then concluded by ruling that "[a]ll parties are hereby enjoined from instituting or prosecuting any collateral litigation or other proceeding against one another relating to insurance coverage for the prescription opioid lawsuits against . . . ABDC, or any other affiliated entity."

Defendant St. Paul now appeals the circuit court's January 7, 2021, injunction order. Defendant Acé American subsequently filed a motion to intervene and join St. Paul in appealing the circuit court's order, a motion this Court granted.

II. Standard of Review

A circuit court entering an injunction is guided by the following discretionary standard:

The granting or refusal of an injunction . . . calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.

Syl. pt. 4, *State v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932). Hence, we apply the following deferential standards to our review of an order granting injunctive relief:

In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of . . . [an] injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the . . . injunction and the ultimate disposition under an abuse of discretion standard, we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law de novo.

Syl. pt. 1, *State By & Through McGraw v. Imperial Mktg.*, 196 W. Va. 346, 472 S.E.2d 792 (1996) (citations omitted).

With these guidelines in mind, we examine the circuit court's order.

III. Discussion

St. Paul and Ace American contend that the circuit court erred in issuing an anti-suit injunction precluding the prosecution of the California action. They assert that the West Virginia and California actions are not “parallel proceedings” because there is no overlap between the claims at issue in the West Virginia action and the claims in the California action. Hence, St. Paul and Ace American contend that ABDC has failed to show any irreparable harm, sufficient to support an injunction, from the California action.

To fully assess the parties’ positions, we begin by considering the power of a circuit court to issue an anti-suit injunction. “An anti-suit injunction is a legal order barring litigants from instituting or prosecuting the same or a similar action in another state.” John Ray Phillips, III, *A Proposed Solution to the Puzzle of Anti-suit Injunctions*, 69 U. Chi. L. Rev. 2007, 2009 (2002). “Typically, a court may issue an injunction to enjoin only those acts occurring within that court’s territorial jurisdiction.” *Kessel v. Leavitt*, 204 W. Va. 95, 150, 511 S.E.2d 720, 775 (1998). However, a well-recognized exception exists that permits circuit courts to enjoin acts outside of their territorial jurisdiction. West Virginia Code § 53-5-4 (1923) provides:

Every judge of a circuit court shall have general jurisdiction in awarding injunctions, whether the judgment or proceeding enjoined be in or out of his circuit, or the party against whose proceeding the injunction be asked reside in or out of the same.

West Virginia Code § 53-5-4 enables a circuit court to enjoin the parties to an action from pursuing substantially similar litigation in another court that threatens the circuit court's ability to resolve the action. Stated simply, there is no question that West Virginia courts are empowered to issue injunctions to prevent parties from going forward with parallel or duplicative litigation in a sister state. In the context of anti-suit injunctions, the terms "parallel," "duplicative," or "substantially similar" litigation involve a three-part test "that assesses (1) the similarity of the parties; (2) the similarity of the issues; and (3) the capacity of one action to dispose of the action to be enjoined." *Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756, 767 (Minn. Ct. App. 2017).

We discussed the long-standing equitable power to issue anti-suit injunctions in *State v. Fredlock*, 52 W. Va. 232, 43 S.E. 153 (1903), finding that when a circuit court asserts jurisdiction over a cause of action, the court's jurisdiction embraces "every question arising which could be determined" in the case and "could not be trenched upon by any other tribunal." *State v. Fredlock*, 52 W. Va. at 240, 43 S.E. 153, 156 (1903) (quoting *French v. Hay*, 89 U.S. 250, 253 (1874)). We therefore held, in Syllabus Point 1 of *Fredlock*, that

[w]hen the jurisdiction of a court is asserted over a cause of action, it embraces everything in the case and every question arising which can be determined in it; and, until thus exhausted, or in some way relinquished, the jurisdiction is exclusive and cannot be encroached upon by any other tribunal.

52 W. Va. at 232, 43 S.E. at 153.

When, however, the parties before the circuit court initiate parallel litigation in another court, or otherwise ask another court to act in a manner that invades or encroaches upon the circuit court's ability to resolve a pending cause of action or controversy, this Court determined that a circuit court is authorized by West Virginia Code § 53-5-4 and by principles of equity to enter an injunction designed to "uphold, maintain and protect a jurisdiction which attaches upon grounds wholly independent of the injunction," *Id.* at 239, 43 S.E. at 156. In other words, a circuit court may enjoin a party from pursuing a parallel case in the courts of another state.⁷ This Court concluded, in Syllabus Point 2 of *Fredlock*, that

[a] court having jurisdiction *in personam*, may require the defendant to do, or refrain from doing, beyond its territorial jurisdiction, anything which it has power to require him to do or omit within the limits of its territory.

52 W. Va. at 233, 43 S.E. at 153. Stated differently, "a court has a duty, as well as power, to protect its jurisdiction over a controversy in order to decree complete and final justice

⁷ As for a party's attempt to pursue substantially similar litigation in another West Virginia circuit court, Rule 42(b) of the West Virginia Rules of Civil Procedure provide circuit courts with the appropriate remedy:

When two or more actions arising out of the same transaction or occurrence are pending before different courts or before a court and a magistrate, the court in which the first such action was commenced shall order all the actions transferred to it or any other court in which any such action is pending. The court to which the actions are transferred may order a joint hearing or trial of any or all of the matters in issue in any of the actions; it may order all the actions consolidated; and it may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

between the parties and may issue an injunction for that purpose[.]” *James v. Grand Trunk W. R. Co.*, 152 N.E.2d 858, 865 (Ill. 1958).

To be clear, an anti-suit injunction applies only to the parties before the circuit court, not to the other court or other judge presiding over the parallel case.

The injunction is directed, not to the court, but to the litigant parties, and in no manner denies the jurisdiction of the legal tribunal. It merely seeks to control the person to whom it is addressed, and to prevent him from using the process of courts of law where it would be against conscience to allow him to proceed. It is granted on the ground that an unfair use is being made of the legal forum, which, from circumstances of which equity alone can take cognizance, should be restrained, lest an injury be committed, wholly remediless at law.

52 W. Va. at 247-48, 43 S.E. at 159 (cleaned up). *See also*, W. Va. R. Civ. Pro. Rule 65(d) (“Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.”); Kurtis A. Kemper, *Propriety Under Circumstances of State Court Injunction Against Nonmatrimonial Action in Court of Sister State*, 20 A.L.R.6th 211 (2006) (“It is clearly within the equitable powers of a state court to restrain a person over whom it has jurisdiction from instituting or proceeding with an action in a sister state’s court. The exercise of such power does not direct or control a sister state’s court but operates in personam upon a party over whom the court has jurisdiction.”). Circuit courts have the power to enjoin parties from pursuing parallel litigation “in sister state courts

under the common law doctrine of comity; and . . . in foreign countries.” James P. George, *Parallel Litigation*, 51 Baylor L. Rev. 769, 781 (1999).

When entering an injunction precluding parties from pursuing parallel litigation in a sister state, circuit courts are guided by two concepts: comity and equity.

Comity compels a court to act cautiously and with restraint. Stated broadly, when considering whether to issue an anti-suit injunction, “[t]he principle of comity requires that courts exercise the power to enjoin foreign suits sparingly and only in very special circumstances where a clear equity is presented requiring the interposition of the court to prevent manifest wrong and an irreparable miscarriage of justice.” 42 Am. Jur. 2d Injunctions § 186 (2021). Comity is a flexible, court-created doctrine of deference by one court toward another designed to promote “legal harmony and uniformity among the co-equal states.” *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 300, 418 S.E.2d 738, 746 (1992). As one court noted

comity is not a constitutional requirement to give full faith and credit to the law of a sister state, but it is a rule of convenience and courtesy. The doctrine of judicial comity represents a willingness to grant a privilege, not as a matter of right, but out of deference and good will.

Cloverleaf Enterprises, Inc. v. Centaur Rosecroft, LLC, 815 N.E.2d 513, 519 (Ind. Ct. App. 2004) (citations omitted). *See also Hawsey v. Louisiana Dep’t of Soc. Servs.*, 934 S.W.2d 723, 726 (Tex. App. 1996) (“Comity is a principle under which the courts of one state give effect to the laws of another state . . . not as a rule of law, but rather out of deference or respect.”). Courts apply principles of comity “to foster cooperation, promote harmony,

and build goodwill.” *Trillium USA, Inc. v. Bd. of Cty. Comm’rs of Broward Cty., Fla.*, 37 P.3d 1093, 1098 (Utah 2001). “Courts sometimes use the term ‘comity’ as a shorthand term to explain why a forum court is deferring to the law or rulings of another jurisdiction.” *Russell v. Bush & Burchett, Inc.*, 210 W. Va. 699, 703 n.4, 559 S.E.2d 36, 40 n.4 (2001).⁸

In addition to comity, circuit courts weighing whether to issue an anti-suit injunction are guided by fundamental principles of equity. Our review of the law reveals that state courts have granted anti-suit injunctions after identifying equitable concerns

⁸ One treatise suggests that considerations of comity might impel a circuit court, through the parties, to encourage

the sister state’s court to address concerns such as the duplication of parties and issues, the expense and effort of simultaneous litigation in two courts, and the potential for inconsistent judgments by means of a motion to stay or dismiss the proceedings based on forum non conveniens considerations or other grounds.

Kurtis A. Kemper, *Propriety Under Circumstances of State Court Injunction Against Nonmatrimonial Action in Court of Sister State*, 20 A.L.R.6th 211, § 2 (2006). However, another commentator noted

Traditionally, interstate recognition of antisuit injunctions is said to be a matter of “comity,” defined as “the nonmandatory acceptance by one jurisdiction of the law of another.” In practice, comity has never been a weighty, let alone dispositive, consideration for courts. As Justice Story wrote, it is an “imperfect obligation, like that of beneficence, humanity, and charity.” Not surprisingly, then, when considering whether to recognize antisuit injunctions, courts pay homage to comity but seldom invoke it as the sole ground for their decision.

Phillips, *A Proposed Solution to the Puzzle of Antisuit Injunctions*, 69 U. Chi. L. Rev. at 2015-16 (footnotes omitted).

about interference with the court's jurisdiction,⁹ duplicative suits,¹⁰ and vexatious litigation.¹¹ Additionally, state courts have issued anti-suit injunctions when a foreign-state lawsuit would circumvent the enforcement of the state's public policy.¹² The Texas Supreme Court has distilled the cases into the following guide:

⁹ See, e.g., *Staton v. Russell*, 565 S.E.2d 103, 109 (N.C. App., 2002) (permitting anti-suit injunction because "appellants' continued prosecution of the Florida action threatened our trial court's jurisdiction over issues that affect the rights of parties not represented in the Florida action."); *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 449–50 (Minn. Ct. App. 2001) ("When a party acts 'in a calculated and systematic manner . . . to deprive the [Minnesota] court of its jurisdiction,' issuing an injunction to stop the action in another jurisdiction is appropriate.")

¹⁰ See, e.g., *Forum Ins. Co. v. Bristol-Myers Squibb Co.*, 929 S.W.2d 114, 120 (Tex. App. 1996) ("'[C]lear equity' favors all parties seeking a completion and finality to their dispute in a single proceeding without the vexation of potentially multiplicitous or harassing litigation."); *Glitsch, Inc. v. Harbert Const. Co., a Div. of Harbert Int'l*, 628 So. 2d 401, 403 (Ala. 1993) (upholding anti-suit injunction by Alabama trial court precluding prosecution of parallel action in Texas, because "the actions are substantially the same and because of the hardship to the parties to litigate in two forums, with the possibility of inconsistent results[.]"); *Cajun Electric Power Coop., Inc. v. Triton Coal Co.*, 590 So.2d 813, 816-18 (La. App. 1991) (an anti-suit injunction should issue where "[t]he two suits are clearly duplicative, and permitting both suits to continue only thwarts the legitimate effort to avoid a multiplicity of lawsuits for the benefit of both the litigants and the courts.").

¹¹ See, e.g., *Am. Int'l Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d 337, 342 (Tex. App. 2001) (Texas trial court granted anti-suit injunction, finding insurer's later-filed suit in California was "vexatious and harassing," because rather than "submitting to the jurisdiction of the Texas court and abiding by its decision . . . [the insurer] filed suit in California and proceeded to race to judgment there."); *Wallace Butts Ins. Agency, Inc. v. Runge*, 314 S.E.2d 293, 297 (N.C. App. 1984) (trial judge correctly entered restraining order so that defendant would not be "forced to defend two lawsuits in separate states involving the same subject matter resulting in vexation, harassment, annoyance and great expense.").

¹² See, e.g., *Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756, 769 (Minn. Ct. App. 2017) ("[E]quity supports an anti-suit injunction when a party

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An anti-suit injunction is appropriate in four instances: 1) to address a threat to the court's jurisdiction; 2) to prevent the evasion of important public policy; 3) to prevent a multiplicity of suits; or 4) to protect a party from vexatious or harassing litigation.

Golden Rule Ins. Co. v. Harper, 925 S.W.2d 649, 651 (Tex. 1996). Similarly, the *Restatement (Fourth) of Foreign Relations Law* proffers an equitable guide for anti-suit injunctions to preclude parallel litigation in other countries, and says:

A court in the United States may enjoin persons subject to its jurisdiction from pursuing parallel foreign proceedings. An antisuit injunction is an exceptional remedy and is appropriate only if the foreign proceeding threatens the court's jurisdiction, frustrates an important public policy of the forum, is vexatious or inequitable, or would result in delay, inconvenience, expense, inconsistency, or a race to judgment.

Restatement (Fourth) of Foreign Relations Law § 425 (2018).

After consideration of these authorities, we hold that an anti-suit injunction is an order barring parties to an action in this state from instituting or prosecuting substantially similar litigation in another state. Whether the foreign state action is substantially similar involves assessing (1) the similarity of the parties; (2) the similarity of the issues; and (3) the capacity of the action in this state to dispose of the foreign state action.

attempts to evade the effects of Minnesota law[.]”); *AutoNation, Inc. v. Hatfield*, 186 S.W.3d 576, 581 (Tex. App. 2005) (anti-suit injunction was proper because litigation in foreign state would “likely apply a legal standard contrary to the public policy of this state” and “Texas public policy may be thwarted[.]”).

We further hold that the principle of comity requires that a circuit court enter an anti-suit injunction cautiously and with restraint. An anti-suit injunction is an exceptional remedy but is appropriate when equity compels the circuit court: (1) to address a threat to the court's jurisdiction; (2) to prevent the evasion of an important public policy; (3) to prevent a multiplicity of suits that result in delay, inconvenience, expense, inconsistency, or will be a "race to judgment"; or (4) to protect a party from vexatious, inequitable or harassing litigation.

With these standards in mind, we now examine the circuit court's order. St. Paul offers an interpretation of the record which posits that the circuit court erred because no "parallel proceedings" have been filed in California. The common refrain of St. Paul's brief is a contention that the West Virginia lawsuit "concerns only 50 specific lawsuits that were filed in West Virginia and one St. Paul insurance policy" issued in 2006 to ABDC's parent company, AmerisourceBergen Corporation. St. Paul also says that

the California Action concerns questions regarding insurance coverage for more than 3,500 underlying opioid-related lawsuits filed against [ABDC and its affiliates] in California and elsewhere---*expressly excluding the 50 underlying suits at issue in this case*---under a multitude of policies dating from the mid-1990s that were issued by the 75 insurance companies that are named parties in the California Action.

Using its own construal of the facts, St. Paul insists that "there is no overlap between the underlying claims at issue in the California Action and this case," and, thus, the circuit court erred in finding any prejudice or harm to ABDC by the California coverage action. Moreover, St. Paul claims that the circuit court "interfere[d] with and assert[ed] control

over litigation in a court in another state more than 2,000 miles away,” and that the court’s order “reflects a stunning disregard for fundamental principles of comity and sovereignty between the courts of different states.”

We have reviewed the record and the circuit court’s order, and we reject the interpretation of the facts asserted by St. Paul. The record reflects a substantially different factual picture than that painted by St. Paul in its brief. It is true that ABDC’s complaint and amended complaint initially identified fifty specific opioid-related lawsuits in West Virginia. Nevertheless, ABDC also said in its 2017 amended complaint that “[a]dditional counties, towns, and cities in West Virginia have publicly announced that they intend to file prescription opioid lawsuits” and that ABDC “reserve[d] the right to include additional lawsuits in this civil action.” The record shows that, in the three-and-a-half year course of discovery, ABDC informed St. Paul of 165 specific opioid-related lawsuits in West Virginia for which ABDC sought defense or indemnity costs from St. Paul.

Moreover, we find no error in the circuit court’s conclusion that St. Paul instituted competing, parallel litigation in California. First, both the West Virginia action and the California action involve, not merely similar parties, but identical parties. Every single one of the plaintiffs and defendants in the West Virginia action are parties in the California action.¹³ That St. Paul chose to include dozens of additional parties in the

¹³ ABDC and its subsidiary, Bellico Drug Corporation, are the plaintiffs in the West Virginia action; the California action was filed against ABDC, Bellico Drug Corporation, and other corporate affiliates of ABDC. St. Paul is one of five defendants in

Continued . . .

California action does not negate the circuit court's finding that all of the parties in the West Virginia action are parties to the California action. Second, the competing cases involve similar issues: the West Virginia case seeks to interpret sixteen specific insurance policies in effect between 2006 and 2013; the California case seeks to interpret those same policies, as well as seemingly every other insurance policy issued to ABDC and its affiliates between 1995 and 2018. Third, the circuit court could fairly conclude that the resolution of the West Virginia action would dispose of a portion of the California action, certainly as to the interpretation of the sixteen insurance policies identified in the West Virginia complaint, and possibly as to other policies at issue in California that contain language comparable to that in dispute in West Virginia. Hence, we find no error in the circuit court's conclusion that St. Paul initiated substantially similar litigation in California which overlapped and competed with the issues pending in West Virginia.

The next question we must address is whether, in light of principles of comity and equity, the circuit court abused its discretion in entering the injunction. As a general matter, the circuit court found that it was uniquely situated because it was the first court in the nation to oversee a prescription opioid lawsuit brought by a government entity (the Attorney General in 2012) against a pharmaceutical distributor, and it was one of the first

the West Virginia action and is the lead plaintiff in the California action. The other four defendants in the West Virginia action (Ace American Insurance Company; Ace Property and Casualty Insurance Company; American Guarantee & Liability Insurance Company; and Endurance American Insurance Company) are named defendants in the California action.

to bring such a case to a final resolution. Because of the extent of the opioid epidemic in West Virginia, the courts of this state have a compelling interest in determining whether the policies at issue in ABDC's West Virginia suit provide coverage for the underlying claims brought by West Virginia entities, without competing rulings from a foreign court.

The circuit court found its ability to successfully resolve the West Virginia suit was threatened by St. Paul's California action. The circuit court had expended substantial resources overseeing litigation for three-and-a-half years and gained a unique understanding of the parties and issues. Additionally, at the request of the parties early in the case, the circuit court had entered a "stay order" focusing discovery and litigation on insurance coverage for the Attorney General's now-completed 2012 lawsuit, and otherwise staying the examination of coverage for all other West Virginia cases. In part, the stay order was the result of St. Paul telling the circuit court that the underlying allegations against ABDC in the Attorney General's lawsuit were materially identical in all other suits, in West Virginia and nationwide. St. Paul's California action violated the terms and spirit of the circuit court's stay order and was effectively a means of litigating the coverage questions stayed by the circuit court.

The circuit court also determined that St. Paul's California action created a multiplicity of suits that would, by design, complicate the West Virginia coverage issues and would inevitably result in unnecessary and improper delays. The circuit court noted that St. Paul filed the California action three-and-a-half years after the West Virginia action was filed, "without making any effort to join in [the West Virginia] action any of the parties

or insurance policies it now claims are essential to the resolution of this dispute.”¹⁴ Additionally, St. Paul filed suit in California “despite the fact that none of the eighty-three parties . . . are headquartered in California and only one of the eighty-three parties is incorporated in California ([and] that party has its principal place of business in Texas).” The circuit court fairly concluded that St. Paul’s parallel suit in California was filed for improper purposes, namely forum shopping and the disruption of the orderly resolution of the West Virginia suit.

On this record, we find no error by the circuit court in its decision to enter an anti-suit injunction. The circuit court’s order demonstrates the existence of exceptional circumstances, and the court did not abuse its discretion in finding equity compelled an order. Like the circuit court, we too are unpersuaded by St. Paul’s “carve-out” footnote in its California complaint claiming some portion of the West Virginia action “is not intended to be” the subject of the California action. The broad language of the California complaint clearly subsumes and seeks rulings on the exact issues that are to be decided (or have already been decided) in West Virginia. Hence, an injunction was needed to prevent a threat to the court’s jurisdiction and ability to resolve the West Virginia coverage suit, and to prevent a multiplicity of suits filed with the intent of causing delay, expense and inconsistent judgments.

¹⁴ We note that, in three-and-a-half years of litigation, ABDC also did not seek to expand the scope of its West Virginia action and join any of the parties or insurance policies exclusively at issue in the California action.

That said, having reviewed the terms of the circuit court's order, we do find an abuse of discretion in its breadth and focus. Ace American's argument to this Court notes that the circuit court's order only enjoined ABDC and the five insurers who were parties to the West Virginia action from further litigation; it did nothing to enjoin the dozens of other parties to the California action who issued countless other policies to ABDC and its affiliates. Ace American points out that many of the California-only parties have proceeded to file cross-claims, counter-claims, and discovery requests in response to St. Paul's complaint, but the circuit court's order precludes ABDC and the five insurers who are parties to the West Virginia action from effectively responding.¹⁵

As we noted earlier, the anti-suit injunction order enjoins *all parties* to the West Virginia action from instituting or prosecuting *any* legal proceeding concerning ABDC's insurance coverage.¹⁶ Our concern is that ABDC's West Virginia complaint is limited in scope and seeks a declaratory judgment concerning only sixteen insurance policies issued by five insurance companies. As ABDC's complaint is cast, it asks the circuit court for a judgment regarding whether those sixteen policies provide coverage for

¹⁵ Ace American contends that the circuit court's injunction violated the bedrock principle that "equity never does a useless thing." *Kennewig Co. v. Moore*, 49 W. Va. 323, 325, 38 S.E. 558, 558 (1901). We do not think the circuit court's error was "useless," as Ace American claims; rather, as we discuss in the text, we find the order's conclusion was, seemingly, overbroad.

¹⁶ As a reminder, the circuit court's order provides: "All parties are hereby enjoined from instituting or prosecuting any collateral litigation or other proceeding against one another relating to coverage for the prescription opioid lawsuits against . . . ABDC, or any other affiliated entity."

the growing number of West Virginia-based opioid lawsuits. The circuit court was within its rights to protect its jurisdiction to resolve the dispute as presented by ABDC.

However, as it is written, the circuit court's order impairs the parties' ability to litigate, against each other or with third parties, over policies separate from the sixteen policies identified by ABDC. Stated simply, the order is unclear as to why the circuit court precluded the litigation of *any* issues between the parties, if those issues were unrelated to the interpretation of the sixteen insurance policies at issue in the West Virginia action. Moreover, by preventing any litigation activity between the parties, the circuit court's order effectively precluded the parties from pursuing some agreed-upon resolution of the California action, or a resolution from the California court such as a stay or a dismissal.

We understand that the circuit court's judgment interpreting the policies at issue will become precedent for future cases in sister states, but we do not yet see that as a compelling reason to prevent the parties from litigating comparable questions of coverage for opioid lawsuits, regarding different policies, in other forums. As it is written, the circuit court's order does not make clear why questions pertaining to policies other than the sixteen policies identified by ABDC cannot be the subject of litigation in our sister states. Principles of comity require a court to act with restraint and to respect the idea that the courts of our sister states will likewise act with fairness and restraint. In this instance, despite the circuit court's conclusion that St. Paul had questionable motives in filing its California action, we find that the circuit court's order should have clearly and finely

tailored a connection between the relief sought in ABDC's West Virginia action and the prohibition of the parties' actions in California.

Accordingly, we find the circuit court's order to be overbroad and, as currently drafted, to constitute an abuse of the court's discretion. The order must therefore be reversed, and the case remanded for reconsideration.

IV. Conclusion

Upon our review of the law and the record, we find the circuit court clearly had the authority to enter an anti-suit injunction. Hence, we affirm the circuit court's decision to enter an injunction. However, an anti-suit injunction is an exceptional remedy and must be narrowly tailored to address the equitable circumstances presented. As the circuit court's order is drafted, we find it to be overbroad and, therefore, an abuse of discretion. Thus, we must therefore reverse the circuit court's January 7, 2021, order, and remand the case for clarification of the order or such other proceedings as are necessary.

Affirmed, in part, reversed, in part, and remanded.

EXHIBIT B

LAMP BARTRAM LEVY
TRAUTWEIN & PERRY, PLLC
ATTORNEYS AND COUNSELORS AT LAW

Matthew Perry
Writer's Email: mperry@lbtlplaw.com

June 1, 2017

File No: 8088

Via Hand Delivery

Rory L. Perry, II, Clerk of the Court
Capitol Complex
1900 Kanawha Boulevard East
Building One, Room E-317
Charleston, WV 25305

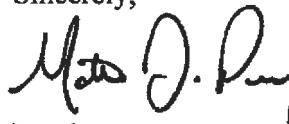
Re: *AmerisourceBergen Drug Corporation v ACE American Insurance Company, et al*
Circuit Court of Boone County, West Virginia
Civil Action No.: 17-C-36

Dear Mr. Perry:

Enclosed for filing, pursuant to Trial Court Rule 29.06 and the direction of your office, please find an original **Joint Motion to Refer Case to the Business Court Division**, with attachments, and five (5) copies of the Joint Motion, without attachments. Per the attached Certificate of Service, copies of this Joint Motion are being served on the parties, Judge William S. Thompson, the Boone County Circuit Clerk and the Central Office of the Business Court Division.

Thank you for your assistance in this matter. If there are any issues or questions regarding this filing, please do not hesitate to contact me.

Sincerely,



Matthew J. Perry

F:\8088\CLERK CT. APPEALS - JOINT MOTION.DOCX

**LAMP BARTRAM LEVY
TRAUTWEIN & PERRY, PLLC**

cc:

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The Honorable William S. Thompson
Judge of the Circuit Court of Boone County
Boone County Courthouse
200 State Street
Madison, WV 25130

Boone County Circuit Clerk's Office
200 State Street
Madison, WV 25130

Business Court Division Central Office
Berkeley County Judicial Center
380 W. South Street, Suite 2100
Martinsburg, WV 25401

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**AMERISOURCEBERGEN DRUG
CORPORATION,**

Plaintiff,

v.

CIVIL ACTION NO. 17-C-36

**ACE AMERICAN INSURANCE COMPANY,
ACE PROPERTY AND CASUALTY
INSURANCE COMPANY, AMERICAN
GUARANTEE & LIABILITY INSURANCE
COMPANY, ENDURANCE AMERICAN
INSURANCE COMPANY and ST. PAUL
FIRE & MARINE INSURANCE COMPANY,**

Defendants.

JOINT MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

Now comes, ACE American Insurance Company, ACE Property and Casualty Insurance Company, American Guarantee & Liability Insurance Company, Endurance American Insurance Company and St. Paul Fire and Marine Insurance Company (the "Defendants"), by undersigned counsel, and hereby jointly move this Court to refer the above-captioned insurance coverage action (hereinafter referred to as the "Coverage Action") commenced by AmerisourceBergen Drug Corporation ("Amerisource" or "Plaintiff") to the Business Court Division of the West Virginia Circuit Courts. This Coverage Action is pending before the Circuit Court of Boone County, West Virginia.

In support of their Joint Motion, Defendants state as follows:

1. As explained below, this Coverage Action is a classic example of Business Litigation that should be transferred to the West Virginia Business Court Division pursuant to

West Virginia Code §51-2-15 and Rule 29 of the *West Virginia Trial Court Rules* because it involves: (a) a dispute between business entities – a Fortune 50 pharmaceutical company with over \$100 billion in annual revenues, on the one hand, and five multi-national insurance companies on the other; (b) complex legal issues that will have to be addressed in accordance with out-of-state insurance law under at least 16 different insurance policies spanning more than a decade, each with its own terms and conditions; and, (c) at least thirteen or more different underlying lawsuits in which government entities and others seek injunctive relief, the costs of addressing the opioid epidemic and other economic losses which they have allegedly incurred.

The Allegations And Claims In This Coverage Action

2. The allegations and claims in this Coverage Action demonstrate that this is a Business Litigation best suited for the Business Court Division. The docket sheet and copies of all pleadings filed in the Coverage Action are attached hereto as Exhibit A.

3. Plaintiff asserts two claims. First, it seeks a declaratory judgment pursuant to Rule 57 of the West Virginia Rules of Civil Procedure and the West Virginia Declaratory Judgments Act, *W. VA. Code* §§ 55-13-1, *et seq.* that under their respective commercial liability policies (16 primary, umbrella and excess policies are at issue), the defendant insurers allegedly cover all past, present, and future defense costs and indemnity in connection with five (5) different opioid-related lawsuits (hereinafter the "Opioid Lawsuits"¹ or "underlying suits") filed against Plaintiff, each of which involves its own separate allegations and claims. [See Compl. at ¶¶ 61-66.] Second, Plaintiff broadly asserts that the Defendants breached their obligations to provide such coverage, without addressing the specific policy language contained in each at-issue policy. [See Compl. at ¶¶ 67-70.] The policies were issued by different insurers located in different states

¹ As explained below, Opioid Lawsuits refers collectively to the matters identified in Exhibit B and Exhibit C.

and provide insurance at different levels, during different periods of time and with different terms, conditions, exclusions, endorsements and retentions. [See Compl. at ¶ 2.]

4. Defendants dispute that the policies they issued to Plaintiff provide coverage for the defense of the Opioid Lawsuits and any indemnity resulting from judgments and/or settlements from the Opioid Lawsuits. [See generally Exhibit A, Answers filed by the Defendants.]

5. The parties are all extremely large and sophisticated business or commercial entities. [See Compl. at ¶¶ 5-10; see generally Answers filed by the Defendants.] Plaintiff is a multi-billion dollar, multinational corporation whose primary business is the distribution of prescription pharmaceutical products to pharmacies, hospitals and other healthcare providers throughout the United States, including West Virginia. [See Compl. at ¶ 5.] The insurers are large property and casualty insurers. [See Compl. at ¶¶ 5-10; see generally Answers filed by the Defendants.] None of the parties is incorporated in or has a principal place of business in West Virginia.

6. Adding to the complexity and need for special handling by the Business Court Division is the fact that there are 5 separate underlying Opioid Lawsuits for which Plaintiff presently seeks defense and/or indemnity in this Coverage Action under 16 different insurance policies each with different provisions. [See Compl. at ¶¶ 15-43.] Although this case is in its infancy, and Plaintiff has yet to delineate its coverage positions, it is likely that the Court will be called upon to determine: (a) whether there is coverage for any of the alleged costs incurred by governmental entities in any of the Opioid Lawsuits under any of the policies; and, (b) if so, which alleged costs are covered in connection with which Opioid Lawsuit(s) under which policies. Consequently, the Opioid Lawsuits may implicate difficult and complex coverage

issues, including but not limited to application of out-of-state law, any defense obligations, and any indemnity obligations. [See *id.*]

7. In June 2012, the State of West Virginia filed a complaint against Plaintiff and others in the action styled *State of West Virginia v. AmerisourceBergen Drug Corporation, et al.*, No. 12-C-141 (Circuit Court of Boone County, West Virginia) (the "WVAG Lawsuit"). [See Compl. at ¶ 16.] Among other things, the WVAG Lawsuit alleged that Plaintiff oversupplied prescription opioids to pharmacies and other entities and failed to control the amount of prescription drugs it was distributing, which resulted in the State of West Virginia expending significant sums on a variety of public services, including the costs of hospitals, prisons, courts and law enforcement. [See Compl. at ¶¶ 16-31.] In February 2017, Plaintiff entered into a \$16 million settlement with the State of West Virginia with respect to the WVAG Lawsuit. [See Compl. at ¶ 30.] Plaintiff seeks insurance coverage from Defendants related to the WVAG Lawsuit in the Coverage Action.

8. In 2016 and 2017 several West Virginia counties and cities (the "County and City Lawsuits") filed opioid-related lawsuits against Plaintiff and others, for which Plaintiff seeks coverage in this Coverage Action:

- *McDowell County v. McKesson Corporation, et al.*, No 16-C-137-M (Circuit Court of McDowell County, West Virginia);
- *The City of Huntington v. AmerisourceBergen Drug Corporation, et al.*, No 17-C-38 (Circuit Court of Cabell County, West Virginia);
- *Mayor Reba Honaker, on behalf of The City of Welch v. McKesson Corporation, et al.*, Civil Action No. 17-C-18 (Circuit Court of McDowell County, West Virginia); and
- *Mayor Charles Sparks, on behalf of The Town of Kermit v. McKesson Corporation, et al.*, Civil Action No. 17-C-13 (Circuit Court of Mingo County, West Virginia).

[See Compl. at ¶¶ 32-43.]

9. The County and City Lawsuits allege Plaintiff supplied excess amounts of prescription drugs to pharmacies which have resulted in various costs to the cities and counties. Again, Plaintiff seeks coverage rulings as to each of these Opioid Lawsuits. [See *id.*] Attached as Exhibit B is a schedule of the Opioid Lawsuits for which Plaintiff currently seeks coverage in the Coverage Action.

10. The Complaint further alleges that additional counties, towns, and/or cities in West Virginia have publically announced that they intend to file similar opioid-related lawsuits. [See Compl. at ¶ 36.] Plaintiff has reserved the right to include these additional Opioid Lawsuits in the Coverage Action. [See *id.*]

11. In fact, as of the date of this motion there are at least 8 additional Opioid Lawsuits that have been filed, which make similar allegations and may ultimately become part of this Coverage Action. Attached as Exhibit C is a schedule of the Opioid Lawsuits which have been filed, are not presently apart of the Coverage Action, but which Plaintiff has reserved the right to seek coverage from Defendants.

12. While Judge Thompson presided over the WVAG Lawsuit, the other 12 Opioid Lawsuits have been commenced in different West Virginia State and Federal Courts and are before different judges. Moreover, none of the Opioid Lawsuits involved insurance-related claims and issues, when in contrast this Coverage Action only involves insurance coverage issues.

The Coverage Action Is A Business Litigation

13. The Coverage Action is clearly a Business Litigation within the meaning of Rule 29 of the *West Virginia Trial Court Rules*, because:

- A major pharmaceutical company (Amerisource) is seeking coverage for settled and pending Opioid Lawsuits filed against it within the State of West Virginia and

has reserved the right to include additional, similar opioid-related lawsuits in this Coverage Action. [See Compl. at ¶¶ 61-66.]

- There are five large property and casualty insurers named as defendants (ACE American Insurance Company, ACE Property & Casualty Insurance Company, American Guarantee & Liability Insurance Company, Endurance American Insurance Company and St. Paul Fire and Marine Insurance Company). Plaintiff alleges that each of them has denied coverage for the Opioid Lawsuits filed against Amerisource. [See *generally*, Answers filed by Defendants annexed at Exhibit A.]
- The insurers issued 16 primary, umbrella and excess policies, which have their own terms and provisions (many of which differ from one another), and which were in effect at various times over a ten-year period. [See Compl. at ¶2.] The terms of these policies go directly to whether or not there is coverage for the Opioid Lawsuits.
- At least 13 underlying Opioid Lawsuits have been brought against Amerisource by the State of West Virginia, various counties and municipalities in West Virginia, and also by the Cherokee Nation. It is believed that beyond these 13 Opioid Lawsuits, there will be more suits brought by various governmental entities against plaintiff that make similar allegations.
- The relevant facts with respect to each of the Opioid Lawsuits will not be the same, and different, unique, and complex insurance coverage issues will likely arise in each of the underlying suits. By way of example only, Amerisource will have to identify the factual basis for the specific costs paid to the State and sought by each county or town for which Amerisource is seeking coverage, for purposes of proving that those costs constitute amounts that Amerisource is legally required to pay for covered bodily injury or property damage caused by an event or occurrence. In the unlikely event that Amerisource clears that hurdle, it will have to establish when any covered harm occurred. These are complex, claim-by-claim determinations involving issues of coverage, trigger and allocation that will benefit from the expertise and attention of the Business Court Division.

14. Given the above issues and facts, Defendants submit that this Coverage Action constitutes Business Litigation and as such should be transferred to the Business Court Division.

Rule 29 of the *West Virginia Trial Court Rules* defines "Business Litigation" as follows:

- (1) The principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and
- (2) The dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for

specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and

- (3) The principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

W.Va. T.C.R. 29.04(a)(1)-(3).

15. The Coverage Action comes squarely within this definition, because: it goes directly to matters of significance with respect to transactions and operations between business entities; the disputes present commercial issues for which specialized treatment is required to determine a fair and reasonable resolution of the controversies; and there is a need for specialized knowledge and expertise in resolving insurance coverage disputes where familiarity with specific legal principles is needed.

16. Moreover, there is a clear need for the insurers and insured to receive reliable and consistent rulings, something the Business Court Division is uniquely situated to do. *See Am. States Ins. Co. v. Tanner*, 211 W. Va. 160, 169 n.17, 563 S.E.2d 825, 834 (2002) (Court explains that insurance coverage ruling "is consistent with the decisions of other courts").

17. Finally, the claims in the Coverage Action do not fall within Rule 29.04(a)(3), because the disputes do not implicate consumer litigation and/or noncommercial insurance involving individuals but rather involve disputes between major corporations with respect to commercial insurance policies.

18. The insurers are entitled to make this motion, because any party may seek a referral of "Business Litigation" to the Business Court Division by filing a Motion to Refer in the Supreme Court of Appeals of West Virginia. *See* W.Va. T.C.R. 29.06(a)(1). The Defendants recognize that the filing of this Joint Motion to Refer shall not operate as a stay of the underlying pending civil actions, unless otherwise ordered by Judge Thompson. There are no known, coverage-related actions pending in West Virginia Circuit Courts.

**There Is Ample Authority Demonstrating
This Motion Should Be Granted**

19. Shortly after the Business Court Division was established, Judge Christopher C. Wilkes, the current Chairman of the Business Court Division, wrote an article about the purpose and use of the Business Court Division. Hon. Christopher Wilkes, *West Virginia's New Business Court Division: An Overview of The Development and Operation of Trial Court Rule 29*, The West Virginia Lawyer, Jan-March 2013, at 40-43. Among other things, Judge Wilkes pointed out the following:

- The Business Court Division was adopted to establish a "process for efficiently managing and resolving litigation involving commercial issues and disputes between businesses that includes the establishment of a Business Court Division to handle a specialized court docket within the circuit courts."
- The Business Court Division was "designed to handle complex commercial litigation cases between businesses."
- Litigation between businesses is at the center of the Business Court Division's purpose. Cases which have a high level of complexity, novel issues or other issues requiring specialized treatment are likely to land on the Business Court Docket if requested.

20. This Coverage Action is the kind of complex, commercial dispute between large businesses which the Business Court Division was designed to handle. Given the complex, novel and diverse insurance coverage issues involved in the Coverage Action, the Business Court Division is best suited to give this matter specialized treatment.

21. West Virginia case law supports the transfer of this matter to the Business Court Division. For example, in *American Bituminous Power Partners, L.P. v. Horizon Ventures of West Virginia, Inc.*, No. 14-0446, 2015 WL 2261649, at *7 (W. Va. May 13, 2015), four parties disputed the terms of three related contracts: a trust indenture, a lease agreement, and an agreement to resolve pending litigation. *Id.* at *1-3. With only four parties involved and three disputed contracts, the Supreme Court of Appeals instructed that "[g]iven the complexity of the contractual agreements governing this dispute, we direct the circuit court to promptly transfer this case, in its entirety, to the Business Court Division." *Id.* at *1. This Coverage Action, of course, involves more parties and a five-fold increase in the number of contracts that are disputed and will need to be interpreted.

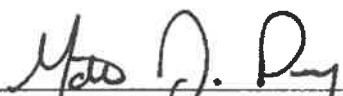
22. Likewise, in *West Virginia Investment Management Board v. Variable Annuity Life Insurance Co.*, 766 S.E.2d 416, 432 (W. Va. 2014), a declaratory judgment action was commenced between two public entities and an insurer with respect to coverage regarding rights and obligations under two annuity contracts. *Id.* at 419. There, the Court explained that "[g]iven the admitted complexity of the issues presented . . . we . . . direct the circuit court to promptly transfer this case to the Business Court Division." *Id.* at 432. Again, here, the number of parties, and number of disputed contracts is greater, and the coverage issues are far more complicated and diverse than the issues in the *Variable Annuity Life Insurance Co.* matter.


23. In fact, declaratory judgment matters involving insurance claims have proven particularly suited for transfer to the Business Court Division. See Findings of Fact and Recommendation, *Erie Ins. Property and Casualty Co. v. Alex Lambert, et al.*, Civil Action No. 12-C-687 (Cir. Ct. Mercer Cnty., W. Va. Apr. 24, 2013). A copy of the Court's Findings of Fact and Recommendation is annexed hereto as Exhibit D. In the *Erie Insurance* matter, just as here,

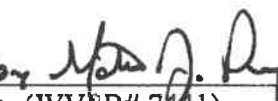
a declaratory judgment suit was commenced to determine whether the insurer was required to defend and indemnify a policyholder. *Id.* at 2. In support of its motion to refer the matter to the Business Court Division, Erie Insurance argued that the case involved matters of significance to and between business entities and presented commercial issues in which specialized treatment by the Business Court Division is likely to improve the expectation of a fair and reasonable resolution. *Id.* at 2. The argument of Erie Insurance, which mirrors the position of Defendants here, was accepted by the Court. In that matter, the Court determined that the "Complaint for Declaratory Relief is appropriate for referral to the Business Court Division." *Id.* at 4. The same result is warranted here.

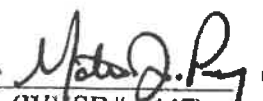
WHEREFORE, the Defendants request that the Chief Justice enter an order granting this Joint Motion to Refer and transfer the instant civil action to the Business Court Division.

Respectfully submitted, this 1st day of June, 2017.


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**AMERISOURCEBERGEN DRUG
CORPORATION,**

Plaintiff,

v.

CIVIL ACTION NO. 17-C-36

**ACE AMERICAN INSURANCE COMPANY,
ACE PROPERTY AND CASUALTY
INSURANCE COMPANY, AMERICAN
GUARANTEE & LIABILITY INSURANCE
COMPANY, ENDURANCE AMERICAN
INSURANCE COMPANY and ST. PAUL
FIRE & MARINE INSURANCE COMPANY,**

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2017, I have served the foregoing **Joint Motion to Refer Case to Business Court Division** (with attachments) upon all parties below by depositing a true copy thereof via first class mail, postage prepaid, to the following:

Charles S. Piccirillo SHAFFER & SHAFFER PLLC 330 State Street P.O. Box 38 Madison, West Virginia 25130 <i>Counsel for Amerisourcebergen Drug Corporation</i>	Tiffany R. Durst, Esquire PULLIN FOWLER FLANAGAN BROWN & POE, PLLC 2414 Cranberry Square Morgantown, WV 26508 <i>Counsel for American Guarantee & Liability Insurance Company</i>
Edward P. Tiffey, Esquire TIFFEY LAW PRACTICE, PLLC PO Box 3785 Charleston, WV 25337-3785 <i>Counsel for Endurance American Insurance Company</i>	Hema Patel Mehta, Esquire FINEMAN KREKSTEIN & HARRIS, PC Ten Pen Center 1801 Market Street, Suite 1100 Philadelphia, PA 19103 <i>Counsel for Endurance American Insurance Company</i>

<p>Courtney C. T. Horrigan, Esquire Kateri T. Persinger, Esquire REED SMITH, LLP 225 Fifth Avenue Pittsburgh, PA 15222 <i>Counsel for Amerisourcebergen Drug Corporation</i></p>	<p>Caitlin R. Garber, Esquire REED SMITH, LLP Three Logan Square 1717 Arch Street, Suite 3100 Philadelphia, PA 19103 <i>Counsel for Amerisourcebergen Drug Corporation</i></p>
<p>Lee Murray Hall, Esquire JENKINS FENSTERMAKER, PLLC P. O. Box 2688 Huntington, WV 25726-2688 <i>Counsel for St. Paul Fire & Marine Insurance Company</i></p>	<p>Robert A. Kole, Esquire CHOATE, HALL & STEWART LLP Two International Place Boston, MA 02110 <i>Counsel for St. Paul Fire & Marine Insurance Company</i></p>
<p>The Honorable William S. Thompson Judge of the Circuit Court of Boone County Boone County Courthouse 200 State Street Madison, WV 25130</p>	<p>Boone County Circuit Clerk's Office 200 State Street Madison, WV 25130</p>
<p>Business Court Division Central Office Berkeley County Judicial Center 380 W. South Street, Suite 2100 Martinsburg, WV 25401</p>	

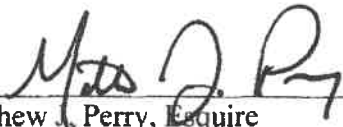

Matthew J. Perry, Esquire
***Counsel for Ace American Insurance Company
and Ace Property and Casualty Insurance Company***

EXHIBIT C



West Virginia E-Filing Notice

CC-03-2017-C-36

Judge: William S. Thompson

To: Todd A. Mount
tmount@shafferlaw.net

NOTICE OF FILING

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA
AMERISOURCEBERGEN DRUG CORP. v. ACE AMERICAN INSURANCE CO; ET AL
CC-03-2017-C-36

The following order - case was FILED on 8/18/2021 11:58:43 AM

Notice Date: 8/18/2021 11:58:43 AM

Anita D. Perdue
CLERK OF THE CIRCUIT COURT
Boone County
200 State Street Suite 202
MADISON, WV 25130

(304) 369-7321
anita.perdue@courtsww.gov

In the Circuit Court of Boone County, West Virginia

AMERISOURCEBERGEN DRUG)
CORP.,)
BELLCO DRUG CORPORATION,)
Plaintiffs,)
)
vs.))
)
ACE AMERICAN INSURANCE CO; ET)
AL,)
ACE PROPERTY & CASUALTY INS.)
CO; ET AL,)
AMERICAN GUARANTEE & LIABILITY)
INS CO,)
ENDURANCE AMERICAN INS CO,)
ST PAUL FIRE & MARINE INS CO ET)
AL,)
Defendants)
)

Case No. CC-03-2017-C-36

THIRD AMENDED SCHEDULING ORDER[1]

[1] All deadlines set forth in this Order are limited to Phase I issues as identified in the Court's February 22, 2018 Order Granting Joint Motion for Bifurcation and Partial Stay.

Pursuant to West Virginia Rule of Civil Procedure 16, it is **ORDERED** that:

Fact Discovery

1. By July 2, 2021, Plaintiffs shall produce a privilege log that includes entries for all documents over which AmerisourceBergen asserts privilege or other protections from disclosure in this case, including documents withheld on the basis of assertions of privilege or other protections from disclosure in the MDL or other opioids litigation. Defendants shall raise any challenges to the privilege log with Plaintiffs no later than August 9, 2021.

2. The deadline to complete all fact discovery shall be October 29, 2021.[1] This deadline is a deadline for completion of fact discovery and not a deadline prior to which a party may "initiate" discovery. (For example, a deposition notice sent prior to the deadline, but requiring the deposition to take place after the deadline is insufficient. The deposition itself has to be taken prior to the deadline. Or, for example, interrogatories, requests for production, and requests for admission must be filed and served upon the opposing party at least 30 days prior to the deadline so that answers and responses will be due on or before the deadline.) This date does not apply to trial depositions.

3. A notice of deposition (and/or subpoena) must be served on all parties at least 14 days prior to the date of the deposition set forth in the notice (and/or subpoena).

4. Any party intending to serve a subpoena (and/or notice of deposition) on a non-party must provide at least 14 days' notice to all other parties that it intends to serve such a subpoena (and/or notice of deposition) prior to actually serving the subpoena (and/or notice of deposition), so as to allow any party objecting to such subpoena (and/or notice of deposition) sufficient time to seek relief from this Court, if necessary.

5. This Court will hold a status conference on September 23, 2021 at 1:30 p.m. This conference can also be used for any discovery disputes.

Expert Witnesses

6. Plaintiffs shall disclose their expert witness(es), including the information required under West Virginia Rule of Civil Procedure 26(b)(4)(A)(i), by no later than December 17, 2021.

7. Defendants shall disclose their expert witness(es), including the information required under West Virginia Rule of Civil Procedure 26(b)(4)(A)(i), by no later than February 25, 2022.

8. Plaintiffs shall disclose their rebuttal expert witness(es), including the information required under West Virginia Rule of Civil Procedure 26(b)(4)(A)(i), by no later than March 28, 2022.

9. The deadline to complete all expert discovery, including depositions, shall be May 27, 2022. This deadline is a deadline for completion of expert discovery and not a deadline prior to which a party may "initiate" expert discovery.

10. A notice of an expert witness deposition (and/or subpoena) must be served on all parties at least 14 days prior to the date of the deposition set forth in the notice (and/or subpoena).

Dispositive Motions

11. All dispositive motions must be filed by no later than July 8, 2022. Any brief in opposition to a dispositive motion must be filed by no later than 42 days after the filing of the dispositive motion. Any reply brief in support of a dispositive motion must be filed by no later than 21 days of the filing of any brief in opposition.

Mediation

12. The parties have agreed that Donald O'Dell shall serve as mediator in this matter.

13. The parties shall confer with each other and with Mr. O'Dell to select a mediation date. The mediation shall occur no later than 30 days prior to the final Pre-Trial Conference.

Pre-Trial Conferences and Trial

14. A first Pre-trial Conference is set for January 27, 2022 at 1:30 p.m. At this first Pre-trial Conference the Court, in consultation with counsel for the parties, will (i) set a schedule for all pre-trial proceedings and submissions, including, but not limited to, filing motions *in limine*; taking trial depositions; and submitting exhibit lists, exhibits, objections to exhibits, final witness lists, and jury instructions, and (ii) take any other action authorized by West Virginia Rule of Civil Procedure 16(c) or otherwise.

15. A second Pre-trial Conference is set for April 7 at 1:30 p.m. At this second Pre-trial Conference, a trial plan shall be finalized, motions *in limine* shall be heard; proposed orders regarding all pending motions by the parties shall be submitted; and a final Pre-Trial Order shall be proposed. At this conference, the Court may also take any other action authorized by West Virginia Rule of Civil Procedure 16(c) or otherwise.

16. A final Pre-Trial Conference is set for September 22 at 1:30 p.m., at which time dispositive motions will be heard.

17. Trial is set to begin on October 4 at 9:30 a.m.

Miscellaneous

18. Unless authorized by the Court, the above dates and requirements of this Order are FINAL.

[1] The parties may seek relief from the Court concerning the fact discovery deadline for good cause shown, including without limitation, if (i) Plaintiffs' privilege logs are not sufficiently easy to decipher or (ii) further document productions as a result of any challenges to Plaintiffs' privilege logs are not completed in time to permit Defendants to effectively review the documents and conduct remaining fact depositions in the timeframe contemplated in Paragraph 2.

/s/ William S. Thompson
Circuit Court Judge
25th Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.

EXHIBIT D

BOONE COUNTY
CLERK
SHE ANN ZICKELHOFF

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

2018 FEB 22 PM 3:10

**AMERISOURCEBERGEN DRUG
CORPORATION,**

RECEIVED

Plaintiff,

v.

**ACE AMERICAN INSURANCE
COMPANY, ACE PROPERTY AND
CASUALTY INSURANCE COMPANY,
AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY, ENDURANCE
AMERICAN INSURANCE COMPANY
and ST. PAUL FIRE & MARINE
INSURANCE COMPANY,**

**CIVIL ACTION NO. 17-C-36
JUDGE THOMPSON**

Defendants.

ORDER GRANTING JOINT MOTION FOR BIFURCATION AND PARTIAL STAY

Upon consideration of the joint motion of the parties for Bifurcation and Partial Stay,

It is hereby Ordered that:

1. Litigation concerning ABDC's claim for coverage with respect to the WVAG Lawsuit will move forward, and
2. Litigation of ABDC's claim for coverage with respect to the Pending West Virginia Actions is stayed until further notice."
3. The Stay of Litigation shall be without prejudice to the right of the parties to be afforded adequate time to conduct discovery with regard to a Pending West Virginia Action at such time as the partial stay ordered herein is lifted as to that action.
4. The Clerk is directed to forward attested copies of this Order to all counsel of record.

Entered this 22nd day of February 2018.


JUDGE WILLIAM S. THOMPSON

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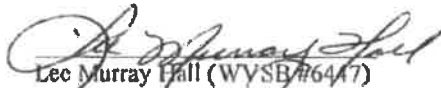
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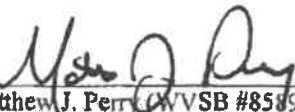
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EXHIBIT E



WEST VIRGINIA JUDICIARY

Business Court Division Orders

Search Search

BUSINESS COURT DIVISION OVERVIEW

WEST VIRGINIA'S NEW BUSINESS COURT DIVISION:

An Overview of the Development and Operation of Trial Court Rule 29

By: Judge Christopher C. Wilkes

On October 10, 2012, Justice Robin Jean Davis, on behalf of Chief Justice Menis Ketchum and the Supreme Court of Appeals of West Virginia, formally opened the Business Court Division of Circuit Court in Martinsburg, West Virginia. West Virginia Trial Court Rule 29.01 concisely portrays the purpose of the new Business Court Division:

In accordance with West Virginia Code § 51-2-15, there is hereby adopted a process for efficiently managing and resolving litigation involving commercial issues and disputes between businesses that includes the establishment of a Business Court Division to handle a specialized court docket within the circuit courts.

The Business Court Division is the product of a complex and in-depth, yet expedited process. Discussions amongst the judiciary began in 2008 after then-Justice Brent Benjamin and then-Administrative Director, Steven Canterbury, traveled to Delaware to study the operation of the Delaware Chancery Court, one of the oldest and longest-operating business courts in America. This study led to House Speaker Rick Thompson introducing House Bill 4352, authorizing the Supreme Court of Appeals to conduct a study and make a recommendation regarding the creation of a Business Court Division. The Legislature passed this bill two years later, in 2010.¹

In response to H.B. 4352, the Supreme Court of Appeals established a committee to study the formation of a business court in West Virginia.² The Business Court Committee's stated purpose was to explore the feasibility of establishing a specialized court function devoted exclusively to the resolution of commercial disputes as well as its advantages, disadvantages, and parameters.³ The Court and the committee, in this statement, recognized that business-related issues are currently being handled fairly, effectively, and expeditiously; yet they also recognized that there is room for improvement, as there is in any case resolution system.

At the direction of Judge Darrell Pratt, chairman of the committee, the members studied business courts that exist in other American jurisdictions and discussed how aspects of those courts were applicable to West Virginia. They also met with various business court judges, undertook informal discussions with various members of the business community and the bar, and engaged in several other areas of study.

The committee was then commissioned to make a recommendation to the Court regarding the establishment of a business court in West Virginia. After further meetings and discussions, the committee chose to solicit input on the creation and implementation of a business court.

On November 12, 2010, the Supreme Court held a public forum in the House of Delegates chamber in Charleston. The keynote speaker at that forum was the Honorable Ben F. Tennille, the chief special superior court judge for complex business cases in North Carolina. Judge Tennille is a recognized leader in business court administration and created the nation's first statewide business court in January 1996. Judge Tennille's remarks were well received by members of the business community, the bar, and the legislative leaders.

The committee next undertook further study of the practical possibilities for a business court and developed a preliminary draft of the rule governing business court litigation. On September 30, 2011, the Business Court Committee met with an invited group of attorneys and others representing businesses across West Virginia in a day-long session in Charleston. At this meeting, input and suggestions were received and the second draft of the proposed rule was discussed. Further revision was undertaken, with those suggestions again in mind, which led to a third draft of the new rule.

Thereafter, this third draft was presented to the Supreme Court of Appeals with a recommendation by the committee that the Supreme Court of Appeals establish a business court division.

The Supreme Court of Appeals, on February 9, 2012, issued an order requesting public comment on the proposed additions to the West Virginia Trial Court Rules that were recommended by the Business Court Committee.⁴ After closing the public comment period on May 11, 2012, the Justices of the Court, led by Justice Robin Jean Davis, and members of the committee reviewed the comments and made changes to the initial proposal in response to the suggestions received and created the final draft of West Virginia Trial Court Rule 29.

On September 11, 2012, by unanimous vote, the Supreme Court of Appeals approved West Virginia Trial Court Rule 29 creating the Business Court Division effective October 10, 2012.⁵ The Court ordered that the headquarters be established in the Berkeley County Judicial Center in Martinsburg, West Virginia, in the space formerly occupied by the Twenty-Third Judicial Circuit Law Library.⁶ The establishment of the Business Court Division headquarters in Martinsburg marks the first division of the Supreme Court of Appeals to be headquartered outside of the Charleston area.

Also on September 11, 2012, Chief Justice Menis Ketchum entered an administrative order appointing the Honorable Donald H. Cookman, Judge of the Twenty-Second Judicial Circuit; the Honorable James Rowe, Judge of the Eleventh Judicial Circuit; and the Honorable Christopher C. Wilkes, Judge of the Twenty-Third Judicial Circuit, to serve under the provisions of Rule 29 effective October 10, 2012, and further appointed the Honorable James H. Young Jr., Judge of the Twenty-Fourth Judicial Circuit, to serve under the provisions of Rule 29 effective January 1, 2013.⁷ The Chief Justice further ordered that Judge Wilkes would serve as chairman of the division for a three-year term.⁸

As noted above, this Court is a new division within West Virginia's Circuit Courts, designed to handle complex commercial litigation cases between businesses. The Court is governed and authorized primarily by West Virginia Code § 51-2-15 and new Trial Court Rule 29. Attorneys and judges may become acquainted with the practical side of getting a case to business court, as well as navigating the new court, by reading Trial Court Rule 29.

Although administrative management of cases will be done through the central office located at the Berkeley County Judicial Center, Business Court cases will be heard throughout the state by Business Court Judges. The rule divides the state into seven regions by grouping circuits together in a manner that follows the requirements of West Virginia Code § 51-2-15(b).⁹

The rule does not limit jurisdiction of the circuit courts, but rather creates a referral process which allows a business case to be assigned to a judge trained in complex business court litigation. The type of cases the Business Court Division will handle is addressed by the new rule:

*(a) "Business Litigation" — one or more pending actions in circuit court in which:
the principal claim or claims involve matters of significance to the transactions, operations, or*

governance between business entities; and the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

W.Va. T.C.R. § 29.04(a).

Litigation between businesses is at the center of the Business Court Division's purpose. Cases which have a high level of complexity, novel issues, or other issues requiring specialized treatment are likely to land on the Business Court docket if requested. The Business Court Judges recognize that business cases present matters that differ from other types of cases and will attempt to resolve these concerns in a judicious and timely manner. The judges have undertaken and will continue to undertake special training in areas such as the administration and governance of business entities, complex discovery of electronically stored information, mediation of commercial disputes, as well as other issues unique to litigation between businesses. The techniques which the judges are being trained in, such as judicially led mediation, provide a method for quicker, less costly, resolution of cases.

So, with this in mind, one may ask how to get a case to the Business Court Division. The Business Court Division is given no original jurisdiction, and a case must be referred to the Division.¹¹ This referral process is relatively simple.

Any party or the judge may file a motion to refer a case to the Business Court Division. A judge can file a motion to refer at any time; however, a party must file the motion within the first three months of filing the action.¹² After a reply period, the circuit clerk will transmit the motion and all reply memoranda to the Chief Justice for review.¹³ The Chief Justice must promptly decide the motion or direct the Business Court Division to conduct a hearing and make recommendations regarding his decision. Once a case has been referred to the Division, management of the case will be conducted by the Business Court Judge assigned to the case and the Business Court Division Central Office in the Berkeley County Judicial Center.

Rule 29 contemplates the Business Court Division Judge, generally, hearing the case in the county in which it was filed.¹⁴ However, if the designated Business Court Judge does not sit in the county where the business litigation is pending, the Division Chairman may submit a request to the Chief Justice that the assigned Business Court Judge be authorized to preside over the action in any county that is within the same Business Litigation Assignment Region.¹⁵

The Business Court Division is designed as a "rocket docket," attempting to resolve cases within ten months.¹⁶ Along these lines, the Business Court Division is in the process of developing case management "methodologies" for the efficient resolution of cases, including more complex discovery and scheduling orders, case management techniques, and mediation possibilities.¹⁷

Like most in the business and legal communities, the Business Court Judges believe this development will prove to be a positive change for West Virginia in a variety of ways – much like it has been in other states that have instituted a business court. Business litigants should be excited that West Virginia will be providing businesses

an opportunity to have a specially trained judge resolve complex business issues. With the Business Court Division, West Virginia is now becoming one of the best legal environments for businesses in the country.

¹ H.B. 4352, 2010 Reg. Sess. (W.Va. 2010).

²At the June 2010 Administrative Conference, the West Virginia Supreme Court of Appeals created the Business Court Committee. The Business Court Committee was led by the Chairman, Judge Darrell Pratt. The other members of the committee were Judge Donald Cookman; Judge Rudolph J. Murensky, II ; Judge James J. Rowe; Judge Susan B. Tucker; and Judge Christopher Wilkes. This group's diligent and thorough work was vital to the creation of the new Business Court Division.

³For the full mission statement see, Resolution of the committee setting mission, comprehensive plan and vision, adopted Oct. 28, 2010; W.Va. Judiciary, Press Releases (Oct. 28, 2010) .

⁴See, W.Va. Judiciary, Press Releases (Oct. 15, 2010) .

⁵Order Re: Approval of Trial Court Rule 29, Relating to the Business Court Division (W.Va., Sept. 11, 2012). See also, W.Va. Judiciary, Press Releases (Sept. 11, 2012) .

⁶See, W.Va. Judiciary, Press Releases (Oct. 10, 2012) .

⁷Order Re: Appointment of Circuit Judges in Accordance with Rule 29.02 of the West Virginia Trial Court Rules Relating to the Business Court Division (W.Va., Sept. 11, 2012).

⁸*Id.*

⁹W.Va. TCR 29.04(b); see also, W.Va. Judiciary, Lower Courts, Business Court Division, .

¹⁰See, W.Va. TCR 29.06.

¹¹See, W.Va. TCR 29.03; 29.06; 29.07.

¹²W.Va. T.C.R. 29.06(a)(2).

¹³See, W.Va. TCR 29.06.

¹⁴See, W.Va. TCR 29.07(b).

¹⁵*Id.*; see also, W.Va. Judiciary, Lower Courts, Business Court Division, .

¹⁶This terminology was used by Justice Robin Davis at the opening ceremony of the Business Court Division on October 10, 2012, and is contemplated by the time standard of 10 months set by W.Va. TCR 29.08(g).

¹⁷See, W.Va. TCR 29.08(a).

EXHIBIT F

BOONE COUNTY
CIRCUIT CLERK
SUE ANN ZIMMERMAN
IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

AMERISOURCEBERGEN DRUG
CORPORATION,

Plaintiff,

v.

Civil Action No. 17-C-36

ACE AMERICAN INSURANCE
COMPANY, ACE PROPERTY AND
CASUALTY INSURANCE COMPANY,
AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY, ENDURANCE
AMERICAN INSURANCE COMPANY
and ST. PAUL FIRE & MARINE
INSURANCE COMPANY,

Defendants.

SCHEDULING ORDER

Pursuant to West Virginia Rule of Civil Procedure 16, and after consultation with counsel for all parties during an initial scheduling conference held in this matter on September 28, 2017, it is **ORDERED** that:

Amendment of Pleadings

1. The deadline for any party to move to amend or supplement its pleading(s) and/or add an additional party(ies) is, except on a showing of good cause, **100 days** after the initial scheduling conference. Any party opposing such motion shall have **10 days** to serve its response, and the moving party shall have **5 days** to reply.

2. Any amendment or supplementation of a pleading shall be governed by West Virginia Rule of Civil Procedure 15.

Fact Discovery

3. The deadline to complete all fact discovery shall be **210 days** after the date of the initial scheduling conference. This deadline is a deadline for **completion** of fact discovery and

not a deadline prior to which a party may “initiate” discovery. (For example, a deposition notice sent **prior** to the deadline, but requiring the deposition to take place **after** the deadline is insufficient. The deposition itself **has to be taken prior to the deadline**. Or, for example, interrogatories, requests for production, and requests for admission, must be filed and served upon the opposing party **at least 30 days prior to the deadline** so that answers and responses will be due on or before the deadline.) This date does **not** apply to trial depositions. In any event, absent Court approval, no deposition may be taken until **60 days** after the initial scheduling conference.

4. A notice of deposition (and/or subpoena) must be served on all parties at least **14 days** prior to the date of the deposition set forth in the notice (and/or subpoena).

5. Any party intending to serve a subpoena (and/or notice of deposition) on a non-party must provide at least **14 days’** notice to all other parties that it intends to serve such a subpoena (and/or notice of deposition) prior to actually serving the subpoena (and/or notice of deposition), so as to allow any party objecting to such subpoena (and/or notice of deposition) sufficient time to seek relief from this Court, if necessary.

6. This Court will hold a status conference on **March 8, 2018 at 11:00 a.m.** This conference can also be used for any discovery disputes.

Expert Witnesses

7. Plaintiff shall disclose its expert witness(es), including the information required under West Virginia Rule of Civil Procedure 26(b)(4)(A)(i), by no later than **30 days** after the close of fact discovery.

8. Defendants shall disclose their expert witness(es), including the information required under West Virginia Rule of Civil Procedure 26(b)(4)(A)(i), by no later than **90 days** after the close of fact discovery.

9. Plaintiff shall disclose its rebuttal expert witness(es), including the information required under West Virginia Rule of Civil Procedure 26(b)(4)(A)(i), by no later than **111 days** after the close of fact discovery.

10. The deadline to complete all expert discovery, including depositions, shall be **153 days** after the close of fact discovery. This deadline is a deadline for **completion** of expert discovery and **not** a deadline prior to which a party may “initiate” expert discovery.

11. A notice of deposition (and/or subpoena) must be served on all parties at least **14 days** prior to the date of the deposition set forth in the notice (and/or subpoena).

Dispositive Motions

12. All dispositive motions must be filed by no later than **30 days** after the close of expert discovery. Any brief in opposition to a dispositive motion must be filed by no later than **45 days** after the filing of the dispositive motion. Any reply brief in support of a dispositive motion must be filed by no later than **21 days** of the filing of any brief in opposition.

Mediation

13. The parties have agreed that Donald O'Dell shall serve as mediator in this matter.

14. The parties shall confer with each other and with Mr. O'Dell to select a mediation date. The mediation shall occur prior to the final Pre-Trial Conference.

Pre-Trial Conferences and Trial

15. A first Pre-trial Conference is set for **October 11, 2018 at 11 a.m.** At this first Pre-trial Conference the Court, in consultation with counsel for the parties, will (i) set a schedule

for all pre-trial proceedings and submissions, including, but not limited to, filing motions *in limine*; taking trial depositions; and submitting exhibit lists, exhibits, objections to exhibits, final witness lists, and jury instructions, and (ii) take any other action authorized by West Virginia Rule of Civil Procedure 16(c) or otherwise.

16. A second Pre-trial Conference is set for **November 29, 2018 at 11 a.m.** At this second Pre-trial Conference, a trial plan shall be finalized, motions *in limine* shall be heard; proposed orders regarding all pending motions by the parties shall be submitted; and a final Pre-Trial Order shall be proposed. At this conference, the Court may also take any other action authorized by West Virginia Rule of Civil Procedure 16(c) or otherwise. Dispositive motions shall be filed on or before November 29, 2018.

17. A final Pre-Trial Conference is set for **December 20, 2018 at 11:00 a.m.** At which time all dispositive motions will be heard.

18. Trial is set to begin on **January 29, 2019 at 9:30 a.m.**

Miscellaneous

19. Unless authorized by the Court, the above dates and requirements of this Order are **FINAL**

ENTERED this 8th day of December, 2017.


HONORABLE WILLIAM S. THOMPSON