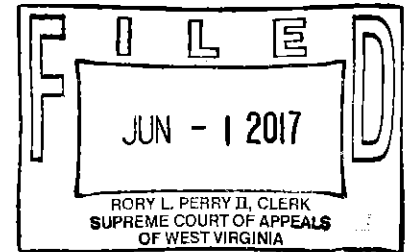


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**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.

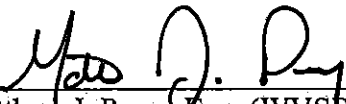
22. Likewise, in *West Virginia Investment Management Board v. Variable Annuity Life Insurance Co.*, 766 S.E.2d 416, 432 (W. Va. 2014), a declaratory judgment action was commenced between two public entities and an insurer with respect to coverage regarding rights and obligations under two annuity contracts. *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,

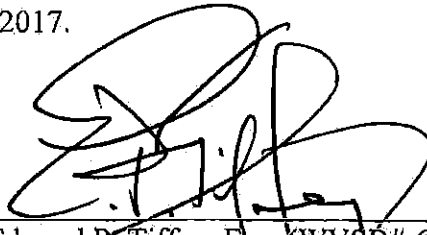
a declaratory judgment suit was commenced to determine whether the insurer was required to defend and indemnify a policyholder. *Id.* at 2. In support of its motion to refer the matter to the Business Court Division, Erie Insurance argued that the case involved matters of significance to and between 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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AMERISOURCEBERGEN DRUG
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CIVIL ACTION NO. 17-C-36

ACE AMERICAN INSURANCE COMPANY,
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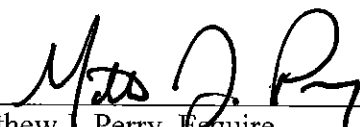
Defendants.

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:

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<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>
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