

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**AMERISOURCEBERGEN DRUG  
CORPORATION,**

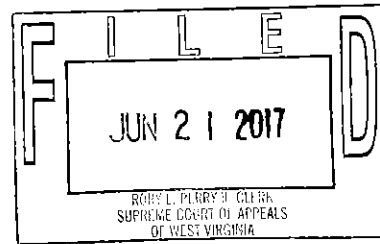
**Plaintiff,**

**v.**

**Boone County Circuit Court  
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.**



**MEMORANDUM IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO REFER  
CASE TO THE BUSINESS COURT DIVISION**

Plaintiff AmerisourceBergen Drug Corporation ("ABDC") opposes Defendants' Joint Motion to Refer Case to the Business Court Division ("Motion to Refer"). The primary underlying lawsuit at issue in this liability insurance coverage case is the State of West Virginia's prescription opioid litigation against ABDC and other pharmaceutical distributors.<sup>1</sup> The other underlying cases are similar. The WVAG Lawsuit was ably presided over by Judge William Thompson in the Boone County Circuit Court – the same judge assigned here. Judge Thompson's experience gained from handling the WVAG Lawsuit makes him uniquely situated to resolve the insurance issues arising from that same case and the follow-on cases filed against ABDC by counties, cities and towns after the WVAG Lawsuit settled. The WVAG Lawsuit also demonstrated his ability to oversee litigation involving multiple parties and claims. The Business Court Division has no body of specialized knowledge or experience in either

---

<sup>1</sup> That lawsuit is styled *State of West Virginia, et al. v. AmerisourceBergen Drug Corporation, et al.*, No. 12-C-141 (Boone County, Circuit Court of West Virginia) (the "WVAG Lawsuit").

insurance coverage generally or the underlying subject matter in particular. Granting the current Motion to Refer would deprive the parties and the courts of Judge Thompson's experience and ultimately waste scarce judicial resources. For these reasons and the additional reasons that follow, ABDC respectfully requests that the Court deny Defendants' Motion to Refer.

**I. JUDGE THOMPSON IS BEST POSITIONED TO DECIDE THE LEGAL ISSUES IN THIS INSURANCE COVERAGE LAWSUIT**

This insurance coverage lawsuit is currently pending in the Circuit Court of Boone County before Judge Thompson, who presided over the WVAG Action for over four and a half years. *See* Exhibit 1, WVAG Action Docket. The WVAG Action was the first prescription opioid lawsuit filed against ABDC in West Virginia and, after its settlement, additional counties and cities filed follow-on lawsuits containing analogous allegations. *See* Motion to Refer at Exhibit A, Complaint ("Complaint") ¶¶ 15-35. The Defendants do not dispute the similarity between the county and city lawsuits and the WVAG Action. In fact, the Defendants admit that the prescription opioid lawsuits all contain "similar allegations." Motion to Refer at ¶¶ 11, 13.

Given this factual overlap of the allegations in the at-issue prescription opioid lawsuits, Judge Thompson is without question best positioned to analyze whether those allegations invoke coverage under the terms of the Defendants' insurance policies. Although not assigned to the Business Court Division, Judge Thompson has extensive experience with complex litigation involving novel issues and numerous parties. For example, during his tenure as presiding judge over the WVAG Action, Judge Thompson oversaw 20 parties (3 plaintiffs, 13 defendants and 4 intervening parties), heard close to 100 motions and issued over 40 court orders. *See* Exhibit 1. He is also no stranger to insurance coverage disputes. In fact, based on available information, it

appears that Judge Thompson individually has handled the same number of insurance coverage disputes as the Business Court Division.<sup>2</sup>

Judge Thompson's extensive knowledge of the underlying WVAG Action will be valuable in presiding over this dispute. Moreover, it would waste judicial resources to require another judge to get up-to-speed on a subject matter with which Judge Thompson is already intimately familiar.

## **II. THE BUSINESS COURT DIVISION HAS NO SPECIALIZED INSURANCE KNOWLEDGE OR EXPERTISE TO AID IN RESOLVING THIS CASE**

Defendants contend this lawsuit requires specialized treatment, because it involves multiple parties, contracts and underlying lawsuits and therefore inherently presents "complex insurance coverage issues." Motion to Refer at ¶ 13. However, the applicable West Virginia rules do not contemplate referral for these reasons. Instead, West Virginia law makes clear that disputes presented to the Business Court Division must have a "need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable." W. Va. Tr. Ct. R. 29.04(a)(2).

Contrary to the Defendants' assertion that this type of dispute is a "classic example of Business Litigation" (Motion to Refer at ¶ 1), the Business Court Division apparently has, since its beginning, handled only two cases involving insurance coverage issues.<sup>3</sup> Stated differently, a

---

<sup>2</sup> Compare *Cunningham v. Hill*, No. 07-C-51, 2008 WL 8188993 (W. Va. Cir. Ct. Dec. 30, 2008) (Thompson, J.) (answering certified question regarding the enforceability of certain policy provisions in automobile liability insurance policies) and *Castle v. Newton Energy, Inc.*, No. 06-C-97, 2010 WL 8942485 (W. Va. Cir. Ct. Mar. 22, 2010) (Thompson, J.) (determining the enforceability of an arbitration policy in a CGL policy) with those cases discussed in Footnote 2, below.

<sup>3</sup> See *Erie Ins. Prop. and Cas. Co. v. Lambert Constr. Co.*, No. 12-C-687 (declaratory judgment to determine coverage for an underlying action involving complex negligence, breach of contract, and promissory fraud allegations between two business entities revolving around a commercial contract); *Dealership Mgmt. Co., LLC v. Air-Row Sheet Metal Co., Inc.*, No. 11-C-519 (referred to the Business Division due to the case's complex commercial issues regarding transactions between two business entities, and not due to an insurer's intervention to resolve coverage issues).

mere 3.3% of the cases referred to the Business Court Division between 2013 and 2016 involved coverage determinations.<sup>4</sup> In fact, this Court frequently denies insurance-related Motions to Refer to the Business Court Division. *See, e.g., Baumgardner v. Admiral Ins. Co.*, Nos. 10-C-541, 10-C-561, 11-C-201, 11-C-206, 11-C-215 (W. Va. Nov. 14, 2014); *Messer v. Electric Line Co., Inc.*, No. 06-C-182 (W. Va. May 15, 2013); *Fox Ins. Agency v. Ron Fleshman, Inc.*, No. 08-C-333 (W. Va. July 9, 2013).<sup>5</sup>

Defendants' apparent strategy here is to complicate this case and delay resolution. However, the issues set forth by ABDC are straightforward. ABDC has asked the Boone County Circuit Court to determine the meaning of and enforce the Defendants' standard form comprehensive general liability insurance policies. *See* Complaint at ¶ 2. Under the terms of those policies, the Defendants are required to pay for all defense costs and liability incurred in connection with ABDC's prescription opioid lawsuits. *Id.* at ¶ 14. The Defendants dispute coverage for the prescription opioid lawsuits and refuse to pay ABDC's costs and liability. Motion to Refer at Exhibit A, Defendants' Answers.

The Defendants do not state what "specialized treatment" is needed to analyze such issues. Or how the Business Court Division could provide "specialized treatment" that is not otherwise available from the assigned Circuit Court judge. The Defendants do not identify any deficiency in Judge Thompson's knowledge or expertise in handling insurance coverage

---

<sup>4</sup> This information is taken from the 2013-2016 Business Court Division Annual Reports. Copies of these reports are attached as Exhibit 2. The Annual Reports include reference to three other cases referred to the Business Division that, although identifying insurance-related entities in their captions, do not actually involve insurance coverage issues. *See Zurich Am. Ins. Co. v. Thrasher Eng., Inc.*, No. 14-C-391-2 (involving Zurich acting as subrogee for its policyholder in a commercial breach of contract matter between the policyholder and another business entity); *Wells Fargo Ins. Serv. of W. Va. v. MVB Ins. Co.*, No. 13-C-407 (concerning allegations that former employees of Wells Fargo unlawfully took customer information to their new company); *W. Va. Inv. Mgmt. Bd. v. The Variable Annuity Life Ins. Co.*, No. 09-C-2104 (declaratory judgment action brought against life insurance company requesting that it surrender public money from the investments of members of a retirement system).

<sup>5</sup> Copies of the denial orders for each of these cases are attached as Exhibit 3.

disputes. They also do not explain why they view the Business Court Division as better positioned to apply Pennsylvania law.

Vague assertions that insurance coverage issues are “complex” do not sufficiently demonstrate that the Boone County Circuit Court is unable to reach a fair result. West Virginia Circuit Court judges have interpreted countless insurance policies. *See, e.g., Walker v. Elk Run Coal Co.*, No. 11-C-1740, 2014 WL 8331423 (W. Va. Cir. Ct. May 28, 2014) (determining coverage for an underlying auto accident under insured’s commercial general liability policy); *Max Specialty Ins. Co. v. Flowers*, No. 11-C-216, 2013 WL 7863600 (W. Va. Cir. Feb. 8, 2013) (determining coverage under a commercial general liability policy for bodily injury sustained at an insured’s premises due to a shooting); *Fluker v. Cava*, No. 09-C-110, 2013 WL 7854120 (W. Va. Cir. Ct. Jan. 24, 2013) (determining whether coverage was available for an underlying Equal Employment Opportunity Commission claim under a directors and officers and employment practices liability policy).<sup>6</sup> Interpreting an insurance contract can hardly be considered a “novel” issue. And insurance-related declaratory judgment and breach of contract matters are relatively straightforward and routine matters for an experienced Circuit Court judge, like Judge Thompson.

The simple fact that this insurance coverage dispute involves a disagreement amongst multiple companies over the terms of several insurance contracts, standing alone, is not a mandatory or even compelling reason for referral to the Business Court Division. Even if, as the Defendants suggest, the insurance issues raised in this lawsuit are slightly more complex than

---

<sup>6</sup> *See also Mylan Lab. Inc. v. Am. Motorists Ins. Co.*, No. 07-C-69, 2007 WL 7713832 (W. Va. Cir. Ct. Feb. 8, 2007) (determining whether four insurers were obligated to defend and indemnify major pharmaceutical corporation in underlying lawsuits under 14 general liability policies); *Wheeling Pittsburgh Corp. v. Am. Ins. Co.*, No. 93-C-340, 2003 WL 23652106 (W. Va. Cir. Ct. Oct. 18, 2003) (deciding motion for partial summary judgment relative to the construction and interpretation of certain commercial general liability insurance policies spanning several decades and multiple policy periods that were issued by more than 20 insurers).

those presented in a garden variety insurance coverage case (which ABDC disputes), they still do not require resources beyond those of the Circuit Court of Boone County. Because this lawsuit does not require “specialized treatment,” it does not qualify as “Business Litigation” under Trial Court Rule 29 and should not be referred to the Business Court Division.

### **III. THE BUSINESS COURT DIVISION’S EXPEDITED DOCKET IS INAPPROPRIATE UNDER THESE CIRCUMSTANCES**

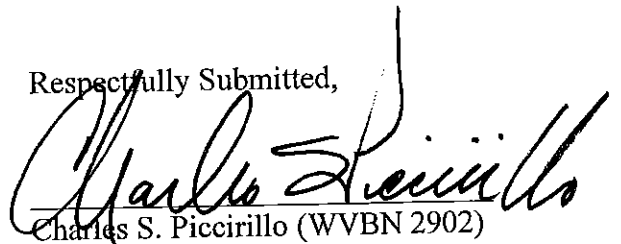
Absent from Defendants motion is any mention of the Business Court Division’s 10-month anticipated adjudication goal and the reality of the time this case may take to move toward conclusion. Under the West Virginia Rules, judges within the Business Court Division must “make all reasonable efforts to conclude Business Litigation within ten (10) months from the date the case management order was entered.” W. Va. Tr. Ct. R. 29.08. In their attempts to avoid liability, the Defendants argued that any judge presented with this case will need to undergo a painstaking allegation-by-allegation and claim-by-claim review of the underlying lawsuits. Motion to Refer at ¶ 13. Such an undertaking will be time consuming and, practically speaking, likely could not be completed in the short time period typically expected to resolve cases in the Business Court Division.

Defendants also point out that prescription opioid lawsuits are continuing to be filed against ABDC and will be added to this insurance coverage litigation. *Id.* at ¶ 11. These additional cases would impede a “rocket-docket” approach. Therefore, one of the main benefits of the Business Court Division’s jurisdiction would not be practicable here. That said, Judge Thompson’s unique experience and expertise should allow this case to move forward as expeditiously as possible.

#### IV. CONCLUSION

This case should not be referred to the Business Court Division and should instead remain with Judge Thompson in the Circuit Court of Boone County for decision, verdict and judgment. Accordingly, ABDC respectfully requests that the Court deny Defendants' Motion to Refer.

Respectfully Submitted,



Charles S. Piccirillo (WVBN 2902)  
SHAFFER & SHAFFER PLLC  
330 State Street  
P.O. Box 38  
Madison, West Virginia 25130  
(304) 369-0511

Courtney C.T. Horrigan, Esquire  
*(pro hac vice forthcoming)*  
REED SMITH LLP  
225 Fifth Avenue  
Pittsburgh, Pennsylvania 15222  
(412) 288-4226

Douglas R. Widin, Esquire  
*(pro hac vice forthcoming)*  
Caitlin R. Garber, Esquire  
*(pro hac vice forthcoming)*  
REED SMITH LLP  
Three Logan Square  
1717 Arch Street, Suite 3100  
Philadelphia, Pennsylvania 19103  
(215) 851-8217

*Counsel for Plaintiff*  
*AmerisourceBergen Drug*  
*Corporation*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMERISOURCEBERGEN DRUG  
CORPORATION,

Plaintiff,

v.

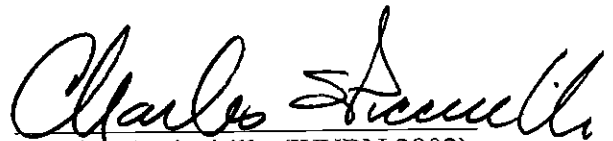
Boone County Circuit Court  
Civil Action No. 17-C-36

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, Charles S. Piccirillo, counsel for AmerisourceBergen Drug Corporation, do hereby  
certify that service of the *Memorandum in Opposition to Defendants' Joint Motion to Refer  
Case to the Business Court Division* was made to the following counsel of record via U.S. Mail,  
postage prepaid on this 21<sup>st</sup> day of June, 2017:



Charles S. Piccirillo (WVBN 2902)  
SHAFFER & SHAFFER PLLC  
330 State Street  
P.O. Box 38  
Madison, West Virginia 25130  
(304) 369-0511

Matthew J. Perry, Esquire  
Lamp, Bartram, Levy, Trautwein & Perry, PLLC  
720 4<sup>th</sup> Avenue  
Huntington, West Virginia 25701  
Telephone: (304) 523-5400  
Fax: (304) 523-5409  
*Counsel for Defendant, ACE American  
Insurance Co. and ACE Property and  
Casualty Insurance Co.*

Tiffany R. Durst, Esquire  
Pullin, Fowler, Flanagan, Brown & Poe, PLLC  
2414 Cranberry Square  
Morgantown, West Virginia 26508  
Telephone: (304) 225-2200  
Fax: (304) 225-2214  
*Counsel for American Guarantee &  
Liability Casualty Insurance Co.*



Hema Mehta, Esquire  
Fineman Krekstein & Harris PC  
1801 Market Street, Suite 1100  
Philadelphia, Pennsylvania 19103  
*Counsel for Endurance American  
Insurance Co.*

Lee Murray Hall, Esquire  
JENKINS FENSTERMAKER, PLLC  
P.O. Box 2688  
Huntington, West Virginia 25726-2688  
*Counsel for St. Paul Fire & Marine  
Insurance Company*

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

Berkeley County Judicial Center  
Business Court Division  
380 W. South Street, Suite 2100  
Martinsburg, West Virginia 25401

Edward P. Tiffey, Esquire  
Tiffey Law Practice, PLLC  
205 Capitol Street, 4<sup>th</sup> Floor  
Charleston, West Virginia 25337  
*Counsel for Endurance American  
Insurance Co.*

Robert A. Kole, Esquire  
CHOATE, HALL & STEWART LLP  
Two International Place  
Boston, Massachusetts 02110  
*Counsel for St. Paul Fire & Marine  
Insurance Company*

Sue Ann Zickefoose, Clerk  
Boone County Courthouse  
200 State Street  
Madison, West Virginia 25130