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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0036

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Defendant Below, Petitioner,

v.

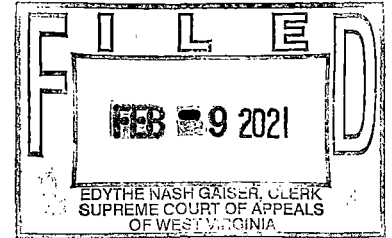
**AMERISOURCEBERGEN DRUG CORPORATION and
BELLCO DRUG CORPORATION,**

Plaintiffs Below, Respondents,

v.

**ACE AMERICAN INSURANCE COMPANY and
ACE PROPERTY AND CASUALTY INSURANCE COMPANY,**

Defendants Below, Intervenor-Petitioners.



**BRIEF OF INTERVENOR-PETITIONERS
ACE AMERICAN INSURANCE COMPANY AND
ACE PROPERTY AND CASUALTY INSURANCE COMPANY**

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Intervenor-Petitioners ACE American Insurance Company and ACE Property and Casualty Insurance Company (“ACE”) seek reversal of an anti-suit injunction order of the Circuit Court (the “Order”). ACE respectfully submits this brief to join in the appeal of Petitioner St. Paul Fire & Marine Insurance Company (“St. Paul”) and to specify an additional assignment of error.

ASSIGNMENTS OF ERROR

ACE joins in St. Paul’s Assignments of Error and makes the following additional assignment: The Circuit Court abused its discretion by granting injunctive relief that is futile, in contravention of a fundamental principle of equity. It was legal error to enter such an injunction.

STATEMENT OF THE CASE

Respondents AmerisourceBergen Drug Corporation and Belco Drug Corporation (“AmerisourceBergen”) have been named in thousands of lawsuits based on their alleged role in the nationwide opioid crisis. Defendants below are AmerisourceBergen’s primary commercial general liability insurance carriers—St. Paul and ACE—and just two of its many excess carriers.

In this action, filed in 2017, AmerisourceBergen seeks insurance coverage for underlying opioid lawsuits that were filed against it in and relate to events in West Virginia. SPApp.0001.¹ In November 2020, it was announced that AmerisourceBergen and other opioid distributors had reached a \$21 billion global settlement of over 3,000 underlying opioid lawsuits filed *outside* West Virginia. SPApp.0310. Two days later, St. Paul commenced a comprehensive action in California seeking a declaration regarding coverage, if any, concerning the settlement and thousands of opioid lawsuits outside West Virginia. SPApp.0307. AmerisourceBergen then sought and obtained the Order, which bars the parties here from litigating coverage as to opioid lawsuits filed outside West Virginia in the California court or any other court, SPApp.1780, even though AmerisourceBergen

¹ “SPApp.” and “ACEApp.” refer to the appendices to St. Paul’s brief and this brief, respectively.

has limited this action to West Virginia lawsuits and litigated on that basis for years.²

St. Paul has appealed the Order, and ACE now intervenes. For additional procedural history and detail, ACE respectfully refers the Court to St. Paul's Statement of the Case.

SUMMARY OF ARGUMENT

The Circuit Court issued an anti-suit injunction affecting an action in a sister state, an extreme measure rarely used, and apparently never in this state. ACE is aware of no other anti-suit injunction enjoining only a subset of the parties in a more comprehensive action, such that litigation of issues there will continue without those parties. Moreover, in an extraordinary affront to comity, the Order effectively declares the Circuit Court to be the only court in the United States where the enjoined insurers may seek coverage rulings relating to AmerisourceBergen and opioids, even though opioids are a national issue. As set forth in St. Paul's brief, the Order is fatally flawed.

And the Order should be reversed for another, independent reason—it contravenes the fundamental principle that equity will not do a useless thing. Although the Order hobbles the ability of the insurer-parties here to protect their interests in the California action, that action will go forward. Four of the five plaintiff-insurers and 66 of the 70 defendant-insurers in the California action are not parties here and thus are not enjoined. A number of the additional parties assert claims in the California action, seeking coverage rulings with respect to AmerisourceBergen on the same policy language that, according to the Circuit Court, is at issue here. Thus, neither the

² In addition to limiting this action to coverage for West Virginia opioid lawsuits in its complaints, *see* SPApp.0001–02, ¶ 1; SPApp.0024–25, ¶ 1, AmerisourceBergen repeatedly affirmed at a hearing that this action would be thus limited in order to obtain an extension of time to amend its pleadings, stating, “we do intend to add [] other West Virginia cases; we have no intent of adding cases from other jurisdictions,” ACEApp.005 at 18–20; *see also* ACEApp.006 at 10–13 (AmerisourceBergen: “We anticipate there will be additional [cases], and we would anticipate joining those into this case for the coverage issue, but only as to the West Virginia cases.” The Court: “Not going outside --” AmerisourceBergen: “Not going outside West Virginia.”); ACEApp.007 at 20–22 (“This is really limited to the coverage and duty to defend the West Virginia actions under these -- for these four carriers under these policies.”); ACEApp.027 (post-hearing order, stating, “Counsel for plaintiff affirmed that, in this matter, it is seeking and will only seek coverage for . . . prescription opioid lawsuits filed against ABDC in West Virginia.”).

principal harm identified by AmerisourceBergen—the risk of inconsistent rulings—nor any other ostensible harm is eliminated by the Order. The injunction is futile and therefore inequitable.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is warranted because this appeal raises an issue of “first impression” and “fundamental public importance”: whether an anti-suit injunction affecting an action in a sister state is proper even if it is ineffective to remedy any harm. *See* W. Va. R. App. P. 20(a).

ARGUMENT

ACE joins in the arguments presented in St. Paul’s brief. As St. Paul explains, the Order violates fundamental principles of comity essential to harmonious relations between co-equal states, including the well-established, threshold requirement that, for a court to issue an anti-suit injunction, the enjoined action must involve the same parties and issues as the action before the enjoining court.³ Moreover, the standard elements required for injunctive relief are not met, and the injunction motion did not address the harm to ACE and the other defendant-insurers in the California action if they could not assert cross-claims, as other insurers have done.

The Order also should be reversed for an independent reason. It violates the fundamental principle that “[e]quity will not do a useless thing.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 744 (1971) (Marshall, J., concurring) (citing 1 H. Joyce, *Injunctions* §§ 58–60a (1909)).⁴ In a

³ Moreover, as the D.C. Circuit explained in a case this Court has cited on comity, even where the parties are the same, “the possibility of . . . potentially inconsistent adjudications does not outweigh the respect and deference owed to independent foreign proceedings.” *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 928–29 (D.C. Cir. 1984); *see Gebr. Eickhoff Maschinenfabrik & Eisengieberei mbH v. Starcher*, 174 W.Va. 618, 328 S.E.2d 492, 501–06 (1985) (relying on *Laker Airways*); *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 418 S.E.2d 738, 746 (1992) (citing *Laker Airways* in a case involving Ohio law). Other courts agree. *See, e.g., Golden Rule v. Harper*, 925 S.W.2d 649, 651–52 (Tex. 1996) (*per curiam*); *Auerbach v. Frank*, 685 A.2d 404, 409 (D.C. 1996); *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231, 236 (Cal. 2002).

⁴ *Accord Kinney v. Barnes*, 443 S.W.3d 87, 97 (Tex. 2014); *State v. Lake Super. Ct.*, 820 N.E.2d 1240, 1256 (Ind. 2005); *Lortz v. Rose*, 145 S.W.2d 385, 387 (Mo. 1940); *cf. Hunter Grp., Inc. v. Smith*, 164 F.3d 624 (4th Cir. 1998) (*per curiam*) (injunction must be denied if it “will not remedy the injuries . . . identified”).

decision affirmed by the Delaware Supreme Court, the Delaware Chancery Court declined to enjoin insurance coverage proceedings in another state—West Virginia, as it happens—for precisely this reason. *See N. River Ins. Co. v. Mine Safety Appliances Co.*, No. 8456-VCG, 2013 WL 6713229, at *1 (Del. Ch. Dec. 20, 2013), *aff'd*, 105 A.3d 369 (Del. 2014), *as revised* (Nov. 10, 2014). *North River* is directly on point.

In *North River*, a mine safety equipment manufacturer and its insurers had commenced five lawsuits involving coverage for thousands of claims filed against the insured as the result of alleged defects in its equipment. *Id.* at *2–*4. While a comprehensive action between the insured and dozens of its insurers was pending in the Delaware Superior Court, tort victims filed actions in West Virginia courts against the insured. *Id.* at *4–6. Relying upon West Virginia’s Uniform Declaratory Judgments Act, the tort victims also sued the insurer North River directly, and the insured then cross-claimed against North River for indemnity. *Id.* The sole insurance policy at issue in the West Virginia cases was already at issue in the Delaware case. *Id.* at *3–*5, *10.

North River then sought an anti-suit injunction from the Delaware Chancery Court to enjoin the insured’s prosecution of the West Virginia actions. According to North River, the insured was colluding with the tort victims in West Virginia to evade the jurisdiction of the Delaware Superior Court and Pennsylvania courts in which the parties were engaged in related litigation. *Id.* at *1, *6, *8, *10. North River argued that the insured’s cross-claims against it in West Virginia exposed it to a risk of inconsistent judgments, necessitating an injunction. *Id.* at *6.

The Delaware court refused to issue the injunction. *Id.* at *1, *7–*10. The court observed that an anti-suit “injunction is an extraordinary form of relief,” in part because “[a] sense of comity [is] owed to the courts of other states.” *Id.* at *7–*8. The West Virginia court had denied North River’s motion to dismiss the pending cases there, ruling that the underlying plaintiffs had the right

to pursue direct claims against the insurer. *Id.* at *6. According respect to the West Virginia Court’s decision, the Chancery Court recognized that any injunction of the insured alone would “be ineffective to achieve its desired result” of preventing the risk of inconsistent judgments, because the underlying plaintiffs’ action against North River would continue. *Id.* at *7, *9. Thus, honoring “the well-established principle that equity will not do a useless thing,” North River had failed to show that an injunction was appropriate. *Id.* at *9; *see also id.* at *1.⁵

The same reasoning applies here. The California action involves plaintiffs and numerous defendants and cross-plaintiffs who are not parties here.⁶ The Circuit Court has not enjoined those additional parties and, indeed, lacks authority to do so. *See* SPApp.1798, ¶ 89 (“An anti-suit injunction is directed at the parties appearing before this Court.”) (citing *State v. Fredlock*, 52 W. Va. 232, 232, 43 S.E. 153, 159 (2002)).

Like the West Virginia action sought to be enjoined in *North River*, the California action here will continue regardless of the Order. The additional plaintiffs and cross-plaintiffs will litigate their claims concerning the policies they issued to AmerisourceBergen and other companies—policies that AmerisourceBergen avers contain materially similar terms to those at issue here. SPApp.0088, ¶¶ 51–53. The possibility of inconsistent rulings in the California action will remain. So too, will the other ostensible harms—economic burden, delay, inefficiency, and uncertainty. *See* SPApp.1804–07, ¶¶ 126–40. The Order “def[ies] the well-established principle that equity will not do a useless thing,” *North River* 2013 WL 6713229, at *9, and should be reversed.

⁵ The Vice Chancellor also observed that an injunction would prejudice the insured by “preclud[ing] [it] from protecting its rights . . . while North River continues to litigate . . . in West Virginia.” *Id.* at *9. The Order likewise prejudices ACE by preventing it from asserting cross-claims in the California action.

⁶ *See* SPApp.0026–27, ¶¶ 8–15 (amended complaint, listing parties to West Virginia action); SPApp.0311–18, ¶¶ 8–23 (complaint, listing parties to California action); SPApp.1867 (National Union cross-complaint); SPApp.1988 (Arrowood cross-complaint); ACE App.035 (Hartford cross-complaint).

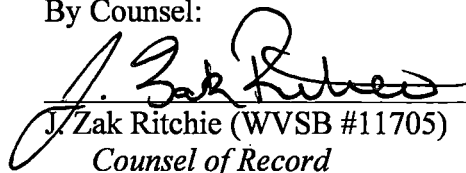
CONCLUSION

For the foregoing reasons, the Order should be reversed.

Respectfully submitted,

**ACE AMERICAN INSURANCE COMPANY,
ACE PROPERTY & CASUALTY INSURANCE COMPANY**

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