

21-0036
FILE COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. _____

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,

Defendant Below,
Petitioner,

v.

AMERISOURCEBERGEN DRUG
CORPORATION, and BELLCO DRUG
CORPORATION,

Plaintiffs Below,
Respondents.

**DO NOT REMOVE
FROM FILE**
On appeal from the Circuit Court
of Boone County, West Virginia
(Civil Action No. 17-C-36)

**PETITIONER ST. PAUL FIRE AND MARINE INSURANCE COMPANY'S
OPENING BRIEF**

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Dated: January 19, 2021

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I. ASSIGNMENTS OF ERROR

Petitioner St. Paul Fire and Marine Insurance Company (“St. Paul”) appeals the January 7, 2021 Corrected Order Granting Plaintiffs’ Motion For Injunction (the “Injunction Order”) entered by the Honorable William S. Thompson of the Circuit Court of Boone County in this civil action, which enjoins proceedings in a case pending in another state, specifically the Superior Court of Orange County, California, by prohibiting St. Paul from prosecuting pending claims and following the rules of the California Superior Court.¹

St. Paul appeals the Injunction Order on the following grounds:

1. The Circuit Court exceeded its legitimate authority when it enjoined proceedings in California and prevented St. Paul from complying with California rules, by ordering St. Paul to cease prosecuting claims properly pending before a California court.

2. The Circuit Court abused its discretion by granting an injunction when Respondents had not met their burden of proof under West Virginia law and Rule of Civil Procedure 65. Specifically, Respondents failed to provide evidence of irreparable harm absent an injunction of the California proceedings, failed to establish a lack of other adequate legal remedies for movants, and failed to provide evidence that the balancing of potential harm to the parties, including harm to St. Paul, and the public weighed in favor of an injunction of the California proceedings.

3. The Circuit Court abused its discretion by granting an injunction that prohibits insurance coverage litigation involving AmerisourceBergen Corporation (a Pennsylvania

¹ Contemporaneously with the filing of this appeal, St. Paul is filing a motion with this Court seeking an expedited stay of enforcement of the Injunction Order, pursuant to West Virginia Rules of Appellate Procedure 28(b) and 29(c). Additionally, given the urgency of the situation and in an effort to obtain appellate relief as swiftly as possible, St. Paul is filing this appeal brief contemporaneously with its notice of appeal in order to further expedite the appellate process.

company) and any affiliated entity from being heard anywhere in the United States except the Boone County Circuit Court.

4. The Circuit Court abused its discretion by granting an injunction that prohibits St. Paul from continuing to prosecute separate litigation pending in California concerning insurance coverage for an entirely distinct set of underlying claims under a multitude of different insurance policies, which are not at issue in the case before the Circuit Court. The operative insurance coverage action in West Virginia concerns only coverage for 50 specific underlying cases that were filed in West Virginia under one \$5 million limit insurance policy issued by St. Paul in 2006. On the other hand, the California insurance coverage action concerns coverage for more than 3,500 cases filed in California and elsewhere, expressly *excluding* the 50 underlying cases at issue below, under at least 13 policies issued by St. Paul to a California company with more than \$200 million of limits. Not a single one of the policies at issue in the California case was issued in West Virginia or to a West Virginia company.

5. The Circuit Court exceeded its legitimate authority by attempting to control litigation pending in California (just as the California courts have no authority to control litigation in West Virginia) because it violates principles of comity, federalism, and the sovereignty between states and their independent court systems.

6. The Circuit Court violated the West Virginia and United States Constitutions by prohibiting St. Paul from continuing to petition the California Superior Court for redress and defend itself from claims and other applications for relief asserted against it in the California Superior Court.

II. STATEMENT OF THE CASE

A. In 2017, AmerisourceBergen Sought Insurance Coverage In Boone County For Its Settlement Of The West Virginia Attorney General Lawsuit

AmerisourceBergen Drug Corporation (“ABDC”) and Belco Drug Corporation (“Belco” and, together with ABDC, “AmerisourceBergen”) are Plaintiffs below and Respondents in this appeal. In June 2012, the West Virginia Attorney General sued ABDC in an action styled *State ex rel. Morrissey v. AmerisourceBergen Drug Corp.*, No. 12-C-141 in the Circuit Court of Boone County, West Virginia (the “WVAG Lawsuit”). The State alleged that ABDC engaged in “heavy distribution and sale of addictive controlled substances to Pill Mill pharmacies in unusually large quantities” despite knowing these drugs “would be diverted and/or improperly used thereby creating an unreasonable risk of harm” to the State, and that ABDC “put their desire for profits above and beyond their duty to place effective controls and procedures to prevent diversion of controlled substances and wholly failed in their duties to design and implement a system to disclose suspicious orders.” *State ex rel. Morrissey v. AmerisourceBergen Drug Corp.*, No. 12-C-141, 2014 WL 12814021, at *7-8 (W. Va. Cir. Ct., Boone Cty. Dec. 12, 2014). In January 2017, ABDC settled the WVAG Lawsuit by, among other things, agreeing to pay the State of West Virginia \$16 million. *See* SPApp.0031 (Pls. July 18, 2018 Am. Compl. ¶¶ 34-37).

In March 2017, ABDC commenced this insurance coverage action in Boone County Circuit Court against St. Paul and four other insurance companies. It sought coverage from St. Paul under one policy with a \$5 million limit for costs it incurred defending and settling the WVAG Lawsuit and four other opioid-related lawsuits brought by certain West Virginia cities and counties. *See* SPApp.0004, 0007-08, 0009 (ABDC Mar. 17, 2017 Compl., ¶¶ 16, 32-35, 37). In July 2018, ABDC filed an amended complaint that added its affiliate, Belco, as an additional plaintiff and identified a total of 50 lawsuits in West Virginia—the WVAG Lawsuit and 49 other opioid-related

lawsuits defined in the amended complaint as “Pending West Virginia Prescription Opioid Lawsuits”—for which it sought insurance coverage from St. Paul under one policy. *See* SPApp.0046, 0048 (Pls. July 18, 2018 Am. Compl., ¶¶ 89, 93). Thus, the amended complaint concerns only 50 specific lawsuits that were filed in West Virginia and one St. Paul insurance policy that was issued in Pennsylvania in 2006 to AmerisourceBergen Corporation (ABDC’s corporate parent), a Pennsylvania company.

On February 22, 2018, the Circuit Court entered an agreed Order Of Bifurcation And Partial Stay, which provides: “Litigation concerning ABDC’s claim for coverage with respect to the WVAG Lawsuit will move forward, and . . . [l]itigation of ABDC’s claim for coverage with respect to the Pending West Virginia Actions is stayed until further notice.” SPApp.0018 (Feb. 22, 2018 Stay Or. ¶¶ 1-2) (“Stay Order”). Pursuant to the Stay Order, the parties are currently litigating only AmerisourceBergen’s demand for coverage for the WVAG Lawsuit; litigation regarding the other 49 West Virginia-based lawsuits identified in AmerisourceBergen’s operative complaint has been stayed.

AmerisourceBergen’s amended complaint does not seek any determination of insurance coverage for the federal prescription opiate multi-district litigation (“Opioid MDL”), nor could it. The Opioid MDL is not a case. It is the centralized pre-trial handling of opioid-related lawsuits in the federal system. The lawsuits included in the Opioid MDL remain pending for merits decisions in federal courts across the country, and, most importantly for purposes of this appeal, none of the cases pending outside West Virginia are included in AmerisourceBergen’s amended complaint.

In September and November of 2020, the Circuit Court issued decisions on pending discovery motions and denied St. Paul’s motion for summary judgment on a single legal issue pending completion of discovery. In accordance with these rulings, the parties have resumed

discovery related to AmerisourceBergen's claim for coverage for the WVAG Lawsuit. Litigation for the 49 other Pending West Virginia Prescription Opioid Lawsuits remains stayed, under the Stay Order. No trial date is presently set in this case.

B. In 2020, St. Paul Commenced Litigation In California Concerning Insurance Coverage Under Policies Issued To A California Company Sued In California And Elsewhere

Since ABDC filed this coverage action in the Boone County Circuit Court, other cities, states, counties, and municipalities in California and across the country have also filed lawsuits against AmerisourceBergen purportedly alleging, among other things, fraud, public nuisance, negligence, false advertising, and unjust enrichment relating to their distribution of opioids and failure to maintain effective controls against diversion of opioids. In 2019—a year after AmerisourceBergen filed its operative complaint in this action—St. Paul began receiving notices for the first time from AmerisourceBergen and other companies seeking insurance coverage for various opioid claims under policies that were issued as far back as the mid-1990s to a California company named Bergen Brunswig Corporation (“Bergen Brunswig”). Bergen Brunswig was a California-based pharmaceutical distributor that, beginning in the 1980s, purchased insurance policies in California, governed by California law, from St. Paul. *See* SPApp.0309 (*St. Paul Fire and Marine Insurance Co., et al. v. AmerisourceBergen Corp., et al.*, No. 30-2020-01168930-CU-IC-CXC (Cal. Super. Ct. Nov. 5, 2020) (“Nov. 5, 2020 Cal. Action Compl.”), ¶ 2). Between 1995 and 2006, the limits of policies issued in California totaled nearly \$250 million. *See id.* In 2001, Bergen Brunswig merged with AmerisourceBergen Corporation, ABDC's corporate parent, which purports to be the successor to Bergen Brunswig's rights under the California insurance policies and California liabilities. *See id.*

In October 2019, the North Carolina Attorney General reported that AmerisourceBergen agreed to pay \$5.58 billion for a global settlement of opioid-related cases brought by a host of

cities, states, counties, and other municipalities, across the country, including in California.² On November 3, 2020, it was reported that the terms of this global settlement had been agreed and that AmerisourceBergen, along with two other pharmaceutical distributors, had agreed to pay \$21 billion toward the settlement.³ West Virginia is not part of this settlement.⁴

Because the case at bar concerns only the 50 underlying cases in West Virginia named in AmerisourceBergen's amended complaint, on November 5, 2020, St. Paul and four other insurance companies not party to this case (the "California Action Plaintiffs") filed a complaint (the "California Action Complaint") in the Superior Court for the State of California in Orange County, styled, *St. Paul Fire and Marine Insurance Co., et al. v. AmerisourceBergen Corp., et al.*, No. 30-2020-01168930-CU-IC-CXC (Cal. Super. Ct. Nov. 5, 2020) (the "California Action") seeking a determination of insurance coverage concerning underlying cases in California and other states—*expressly excluding* the 50 underlying cases at issue in West Virginia. *See* SPApp.0310-11, 0323 (Nov. 5, 2020 Cal. Action Compl. ¶¶ 4-7, 41 n.11). The California Action is currently pending before Judge Randall J. Sherman.

² *See* Attorneys General Stein, Slatery, Shapiro, and Paxton Announce \$48 Billion Deal with Cardinal Health, McKesson, AmerisourceBergen, Johnson & Johnson, and Teva, NORTH CAROLINA DEPARTMENT OF JUSTICE (Oct. 21, 2019); Laura Brewer, *Attorney General Josh Stein Announces \$48 Billion Settlement Framework with Five Companies Over Opioid Epidemic*, NORTH CAROLINA DEPARTMENT OF JUSTICE (Oct. 21, 2019).

³ *See* Kevin Stawicki, *McKesson, 2 Other Distributors Ink \$21B Opioid Settlement*, Law360, Nov. 3, 2020.

⁴ *See* Joel Achenbach, Christopher Rowland, Katie Zezima, and Aaron C. Davis, *Johnson & Johnson, Three Other Companies Close in on \$26 Billion Deal on Opioid Litigation* (Nov. 5, 2020), WASHINGTON POST, available at https://www.washingtonpost.com/health/opioid-settlement-drug-distributors/2020/11/05/6a8da214-1fc7-11eb-b532-05c751cd5dc2_story.html ("West Virginia is not part of the settlement"); SPApp.0348 (Pls. Dec. 13, 2020 Reply Br., ¶¶ 6-7) (noting underlying opioid lawsuits "pending in state courts in West Virginia" are subject to ongoing mediation in West Virginia).

The California Action Plaintiffs seek a declaration that they have no duty to defend or indemnify thousands of underlying opioid lawsuits pending in California and dozens of other jurisdictions against eight different affiliates of Bergen Brunswig, collectively referred to in the California Action Complaint as the “Bergen Brunswig Affiliates.” *See* SPApp.0309 (Nov. 5, 2020 Cal. Action Compl. ¶ 2). The California Action Complaint also asserts claims for equitable contribution and equitable indemnification against 70 defendant-insurers, only four of which are parties here. *See* SPApp.0325-26 (Nov. 5, 2020 Cal. Action Compl. ¶¶ 57-62).

In sum, the California Action concerns questions regarding insurance coverage for more than 3,500 underlying opioid-related lawsuits filed against the Bergen Brunswig 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. *See* SPApp.0310-11, 0323 (Nov. 5, 2020 Cal. Action Compl., ¶¶ 4-7, 41 n.11). To be clear, the California Action Complaint explicitly carves out of its scope all of the underlying actions at issue in the case below, stating:

In 2017, [AmerisourceBergen Corporation] 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 ABC 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.

SPApp.0323 (Nov. 5, 2020 Cal. Action Compl., ¶ 41 n.11) (emphasis added).⁵

⁵ For the Court’s convenience, St. Paul has appended as Exhibit A a chart displaying the underlying cases, policyholders/insured entities, and insurers at issue in the California Action, on the one hand, and in this case, on the other hand. *See* Ex. A.

Since the California Action Complaint was filed on November 5, 2020, answers and cross-claims have been filed by insurers that are not party to this case against the California Action Plaintiffs, other defendant-insurers, and certain Bergen Brunswig Affiliates.⁶ St. Paul is due to respond to the cross-claims that have been asserted against it within 30 days of service—if it does not, a default may be taken on the cross-complaint. *See* Cal. Code Civ. P. § 432.10; Cal. Code Civ. P. § 585. St. Paul will further be required to respond to additional cross-complaints that all but inevitably will be filed by the many other insurer-defendants in the California Action, the vast majority of which are not party to the case at bar.

Furthermore, California law requires that St. Paul serve the complaint upon all named defendants in the California Action within 60 days of the commencement of the case. *See* Cal. Rule of Court 3.110. Although the California Superior Court has granted one extension of time for St. Paul to effect service, the Injunction Order threatens to preclude it from completing service.

C. The Motion And Injunction Order That Is The Subject Of This Appeal

On November 19, 2020, two weeks after the California Action was filed, AmerisourceBergen moved the Circuit Court of Boone County, West Virginia for an injunction prohibiting St. Paul “from proceeding with the California Coverage Action.” SPApp.0090 (Pls. Nov. 19, 2020 Mot. For Injunction, ¶ 61). Then, AmerisourceBergen demanded that St. Paul pay all costs that are the subject of the complaint in the California Action (but not subject to this case). *See* SPApp.1626-32 (Horrigan Nov. 25 & Dec. 2, 2020 Ltrs. to Frankel).

⁶ SPApp.1867 (National Union Fire Ins. Co. of Pittsburgh, PA’s Cross-Complaint For Declaratory Judgment, *St. Paul Fire and Marine Ins. Co., et al. v. AmerisourceBergen Corp.*, No. 30-2020-01168930 (Cal. Super. Ct. Dec. 13, 2020)); SPApp.1988 (Arrowood Indemnity Co.’s Cross-Complaint For Declaratory Judgment, *St. Paul Fire and Marine Ins. Co., et al. v. AmerisourceBergen Corp.*, No. 30-2020-01168930 (Cal. Super. Ct. Jan. 14, 2021)).

On December 9, 2020, St. Paul filed a memorandum of law in opposition to Plaintiffs' injunction motion, to which Plaintiffs replied on December 13, 2020. *See* SPApp.0147 (St. Paul Dec. 9, 2020 Opp'n Br.) (sealed); SPApp.1442 (St. Paul Dec. 9, 2020 Opp'n Br.) (redacted); SPApp.341 (ACE Dec. 10, 2020 Joinder to St. Paul Opp'n Br.); *see also* SPApp.0346 (Pls. Dec. 13, 2020 Reply Br.). Significantly—and as St. Paul repeatedly advised the Circuit Court—none of AmerisourceBergen's motion papers included a factual affidavit establishing the mandatory elements for issuance of injunctive relief under West Virginia law and Rule 65 or any other manner of evidence supporting the requisite criteria for issuance of an injunction. Oral argument was held on December 14, 2020.

At the Circuit Court's request, on December 30, 2020, St. Paul and AmerisourceBergen each submitted a proposed order regarding the motion. *See* SPApp.0473 (St. Paul Dec. 30, 2020 Prop. Or); SPApp.0500 (Pls. Dec. 30, 2020 Prop. Or.); *see also* SPApp.0494 (ACE Dec. 30, 2020 Prop. Or.). In addition, AmerisourceBergen submitted an unsolicited post-motion hearing letter attaching 873 pages of previously-available material that it had not filed with its prior motion papers. *See* SPApp.0549-1425 (Pls. Dec. 30, 2020 Supp. Ltr.). With leave of the Circuit Court, St. Paul filed a brief response letter on January 4, 2021. *See* SPApp.1426 (St. Paul Jan. 4, 2021 Response Ltr.). AmerisourceBergen filed another reply letter on January 5, 2021. *See* SPApp.1435 (Pls. Jan. 5, 2021 Reply Ltr.).

On January 6, 2021, AmerisourceBergen re-filed a modified form of its 45-page proposed order. Approximately ten minutes later, the Circuit Court entered its Order granting the motion for injunction. *See* SPApp.1638 (Pls. Jan. 6, 2021 Re-Filed Prop. Or.) (timestamp 4:38 p.m.); SPApp.1686 (Jan. 6, 2021 Injunction Or.) (timestamp 4:48 p.m.). The Circuit Court's Order adopted AmerisourceBergen's proposed order in its entirety, with the single addition of a statement

that the Circuit Court had considered the parties' January 4 and January 5, 2021 letters. *See* SPApp.1690 (Jan. 6, 2021 Injunction Or. ¶ 15.).

The following day, January 7, 2021, counsel for AmerisourceBergen alerted the Circuit Court by email of a drafting error in the proposed order that it had submitted the day before, which the Circuit Court had entered without correcting: a two-column chart displayed at paragraph 71 was blank. *See* SPApp.1886 (Mount Jan. 7, 2021 Email to Circuit Court). After AmerisourceBergen re-filed a "corrected" version of its proposed order, *see* SPApp.1734 (Pls. Jan. 7, 2021 Corrected Prop. Or.), the Circuit Court promptly entered it, *see* SPApp.1780 (Jan. 7, 2021 Corrected Injunction Or.). Once again, the Court made no substantive revisions other than re-inserting the additional statement noted above indicating that the Court had reviewed the parties' January 4 and 5, 2021 letters. *See* SPApp.1784 (Jan. 7, 2021 Corrected Injunction Or. ¶ 15). The Injunction Order states that it prohibits St. Paul and other parties to the case at bar "from instituting or prosecuting any collateral litigation or other proceeding against one another relating to insurance coverage for the prescription opioid lawsuits against ABC, ABDC, or any other affiliated entity." SPApp.1810-11 (Jan. 7, 2021 Corrected Injunction Or. ¶ 164).

Less than two hours after the Circuit Court entered the original, uncorrected version of the Injunction Order on January 6, 2021, AmerisourceBergen threatened to seek sanctions against St. Paul unless all five plaintiff-insurers in the California Action—*of which St. Paul is only one*—voluntarily dismissed the action in its entirety by noon the following day, less than 24 hours later. *See* SPApp.1883 (Finch Jan. 6, 2021, 6:28 p.m. ET Email to Kronenberg); *see also* SPApp.1935 (Horrigan Jan. 12, 2021 Ltr. to Frankel).

The very next day, January 7, 2021, AmerisourceBergen, in collaboration with five other Bergen Brunswick Affiliates that are named in the California Action (but are not party to this case),

filed motions to dismiss and to quash the California Action. *See* SPApp.1889 (Jan. 7, 2021 Cal. Action Mot. to Dismiss); SPApp.1914 (Jan. 7, 2021 Cal. Action Mot. to Quash). The motions were noticed for a hearing on February 19, 2021. Under California law, St. Paul has a legal obligation to respond to those motions on or before February 4, 2021, to avoid defaulting on its claims and defenses in the California Action. *See* Cal. Code Civ. P. § 1005 (“All papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least nine court days . . . before the hearing.”). Failing to file opposition papers can waive a party’s legal defenses, as the “failure to oppose a motion may be deemed a consent to the granting of the motion.” *See* Cal. Rule of Court 8.54. Moreover, St. Paul is entitled under California law to take jurisdictional discovery in order to formulate its response to AmerisourceBergen’s motions to dismiss. *See Magnecomp Corp. v. Athene Co.*, 209 Cal. App. 3d 526, 533 (Cal. 2d Dist. 1989) (a plaintiff attempting to assert jurisdiction over a nonresident defendant has “the right to conduct discovery with regard to the issue of jurisdiction to develop the facts necessary” to sustain its burden of proof (citation omitted)).

D. St. Paul Seeks A Stay Of The Injunction Order And Files This Appeal

On January 18, 2021, St. Paul moved the Circuit Court, pursuant to West Virginia Rule of Civil Procedure 62(i) and Rule of Appellate Procedure 28(a), for a stay of enforcement of the Injunction Order pending St. Paul’s appeal. *See* SPApp.1826 (St. Paul Jan. 18, 2021 Cir. Ct. Mot. to Stay). The Circuit Court has not yet ruled upon that motion to stay.

Contemporaneously with the filing of this appeal, St. Paul is filing a motion with this Court seeking an expedited stay of enforcement of the Injunction Order, pursuant to Rules of Appellate Procedure 28(b) and 29(c). Additionally, given the urgency of the situation and in an effort to obtain appellate relief as swiftly as possible, St. Paul has filed this appeal brief contemporaneously with its notice of appeal in order to further expedite the appellate process.

III. SUMMARY OF ARGUMENT

On November 19, 2020, AmerisourceBergen moved the Circuit Court to enjoin the continued prosecution of the California Action. On January 6, 2021, the Circuit Court granted AmerisourceBergen's motion for injunction and, on January 7, 2021 issued the operative Corrected Order Granting Plaintiffs' Motion For Injunction (the "Injunction Order").

The 45-page Injunction Order—drafted by AmerisourceBergen and signed by the Circuit Court, with no substantive changes—prohibits St. Paul and other parties to this action “from instituting or prosecuting any collateral litigation or other proceeding against one another relating to insurance coverage for the prescription opioid lawsuits against ABC, ABDC, or any other affiliated entity.” SPApp.1810-11 (Jan. 7, 2021 Corrected Injunction Or. ¶ 164). Specifically, the Injunction Order enjoins St. Paul from prosecuting existing litigation in the California Action, requires St. Paul to violate rules and procedures of the California Superior Court, places St. Paul at risk of default and/or the waiver of its defenses in the California Action, and thereby interferes with and asserts control over litigation in a court in another state more than 2,000 miles away. No order of this extraordinary nature has ever been issued by a West Virginia Court. The Injunction Order is clearly erroneous and constitutes a gross abuse of discretion that conflicts with West Virginia law, precedent across the country, principles of comity, federalism, and the sovereignty of states, and the West Virginia and United States Constitutions.

First, the Circuit Court improperly entered the Injunction Order even though AmerisourceBergen presented no evidence that it would suffer irreparable harm in the absence of an order enjoining the California Action, no evidence that it lacked adequate remedies at law, and no evidence that the balancing of potential harm to each party and the public at large weighs in favor of enjoining the California Action. At a basic level, the Circuit Court simply ignored these mandatory requirements for an injunction to issue under West Virginia law and Civil Procedure

Rule 65. Nor was such a showing by AmerisourceBergen possible because, among other reasons, the California Action does not involve *any* of the same underlying claims as this case, and the California Action involves a multitude of different parties and policies that are not at issue here, as plainly shown in the summary chart submitted herewith as Exhibit A.

The California Action was brought in California against more than 70 parties to address insurance coverage, under dozens of insurance policies purchased in California by a California company and subject to California law (and, at a minimum, not West Virginia law), for more than 3,500 underlying lawsuits related to harm that affiliates of the Bergen Brunswig Corporation allegedly caused in California and elsewhere. In contrast, this case, which involves a dispute over one insurance policy purchased from St. Paul in Pennsylvania by a Pennsylvania company, is being litigated in the Circuit Court because it concerns *only* insurance coverage for the WVAG Lawsuit and the 49 other underlying actions filed in West Virginia that are named in AmerisourceBergen's amended complaint. All 50 of those underlying West Virginia cases are *expressly carved out* from the scope of the California Action.

Since there is no overlap between the underlying claims at issue in the California Action and this case, the Injunction Order instead relies heavily on the fact that ABDC, the Pennsylvania company that filed the instant suit in West Virginia, has a corporate parent, AmerisourceBergen Corporation, that was formed through a merger between Amerisource Health Corporation and the Bergen Brunswig Corporation—years after most of the insurance policies at issue in the California Action expired. But that is far from a sufficient basis to sustain the Circuit Court's Injunction Order. There is no decision in the California Action that will control the Circuit Court's resolution of this case, nor will the California Action impact the timing of the Circuit Court's decision here.

There is not a single precedent in West Virginia or anywhere else that supports an injunction under these circumstances.

The Injunction Order's finding that "parallel proceedings" may delay the ultimate resolution of all issues absent an injunction and thereby harm AmerisourceBergen lacks any evidentiary support. The finding also makes no sense and is clearly erroneous because the only question being litigated in the Circuit Court is insurance coverage for 50 West Virginia underlying cases. That issue is not the subject of any other "parallel proceeding," including the California Action, and therefore there is no possibility of any parallel proceeding delaying the outcome of this case.

In any case, to the extent AmerisourceBergen claims it could be harmed by "parallel proceedings," such harm can be remedied at law. The courts of California and West Virginia are more than capable of managing litigation so as to avoid any undue prejudice. They do so each and every day. The full panoply of legal remedies available to every other party in the California Action is available to AmerisourceBergen, and the California Superior Court is fully capable of adjudicating any such requests. For example, AmerisourceBergen has asked the California Superior Court to dismiss the California Action in favor of this one. The California Superior Court should be afforded the opportunity to rule on that application, not have the result dictated by a judge presiding over a West Virginia Circuit Court.

Second, enforcement of the Injunction Order will irreparably harm St. Paul and infringe on its constitutional right to prosecute an entirely separate pending litigation and to preserve its rights in that litigation. As just one example, St. Paul is required under California rules to respond to the motions to dismiss and to quash that AmerisourceBergen and certain other entities filed *after the Injunction Order was entered*. And yet, AmerisourceBergen has stated that it will argue that St.

Paul will violate the Injunction Order if it defends itself against AmerisourceBergen's initiatives in California. This is gamesmanship of the worst kind. Disputes regarding insurance coverage for more than 3,500 underlying suits are *only* before the California Superior Court—and are not before the Circuit Court below or any other court—and St. Paul has a legal, equitable, and constitutional right to be heard on its claims and defenses with respect to those suits, in accordance with the guarantee of due process of law and the right to petition the courts for timely redress of legitimate legal disputes. See U.S. CONST. amend. V, U.S. CONST. amend. XIV; W. VA. CONST. art. III, § 10; W. VA. CONST. art. III, § 17; CAL CONST. art. I, § 7; U.S. CONST. amend I; W. VA. CONST. art. III, § 16; CAL. CONST. art. I, § 3(a).

Third, the extraordinary nature of the Injunction Order—which precludes St. Paul from participating in litigation concerning insurance coverage for thousands of prescription opioid lawsuits against ABDC and any other affiliated entity in any other court, court system, or jurisdiction other than Boone County, and attempts to control separate pending litigation in the California Action—reflects a stunning disregard for fundamental principles of comity and sovereignty between the courts of different states. As courts have uniformly recognized and cautioned, the issuance of an injunction effectively “enjoining proceedings in another state requires an exceptional circumstance that outweighs the threat to judicial restraint and comity principles . . . for its exercise represents a challenge, albeit an indirect one, to the dignity and authority of that tribunal.” *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697, 705, 708, 59 P.3d 231 (2002), *as modified* (Mar. 5, 2003) (citation omitted). Such exceptional circumstances plainly are not present here, as the courts of the State of California have a compelling interest in resolving the questions at issue in the California Action, which primarily involve whether a California company

and its affiliates are entitled to insurance coverage under policies issued in California and governed by California law for losses that arose in California and elsewhere.

For these reasons, St. Paul respectfully requests that this Court reverse and vacate the Circuit Court's Injunction Order.

IV. STATEMENT REGARDING ORAL ARGUMENT

St. Paul requests oral argument on this appeal. Oral argument is warranted under Rule 20, as this case involves issues of “first impression,” “fundamental public importance,” and “constitutional questions regarding the validity of a . . . court ruling.” W. Va. R. App. P. 20(a). In the alternative, oral argument is also appropriate under Rule 19 because this appeal concerns the Circuit Court's “error in the application of settled law,” “unsustainable exercise of discretion where the law governing that discretion is settled,” and the “insufficient evidence” to support the Circuit Court's ruling. W. Va. R. App. P. 19(a).

V. ARGUMENT

A. Statement Of Jurisdiction And Standard Of Review

This Court has appellate jurisdiction to review “interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief.” *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 844 S.E.2d 133, 137 (W. Va. 2020) (the West Virginia Constitution, article VIII, section 3 grants the Supreme Court of Appeals “appellate jurisdiction of civil cases in equity, includ[ing] a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief” (citing *State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W. Va. 438, 445, 582 S.E.2d 885, 892 (2003))). The Court has regularly considered on direct appeal—and reversed—interlocutory orders imposing preliminary or temporary injunctions. *See, e.g., Markwest Liberty Midstream & Resources v. Nutt*, No. 17-0138, 2018 WL 527209, at *5 (W. Va. Jan. 24, 2018) (memorandum decision) (appeal of order granting preliminary injunction,

order reversed and remanded); *Hart v. NCAA*, 209 W.Va. 543, 550 S.E.2d 79 (2001) (appeal of order awarding preliminary injunction, order vacated); *Wheeling Park Comm'n v. Hotel and Restaurant Employees*, 198 W.Va. 215, 479 S.E.2d 876 (1996) (appeal of preliminary injunction, order reversed and remanded); *Brady v. Smith*, 139 W.Va. 259, 79 S.E.2d 851 (1954) (appeal of order refusing to dissolve temporary injunction, injunction dissolved on appeal).

This Court reviews a Circuit Court's decision to issue a preliminary injunction under an "abuse of discretion standard." *See Ne. Nat. Energy LLC*, 844 S.E.2d at 137. However, the Circuit Court's "underlying factual findings" are reviewed under a "clearly erroneous standard" and all "questions of law" are subject to "de novo" review. *Id.*

B. The Circuit Court Erred In Issuing An Injunction Enjoining The Prosecution Of Separate Litigation Pending In Another State

The Circuit Court exceeded its authority and abused its discretion by issuing a clearly erroneous injunction because there was no clear showing by competent evidence of the requisite criteria for injunctive relief under West Virginia law, or the law of any other state across the country. An injunction may be granted only "in cases of extreme hardship or necessity 'when the right at issue is clearly established and the invasion of the right results in serious injury.'" *Markwest*, 2018 WL 527209, at *3 (citation omitted); *see also, e.g., Martin v. Unsafe Buildings Comm'n of Huntington*, No. 18-0778, 2020 WL 261738, at *4 (W. Va. Jan. 17, 2020) (memorandum decision) (affirming denial of preliminary injunction where movant failed to demonstrate irreparable harm in the absence of injunctive relief). A party seeking a preliminary injunction bears the "burden of demonstrating by a clear showing: (1) the likelihood of irreparable harm . . . ; (2) the absence of other appropriate remedies at law . . . ; and (3) that balancing the potential harm to each [party] and the public at large weighs in favor of the [movant]." *Markwest*, 2018 WL 527209, at *4; *see, e.g., Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752,

760, 575 S.E.2d 362, 370 (2002); *see also* W. Va. R. Civ. P. 65 (requiring a showing that “immediate and irreparable injury, loss, or damage will result to the applicant” in the absence of an injunction).

1. Injunctive Relief Cannot Be Granted Because AmerisourceBergen Failed To Make The Requisite Clear Showing Of Irreparable Harm, The Absence Of Other Appropriate Remedies At Law, And That Balancing The Potential Harm Weighs In Favor Of An Injunction

To be awarded injunctive relief, a movant must demonstrate that irreparable harm will ensue in the absence of an injunction. Yet, none of AmerisourceBergen’s motion papers include a factual affidavit establishing irreparable harm, or any other manner of evidence supporting the requisite criteria for issuance of an injunction under West Virginia law. On this bare record, there is simply no basis upon which an injunction could issue. *See Markwest*, 2018 WL 527209, at *4 (preliminary injunction was improvidently granted by Circuit Court where, *inter alia*, the movant made “no effort to apply the standard criteria for issuing a preliminary injunction, arguing instead, in summary fashion, that the facts involved are unique” and “no evidence whatsoever was offered” to support the issuance of the injunction); *Camden-Clark Mem’l Hosp. Corp.*, 212 W. Va. at 760, 575 S.E.2d at 370 (reversing injunction where Circuit Court failed to properly apply the burden of proof). In fact, there is not even the potential for *any* harm to AmerisourceBergen, let alone *irreparable* harm, in the absence of an injunction prohibiting St. Paul from proceeding with the California Action. AmerisourceBergen is party to dozens of cases in West Virginia and thousands across the country; one more will not cause it irreparable harm. *See, e.g.*, SPApp.0348, 49 (ABDC Dec. 13, 2020 Reply Br., ¶¶ 7, 13).

The Injunction Order’s primary concern appeared to be a perceived similarity of insurance coverage issues between the California Action and this case, despite the absence of such similarity. Even if similarity does exist, however, mere similarity of legal issues does not support an

injunction. It is indisputable that any decisions in the California Action will not dictate the Circuit Court's resolution of this case because the California Court is evaluating insurance coverage under California law (and, at a minimum, not West Virginia law) for an entirely separate set of underlying claims that concern a multitude of policyholders, insurers, and policies that are not involved in this case.

There is also no evidence that there would be unnecessary duplication of efforts between the California Action and the case at bar, and certainly none rising to the level of irreparable harm to AmerisourceBergen that would warrant an injunction. To date, the proceedings below have been tailored to focus solely on the WVAG Lawsuit, and the small set of insurance policies (16) under which AmerisourceBergen has sought coverage from the five defendant-insurers below for the WVAG Lawsuit. Discovery regarding the 49 other Pending West Virginia Prescription Opioid Lawsuits remains stayed pending resolution of the litigation as to the WVAG Lawsuit. *See* SPApp.0018 (Feb. 22, 2018 Stay Or. ¶ 2). To the extent there is any overlapping discovery between this case and the California Action, the courts can, if necessary, require the parties to work together to maximize efficiency and reduce the burden—should any exist—as parties would in the ordinary course in any litigation.

Further, the existence of the California Action will not have any impact on the timing of the Circuit Court's merits rulings in this case. Regardless of the status of the California Action, the Circuit Court will determine the scope of coverage, if any, under the single St. Paul policy at issue here for 50 West Virginia-based lawsuits named in AmerisourceBergen's complaint. Enjoining St. Paul's prosecution of the California Action will not hasten the resolution of coverage questions as to the thousands of other opioid suits that are the subject of the California Action only.

To the contrary, the injunction would, if anything, only further delay determination of whether or not those suits are covered.

To the extent AmerisourceBergen's claims of irreparable harm are based on a theory that litigation of the California Action might lead to a delay in payment by St. Paul (whether by settlement or otherwise), even if that hypothetical scenario were to play out, any cognizable injury could be compensated by money damages and thus would not constitute irreparable harm. "Injunctive relief, like other equitable or extraordinary relief, is inappropriate when there is an adequate remedy at law," such as money damages. *Hechler v. Casey*, 175 W. Va. 434, 440, 333 S.E.2d 799, 805 (1985); see *Radcliff v. Glannon*, No. 2012C0697, 2014 WL 8094939, at *2 (W. Va. Cir. Ct. July 7, 2014) ("money damages . . . have been deemed not to constitute irreparable harm" (citing *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348 (W. Va. 1945); *Wiles v. Wiles*, 58 S.E.2d 601 (W. Va. 1950))). Indeed, potential financial loss is the prime example of harm that can be compensated through a remedy at law—namely, money damages—rendering an injunction unnecessary and unwarranted. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (citation omitted).

AmerisourceBergen also does not contend (nor could it) that it lacks adequate legal remedies with respect to the California Action. AmerisourceBergen is entitled to all of the same legal rights and remedies in the California Court as is every one of the other parties to the California Action. Indeed, AmerisourceBergen has asked the California Superior Court to dismiss the California Action in favor of this one. To the extent that AmerisourceBergen wants the California

Action to be dismissed, or desires any other remedy related to the California Action, Judge Sherman of the California Superior Court—before whom the California Action is pending—is fully capable of adjudicating the request. *See, e.g., Auerbach v. Frank*, 685 A.2d 404, 409 (D.C. 1996) (“concerns such as duplication of parties and issues . . . ordinarily will not be grounds to restrain a party from proceeding with a suit in a court having jurisdiction of the matter,” as such concerns “are better addressed through motions in the other court to stay or dismiss the proceedings, such as on grounds of *forum non conveniens*”).

In contrast to AmerisourceBergen, which made no effort to carry its burden to prove irreparable harm in the absence of an injunction, the Injunction Order plainly will inflict irreparable harm on St. Paul if it is not immediately stayed and ultimately vacated by this Court. It is for this reason that St. Paul is moving both this Court and the Circuit Court for a stay of enforcement of the Injunction Order, pending this Court’s decision on St. Paul’s appeal.

The Injunction Order will inflict irreparable harm upon St. Paul by precluding it from preserving its legal rights in the California Action. Most immediately, St. Paul has both the right and the need to respond to motions to dismiss and to quash that AmerisourceBergen and other entities filed against St. Paul—*after* the Injunction Order had been issued—in order to avoid default on, or waiver of, its claims and defenses in the California Action. Reversal of the Injunction Order—and, as a preliminary step, entry of a stay while this Court reviews St. Paul’s appeal—is essential to protect St. Paul’s rights in the California Action to defend against not only the motions to dismiss and to quash filed by the Bergen Brunswig Affiliates, but also against other cross-claims that already have been and will continue to be asserted against it by other insurers named in the California Action.

Furthermore, as addressed below, *see infra* § V.4, this relief is also necessary to protect St. Paul's constitutional rights to due process and to petition the courts for redress of the legitimate legal disputes concerning questions of insurance coverage for the thousands of opioid claims at issue only in the California Action and under a multitude of policies at issue only in the California Action.

Accordingly, because AmerisourceBergen failed to make any showing of irreparable harm in the absence of injunctive relief, a lack of adequate remedies at law, and the balance of potential harm weighing in favor of an injunction, there was no basis for the Circuit Court's issuance of the injunction. The Injunction Order should be vacated on this basis alone.

2. No Injunction Can Issue Because The California Action Concerns Different Underlying Claims, Parties, And Insurance Policies Than This Case

Courts across the country recognize that an injunction prohibiting a party from participating in a separate legal action is an extraordinary remedy that should be considered only when two actions involve the same claims between the same parties, such that resolution of one action would be arguably dispositive of the other. A threshold question in evaluating a motion for such an injunction is "whether the parties and issues in the two disputes are the same." *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 479 n.15 (4th Cir.), *as amended* (Mar. 27, 2018); *see, e.g., China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36-37 (2d Cir. 1987) (reversing lower court's injunction and explaining that analysis of such a motion begins by determining if parties to the two suits are the same and if one action would be dispositive of the other); *see also, e.g., Temp. Servs. Ins. Ltd. v. O'Donnell*, No. 6:07-cv-1507-Ort-28UAM, 2007 WL 9723208, at *1 (M.D. Fla. Dec. 11, 2007); *Rauland Borg Corp. v. TCS Mgmt. Grp., Inc.*, No. 93 C 6096, 1995 WL 31569, at *3 (N.D. Ill. Jan. 26, 1995). An injunction is inappropriate where the resolution of one action would not be

dispositive of the other. *See, e.g., Temp. Servs. Ins. Ltd.*, 2007 WL 9723208, at *1 (denying motion for injunction where suits involved different parties and resolution of one case would not be dispositive of the other); *Rauland Borg Corp.*, 1995 WL 31569, at *4 (injunction denied where, despite partial overlap of issues, two suits would not have been dispositive of each other).

A comparison of the West Virginia and California Actions makes abundantly clear that there is no relationship between the two actions that provides the Circuit Court with any basis upon which to issue an injunction that results in it controlling coverage litigation that is proceeding in a different state across the country. The California Action involves *entirely different underlying claims* and a multitude of different parties and insurance policies (governed by different controlling law than in this case), as is plainly shown in the summary chart submitted herewith as Exhibit A. The Circuit Court’s judgment on the merits in the case below will be restricted to the question of coverage under a single St. Paul policy issued in 2006 for the 50 West Virginia-based lawsuits identified in AmerisourceBergen’s complaint, *none* of which are at issue in the California Action—in fact, the California Action Complaint *expressly carves out* from the scope of the California Action all 50 of the underlying claims that are the subject of the instant case. Neither the Circuit Court nor AmerisourceBergen cited even a single case in which a West Virginia court—or, for that matter, any other court—issued an injunction under circumstances such as those presented on this appeal.⁷

⁷ *See* SPApp.0086 (Pls. Nov. 19, 2020 Mot. For Injunction, ¶ 43 n.3) (citing *Advanced Bionics Corp.*, 29 Cal. 4th at 706 (denying motion for injunction); *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627-28 (5th Cir. 1996) (granting injunction where party brought “the very same claims” previously filed in a Texas court in a foreign court, despite having previously stipulated that “Texas law . . . would govern any dispute”); *Filler v. Lernout (In re Lernout & Hauspie Secs. Litig.)*, Nos. 00-cv-11589, 02-cv-10302, 02-cv-10303, 02-cv-10304, 2003 U.S. Dist. LEXIS 22466, at *19-20 (D. Mass. Dec. 12, 2003) (district court granted injunction against party that filed ex-parte writ in foreign court seeking to nullify district court’s prior order)); *see also* SPApp.1799, 1804, 1805 (Jan. 7, 2021 Corrected Injunction Or., ¶¶ 91, 125, 127) (citing *Forum Ins. Co. v.*

Inexplicably, and in clear error, the Injunction Order states that the Circuit Court “is unpersuaded” that the California Action Complaint’s carve-out of the underlying cases that are the subject of this case “creates a meaningful distinction between these disputes.” SPApp.1801 (Jan. 7, 2021 Corrected Injunction Or., ¶ 111). But the carve-out could not be clearer: The California Action Complaint expressly states that coverage for the opioid cases that are “the subject of the 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.), . . . is not intended to be the subject of this action.” SPApp.0323 (Nov. 5, 2020 Cal. Action Compl., ¶ 41 n.11). Thus, the California Action concerns only underlying opioid lawsuits that are not at issue here; there is no overlap whatsoever between the underlying claims in the California Action and those before the Circuit Court. To the extent AmerisourceBergen has concerns about the application of the carve-out in the California Action, it can make a motion to Judge Sherman of the California Superior Court, before whom the California Action is pending; petitioning the Circuit Court of Boone County to manage the scope of the California proceedings was blatantly improper and violates the most basic principles of comity between the courts of different states.

The Circuit Court also appeared to be concerned about the existence of a federal prescription opiate multi-district litigation (“Opioid MDL”). But the Opioid MDL, which involves only pre-trial proceedings for certain underlying opioid-related cases, is irrelevant here. Only the 50 West Virginia-based lawsuits named in AmerisourceBergen’s complaint are at issue in this

Bristol-Myers Squibb Co., 929 S.W.2d 114, 118-19 (Tex. App. 1996), writ denied (Feb. 21, 1997) (first-filed suit involved 286 parties and 135 defendants and second-filed suit addressed “identical issue” (emphasis added)); *First State Ins. Co. v. Minnesota Min. & Mfg. Co.*, 535 N.W.2d 684, 687-88 (Minn. Ct. App. 1995) (all parties to second action were parties to the first action, first action was *more comprehensive*, and “issue of insurance coverage [was] identical factually and legally” (emphasis added)); *Am. Int’l Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d 337, 340-42 (Tex. App. 2001) (injunction granted based on policy’s “service of suit” provision)).

case; none of the thousands of other opioid suits in the Opioid MDL are before the Circuit Court below. And, in any case, numerous underlying opioid suits at issue in the California Action have *not* been transferred to the Opioid MDL.⁸

Lacking any overlap between the underlying claims at issue in the California Action and this case, the Injunction Order instead rests heavily on the fact that ABDC's corporate parent was formed through a merger between Amerisource Health Corporation and the Bergen Brunswig Corporation—an event that took place years after most of the insurance policies at issue in the California Action expired. But that is far from a sufficient basis to sustain the Circuit Court's Injunction Order.

Suppose, for example, that a multi-national energy corporation headquartered in Arizona filed suit in California seeking insurance coverage for claims that arose in California. And assume that this Arizona energy company acquired a local West Virginia coal company that had its own line of insurance for decades. Could one seriously contend that the West Virginia coal company and its insurers could never litigate in West Virginia over claims that arose in West Virginia, simply because the coal company was acquired by an out of state entity? But that is precisely what the Circuit Court's order finds. Neither the Circuit Court nor AmerisourceBergen identified any authority or precedent for such a ruling.

Given that there are *zero* underlying lawsuits for which insurance coverage is at issue that overlap between the West Virginia and the California Action, the Circuit Court's rationale for the injunction instead rests largely on the premise that the California Action implicates certain legal

⁸ The cases that have not been transferred to the Opioid MDL include, among many others, actions pending in state and federal courts in California. *See* Docket, *City and County of San Francisco, et al. v. Purdue Pharma L.P., et al.*, No. 3:18-cv-07591-CRB (N.D. Cal.); Docket, *City of El Monte, et al. v. Purdue Pharma L.P., et al.*, No. 19-STCV-10532 (Cal. Super. Ct.); Docket, *County of Kern, et al. v. Purdue Pharma L.P., et al.*, No. BCV-19-100861 (Cal. Super. Ct.).

issues that have been raised in the case below as well. But the Circuit Court’s decision concerning the viability of St. Paul’s contract arguments as to the WVAG Lawsuit under Pennsylvania law⁹ will not bind the California Superior Court or the courts of other states in resolving how such defenses might apply to other underlying lawsuits with different factual allegations and proof under the laws of their respective states. There is no indication that Pennsylvania law will apply to the contract issues arising out of insurance policies issued in California to a California company—as is the case for numerous policies at issue in the California Action. More broadly, mere overlap of legal defenses or the fact that two actions implicate the same or similar policy language cannot possibly justify an injunction. *See, e.g., Total Minatome Corp. v. Santa Fe Minerals, Inc.*, 851 S.W.2d 336, 341 (Tex. App. 1993) (reversing trial court’s injunction where movant “ha[d] shown only it may be inconvenienced and that the two courts may in the end address the same or similar issues,” which “is not enough” “to show a clear equity entitling it to injunctive relief” and “failed to prove any irreparable injury for which it had no adequate remedy at law”).

Taken to its logical conclusion, the Circuit Court’s Injunction Order would require that every insurance coverage action concerning underlying opioid lawsuits filed against AmerisourceBergen—irrespective of where the alleged harm occurred or where the events relevant to the contract occurred—must be heard in Boone County, West Virginia. There is no authority or precedent for such a result.

Because there is no overlap between the claims involved in the West Virginia and California Actions such that resolution of one action will be dispositive of the other, and the two actions involve a multitude of different parties and insurance policies, the Injunction Order

⁹ As the Circuit Court noted in a November 23, 2020 Order, “Pennsylvania law governs the interpretation of the St. Paul Policy” at issue in this case. SPApp.0128 (Nov. 23, 2020 Order on St. Paul’s Mot. for SJ ¶ 63).

enjoining St. Paul from proceeding with the California Action is clear error that departs from established case law across the country and should be reversed.

3. The Injunction Violates Fundamental Principles Of Comity, Federalism, And Sovereignty Of The Courts Of Different States

Issuance of an injunction that results in “enjoining proceedings in another state requires an exceptional circumstance that outweighs the threat to judicial restraint and comity principles . . . for its exercise represents a challenge, albeit an indirect one, to the dignity and authority of that tribunal.” *Advanced Bionics Corp.*, 29 Cal. 4th 697, 705, 708 (citation omitted). Because such exceptional circumstances were not present here, the Circuit Court’s entry of the Injunction Order vastly exceeded its legitimate authority and jurisdiction and should be vacated.

The courts of the State of California have a compelling interest in managing litigation like the California Action, which involves insurance policies issued to a California company and underlying opioid-related lawsuits filed in California. Indeed, California law will be front and center in the California Action. For example, California Insurance Code Section 533 expressly provides that “[a]n insurer is not liable for a loss caused by the willful act of the insured” Cal. Ins. Code § 533. In a case analogous to the California Action that involved a manufacturer of lead paint that sought more than \$100 million in coverage for underlying litigation filed against it concerning public harm caused by its products, a California court recently held that insurance coverage is precluded where, as here, a company “willfully promoted [a product] with actual knowledge of its hazards.” *Certain Underwriters at Lloyd’s of London, et al. v. ConAgra Grocery Prods. Co., et al.*, No. CGC-14-536731, 2020 WL 3096821, at *2-3, 6-7 (Cal. Super. Ct. Feb. 26, 2020). Likewise, a California appellate court ruled in 2017 that an insurer had no coverage obligations under California law for suits brought by municipalities alleging that a drug manufacturer engaged in a deceptive opioid marketing campaign. *See Travelers Prop. Cas. Co.*

of Am. v. Actavis, Inc., 16 Cal. App. 5th 1026, 1038-42 (Cal. Ct. App. 2017). A California court is best suited to address the application of California Insurance Code Section 533.

Thus, fundamental principles of comity between the courts of different states underscore the Circuit Court's clear error in issuing an injunction precluding St. Paul from proceeding with litigation of the California Action in California State Court. See, e.g., *TSMC N. Am. v. Semiconductor Mfg. Int'l Corp.*, 161 Cal. App. 4th 581, 596-97, 74 Cal. Rptr. 3d 328, 339-40 (2008) (declining to enjoin second-filed foreign proceeding based on principles of comity, where party to second-filed action represented "that it [would] not ask the [foreign] court to enjoin the [initial] litigation"); see also, e.g., *Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877, 887 (3d Cir. 1981), *aff'd sub nom. Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (lower court abused its discretion and compromised "the comity . . . owe[d] to courts of other jurisdictions" when it enjoined insurer's action in foreign court solely because foreign action was "delay[ed]" and "duplicative"); *China Trade & Dev. Corp.*, 837 F.2d at 36 (respecting principles of comity, when two courts have concurrent jurisdiction, "one court will ordinarily not interfere with or try to restrain proceedings before the other"); *Teck Metals Ltd. v. Certain Underwriters at Lloyd's, London*, No. CV-05-411-LRS, 2009 WL 4716037, at *3 (E.D. Wash. Dec. 8, 2009) (party could not enjoin action in Washington because injunction would frustrate the State of Washington's compelling interest in resolving insurance litigation involving liabilities within the state); *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 444-445 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003) (comity concerns are heightened where injunction would preclude litigation in the forum where the alleged injury occurred and whose laws are being invoked).

4. The Injunction Infringes St. Paul's Constitutional Rights

The Injunction Order should be vacated because it infringes on St. Paul's constitutional right to defend itself from the claims asserted against it in the California Action, as well as its rights to petition the courts for timely redress of active disputes between St. Paul and the more than 70 other insured entities and insurance companies that are named *only* in the California Action (and are not party to this case) concerning more than 3,500 underlying opioid lawsuits that are not before the Circuit Court in this case. These 3,500+ claims are *only* before the California Superior Court, and are not before any other court, but the Injunction Order purports to preclude St. Paul from having them heard in the California Superior Court—or *anywhere* but Boone County, which has no basis for adjudicating insurance coverage cases based on liabilities arising out of California under insurance policies issued in California to a California company.

Moreover, St. Paul is a defendant against cross-claims in the California Action, against which it has a legal, equitable, and constitutional right to defend in accordance with the constitutional guarantee of due process of law. *See Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983) (“the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances”) (citation omitted); *id.* at 753 (“the Constitution protects a person’s right to file and to prosecute a lawsuit in state court”) (Brennan, J., concurring); U.S. CONST. amend I; W. VA. CONST. art. III, § 16; CAL. CONST. art. I, § 3(a); *see also Bounds v. Smith*, 430 U.S. 817, 828 (1977) (recognizing “fundamental constitutional right of access to the courts” under the due process clause); U.S. CONST. amend. V; U.S. CONST. amend. XIV; W. VA. CONST. art. III, § 10; W. VA. CONST. art. III, § 17; CAL CONST. art. I, § 7.

5. The Filing Of The California Action Did Not Violate The Circuit Court's February 2018 Stay Order

There is no basis in law or fact for the Circuit Court's ruling (adopted verbatim from the draft proposed order submitted by AmerisourceBergen) that the filing of the California Action "violate[d] . . . the terms and the spirit" of the Circuit Court's February 22, 2018 Stay Order.

The Stay Order states, in relevant part, that "[l]itigation of ABDC's claim for coverage with respect to the *Pending West Virginia Actions* is stayed until further notice." SPApp.0018 (Feb. 22, 2018 Stay Or. ¶ 2) (emphasis added). By contrast, the California Complaint expressly states that the underlying West Virginia-based actions pending before the Circuit Court are excluded from the scope of the California Action. See SPApp.0323 (Nov. 5, 2020 Cal. Action Compl., ¶ 41 n.11) ("cases brought by certain West Virginia governmental entities against ABC and its affiliates is the subject of litigation pending in West Virginia . . . and is not intended to be subject to this action").

It is clear from the face of the California Action Complaint that St. Paul has not taken any action to litigate AmerisourceBergen's claim for coverage with respect to the "Pending West Virginia Actions" subject to the February 22, 2018 Stay Order. Instead, the California Action seeks only to resolve coverage questions with respect to underlying opioid lawsuits *other than* those being litigated in this case. Those coverage questions will be evaluated under different facts, different states' laws, and varying legal standards that are not applicable in the "West Virginia Actions," and vice versa. There is simply no overlap between the 50 underlying lawsuits governed by the Stay Order and the more than 3,500 suits at issue in the California Action. The Circuit Court's ruling that the Stay Order had been violated is clearly erroneous; the Injunction Order should be reversed on this basis alone.

VI. CONCLUSION

For the reasons set forth herein, St. Paul respectfully requests that this Court reverse and vacate the Circuit Court's January 7, 2021 Corrected Order Granting Plaintiffs' Motion For Injunction.

Dated: January 19, 2021

**ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,**

By Counsel,



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VERIFICATION

I, Lee Murray Hall, counsel for Petitioner St. Paul Fire and Marine Insurance Company, verify that the factual discussion and legal argument addressed herein are true and accurate to the best of my belief.



Lee Murray Hall (WVSB #6447)

**ST. PAUL FIRE AND MARINE INSURANCE COMPANY'S
EXHIBIT A**

	<u>California Action</u>	<u>West Virginia Action</u>	<u>Overlap</u>
Underlying Cases	<ul style="list-style-type: none"> • 3,500+ opioid-related suits <ul style="list-style-type: none"> ◦ Includes 80+ suits originally filed in CA state and federal courts¹ 	<ul style="list-style-type: none"> • 50 opioid-related suits identified in ABDC's amended complaint² 	<ul style="list-style-type: none"> • None³
Policyholders/ Insured Entities	<ul style="list-style-type: none"> • Eight (8) affiliates of Bergen Brunswig Corp. 	<ul style="list-style-type: none"> • Two (2) insured entities 	<ul style="list-style-type: none"> • Two (2) out of eight (8) insured entities
Insurers	<ul style="list-style-type: none"> • 75 insurers 	<ul style="list-style-type: none"> • Five (5) insurers 	<ul style="list-style-type: none"> • Five (5) out of 75 insurers

¹ See SPApp.0310, 0320-21 (Nov. 5, 2020 Cal. Action Compl., ¶¶ 3, 34).

² These include *State of West Virginia v. AmerisourceBergen Drug Corp., et al.*, No. 12-C-141 (W. Va. Cir. Ct., Boone Cty.) and 49 cases identified in AmerisourceBergen's July 18, 2018 amended complaint. See SPApp.0032-46 (Pls. July 18, 2018 Am. Compl., ¶¶ 40-89).

³ See SPApp.0323 (Nov. 5, 2020 Cal. Action Compl., ¶ 41 n.11) ("In 2017, ABC 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 ABC 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 THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. _____

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,

Defendant Below,
Petitioner,

v.

AMERISOURCEBERGEN DRUG
CORPORATION, and BELLCO DRUG
CORPORATION,

On appeal from the Circuit Court
of Boone County, West Virginia
(Civil Action No. 17-C-36)

Plaintiffs Below,
Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, hereby certifies that on this 19th day of January, 2021, a true copy of the foregoing "*Petitioner St. Paul Fire and Marine Insurance Company's Opening Brief*" and "*Appendix*", were served upon the following individuals by e-mail:

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