

**FILE COPY**

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

**No. 21-0036**

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

*Defendant Below, Petitioner,*

**and**

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

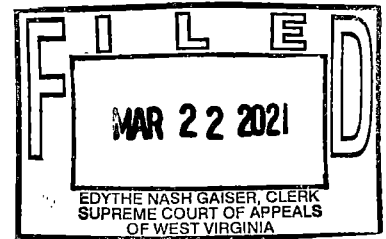
*Defendants Below, Intervenor-Petitioners,*

**v.**

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

*Plaintiffs Below, Respondents.*

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

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J. Zak Ritchie (WVSB #11705)  
*Counsel of Record*  
HISSAM FORMAN DONOVAN RITCHIE PLLC  
P.O. Box 3983  
Charleston, WV 25339  
(681) 265-3802 *office*  
(304) 982-8056 *fax*  
zritchie@hfdrlaw.com

## PRELIMINARY STATEMENT

The claimed risk of inconsistent rulings between the California Action and this action does not justify the sweeping, nationwide injunction ordered by the Circuit Court. As set forth in St. Paul’s reply, which ACE joins, well-established law governing anti-suit injunctions requires more for such extraordinary relief. Among other things, the parties and issues in the California Action and this action are not the same, and neither action can dispose of the other. Moreover, the Order overreaches because such a drastic remedy is unnecessary. As AmerisourceBergen’s stay motions in the California Action show, the proper means to address its purported concerns while avoiding prejudice to other parties is to seek relief in that court, which has the tools to address such concerns.

Beyond all that—even if one assumes there is a risk of harm to AmerisourceBergen from inconsistent rulings—the Order should be reversed because it violates the fundamental rule that equitable relief is not appropriate when it will not serve its intended purpose: “equity will not do a useless thing.” The Order cannot, and does not, enjoin litigation by parties that are not before the Circuit Court. It therefore cannot prevent the inconsistent rulings that AmerisourceBergen purportedly fears. Worse still, the Order is *inequitable*, because it allows AmerisourceBergen and other insurers to litigate the rights and obligations of ACE and St. Paul, while preventing ACE and St. Paul from fully participating in the California Action or coverage litigation elsewhere. And the motions to stay in the California Action show that such extraordinary relief is unnecessary.

## ARGUMENT

AmerisourceBergen does not dispute the bedrock principle that “equity never does a useless thing.” *Kennewig Co. v. Moore*, 49 W. Va. 323, 38 S.E. 558, 558 (1901).<sup>1</sup> That rule requires reversal of the Order, because the Order cannot halt the California Action or other

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<sup>1</sup> See also 30A C.J.S. Equity § 16 (“A court sitting in equity will not do, or require the doing of, a vain or useless thing; it will not use its authority to accomplish a useless purpose[.]”); ACE Opening Brief 3 & n.4.

coverage actions that may be brought by AmerisourceBergen’s insurers who are not defendants here. AmerisourceBergen strains to identify some useful purpose for the Order, arguing that it at least “remove[s] the primary layer policies [at issue before the Circuit Court] from the California case.” ABDC Br. 34. But AmerisourceBergen and the Order assert that the cross-claims of the additional insurers in the California Action involve the “exact same policy terms” at issue before the Circuit Court, Order at ¶ 107; *see also* ABDC Br. 5–6, 9, 22–24, 34 n.15. Therefore—in AmerisourceBergen and the Circuit Court’s own view—the injunction will not avoid any alleged risk of inconsistent rulings (or any other ostensible harm). But the Order *will* harm ACE and St. Paul by requiring them to sit on the sidelines while others litigate issues that impact their rights.

As discussed in ACE’s opening brief, *North River* is on point. There, the court refused to grant an anti-suit injunction that would not accomplish what the movant sought—to prevent “the possibility of inconsistent adjudications” as to an insurance policy. *North River Ins. Co. v. Mine Safety Appliances Co.*, No. 8456-VCG, 2013 WL 6713229, at \*8 (Del. Ch. Dec. 20, 2013), *aff’d*, 105 A.3d 369 (Del. 2014), *as revised* (Nov. 10, 2014). *North River* explained that an injunction would not avoid inconsistent rulings—making it “inevitably ineffective”—because the court could not stop other non-enjoined parties from “continu[ing] to litigate the [insurance] issue in their declaratory judgment actions.” *Id.* at \*1.<sup>2</sup> Moreover, *North River* recognized that enjoining a party from participating in litigation that will proceed despite the injunction would “inequitably preclude [the enjoined party] from protecting its rights under” the insurance policy at issue. *Id.* at \*9.

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<sup>2</sup> AmerisourceBergen asserts in passing that “this specific argument” was not raised below. ABDC Br. 32. That is incorrect. ACE argued below that “the California Action involves additional plaintiffs and dozens of additional insurer defendants who are *not* before this Court” and who “cannot be enjoined,” and that, accordingly, the injunction was useless. SPApp.0343 ¶ 2 (“AmerisourceBergen seeks relief this [Circuit] Court cannot grant”). In addition, ACE’s proposed findings of fact and conclusions of law explained that an injunction would be improper because the California Action would proceed “even if this [Circuit] Court granted AmerisourceBergen’s motion,” prejudicing ACE. SPApp.0497–0498, ¶¶ 6–7 (citing *North River*).

*North River's* reasoning applies with equal force here. *First*, the Circuit Court's Order will not prevent the asserted risk of inconsistent rulings. The Order does not halt the California Action, which involves cross-plaintiffs who are not parties here, who thus are not enjoined, and who have asserted their own coverage claims against AmerisourceBergen.<sup>3</sup> The Order also does not prevent insurers who are not parties here from litigating their rights anywhere else outside West Virginia. AmerisourceBergen itself argues that these insurers' claims implicate the same "key provisions of the primary layer policies" "before the West Virginia court." ABDC Br. 9. Assuming that is true, the Order cannot achieve its supposed purpose of preventing inconsistent rulings. Nor will it prevent any other ostensible harm, such as the burden of additional discovery.<sup>4</sup>

*Second*, the Order inequitably limits ACE and St. Paul's ability to protect their rights in the California Action—or any other action brought by insurers who are not parties here—where claims for insurance coverage and contribution for the thousands of underlying claims at issue will be litigated by other parties, *including AmerisourceBergen*. Such a result is unfair and inequitable. *See North River*, 2013 WL 6713229, at \*9; *cf. Beloit Foundry Co. v. Ryan*, 192 N.E.2d 384, 392 (Ill. 1963) ("A court of chancery . . . will not require the doing of an act which will result in little benefit to one but great hardship to another."). AmerisourceBergen's injunction motion did not present any argument as to why ACE should be enjoined, much less address the harm to ACE if it could not litigate in the California Action on the same basis as other insurers. *See* SPApp.0076.

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<sup>3</sup> *See* SPApp.1867; SPApp.1988; ACEApp.035; ACEApp.056; ACEApp.074; ACEApp.092 (cross-complaints of National Union, Arrowood, Hartford, North American Capacity, American Alternative, and Gemini). The California Action also involves additional plaintiff-insurers who are not parties here. *See* SPApp.0307. ACEApp. pages above 055 refer to the Supplemental Appendix filed today.

<sup>4</sup> AmerisourceBergen's assertion that additional discovery in the California Action would be "duplicative" or "wasteful" is incorrect. To the extent AmerisourceBergen already has produced relevant materials in this action, it should be simple to re-produce them in the California Action. And, because the California Action concerns thousands of underlying claims and parties and policies not at issue here, the discovery as to those matters will not be "duplicative." The Circuit Court and the California court are no doubt capable of supervising the parties before them to ensure discovery is conducted efficiently.

AmerisourceBergen's opposition brief here is conspicuously silent on this point.

AmerisourceBergen's response to *North River* falls flat. It first says the case is not on point because the California Action is not "a lawsuit initiated by a true third-party." ABDC Br. 34. This is inaccurate. The California Action involves cross-plaintiffs and plaintiffs who are separate, distinct insurance companies that issued their own policies. The six cross-plaintiffs are unaffiliated with any parties in this action, and under California law, "[a] complaint and cross-complaint are, for most purposes, treated as independent actions." *Westamerica Bank v. MBG Indus., Inc.*, 158 Cal. App. 4th 109, 134 (2007) (quotation marks and citation omitted). And it is undisputed that the cross-plaintiffs are not, and cannot be enjoined by the Order, nor can the additional plaintiffs.

AmerisourceBergen's other argument fares no better. It insists *North River* is inapplicable because there "the allegedly duplicative lawsuit[s] would proceed, pursuant to a specific state statute, and would result in legal findings on the terms of the very policies at issue," while "[h]ere, enjoining St. Paul and ACE would, at a minimum, remove the primary layer policies from the California case," "protect the Circuit Court's jurisdiction," and prevent "interferen[ce]" by the California court. ABDC Br. 34. But this contradicts what both AmerisourceBergen and the Order elsewhere state. AmerisourceBergen says the cross-claims "necessarily depend[] o[n] the construction of the primary policies' language." ABDC Br. 34 n.15.<sup>5</sup> The Order similarly states that "coverage under those excess policies would be determined by evaluating the exact same policy terms and conditions that have been before this Court." Order ¶ 107. Because the cross-claims will proceed in California, the alleged risk of inconsistent rulings will remain *according to the Order's and AmerisourceBergen's own logic*, and the Order cannot fulfill its intended purpose.

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<sup>5</sup> This is inaccurate, because several policies at issue in the California Action but not here are primary policies issued by other insurers, which do not "follow form" from policies at issue here. *See* ACEApp.119. Further, while ABDC refers to ACE's policies as "primary," they are in fact first-layer excess policies.

The California court's order of a partial stay, *solely* "as to plaintiffs' Complaint," ABDC-App.017, does not alter that calculus, as it leaves the cross-claims unaffected. Nor would AmerisourceBergen's pending motion to stay certain cross-claims—even if it were granted—make the injunction serve any useful purpose. AmerisourceBergen represents in its stay motion that *it is willing to litigate the cross-claims in any one of "multiple . . . alternative forums,"* even though the cross-claims purportedly involve "the exact same coverage issues" as those here. ACEApp.127, 131 (emphasis added). Thus any risk of inconsistent rulings from the cross-claims remains, regardless of any stay. Further, the stay motion underscores that AmerisourceBergen has always had adequate remedies in the California court to address its purported concerns. In short, the stay motion shows that—as comity requires—the California court, not the Circuit Court, is the proper court to determine the scope of the California Action. *See* St. Paul Reply 10.

ACE does not, as AmerisourceBergen claims, "concede[] the potential for harm from inconsistent rulings." ABDC Br. 38 n. 18. On the contrary, as explained in St. Paul's reply, the Order is improper because the parties and issues presented in the two coverage actions are *not* the same, any risk of inconsistent rulings is *not* a sufficient basis for an anti-suit injunction, and the California Action does *not* threaten the Circuit Court's jurisdiction. *See* St. Paul Reply 11–18. Although AmerisourceBergen asserts that only St. Paul and ACE issued relevant primary policies (actually first-layer excess policies), that is wrong—AmerisourceBergen seeks coverage under other primary policies, and those policies are at issue in the California Action. *See supra* n.5.

ACE's point—supported by bedrock equity jurisprudence—is that even if there is a risk of inconsistent rulings, *see* ACE Br. 2–3 (addressing harms existing "*according to the Circuit Court*" and as "*identified by AmerisourceBergen*") (emphasis added), the Order will not prevent them and therefore the Order was issued in error. AmerisourceBergen cannot show otherwise.

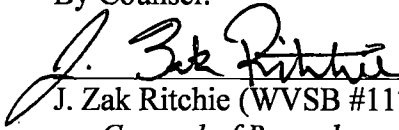
**CONCLUSION**

The Order should be reversed.

Respectfully submitted,

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

By Counsel:

  
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J. Zak Ritchie (WVSB #11705)  
*Counsel of Record*

HISSAM FORMAN DONOVAN RITCHIE PLLC  
P.O. Box 3983  
Charleston, WV 25339  
(681) 265-3802 *office*  
(304) 982-8056 *fax*  
zritchie@hfdrlaw.com

Matthew J. Perry (WVSB #8589)  
LAMP BARTRAM LEVY TRAUTWEIN & PERRY PLLC  
720 Fourth Avenue  
P.O. Box 2488  
Huntington, WV 25725  
(304) 523-5400 *office*  
(304) 523-5409 *fax*  
mperry@720legal.com

Michael S. Shuster (*pro hac vice application pending*)  
James M. McGuire (*pro hac vice application pending*)  
Blair E. Kaminsky (*pro hac vice application pending*)  
Daniel M. Sullivan (*pro hac vice application pending*)  
Matthew Gurgel (*pro hac vice application pending*)  
HOLWELL SHUSTER & GOLDBERG LLP  
425 Lexington Avenue  
New York, NY 10017  
(646) 837-5151 *office*  
(646) 837-5150 *fax*  
mshuster@hsgllp.com  
jmcguire@hsgllp.com  
bkaminsky@hsgllp.com  
dsullivan@hsgllp.com  
mgurgel@hsgllp.com

Robert Mangino (*pro hac vice application pending*)

CLYDE & Co. US LLP

200 Campus Drive, Suite 300

Florham Park, NJ 07932

(971) 210-6700 *office*

(971) 210-6701 *fax*

robert.mangino@clydeco.us

Susan Koehler Sullivan (*pro hac vice application pending*)

CLYDE & Co. US LLP

355 Grand Avenue, Suite 1400

Los Angeles, CA 90071

(213) 358-7600 *office*

(213) 358-7650 *fax*

susan.sullivan@clydeco.us

Dated: March 22, 2021



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 22, 2021, I caused a copy of the foregoing to be served on the parties by U.S. Mail and email:

Thomas E. Scarr  
Lee Murray Hall  
Sarah A. Walling  
Jenkins Fenstermaker, PLLC  
P.O. Box 2688  
Huntington, WV 25722-2688  
tes@jenkinsfenstennaker.com  
lmh@jenkinsfenstermaker.com  
saw@jenkinsfenstermaker.com


Andrew T. Frankel  
Bryce L. Friedman  
Matthew C. Penny  
SIMPSON THACHER & BARTLETT LLP  
425 Lexington Avenue  
New York, NY 10017-3954  
Telephone: (212) 455-2000  
Fax: (212) 455-2502  
E-mail: afrankel@stblaw.com  
bfriedman@stblaw.com  
matthew.penny@stblaw.com

Charles S. Piccirillo (WVSB# 2902)  
Todd A Mount (WVSB# 6939)  
Shaffer & Shaffer PLLC  
330 State Street  
P.O. Box 38  
Madison, WV 25130  
cpiccirillo@shafferlaw.net  
tmount@shafferlaw.net

Courtney C.T. Horrigan  
Dominic I. Rupprecht  
REED SMITH LLP  
225 Fifth Avenue  
Pittsburgh, Pennsylvania 15222  
Telephone: (412) 288-3131  
E-mail: chorrigan@reedsmith.com  
drupprecht@reedsmith.com

Douglas R. Widin

REED SMITH LLP  
Three Logan Square  
1717 Arch Street, Suite 3100  
Philadelphia, Pennsylvania 19103  
Telephone: (215) 851-8170  
E-mail: [dwidin@reedsmith.com](mailto:dwidin@reedsmith.com)

  
J. Zak Ritchie (WVSB #11705)