IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 21-0036

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Defendant Below,
Petitioner,

v.

AMERISOURCEBERGEN DRUG CORPORATION and BELLCO DRUG CORPORATION,

Plaintiffs Below,
Respondents,

and

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

Defendants Below,
Intervenors-Petitioners.

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 REPLY BRIEF

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Petitioner St. Paul Fire and Marine Insurance Company submits this reply brief in further support of its appeal and in response to the March 1, 2021 brief of Respondents AmerisourceBergen Drug Corporation and Bellco Drug Corporation ("ABDC Br.").[1] St. Paul joins in the additional assignment of error presented in the February 9, 2021 brief of Intervenors-Petitioners ACE American Insurance Company and ACE Property & Casualty Insurance Company (together, "ACE"). St. Paul respectfully requests that this Court reverse and vacate the Circuit Court's January 7, 2021 Corrected Order Granting Plaintiffs' Motion For Injunction.

I. SUMMARY OF ARGUMENT

Respondents' brief underscores that the Injunction Order should be vacated because it reflects an extraordinary exercise of authority the Circuit Court does not have, is untethered from any precedent of this Court (or any other court), and was issued despite AmerisourceBergen's failure to adduce any record evidence establishing the bedrock requirements for injunctive relief under West Virginia law—including irreparable harm, a lack of adequate remedies at law, and a balancing of hardships between the parties and the public.

Moreover, and critically, courts across the country roundly recognize that an injunction precluding the prosecution of separate litigation pending in another jurisdiction may not be issued unless the parallel cases concern the same underlying claims between the same parties. Yet, Respondents *concede* that this case concerns *only* their request for insurance coverage for opioid-related lawsuits filed in West Virginia, while the California Action concerns the question of insurance coverage for thousands of distinct underlying lawsuits filed in California and elsewhere, which are not at issue here. Indeed, AmerisourceBergen has expressly affirmed and the Circuit

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[1] Unless otherwise noted, capitalized terms are defined in St. Paul's January 19, 2021 opening brief ("St. Paul Op. Br.").

Court has recognized that this case is only about insurance coverage for opioid claims that were brought against AmerisourceBergen in West Virginia. Based on these concessions, the Injunction Order should be vacated because no decision by the California Superior Court will be dispositive of the Circuit Court's resolution of coverage questions related to the entirely distinct—and comparatively narrow—set of West Virginia-based lawsuits at issue in this case. Neither of the actions can dispose of the other, which is a threshold requirement for an injunction prohibiting litigation before a court of another state.

Without any evidence or precedent to support the Injunction Order, Respondents resort to spurious assertions that the injunction is justified because St. Paul purportedly delayed bringing the California Action and, through that litigation, seeks a "do over" of the Circuit Court's rulings in this case. A simple glance at the calendar dispels these claims. The California Action was commenced only days after a proposed global settlement of thousands of underlying opioid-related claims filed in jurisdictions outside of West Virginia was publicly reported, and it seeks a determination of the scope of coverage, if any, that may be owed by a multitude of insurers for those very claims. Moreover, the California Action was filed weeks *before* the Circuit Court below issued its first (and, to date, only) decision touching on the merits of the parties' claims and defenses in this case.

Furthermore, Respondents cannot meaningfully deny that the Injunction Order threatens fundamental principles of comity that underpin the relations between the courts of West Virginia and its sister states, nor should this Court ignore the constitutional harms that the Injunction Order inflicts upon St. Paul, ACE, and the other defendants in this case.

Accordingly, the Injunction Order should be vacated.

II. ARGUMENT

A. The Injunction Should Be Vacated Because AmerisourceBergen Failed To Make The Requisite Showing Of Irreparable Harm, An Absence Of Other Appropriate Remedies At Law, And That A Balancing Of Potential Harm Weighed In Favor Of An Injunction

Respondents' brief confirms that the Injunction Order cannot stand because AmerisourceBergen did not even attempt to make the requisite clear evidentiary showing of the necessary elements for injunctive relief under West Virginia law.

As this Court has explained, "Rule 65 of the West Virginia Rules of Civil Procedure and West Virginia Code § 53-5-1 *et seq*. govern the issuance of injunctions." *Camden-Clark Memorial Hosp. Corp. v. Turner*, 212 W.Va. 752, 757, 575 S.E.2d 362, 367 (2002). AmerisourceBergen invoked these rules when it moved the Circuit Court to enter the Injunction Order. *See* SPApp.0076 (ABDC Nov. 19, 2020 Injunction Mot. Op. Br. at 1). In turn, the Injunction Order was expressly premised on the Circuit Court's authority to issue injunctions "pursuant to West Virginia Code § 53-5-1 *et seq.* and Rule 65 of the West Virginia Rules of Civil Procedure." SPApp.1810 (Injunction Or., ¶ 163).

This Court "has consistently articulated the criteria for preliminary injunction relief" under Rule 65 and West Virginia Code § 53-5-1 *et seq*., explaining that a movant must demonstrate its entitlement to an injunction by making a "clear showing" of the following factors:

> [A] reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.

Markwest Liberty Midstream & Res. v. Nutt, No. 17-0138, 2018 WL 527209, at *3 (W. Va. Jan. 24, 2018) (memorandum decision) (quoting *State ex rel. McGraw v. Imperial Mktg.*, 196 W. Va.

346, 352 n.8, 472 S.E.2d 792, 798 n.8 (1996); *Jefferson Cty. Bd. of Educ. v. Jefferson Cty. Educ. Ass'n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990)) (internal quotation marks omitted).

Yet, AmerisourceBergen now argues on appeal that the "traditional injunction factors" that govern Rule 65 and West Virginia Code § 53-5-1 *et seq.* "do not apply" to the Injunction Order. ABDC Br. at 36. In other words, according to AmerisourceBergen, a West Virginia Circuit Court may issue an injunction *without regard* to whether the movant has demonstrated irreparable harm, or a lack of adequate remedies at law, or any of the other mandatory criteria required for the issuance of an injunction under West Virginia law—so long as the injunction precludes the prosecution of separate litigation pending before the courts of other states. This argument is baseless. AmerisourceBergen cites a single West Virginia case, *State v. Fredlock*, 52 W. Va. 232, 43 S.E. 153 (1902), a 119-year-old decision that does not support its position. Far from articulating an exception to the "traditional" rules governing injunctive relief, the Court explained in *Fredlock* that an injunction prohibiting a party from prosecuting a separate case pending in another court can be awarded only to prevent "an injury . . . wholly remediless at law" (*id.* at 159)—in other words, *to prevent irreparable harm in the absence of any other appropriate remedy at law*, precisely the elements that this Court has consistently held are required for any injunction to be issued under West Virginia law (*see supra* at 3-4).[2]

AmerisourceBergen seeks to end-run West Virginia's legal standards for injunctive relief because it failed to provide the Circuit Court with any evidence to demonstrate irreparable harm

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[2] AmerisourceBergen's reference to a federal court decision from outside of West Virginia, *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2006), is to no avail. The cited passage merely states that, rather than needing to show "a likelihood of success on the merits" of the underlying claim, the court determined that the preliminary injunction standard required the movant that sought an injunction precluding litigation pending in another court to demonstrate the "merits" of issuing such an injunction. *Id.* at 990-91.

in the absence of an injunction, the lack of adequate remedies at law, and that a balancing of harms between the parties and the public weighed in favor of the Injunction Order. Indeed, unable to point to any affidavit or other record evidence that it supplied the Circuit Court in support of its motion, AmerisourceBergen argues that *no evidence was required* because "the harms are self-evident." ABDC Br. at 38. Such naked, circular arguments for injunctive relief are precisely what this Court rejected in *Markwest*, where an injunction was reversed for abuse of discretion because the movant had made "no effort to apply the standard criteria" for injunctive relief, produced "no evidence" in support of its motion, and instead merely argued "in summary fashion" that an injunction was justified due to the supposedly "unique" facts of the case. *Markwest*, 2018 WL 527209, at *4-5; *see also Jefferson Cty. Bd. of Educ.*, 183 W. Va. at 24, 393 S.E.2d at 662 (explaining that "a cursory affidavit" cannot support issuance of a preliminary injunction and this Court has "uniformly held that in order to obtain a preliminary injunction, a party must demonstrate the presence of irreparable harm" (citation omitted)).

Without adducing a shred of evidence, AmerisourceBergen urged the Circuit Court to enter the Injunction Order based on a professed concern that litigating the California Action would require it to expend additional time and money and might somehow delay its receipt of payment from St. Paul or other insurers. *See* SPApp.0089; SPApp.0160-0161; SPApp.0347-0349. But potential financial loss is the paradigmatic example of harm that *can* be redressed through a remedy at law—namely, money damages—making it by definition not "irreparable" and an insufficient basis for injunctive relief. *See Radcliff v. Glannon*, No. 2012C0697, 2014 WL 8094939, at *2 (W. Va. Cir. Ct. July 7, 2014) (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)). In its response brief, AmerisourceBergen now retreats from its economic-harm argument; instead, AmerisourceBergen now focuses solely

on supposed "intangible," "nonmonetary" harms. ABDC Br. at 37-38. This argument fares no better.

Specifically, AmerisourceBergen asserts that the Injunction Order was warranted due to a purported risk of "potential inconsistent rulings" that might be issued by the Circuit Court below and the California Superior Court. ABDC Br. at 37. However, this is not a situation where two separate litigations seek rulings about the same underlying claims, such that a decision in one case could be dispositive of the other case. To the contrary, this case and the California Action concern insurance coverage disputes over entirely distinct sets of underlying claims. Indeed, AmerisourceBergen concedes that the scope of this litigation is limited to the question of insurance coverage for certain opioid-related lawsuits filed against it by West Virginia governmental entities in West Virginia courts. *Compare* St. Paul Op. Br. at 3-4, *with* ABDC Br. at 3-4, 8-10, 25-26; *see* SPApp.0024-0025, 0032-0046, 0048 (Pls. July 18, 2018 Am. Compl., ¶¶ 1, 40-89, 93); *see also, e.g.*, SPApp.2179-2181 (Sept. 28, 2017 Hr'g Tr. at 5:19-20, 6:15-16, 7:19-22); SPApp.2022 (Oct. 16, 2017 Or. re: Events of Hr'g Held on Sept. 28, 2017 at 1).[3] Moreover, AmerisourceBergen does not (indeed, cannot) dispute that the California Action concerns thousands of underlying claims filed in California and elsewhere that implicate a multitude of policyholders, insurers, and policies that are not involved in this case. *Compare* St. Paul Op. Br. at 5-7, 13, 23, & attached Ex. A, *with* ABDC Br. at 3-4, 25-26; *see* SPApp.0310-0311, 0323 (Nov. 5, 2020 Cal. Action Compl., ¶¶ 2, 4-7, 41 n.11). Furthermore, all of the West Virginia-based claims are expressly carved out

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[3] The September 28, 2017 hearing transcript and October 16, 2017 Order are also included in ACE's February 9, 2021 appendix. *See* ACEApp.001-026; ACEApp.027-034.

from the scope of the California Action Complaint. *See* SPApp.0323 (Nov. 5, 2020 Cal. Action Compl., ¶ 41 n.11).[4]

Thus, any decision issued by the California Superior Court with respect to the thousands of underlying claims that are pending before that court—and only before that court—will not be dispositive of the Circuit Court's resolution of the parties' disputes related to the West Virginia-based opioid lawsuits that are at issue here. There is no possibility that any "potential inconsistent rulings" in California could "irreparably harm" AmerisourceBergen in this litigation. No matter what is decided in California, the Circuit Court below will decide the question of coverage for the West Virginia-based claims pending before it.

These facts fundamentally distinguish this case from *Fredlock*—the only West Virginia decision that AmerisourceBergen invokes as supposedly supporting an injunction prohibiting the prosecution of litigation pending before another court. *Fredlock* addressed two lawsuits that were both filed in West Virginia state courts, the first in Ohio County and the second in Mineral County. Both suits sought a legal determination concerning the disposition of *one specific parcel of land*, and it was held that the second-filed action should give way to the first. *Fredlock*, 52 W. Va. 232, 43 S.E. at 155-57, 159-60. That is not at all analogous to the situation presented here. Here, unlike in *Fredlock*, the California Action and this case concern entirely separate sets of underlying opioid

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[4] AmerisourceBergen recites the Injunction Order's unexplained statement—which AmerisourceBergen itself drafted and is not supported by any actual record evidence—that there is "no practicable way" to apply the carve-out to "segregate" defense and indemnity costs between the West Virginia-based underlying claims and claims from jurisdictions outside of West Virginia. ABDC Br. at 25. This is flatly wrong. It is of course possible for AmerisourceBergen to allocate costs between the various claims—indeed, AmerisourceBergen, as the party demanding indemnification from its insurance carriers for these claims, bears the legal burden to demonstrate that it is entitled to coverage for any such costs for which it seeks payment, which means that AmerisourceBergen will need to identify which costs pertain to which claims, which costs are purportedly owed by which insurers, and under which policies and which years such costs are purportedly covered.

lawsuits for which coverage determinations are sought. Moreover, whereas *Fredlock* concerned two parallel actions that were both pending in West Virginia courts, the Injunction Order reaches across state lines to prohibit litigation in *any court other than the Boone County Circuit Court*, which, as discussed further below (*see infra* § II.C), violates fundamental principles of comity and judicial restraint that govern the relations between the courts of different states—critical issues that the *Fredlock* Court had no occasion to consider.

AmerisourceBergen attempts to backfill the evidentiary void in its motion papers by arguing that it satisfied its burden of proof by asking the Circuit Court to take judicial notice of "public court filings" from the Circuit Court's own docket and the California Action, as well as a transfer order from the Opioid MDL. The Injunction Order states that, purportedly based on a review of these filings, the Circuit Court "concluded that there was sufficient overlap in these lawsuits to warrant an antisuit injunction." ABDC Br. at 38-39. But the pleadings filed below plainly state (and AmerisourceBergen does not dispute) that this litigation concerns *only* underlying opioid-related claims filed against AmerisourceBergen in West Virginia, all of which are expressly carved out from the California Action Complaint. *See* SPApp.0024-0025, 0032-0046, 0048 (Pls. July 18, 2018 Am. Compl., ¶¶ 1, 40-89, 93); SPApp.0323 (Nov. 5, 2020 Cal. Action Compl., ¶ 41 n.11). Indeed, during a scheduling hearing before the Circuit Court at the outset of this case, AmerisourceBergen repeatedly affirmed—and the Circuit Court memorialized in a post-hearing order—that the scope of this coverage litigation would not extend beyond the borders of West Virginia. AmerisourceBergen explained that it has "no intent of adding cases from other jurisdictions" to this coverage action and will "[n]ot [be] going outside of West Virginia in this case" because "[t]his is really limited to the coverage and duty to defend the West Virginia actions under these -- for these four carriers under these policies." SPApp.2179-2181 (Sept. 28,

2017 Hr'g Tr. at 5:19-20, 6:15-16, 7:20-22); *see* SPApp.2022 (Oct. 16, 2017 Or. re: Events of Hr'g Held on Sept. 28, 2017 at 1) (Circuit Court Order memorializing that "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."); *see also* SPApp.2179-2181 (Sept. 28, 2017 Hr'g Tr. at 7:19-22) (with respect to the federal multi-district opiate litigation, AmerisourceBergen's counsel further explained to the Circuit Court, "I don't think it affects what we're doing here" because "[t]his [case] is really limited to the coverage [of] . . . the West Virginia actions . . . for these four carriers under these policies").

As for the Opioid MDL transfer order, "while a court may take judicial notice of the orders of another court, *such notice is not for the truth of the matters asserted in the other litigation*, but rather to establish the fact of such litigation and related filings." *Arnold Agency v. W. Va. Lottery Comm'n*, 206 W. Va. 583, 596, 526 S.E.2d 814, 827 (1999) (emphasis added) (internal citations and quotation marks omitted). Moreover, many of the lawsuits at issue in the California Action have not even been transferred to the Opioid MDL. *See* St. Paul Op. Br. at 25 & n.8. AmerisourceBergen did not put before the Circuit Court any of the thousands of underlying complaints at issue in the California Action, and it made no effort to compare any of those thousands of complaints with the complaints filed in the West Virginia-based lawsuits that are at issue here. Merely requesting that the Circuit Court take judicial notice of another court's transfer order could not possibly have satisfied AmerisourceBergen's burden to prove by clear evidence that it would suffer irreparable harm if the Injunction Order was not issued, or that it lacked adequate remedies at law, or that a balancing of the potential harm to each party and the public weighed in favor of an injunction being issued.

Indeed, the Injunction Order also should be vacated for the additional reason that "[i]njunctive relief . . . is inappropriate when there is an adequate remedy at law." *Hechler v. Casey*, 175 W. Va. 434, 440, 333 S.E.2d 799, 805 (1985) (citations omitted). AmerisourceBergen has never lacked adequate legal remedies with respect to the California Action. Rather, it has always had the option to seek legal relief from the California Superior Court directly. Indeed, the day after the Injunction Order was entered, AmerisourceBergen filed a motion to dismiss or stay the California Action. The California Superior Court subsequently entered a minute order that declined to dismiss the California Action but "stay[ed] the case as to plaintiffs' Complaint." ABDC-App.017. This minute order, in AmerisourceBergen's own words, awarded "effectively *the identical relief* . . . granted in [the] Injunction Order." ABDC-App.008 (ABDC Feb. 22, 2021 Ltr. at 1) (emphasis added). Thus, there was no basis for the Circuit Court to take the extraordinary step of issuing an injunction, since adequate legal remedies were available to AmerisourceBergen from the California Superior Court itself. Indeed, this is precisely why an injunction prohibiting a party from prosecuting separate litigation in another jurisdiction "bears a very heavy burden of justification" and why "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"—because such issues "are better addressed through motions in the other court to stay or dismiss the proceedings, such as on grounds of *forum non conveniens*." *Auerbach v. Frank*, 685 A.2d 404, 409 (D.C. 1996).[5]

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[5] St. Paul believes that the California Superior Court's minute order was incorrectly decided, has noticed an appeal from that ruling, and reserves all rights with respect to it. The instant appeal remains ripe for decision by this Court, and AmerisourceBergen does not contend otherwise. Indeed, as the scope of the Injunction Order is not restricted to the California Action—rather, it broadly prohibits the parties from taking certain actions in any court other than the Boone County Circuit Court—this appeal could not possibly be mooted by the California Superior Court's minute order.

Furthermore, a balancing of the hardship to St. Paul and consideration of the public interest weigh decisively against the Injunction Order and mandates that it be vacated. Unless and until the Injunction Order is lifted, St. Paul (and the other parties to this action) will, in violation of their constitutional rights, be impeded from preserving and protecting their legal interests in the California Superior Court and, indeed, in any court other than the Boone County Circuit Court. *See infra* § II.D. Moreover, as the Injunction Order has asserted sweeping and unprecedented control over litigation pending in a court of a sister state on the other side of the country, it threatens to undermine the fundamental principles of comity and judicial restraint that form the basis for relations between the courts of different states. *See infra* § II.C.

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

AmerisourceBergen concedes that the California Action, on the one hand, seeks determinations regarding insurance coverage for thousands of underlying opioid-related claims brought in California and elsewhere that are not before the Boone County Circuit Court, while this case, on the other hand, concerns only certain lawsuits that were filed against AmerisourceBergen in West Virginia. *Compare* St. Paul Op. Br. at 3-7, *with* ABDC Br. at 3-4, 8-10, 25-26. AmerisourceBergen further admits that the California Action includes approximately 70 additional parties that are not before the Circuit Court and implicates numerous insurance policies that are not at issue here either. *Compare* St. Paul Op. Br. at 6-7, *with* ABDC Br. at 9, 22-24; *see supra* at 6-9. These concessions are fatal to AmerisourceBergen's request for injunctive relief and require that the Injunction Order be vacated.

As courts across the country have held on numerous occasions, an injunction cannot be issued to preclude a party from litigating a separate action in another jurisdiction where, as here, the two cases involve different underlying claims between different parties, such that resolution of

one case would not be dispositive of the other. *See, e.g.*, *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 479 n.15 (4th Cir. 2018), *as amended* (Mar. 27, 2018) ("threshold inquiry" is "whether the parties and issues in the two disputes are the same"); *Karaha Bodas Co., LLC, v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 119 (2d Cir. 2007) ("injunction against foreign litigation may be imposed only if two threshold requirements are met: (A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined" (citation and internal quotation marks omitted)); *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004) ("The gatekeeping inquiry is . . . whether parallel suits involve the same parties and issues. Unless that condition is met, a court ordinarily should go no further and refuse the issuance of an . . . injunction."); *see also, e.g.*, *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35-36 (2d Cir. 1987).[6]

As a corollary to that basic principle, where the underlying claims and parties in two separate cases are *not* the same, an injunction is inappropriate as a matter of law. *See, 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.*, 1995 WL 31569, at *3; *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, 163 (Tex. 1986) (injunction improper where, although two cases "undoubtedly concern[ed] the same general subject matter," the "California lawsuit raise[d] issues and involve[d] parties that differ from those in the Texas litigation").[7]

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[6] *See also, e.g.*, *Applied Med. Distrib. Corp. v. Surgical Co. BV*, 587 F.3d 909, 913 (9th Cir. 2009); *Canon Latin Am., Inc. v. Lantech (CR), S.A.*, 508 F.3d 597, 602 (11th Cir. 2007); *Rauland Borg Corp. v. TCS Mgmt. Grp., Inc.*, No. 93 C 6096, 1995 WL 31569, at *3 (N.D. Ill. Jan. 26, 1995).

[7] *See also, e.g.*, *St. Paul Surplus Lines Ins. Co. v. Mentor Corp.*, 503 N.W.2d 511, 516 (Minn. Ct. App. 1993); *State ex rel. Gen. Dynamics Corp. v. Luten*, 566 S.W.2d 452, 460 (Mo. 1978);

Unable to dispute that the two actions concern different underlying claims, parties, and policies, AmerisourceBergen resorts to arguing that the Injunction Order was warranted merely because certain of the *issues* raised in the California Action are "similar" to those raised in this case. ABDC Br. at 25-26; *see id.* at 23-24. This argument fails both factually and legally. This case is limited to the question of insurance coverage for certain West Virginia-based opioid claims under a single 2006-2007 St. Paul policy issued to a Pennsylvania company that is governed by Pennsylvania law and a handful of other policies issued by other insurers for periods from 2006 to 2013. The California Action, by contrast, seeks determinations regarding insurance coverage for thousands of different opioid lawsuits filed in California and other jurisdictions outside of West Virginia under policies issued by more than 70 insurance companies for periods dating back to the mid-1990s and forward to 2018, including multiple policies issued to a California-based company that are governed by California law.

Contrary to AmerisourceBergen's claim, the issues raised in this case and in the California Action are simply not "substantially identical." ABDC Br. at 26. None of the pre-2006 policy years (or post-2013 years) will be addressed by the Circuit Court in this case. Nor will the Circuit Court have occasion to consider any of the policies issued by the approximately 70 other insurers that are named only in the California Action. Nor will any questions of California law be decided by the Circuit Court. While some policies may contain certain terms that are similar or even the same, that does not change the fact that the California Superior Court's determination regarding the application of St. Paul's contract defenses under California law to the thousands of distinct underlying claims that are before it will not be dispositive of the Circuit Court's resolution of the

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Lehigh Valley R. Co. v. Andrus, 109 A. 746, 748 (N.J. Ch. 1920), *aff'd,* 112 A. 307 (1920), *modified*, 122 A. 751 (1923).

questions of coverage under Pennsylvania law for the underlying West Virginia-based lawsuits that are at issue here. Among other things, determining whether coverage is available for each of the thousands of underlying lawsuits filed outside of West Virginia that are at issue only in the California Action may turn on unique factual allegations and evidence—including, for example, facts concerning AmerisourceBergen's alleged conduct in those other jurisdictions; the nature, extent, and timing of any damages that AmerisourceBergen purportedly caused to the governmental entity plaintiffs; and whether AmerisourceBergen expected or intended such harm or knew of it prior to the inception of the relevant insurance policies.[8]

In any event, even where two cases may implicate certain "similar" issues, that routine situation does not suffice to justify an injunction precluding prosecution of a second-filed action in another jurisdiction. *See, e.g.*, *Total Minatome Corp. v. Santa Fe Minerals, Inc.*, 851 S.W.2d 336, 341 (Tex. App. 1993) (injunction reversed where movant showed "only [that] it may be inconvenienced and that the two courts may in the end address the same or similar issues"); *see also supra* at 11-13 & nn.6-7. Unsurprisingly, AmerisourceBergen has failed to identify any precedent—from West Virginia or any other jurisdiction—in which an injunction prohibiting a

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[8] AmerisourceBergen argues that St. Paul's "decision not to amend its pleadings" in this case "to name . . . additional insurer defendants" who are party only to the California Action somehow suggests that these other insurers "are not necessary to the resolution of the dispute." ABDC Br. at 23. This is misleading and meritless. First, AmerisourceBergen neglects to mention that AmerisourceBergen itself declined to amend its complaint to add additional parties or claims to this case (*see* SPApp.2013), and has repeatedly affirmed that this case is limited to West Virginia-based opioid claims (*see supra* at 8-9). Second, numerous other insurers are named in the California Action because that case seeks a determination of coverage, if any, for thousands of claims filed in California and elsewhere under decades of insurance policies covering periods from the mid-1990s to 2018, including policies issued by each of the insurers named in that case. This litigation, by contrast—indeed, by AmerisourceBergen's own design—is narrowly limited to West Virginia-based claims and seeks a coverage determination only as to 16 specific insurance policies issued for periods from 2006 to 2013 by the five insurers that are already named as defendants below. *See supra* at 6-9; *see also* SPApp.0070 (Pls. July 18, 2018 Am. Compl., Ex. A).

separate legal action was entered simply because two cases raised "similar" issues. Indeed, AmerisourceBergen has not cited a single case in which such an injunction was issued under circumstances such as those presented on this appeal.[9]

AmerisourceBergen's discussion of a Minnesota state court decision in *St. Paul Mercury Insurance Company v. Northern States Power Company*, No. A05-486, 2005 WL 3529139 (Minn. Ct. App. Dec. 27, 2005), is misleading and inapposite. In that case, St. Paul Mercury Insurance Company ("St. Paul Mercury," a separate entity from St. Paul and not a party to this case) commenced an insurance coverage action in Minnesota and, shortly thereafter, the insured filed another coverage action in Wisconsin concerning the same underlying claim. *Id.* at *1. Contrary to AmerisourceBergen's representation in its brief, it was another party, Associated Electric & Gas Insurance Services Limited—*not St. Paul Mercury*—that sought an injunction precluding the

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[9] *See* ABDC Br. at 17-22, 26-27 (citing *Fredlock*, 52 W. Va. 232 (second-filed action concerned a specific parcel of land, the disposition of which was already the subject of the first-filed action); *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627-28 (5th Cir. 1996) ("the very same claims" previously filed in a Texas court were brought in a foreign court); *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) (party filed ex-parte writ in foreign court seeking to nullify district court's prior order)); *IRB-Brazil Resseguros S.A. v. Portobello Int'l Ltd.*, 59 A.D.3d 366, 366-67 (N.Y. App. Div. 2009) (two actions to collect on unpaid notes, where global note specified governing law and jurisdiction for any litigation); *St. Paul Mercury Ins. Co. v. N. States Power Co.*, No. A05-486, 2005 WL 3529139, at *3 (Minn. Ct. App. Dec. 27, 2005) (two insurance coverage actions concerned same parties and underlying claim, and resolution of one would have been dispositive of the other); *First State Ins. Co. v. Minn. Min. & Mfg. Co.*, 535 N.W.2d 684, 687-88 (Minn. Ct. App. 1995) (*all* parties to second action were party to the first action, first action was *more comprehensive*, and "issue of insurance coverage [was] *identical* factually and legally" (emphasis added)); *Cajun Elec. Power Co-op., Inc. v. Triton Coal Co.*, 590 So.2d 813, 817 (La. Ct. App. 4th Cir. 1991) (two suits over the same clauses in a single contract, where "the factual situation addressed in both suits [was] identical" and "there [were] no issues asserted in the [second] action which would not be addressed by the [first] court"); *John Hancock Mut. Life Ins. Co. v. Fiorilla*, 199 A.2d 65, 68-69 (N.J. Super. Ct. Ch. Div. 1964) (two actions concerned benefits sought under same life insurance policy related to death of insured and same witnesses would testify in both actions); *Williams v. Payne*, 94 P.2d 341, 344 (Kan. 1939) (two actions related to same automobile accident)).

insured from continuing to litigate the second-filed action, *id.*, which the Minnesota court granted on the basis that "the parties are the same and the issues are *the same*" in the Minnesota and Wisconsin cases and the two actions were "*equally comprehensive*," which meant that "the capacity of the Minnesota court to resolve one of the actions *would, therefore, dispose of the other action*," *id.* at *2-3 (emphasis added). Far from aiding AmerisourceBergen, this decision illustrates why the Injunction Order should be vacated—because the parties and issues in the California Action are *not* "the same" as those before the Circuit Court, and the two actions are not "equally comprehensive," meaning that resolution of one action cannot "dispose of the other action." *Id.*

As AmerisourceBergen plainly failed to satisfy the threshold requirement of demonstrating that the California Action and this case concern the same claims between the same parties, the Injunction Order should be vacated, and AmerisourceBergen's further assertions that the filing of the California Action was "vexatious" or otherwise improper need not be considered. In any event, AmerisourceBergen's spurious claim that St. Paul acted in "bad faith" by supposedly "delay[ing]" commencement of the California Action is simply not true. ABDC Br. at 20, 40. The California Action was initiated by St. Paul and several other insurance companies *only days after* a proposed global settlement of thousands of opioid-related claims filed outside of West Virginia against the Bergen Brunswig Affiliates was publicly reported. The Bergen Brunswig Affiliates have demanded indemnification of those claims from St. Paul and the other plaintiff-insurers in the California Action under insurance policies dating back to the 1990s. The California Action seeks to determine whether the insurers have any obligation to provide coverage for those very claims. *See* St. Paul Op. Br. at 5-7. There was no "delay" in the filing of the California Action.

Likewise, there is no merit to AmerisourceBergen's insinuation that the California Action reflects an effort by St. Paul to secure a "do over" of rulings by the Circuit Court below. ABDC

Br. at 21. The truth is that the California Action was commenced on November 5, 2020, *weeks before* the Circuit Court issued its first and, to date, only substantive decision on November 23, 2020. *Compare* SPApp.0306-0328 (Nov. 5, 2020 Cal. Action Compl.), *with* SPApp.0116-0143 (Nov. 23, 2020 SJ Or.). And, in any event, the California Action addresses coverage questions for thousands of underlying opioid lawsuits filed *outside* of West Virginia, which AmerisourceBergen has repeatedly affirmed are *not* part of this case. *See supra* at 6-9. No one was litigating coverage for those lawsuits before the California Action was filed.

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

The Injunction Order should be vacated because it violates fundamental principles of comity and judicial restraint that govern relations between the courts of sister states, which promote "legal harmony and uniformity among the co-equal states." *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 300, 418 S.E.2d 738, 746 (1992). Seeking to avoid this result, AmerisourceBergen argues that the Injunction Order does not raise any concerns regarding comity or federalism because it is directed to St. Paul rather than Judge Sherman of the California Superior Court. *See* ABDC Br. at 28. But this ignores the fact that the Injunction Order effectively, although indirectly, exerts control over separate litigation pending in California and, moreover, precludes any litigation in any court other than the Boone County Circuit Court "relating to insurance coverage for the prescription opioid lawsuits against [AmerisourceBergen] . . . or any other affiliated entity." SPApp.1810-1811 (Injunction Or. ¶ 164). Courts across the country have, time and again, cautioned that such injunctions should be issued only rarely and in exceptional circumstances, as they represent a fundamental, albeit "indirect," challenge to bedrock principles of "judicial restraint," "comity," and the "dignity and authority" of the foreign court. *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697, 705, 708, 59 P.3d 231, 236-37 (2002), *as*

modified (Mar. 5, 2003) (emphasis added) (citation omitted); *see, e.g.*, *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928-929 (D.C. Cir. 1984) ("[T]he possibility of . . . potentially inconsistent adjudications does not outweigh the respect and deference owed to independent foreign proceedings.") (cited with approval in *Pasquale*, 187 W. Va. at 301 n.9, 418 S.E.2d at 746 n.9); *see also, e.g.*, *Golden Rule v. Harper*, 925 S.W.2d 649, 651 (Tex. 1996) (per curiam); *E.B. Latham & Co. v. Mayflower Indus.*, 278 A.D. 90, 94 (N.Y. 1951).

AmerisourceBergen attempts to turn the table by claiming that the California Action threatens the Circuit Court's jurisdiction. To the contrary, the California Action Complaint was carefully crafted to ensure that the Circuit Court would retain its jurisdiction over the underlying claims that AmerisourceBergen has placed before it—specifically, the West Virginia-based opioid lawsuits identified in AmerisourceBergen's operative complaint, all of which are explicitly excluded from the scope of the California Action. *See* SPApp.0323 (Nov. 5, 2020 Cal. Action Compl., ¶ 41 n.11). There is no impediment to the Circuit Court's continued jurisdiction over the case below. *See, e.g.*, *Advanced Bionics*, 59 P.3d at 242 (Moreno, J., concurring) (explaining that a court's jurisdiction is typically threatened by proceedings in a second court only if the second court "attempt[s] to carve out exclusive jurisdiction over the matter" (citation omitted)).[10]

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

The Injunction Order should be vacated because it inflicts constitutional harms on St. Paul, ACE, and the other defendants below. AmerisourceBergen argues that the Injunction Order does not infringe on St. Paul's constitutional rights because it permits St. Paul to "defend itself" against "independent actions . . . asserted by other parties," so long as it does not "prosecut[e]" litigation

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[10] AmerisourceBergen's discussion of *Tennessee Farmers Mutual Insurance Co. v. Wheeler*, 317 S.E.2d 269 (Ga. Ct. App. 1984), is inapposite. Unlike here, *Tennessee Farmers* concerned two separate actions that related to a single underlying automobile accident.

against AmerisourceBergen. ABDC Br. at 31. But this ignores the fact that St. Paul will be hamstrung in defending itself against such claims. For example, St. Paul cannot effectively defend against a counter-claim for contribution brought by another insurer in the California Action unless it is able to take necessary discovery from AmerisourceBergen to prepare and support its defense.

Indeed, the fact that the California Action will proceed in part while the Injunction Order prohibits a subset of the parties to that case from fully participating in it demonstrates precisely why courts rightly refuse to issue an injunction precluding the prosecution of separate litigation where, as here, the court does not have jurisdiction over *all* of the parties to the other action. *See, e.g.*, *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 387 (Del. 2014), *as revised* (Nov. 10, 2014); *Csohan v. United Benefit Life Ins. Co.*, 200 N.E.2d 345, 348 (Ohio Ct. App. 1964). That the Injunction Order would require the parties to this case to attempt to defend their interests in the still-ongoing California Action while keeping one hand tied behind their backs makes it abundantly clear that it should be vacated.

AmerisourceBergen's contention that the Injunction Order does not threaten St. Paul's constitutional rights also overlooks the fact that it broadly prohibits St. Paul from "instituting or prosecuting *any* collateral litigation or other proceeding" against AmerisourceBergen and its affiliates "relating to insurance coverage for the prescription opioid lawsuits"—in any court in any jurisdiction, not just the California Action. SPApp.1810-1811 (Injunction Or. ¶ 164) (emphasis added). Unless and until the Injunction Order is lifted, it threatens to prevent St. Paul from taking such additional actions as may be necessary to preserve its legal rights with respect to other claims in other jurisdictions as well—even if, for example, it must take certain steps to avoid waiver of its rights or expiration of a statutory limitations period. For this reason, too, the Injunction Order violates St. Paul's constitutional rights and cannot stand.

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

Despite the fact that AmerisourceBergen itself drafted the Injunction Order, including each and every substantive ruling contained therein, its response brief does not offer any substantive argument in support of the Injunction Order's finding that the filing of the California Action violated the Circuit Court's February 22, 2018 Stay Order. *See* ABDC Br. at 28 n.12 (stating only that "St. Paul is wrong on the merits, as the Circuit Court concluded"). Nor could it do so. While the Stay Order provides 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), the California Action Complaint expressly carves out from its scope all of the underlying West Virginia-based actions that are pending before the Circuit Court, SPApp.0323 (Nov. 5, 2020 Cal. Action Compl., ¶ 41 n.11). This ruling was plainly in error and should be reversed.

III. CONCLUSION

For the reasons set forth herein and in its January 19, 2021 opening brief, 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: March 22, 2021

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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,
Movant-Intervenors,

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

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, hereby certifies that on this 22nd day of March, 2021, a true copy of the foregoing *"Petitioner St. Paul Fire and Marine Insurance Company's Reply Brief"* was served upon the following individuals by e-mail:

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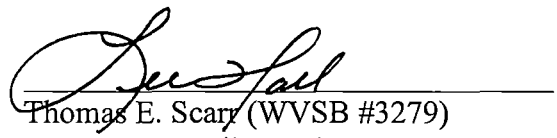

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