

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Nov 28 2022
04:29PM EST
Transaction ID 68446736

CASE NO. 22-564

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

Defendants below / Petitioners,

v.

AMERISOURCEBERGEN DRUG CORPORATION and BELLCO DRUG CORPORATION,

Plaintiffs below / Respondents.

From the Circuit Court of Boone County, West Virginia
Civil Action No. CC-03-2017-C-36

**AMERISOURCEBERGEN DRUG CORPORATION AND BELLCO DRUG
CORPORATION'S BRIEF OF RESPONDENTS**

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INTRODUCTION

The underlying coverage case asks the Boone County Circuit Court to determine whether general liability insurance policies—including policies written by Defendant-Petitioners ACE American Insurance Company and ACE Property & Casualty Insurance Company (collectively, “ACE”)¹—should fund the defense and settlement of prescription opioid liability lawsuits alleging bodily injuries for which the State of West Virginia and other plaintiffs contend that they provided medical care and related services. These prescription opioid liability lawsuits, now flooding the nation’s federal and state courts, have been recognized by the National Opioid MDL court as “the most complex and important group of cases ever filed.”²

This appeal, however, does not involve a question of insurance coverage. The narrow question presented is whether the circuit court properly exercised its discretion in fashioning an injunction that protects the court’s jurisdiction by temporarily prohibiting the prosecution of subsequent actions regarding coverage for the prescription opioid liability lawsuits under the same standard-form insurance policies that are at issue in this trial-ready case. The injunction allows the circuit court to complete its work without the potential for conflicting rulings from sister courts that would delay and constrain the West Virginia proceedings.

In 2021, after the circuit court entered an anti-suit injunction (the “Injunction”), this Court held that the circuit court correctly determined that an injunction was needed to prevent

¹ These two ACE entities are members of the Chubb insurance group. Claims handling for both are centralized under the Chubb umbrella.

² *In re Nat’l Prescription Opiate Litig.*, 2019 U.S. Dist. LEXIS 165494, at *54 (N.D. Ohio Sept. 26, 2019).

a threat to the court’s jurisdiction and protect compelling interests of West Virginia.³ It remanded for clarification of the scope of the Injunction and further articulation of the circuit court’s reasoning for the particulars of the Injunction. On remand, the parties submitted thousands of pages of supplemental briefing and exhibits, after which the circuit court heard argument regarding the proper scope and duration of the Injunction. The circuit court then issued the Renewed Injunction in a detailed and well-reasoned opinion. ACE has appealed. This Court should affirm.

* * *

As this Court is now familiar, AmerisourceBergen Drug Corporation (“ABDC”) initiated this coverage action in March 2017 against ACE, St. Paul Fire and Marine Insurance Company (“St. Paul”), American Guarantee & Liability Insurance Company, and Endurance American Insurance Company (the “Insurer Defendants”).⁴ The material events leading to the Injunction began in November 2020, when St. Paul filed a duplicative suit in California (the “California Coverage Action”) against the same parties, relating to the same insurance policies, and raising the same issues that had then been pending in West Virginia for nearly four years. St. Paul served the California Coverage Action complaint *on the same day* that the circuit court *issued a summary judgment ruling against St. Paul* on what St. Paul called the “threshold” issue of whether the underlying prescription opioid liability lawsuits seek damages for “bodily injury” as required to trigger coverage under the insurance policies’ insuring agreements.

To prevent further procedural gamesmanship, and to protect the jurisdiction and

³ *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Drug Corp.*, ___ W.Va. ___, 868 S.E.2d 724 (2021)

⁴ St. Paul and ACE have appealed the circuit court’s June 10, 2022 Renewed Injunction Order.

compelling interests of West Virginia, the circuit court enjoined the parties to the West Virginia action from prosecuting duplicative litigation relating to the issues pending in the circuit court while the case is pending. On appeal, this Court affirmed that “the courts of this State have a compelling interest in determining whether the policies at issue in ABDC’s West Virginia suit provide coverage for the underlying claims brought by West Virginia entities, without competing rulings from a foreign court” and that the Injunction was “needed to prevent a threat to the court’s jurisdiction and ability to resolve the West Virginia coverage suit, and to prevent a multiplicity of suits filed with the intent of causing delay, expense and inconsistent judgments.”

This Court, however, returned the matter to the circuit court “for clarification of the order or such other proceedings as are necessary.” In particular, this Court directed additional consideration of the following:

- “why the circuit court precluded the litigation of *any* issues between the parties, if those issues were unrelated to the interpretation of the sixteen insurance policies at issue in the West Virginia action”; and
- whether “the circuit court’s order effectively precluded the parties from pursuing some agreed-upon resolution of the California action, or a resolution from the California court such as a stay or dismissal.”

On remand, based on the parties’ submission of thousands of pages of additional briefing and evidence—including insurance policies at issue in both the West Virginia and California actions as well as detailed evidence regarding proceedings in other jurisdictions—the circuit court issued the Renewed Injunction after a lengthy hearing. The court first made findings of fact based on the expanded record, including the following:

- “[F]rom 1995 to 2018, St. Paul and ACE were the only insurers that issued primary layer insurance to ABC (from 2001 to 2018) or Bergen Brunswig Corporation (from 1995 to 2001).”⁵
- “[D]uring that period the St. Paul and ACE policies’ insurance agreements were *identical in all material respects*.”
- “All of [the St. Paul and ACE] policies—not just the sixteen at issue in Phase 1—are directly at issue in Phase 2 of this case.”

The circuit court then acknowledged this Court’s concerns as to potential ambiguities in the initial wording of the Injunction and refashioned the Injunction accordingly. The circuit court “agree[d] that the Injunction should not broadly extend to ‘any issues’ between the parties” and “that the Injunction should not extend to insurance policies that are unrelated to the insurance policies at issue in the West Virginia action.” Accordingly, “to ensure the scope of the Injunction does not sweep more broadly than necessary to accomplish the purposes identified by the Supreme Court of Appeals,” the circuit court clarified that the Renewed Injunction restricts only collateral litigation pertaining to:

- “insurance policies issued to ABDC or its predecessors and affiliates”;
- “insurance policies issued by the Insurer Defendants in this case or their predecessors and affiliates”;
- “insurance policies that are either expressly at issue in this case, that are implicitly at issue in this case by virtue of the temporal scope of the claims asserted in the cases that make up Phase 2 of this case, which include all of defendants’ policies back to at least January 1, 1996, and/or that are written on forms that are substantially similar to the forms at issue in this case, or that follow form to such insurance policies”; and
- “insurance coverage for prescription opioid liability lawsuits of the same types that have been included in the National Opioid MDL or the West Virginia Opioid MLP.”

⁵ On October 19, 2022, this Court ordered that the parties in Appeal Nos. 22-564 (ACE’s appeal) and 22-575 (St. Paul’s appeal) may use the same joint appendix. That joint appendix was filed by St. Paul in Appeal No. 22-575 and is cited herein as “SPApp.”

The circuit court also addressed this Court's second question and held that "[t]he Injunction is modified to clarify that nothing in the Injunction will preclude any party from seeking a compromise resolution of any claims, whether through settlement or otherwise."

The Renewed Injunction, according to the circuit court, is "temporary" and "shall remain in effect until the conclusion of Phase 1 of this dispute, at which time the Court will hear argument on whether any changed circumstances alter the equities involved or require further modification."

On appeal, ACE advances arguments based on a pending action in Delaware, where a former defendant in the California action, Arrowood Indemnity Company ("Arrowood"), has sued ABDC seeking a declaration that Arrowood is not required to provide insurance coverage for the prescription opioid liability lawsuits. On March 1, 2022, after initially suing only ABDC and its parent, Arrowood amended its complaint to include St. Paul and ACE as defendants as well. ACE contends that while it may have been appropriate for the circuit court to enjoin the parties from litigating against each other in California, where St. Paul filed suit for improper purposes, it was not appropriate for the circuit court to enjoin the parties from litigating against each other anywhere else, including in Delaware. The thrust of ACE's argument is that an anti-suit injunction may restrict the parties from litigating *only* those specific actions that already have been filed (improperly) in other courts at the time the injunction was issued.

There is no support for ACE's argument, which is built on flawed premises. Courts need not limit an anti-suit injunction to the specific actions that necessitated the anti-suit injunction in the first place. Although one party's attempt to re-litigate issues outside of West Virginia can serve as a basis for a West Virginia court's conclusion that an anti-suit injunction

is necessary to protect the court’s jurisdiction (as St. Paul’s California suit did here),⁶ the West Virginia court need not restrict its injunction to any specific action. Instead, where it is necessary to protect the court’s jurisdiction, the court may enjoin the parties from litigating anywhere outside of West Virginia—as long as the injunction is tailored to the circumstances of the case. The threat to the West Virginia court’s jurisdiction comes not only from specific actions already filed, but also from the prospect of new actions. As the circuit court recognized, “the threat that Insurer Defendants will initiate *new collateral coverage actions* in one or more jurisdictions necessitates the entry of the Injunction to preserve this Court’s jurisdiction over the issues in this case and ensure that the overall resolution of this case is not delayed or impelled by the issuance of contradictory rulings from other courts.”

If ACE were correct that a West Virginia court is limited to enjoining the litigation of the specific action that gave rise to the need for the injunction, litigants seeking to circumvent an anti-suit injunction could flout it by ceasing litigation in that specific action and moving on to another court. That, in turn, would require the circuit court to play “whack-a-mole,” issuing new injunctions each time a new competing lawsuit popped up. Putting it another way: an anti-suit injunction is intended to forestall the adverse consequences flowing from duplicative suits—whenever and wherever they might be filed—not simply to punish one party for filing the one suit that initially compromised West Virginia’s interests.

In any event, contrary to what ACE argues on appeal, the circuit court expressly accounted for the Delaware action and the prospect that the parties might file suits in Delaware and elsewhere that would threaten the court’s jurisdiction. The circuit court acknowledged that

⁶ In fact, “St. Paul has admitted its intent to pursue other claims in other jurisdictions if the Injunction is lifted or narrowed.” SPApp.13035 ¶ 194.

“various insurers who had filed crossclaims against ABDC in St. Paul’s California Coverage Action have now initiated claims against ABDC in the State of Delaware” and concluded that “if the Injunction is lifted or narrowed, the jurisdiction of this Court would be imperiled by still more forum shopping by the Insurer Defendants, which would undermine the State of West Virginia’s ‘compelling’ interest in the resolution of this suit.”

ACE also contends that, under the Renewed Injunction, it is forced to “sit on the sidelines” in Delaware while important issues are litigated. ACE is wrong for multiple reasons. *First*, no coverage issues are being litigated in Delaware currently. Argument on ABDC’s motion to dismiss or stay Arrowood’s Delaware complaint is set for December 19, 2022. ACE and Arrowood have agreed that ACE need not respond to Arrowood’s complaint until the Delaware court resolves ABDC’s motion. To the extent ACE has concerns regarding the Delaware litigation, it is free to join ABDC’s motion and articulate its concerns to the Delaware court. *Second*, should the Delaware action move forward, the Renewed Injunction will not prevent ACE from litigating a dispute with Arrowood. The Renewed Injunction prevents ABDC and ACE from litigating the same or substantially similar disputes *against each other* in other forums, and for good reason. Allowing ACE to sue ABDC in Delaware regarding the same or substantially similar disputes that are being litigated in West Virginia—which ACE contends it should be permitted to do—would defeat the whole purpose of the injunction. As the circuit court recognized, if the Renewed Injunction is narrowed, the jurisdiction of the West Virginia courts would be imperiled by more forum shopping, which would undermine West Virginia’s compelling interest in the resolution of this suit.

For these reasons, as further explained herein, this Court should affirm the circuit court’s Renewed Injunction.

STATEMENT OF THE CASE

A. The West Virginia Attorney General Sues ABDC in Boone County and the Parties Settle

On June 26, 2012, the West Virginia Attorney General filed suit in the Circuit Court of Boone County against ABDC, alleging that ABDC negligently distributed prescription opioid medications, causing bodily injury and death to West Virginia residents and creating a public nuisance. *State of West Virginia ex rel. Darrell v. McGraw, Jr., Attorney General. v. AmerisourceBergen Drug Corporation, et al.*, Civil Action No. 12-C-141 (Boone Cnty. Cir. Ct., W. Va.) (“WVAG Lawsuit”); SPApp.12989 ¶ 2. The West Virginia Attorney General sought damages against ABDC to reimburse it for costs that the State allegedly paid to address those injuries and deaths, including the costs of providing medical care, treatment, and services to West Virginians. *Id.* ¶ 3.⁷ On December 1, 2016, ABDC and the West Virginia Attorney General reached an agreement in principle on the material terms of a settlement to resolve the WVAG Lawsuit. SPApp.00289 ¶ 8.

B. Other West Virginia Government Entities File Prescription Opioid Lawsuits Against ABDC

After the settlement of the WVAG Lawsuit in December 2016, West Virginia political subdivisions and other plaintiffs began filing prescription opioid liability lawsuits against ABDC similar to the WVAG Lawsuit. SPApp.01913 ¶ 21; SPApp.12990 ¶ 8. These initial West Virginia prescription opioid liability lawsuits were followed by thousands of similar lawsuits against ABDC in West Virginia and across the country by other government entities, third-party payors, individual and putative class action plaintiffs, and Native American Tribes.

⁷ The WVAG Lawsuit was “the first of thousands of similar lawsuits filed around the country.” *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Corp.*, 80 Cal. App. 5th 1, 7, 295 Cal. Rptr. 3d 400, 404 (2022).

SPApp.12991 ¶ 10.

The prescription opioid liability lawsuits filed against ABDC in West Virginia state courts that were not removed to federal court have been consolidated in the West Virginia MLP for pretrial proceedings. SPApp.12992 ¶ 13; SPApp.12981 n.1. The prescription opioid liability lawsuits filed in or removed to federal court have been consolidated in the National Opioid MDL. *In re National Prescription Opioid Litigation*, No. 1:17-md-2804 (N.D. Ohio); SPApp.12991 ¶ 10; SPApp.12981 n.1. According to the National Opioid MDL court, the underlying claims against distributors, including ABDC, involve alleged conduct beginning on or before January 1, 1996. SPApp.13015 ¶ 118 (citing ECF No. 693, June 30, 2018 Discovery Ruling No. 2 Regarding Scope filed in *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (N.D. Ohio); ECF No. 1247, March 31, 2021 Order Denying Summary Judgment on Statute of Limitations Grounds filed in *City of Huntington v. AmerisourceBergen, et al.*, No. 3:17-01362 (S.D. W. Va.)).

The National Opioid MDL court has categorized the lawsuits consolidated in that action by the type of plaintiff bringing the suit, including lawsuits by (i) government entities; (ii) individuals and putative class actions; (iii) third-party payors, providers, and hospitals; and (iv) Native American Tribes. SPApp.12991 ¶ 11. For each category of suit, the National Opioid MDL court has identified bellwether cases that have determined (and will determine) core issues relevant to all of the prescription opioid liability lawsuits, including the West Virginia prescription opioid liability lawsuits. With the exception of Native American Tribe lawsuits, for each of the categories of cases in the National Opioid MDL, there is at least one

equivalent West Virginia prescription opioid liability lawsuit.⁸ SPApp.12991-92 ¶ 12 n.9.

As a result, resolution of the coverage issues before the circuit court will inform the issue of whether distributors and other participants in the pharmaceutical supply chain can access general liability insurance to pay for defense costs and liability in prescription opioid liability lawsuits pending in both the National Opioid MDL and the West Virginia MLP.

C. ABDC Initiates this Coverage Action

On July 28, 2016, ABDC provided notice of the WVAG Lawsuit to the Insurer Defendants and sought insurance coverage for defense costs and any liability. SPApp.00291 ¶ 15; SPApp.00294 ¶ 38. ACE denied all coverage obligations for the WVAG Lawsuit and all other prescription opioid liability lawsuits ABDC has tendered. SPApp.12993 ¶ 20.

On March 16, 2017, ABDC filed its complaint for breach of contract and declaratory judgment against the Insurer Defendants in the circuit court, seeking insurance coverage for the defense and indemnification of the WVAG Lawsuit and all other then-pending prescription opioid liability lawsuits (the “West Virginia Coverage Action”). SPApp.00133. ABDC stated in its original complaint that “[a]dditional counties, towns and/or cities in West Virginia have publicly announced that they intend to file prescription opioid lawsuits against ABDC” and “ABDC reserves the right to include additional lawsuits in this civil action.” SPApp.00145

⁸ By way of example only, see *Wyoming County v. AmerisourceBergen Drug Corp., et al.*, No. 5:17-cv-02311 (S.D. W. Va.); N.D. Ohio (1:17-op-45051) (government entity case pending in the National Opioid MDL, coverage for which is at issue in this case and which is the subject of the circuit court’s Bifurcation and Stay Order); *Mary Tilley, as next friend of K.B. Tilley, a minor child under the age of 18*, No. 2:19-cv-00566 (S.D. W. Va.); N.D. Ohio (1:19-op-46166) (lawsuit pending in the National Opioid MDL, coverage for which is at issue in this case and which is the subject of the circuit court’s Bifurcation and Stay Order); *West Virginia University Hospitals Inc., et al., v. Purdue Pharma, L.P., et al.*, No. 19-C-69 (Circuit Court of Marshall County, W. Va.) (hospital case pending before the West Virginia MLP, coverage for which is at issue in this case and which is the subject of the circuit court’s Bifurcation and Stay Order); SPA.12992 ¶ 12 n.9.

¶ 36.

On July 18, 2018, ABDC filed an amended complaint for breach of contract and declaratory judgment in this action.⁹ SPApp.00194. In the Amended Complaint, ABDC identified additional West Virginia prescription opioid liability lawsuits that had been filed against ABDC since the original complaint, confirmed that many of the prescription opioid liability lawsuits for which ABDC was seeking insurance coverage had been consolidated in the National Opioid MDL, and confirmed that it would be seeking coverage for all subsequently filed West Virginia prescription opioid liability lawsuits. SPApp.00216-18 ¶¶ 90-93.

On February 22, 2018, at the request of *all parties*, the circuit court issued its Bifurcation and Stay Order, which provides that litigation regarding ABDC's entitlement to insurance coverage for prescription opioid liability lawsuits will proceed in two phases. SPApp.00188; SPApp.12994 ¶ 23. In the first phase, the parties are to address ABDC's claim for insurance coverage for the prescription opioid liability lawsuit brought by the West Virginia Attorney General against ABDC in 2012; in the second phase, the parties are to address ABDC's and Bellco's claim for insurance coverage for all of the other prescription opioid liability lawsuits filed in West Virginia, which includes the West Virginia MLP and the National Opioid MDL, because the West Virginia federal cases were consolidated with the other federal cases there. SPApp.00188; SPApp.12994 ¶ 24.

The circuit court designed the Bifurcation and Stay Order to enable the parties and the court to efficiently resolve the coverage issues for all prescription opioid liability lawsuits

⁹ Bellco Drug Corporation ("Bellco") is also a plaintiff in the Amended Complaint. SPApp.00194. As stated in the Amended Complaint, "Belco is a legal subsidiary of ABDC" and "[s]ince its acquisition by ABC in October 2007, Bellco conducts its operations through ABDC." SPApp.00196 ¶ 10.

against ABDC by using the coverage dispute for the WVAG Lawsuit as a bellwether that will resolve the core coverage issues likely to repeat across all of the prescription opioid liability lawsuits. SPApp.12994-95 ¶¶ 26-27.

These core coverage issues include:

- “whether the prescription opioid lawsuits seek damages for, or because of, bodily injury” (an issue the circuit court already resolved in ABDC’s favor);
- “whether the duty to defend provision is triggered”; and
- “whether the Insurer Defendants’ ‘expected or intended’ defense bars coverage”

SPApp.12995 ¶ 27.

As the California Court of Appeal recognized, this West Virginia case is a “bellwether case of national importance” and “the West Virginia case can serve to educate the parties (whether or not the same) and the trial court about the issues” *St. Paul Fire & Marine Ins. Co.*, 80 Cal. App. 5th at 5, 17. “Employing a bellwether case in a complex matter like this can serve to winnow and sharpen not only discovery, but claims, defenses, calendaring decisions, motion practice, arguments, hearings or trial, adjudication, indeed every aspect of the litigation process—to the benefit of the parties, the court, and the public alike.” *Id.* at 16.

Consistent with the circuit court’s Bifurcation and Stay Order, ABDC and the Insurer Defendants have been actively litigating the core legal coverage issues for the last five years. SPApp.12995 ¶ 29. In July 2019, St. Paul moved for summary judgment, arguing that the claims against it should be dismissed based on its argument that the State of West Virginia did not seek damages for “bodily injury” in the WVAG Lawsuit. SPApp.12995 ¶ 30. On November 23, 2020, the circuit court denied St. Paul’s summary judgment motion and held as a matter of law that “insurance coverage is available under the general liability insurance

coverage section of the St. Paul Policy for lawsuits by government entities seeking damages for injuries suffered by their citizens.” SPApp.00302 ¶ 82; SPApp.12996 ¶ 34.

In addition to resolving the threshold coverage issue, extensive discovery efforts have taken place in this action. The Discovery Commissioner spent ten months addressing the parties’ motions to compel and motions for protective order following the conclusion of written discovery. SPApp.12996 ¶ 36. The circuit court spent an additional nine months resolving complicated, multi-faceted discovery motions as well as objections to the Discovery Commissioner’s recommended orders. *Id.* ¶ 37. In June 2021 and April 2022, the circuit court held still more hearings to resolve all remaining discovery disputes and to set the case on a path for resolution of all dispositive motions and, if necessary, trial on any remaining issues. SPApp.00061; SPApp.00094. ABDC has made 30 productions of documents to the Defendant Insurers totaling over **10.5 million pages**, including production of all the documents produced in the National Opioid MDL through September 28, 2020. SPApp.12997 ¶ 40.

In addition to document discovery, ABDC presented 24 current or former ABDC employee or consultant witnesses for depositions (plus four depositions of ABDC’s insurance broker witnesses). SPApp.12997 ¶ 41. ABDC produced to the Defendant Insurers an additional 83 fact witness transcripts from various prescription opioid lawsuits. *Id.* ¶ 42. ABDC also produced an additional 26 expert witness transcripts of depositions taken in the prescription opioid lawsuits. *Id.* And ABDC provided 40 volumes of trial transcripts of other prescription opioid lawsuits. *Id.*

Fact discovery closed on October 29, 2021, and expert discovery closed on May 27, 2022. SPApp.12997-98 ¶¶ 43-45.

On July 8, 2022, the parties filed an additional 12 summary judgment motions,

addressing every legal issue in dispute. SPApp.00100-07.¹⁰ Those motions are fully briefed, and the circuit court heard argument on October 17, 2022. SPApp.13070-72. Trial had been scheduled for October 4, 2022, but the circuit court postponed trial so that it would have adequate time to resolve the 12 pending summary judgment motions. *Id.* The circuit court will set a trial schedule, if needed, within one week of resolving the summary judgment motions.

D. St. Paul Initiates Duplicative Litigation in California

On November 5, 2020, following briefing and argument on its summary judgment motion on the “threshold” coverage issue in this case, and in anticipation of an unfavorable ruling from the circuit court, St. Paul filed a duplicative coverage action in California (the “California Coverage Action”), seeking a declaratory judgment as to its obligation to defend and indemnify ABDC for the National Opioid MDL and all state prescription opioid liability lawsuits. SPApp.00480 ¶ 3; SPApp.00493-95 ¶¶ 42-56. The general liability coverage terms and conditions in the policies in the California Coverage Action are substantially, if not completely, identical to the 16 insurance policies at issue in Phase 1 of this case. SPApp.13001 ¶ 59. St. Paul’s California Coverage Action names as defendants all parties to the circuit court lawsuit, including ABDC, Bellco Drug Corporation, ACE, American Guarantee, and Endurance. SPApp.00480 ¶ 15; SPApp.00483 ¶ 18; SPApp.00484 ¶ 22; SPApp.00495 ¶ 57.

St. Paul’s California Coverage Action also names as defendants certain additional entities affiliated with ABDC’s parent company, AmerisourceBergen Corporation (“ABC”), which St. Paul identifies as “Bergen-Brunswig Affiliates,” referring to a California corporation named Bergen Brunswig Corporation. SPApp.00479 ¶ 2. Bergen Brunswig

¹⁰ The parties filed 13 summary judgment motions, but one has since been resolved via stipulation. SPApp.00121.

Corporation is not, however, a party to St. Paul’s California Coverage Action. SPApp.13009 ¶ 95. That is because, in August 2001, Bergen Brunswig Corporation merged with and into AmeriSource Health Corporation, a Delaware corporation with its principal place of business in Pennsylvania. SPApp.00776; SPApp.13010 ¶ 97. AmeriSource Health Corporation was the surviving entity of the merger, and Bergen Brunswig Corporation ceased to exist upon the completion of the merger in August 2001. SPApp.13010 ¶ 98. Following the merger, AmeriSource Health Corporation changed its name to AmerisourceBergen Corporation.

The entities St. Paul refers to as “Bergen-Brunswig Affiliates” in its California Complaint, including the Plaintiffs in this action (*i.e.*, ABDC and Belco), are actually current or former subsidiaries of ABC, a named policyholder on all of the insurance policies at issue here. SPApp.00971; SPApp.01132; SPApp.00952; SPApp.13010-11 ¶ 101.

In addition to asserting declaratory judgment claims against ABDC and its affiliates, St. Paul also asserted declaratory judgment claims for contribution against a host of other insurers. SPApp.00495 ¶ 55 (Count V); SPApp.00495 ¶ 58 (Count VI); SPApp.00496 ¶ 61 (Count VII). In those contribution claims, St. Paul seeks a ruling that *if* it is liable to ABDC for the defense or indemnification of the prescription opioid lawsuits, *then* it is entitled to seek contribution from other insurers for those same liabilities. *Id.* Accordingly, all of those claims and disputes among the insurers first require a resolution of whether ABDC is entitled to insurance coverage for the prescription opioid liability lawsuits under policies and policy forms that are at issue in this case.

E. The Circuit Court Issues the January 6, 2021 Anti-Suit Injunction

On January 6, 2021, the circuit court granted ABDC’s motion for an anti-suit injunction, ruling that “an anti-suit injunction is warranted in these unique, limited

circumstances” and prohibiting all parties 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.01937 ¶ 157; SPApp.01938 ¶ 164. The court further found that “St. Paul has filed the California Coverage Action for improper purposes, namely, delay and forum shopping and further finds that permitting St. Paul to pursue a collateral action would cause irreparable harm to ABDC and would undermine the important governmental and judicial interests of West Virginia and this Court.” SPApp.01937 ¶ 157.

F. The California Trial Court Stays the California Coverage Action Pending Completion of the West Virginia Proceedings, and the Court of Appeal Affirms

Undaunted, St. Paul continued to pursue its collateral California Coverage Action in direct contravention of the circuit court’s Injunction. Given the California court deadlines that required ABDC to respond to or move to dismiss St. Paul’s complaint, ABDC had no choice but to seek relief in the California court to halt St. Paul’s collateral litigation.

On February 19, 2021, the California court—based on California law—granted ABDC’s motion for a stay of the California action, prohibiting St. Paul from proceeding with its complaint against ABDC in California “pending resolution of the West Virginia action.” SPApp.02453 (the “California Stay Order”). The California court recognized that “at least some of the same insurance policies are at issue in both cases, and the West Virginia court will be interpreting at least one of St. Paul’s policies to determine whether they cover opioid litigation, an answer that presumably will be the same whether the underlying litigation is in West Virginia or some other state.” *Id.* The California court held it was “in the interests of comity and the conservation of judicial resources to avoid potential conflicting rulings and

allow the earlier-filed case to proceed first, eliminating the risk of multiple inconsistent judgments in different cases.” *Id.*

The California Court of Appeal affirmed the California Stay Order. *St. Paul Fire & Marine Ins. Co.*, 80 Cal. App. 5th 1 (2022). The appellate court stated that:

- “The trial court issued the stay in recognition of the bellwether case of national importance that is ongoing in West Virginia ..., which, like this one, arises from the opioid prescription abuse and addiction crisis plaguing the country.” *Id.* at 5.
- “The coverage actions here and in West Virginia arise from the same underlying circumstances as the MDL.” *Id.* at 17.
- “[T]he West Virginia case can serve to educate the parties (whether or not the same) and the trial court about the issues and how to streamline the litigation here.” *Id.*
- “Employing a bellwether case in a complex matter like this can serve to winnow and sharpen not only discovery, but claims, defenses, calendaring decisions, motion practice, arguments, hearings or trial, adjudication, indeed every aspect of the litigation process—to the benefit of the parties, the court, and the public alike.” *Id.* at 16.

G. This Court Affirms the Need for the Anti-Suit Injunction But Remands for Clarification of Its Scope

On November 15, 2021, this Court issued its ruling on St. Paul and ACE’s appeal of the January 6, 2021 Injunction. *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d 724. The Opinion acknowledges the legal validity of an anti-suit injunction, the impropriety of St. Paul’s attempts to disrupt the West Virginia Coverage Action, and the need for an injunction in this case. In particular, this Court held:

- “[T]he courts of this state have a compelling interest in determining whether the policies at issue in ABDC’s West Virginia suit provide coverage for the underlying claims brought by West Virginia entities, without competing rulings from a foreign court.” *Id.* at 735-36.

- “St. Paul’s California [Coverage Action] violated the terms and spirit of the circuit court’s [Bifurcation and Stay Order] and was effectively a means of litigating the coverage questions stayed by the circuit court.” *Id.* at 736.
- “The circuit court fairly concluded that St. Paul’s parallel suit in California was filed for improper purposes, namely forum shopping and the disruption of the orderly resolution of the West Virginia suit.” *Id.*
- “The broad language of the California complaint clearly subsumes and seeks rulings on the exact issues that are to be decided (or have already been decided) in West Virginia.” *Id.*
- “[A]n injunction was needed to prevent a threat to the court’s jurisdiction and ability to resolve the West Virginia coverage suit, and to prevent a multiplicity of suits filed with the intent of causing delay, expense and inconsistent judgments.” *Id.*
- “On this record, we find no error by the circuit court in its decision to enter an anti-suit injunction. The circuit court’s order demonstrates the existence of exceptional circumstances, and the court did not abuse its discretion in finding equity compelled an order.” *Id.*

While this Court endorsed the entry of the Injunction, it remanded “for clarification of the order or such other proceedings as are necessary.” *Id.* at 737. In particular, this Court directed additional fact finding targeted at the following issues:

- “why the circuit court precluded the litigation of *any* issues between the parties, if those issues were unrelated to the interpretation of the sixteen insurance policies at issue in the West Virginia action” *id.* (emphasis in original); and
- whether “the circuit court’s order effectively precluded the parties from pursuing some agreed-upon resolution of the California action, or a resolution from the California court such as a stay or dismissal.” *Id.*

H. St. Paul and ACE Attempt To Undermine the West Virginia Coverage Action and Litigate Coverage Issues in Delaware.

On January 26, 2022, Arrowood Indemnity Company—one of the defendants in St. Paul’s California Coverage Action—filed a complaint against ABDC in Delaware that copied the crossclaim it already had asserted against ABDC in California. SPApp.13154.

On March 1, 2022, Arrowood amended its Delaware complaint to add St. Paul and ACE as defendants (in addition to ABDC). SPApp.13164. About two weeks later, Arrowood dismissed its California cross-complaint against the ABC Entities and ACE. SPApp.13142. Arrowood would later also strike a deal to dismiss its California cross-complaint against St. Paul so that both litigants could attempt to escape the California stay and litigate in Delaware. SPApp.13145.

On April 22, 2022, ABDC moved to dismiss or stay Arrowood's Delaware complaint, asking the Delaware court join its sister courts in West Virginia and California and order that the coverage actions should proceed in the order in which they were filed: West Virginia first, then California, and then Delaware. SPApp.13172. ACE did not join ABDC's motion or otherwise seek to advise the Delaware court of its position here that allowing the Delaware action to proceed would prejudice the ACE companies.

After ABDC moved to dismiss or stay Arrowood's Delaware complaint, St. Paul and ACE reached agreements with Arrowood, whereby St. Paul and ACE need not respond to Arrowood's complaint until 30 days after the Delaware court issues a ruling on ABDC's motion to dismiss or stay, which is scheduled for argument on December 19, 2022. SPApp.13168-71; SPApp.13154.

ACE now points to the pending Delaware case as a reason to reverse the West Virginia anti-suit injunction—arguing it needs to be able to file suit against ABDC in Delaware to protect its interests.

I. The Circuit Court Issues the June 10, 2022 Renewed Anti-Suit Injunction.

On March 4, 2022, after this Court remanded to the circuit court for further clarification of the Injunction, ABDC moved for an emergency temporary anti-suit restraining

order to give the parties time to argue and brief the issues, SPApp.02531, which the circuit court granted. On March 21, 2022, ABDC moved for a Renewed Injunction, SPApp.03360, and the parties submitted thousands of pages of briefing and exhibits, including insurance policies that are at issue in other actions as well as detailed evidence regarding proceedings in those other jurisdictions where the Defendant Insurers are attempting the relitigate coverage issues. SPApp.00086-91 (docket); SPApp.12979 ¶ 1; SPApp.13023 ¶ 146. The circuit court then heard argument on the motion. SPApp.00094. On June 10, 2022, the circuit court conducted additional fact finding and issued the Renewed Injunction. SPApp.12978.

Fact-Finding. Based on the parties' submission of additional material, the Circuit Court entered the following findings:

- “[T]he primary policies St. Paul and ACE sold to ABDC, which are at issue in this litigation, are standard form policies.” SPApp.13029 ¶ 171.
- “Standard form policies are designed to be used by many different insurers and have identical or materially identical provisions, regardless of the insurer selling the policy.” *Id.*
- “[F]rom 1995 to 2018, St. Paul and ACE were the only insurers that issued primary layer insurance to ABC (from 2001 to 2008) or Bergen Brunswick Corporation (from 1995 to 2001).” *Id.* ¶ 172.
- “[D]uring that period the St. Paul and ACE policies’ insuring agreements were identical in all material respects.” *Id.*
- “The underlying claims against distributors, including ABDC, in the National Opioid MDL have been found to potentially reach back to January 1, 1996.” SPApp.13015 ¶ 118.
- “[B]ecause all or at least some of the West Virginia opioid cases that are bifurcated and stayed in Phase 2 of this case (including all West Virginia suits included in the National Opioid MDL) involve claims potentially dating back to January 1, 1996, all of the Insurer Defendants’ policies dating back to January 1, 1996 are directly at issue in this case.” *Id.* ¶ 119.

- “[T]he 16 policies that are specifically listed in ABDC’s Amended Complaint are the policies that are directly at issue in Phase 1 of this case, as determined by the temporal scope of the claims and legal rulings of this Court in the WVAG matter. However, all of Insurer Defendants’ other policies, dating back to January 1, 1996, are also directly at issue in Phase 2 of this case, as determined by the temporal scope of the claims and legal rulings of the federal courts in the Track 2 National Opioid MDL as well as the temporal scope of the claims and legal rulings of the West Virginia Mass Litigation Panel.” SPApp.13016 ¶ 120.

Limitations on the Injunction. The circuit court clarified and limited the scope of the Injunction to address the issues raised by this Court, explaining, “this Court agrees that the Injunction should not broadly extend to ‘any issues’ between the parties” SPApp.13024 ¶ 148 (emphasis in original), and “the Court agrees that the Injunction should not extend to insurance policies that are unrelated to the insurance policies at issue in the West Virginia action.” *Id.* ¶ 149. Accordingly, “to ensure the scope of the Injunction does not sweep more broadly than necessary to accomplish the purposes identified by the Supreme Court of Appeals,” SPApp.13025 ¶ 152, the circuit court issued the Renewed Injunction “with the following significant limitations designed to narrowly tailor the scope of the Injunction to properly address the equitable circumstances presented”:

“a. The Injunction shall be a temporary rather than permanent injunction and shall only enjoin the parties from pursuing collateral litigation while this action remains pending.

b. The Injunction will only apply where each the following conditions are met:

i. The collateral suit must concern insurance policies issued to ABDC or its predecessors and affiliates.

ii. The collateral suit must concern insurance policies issued by the Insurer Defendants in this case or their predecessors and affiliates.

iii. The collateral suit must concern insurance policies that are either expressly at issue in this case, that are implicitly at issue in this case by virtue of the temporal scope of the claims asserted in the cases that make up Phase 2 of this case, which include all of defendants’ policies back to at

least January 1, 1996, and/or that are written on forms that are substantially similar to the forms at issue in this case, or that follow form to such insurance policies; and

iv. The collateral suit must concern insurance coverage for prescription opioid liability lawsuits of the same types that have been included in the National Opioid MDL or the West Virginia Opioid MLP.

c. The Injunction is modified to clarify that nothing in the Injunction will preclude any party from seeking a compromise resolution of any claims, whether through settlement or otherwise.

d. Finally, the Court further modifies the Injunction to confirm that the Court will hold a hearing at the conclusion of Phase 1 of this dispute, which is currently scheduled for trial on October 4, 2022, at which time the Court will hear argument on whether changed circumstances equitably require modification of the Injunction to effectuate the purposes identified by the West Virginia Supreme Court or whether further modifications in the interests of justice are required.”

SPApp.13040-41.

Rationale. The circuit court also provided additional clarification and explanation for the scope of the Injunction:

- “[A]n overly restrictive Injunction would fail to capture the reality of the litigation among the parties and would undermine the legitimate purposes to be served by the Injunction.” SPApp.13024 ¶ 148.
- “[T]he Injunction must extend beyond coverage for a subset of prescription opioid liability lawsuits or just the sixteen insurance policies at issue in Phase 1 of this suit; it must extend to all policies related to all the West Virginia opioid cases.” SPApp.13025 ¶ 151.
- “[N]otwithstanding that the California Coverage Action is not currently proceeding, an Injunction remains necessary to prevent the Insurer Defendants from instituting *new collateral actions in other jurisdictions.*” SPApp.13035 ¶ 193 (emphasis added).
- “St. Paul has admitted its intent to pursue other claims *in other jurisdictions* if the Injunction is lifted or narrowed.” *Id.* ¶ 194 (emphasis added).

- “[T]he threat that Insurer Defendants will initiate *new collateral coverage actions in one or more jurisdictions* necessitates the entry of the Injunction to preserve this Court’s jurisdiction over the issues in this case and ensure that the overall resolution of this case is not delayed or impeded by the issuance of contradictory rulings from other courts.” *Id.* ¶ 195 (emphasis added).
- “[V]arious insurers who had filed crossclaims against ABDC in St. Paul’s California Coverage Action have now initiated claims against ABDC *in the State of Delaware.*” SPApp.13036 ¶ 196 (emphasis added).
- “[I]f the Injunction is lifted or narrowed, the jurisdiction of this Court would be imperiled by *still more forum shopping* by the Insurer Defendants, which would undermine the State of West Virginia’s ‘compelling’ interest in the resolution of this suit.” *Id.* ¶ 198 (emphasis added).
- “[T]he Insurer Defendants will not suffer any prejudice from the Injunction.” *Id.* ¶ 199.

This appeal followed.

SUMMARY OF THE ARGUMENT

In deciding the earlier appeal in this case, this Court held that an injunction is warranted to protect West Virginia’s jurisdiction and compelling interest in determining whether the policies at issue provide coverage for the underlying claims brought by West Virginia entities without competing rulings from a foreign court. This Court then remanded for the circuit court to address the scope of the Injunction and clarify the grounds for its order. The circuit court did exactly that. After conducting additional fact-finding based on the substantially enhanced record, the circuit court imposed significant limitations on the scope of the Injunction and explained why the Injunction was necessary, but no broader than necessary, to protect West Virginia’s interests.

On appeal, ACE argues that the circuit court should have enjoined the parties from litigating against each other *only* in California (where St. Paul filed suit for improper purposes) and not anywhere else, including Delaware. ACE is wrong. Where it is necessary to

protect the court's jurisdiction, the court may enjoin the parties from litigating anywhere outside of West Virginia—as long as the injunction is tailored to the circumstances of the case. If a West Virginia court were limited to enjoining litigation of the specific action that gave rise to the need for the injunction, litigants seeking to circumvent proceedings in West Virginia could just stop litigating that specific action and move on to another jurisdiction, which would then require the other party to seek another anti-suit injunction, causing precisely the disruption the injunction is designed to prevent.

Moreover, and contrary to ACE's contentions, the circuit court accounted for the pending Delaware action and the prospect that the parties might file suits in Delaware and elsewhere that would threaten the court's jurisdiction—and the circuit court rightly concluded that the existence of the Delaware action and the prospect of other collateral litigation provided further support for the Renewed Injunction. The circuit court acknowledged that “various insurers who had filed crossclaims against ABDC in St. Paul's California Coverage Action have now initiated claims against ABDC in the State of Delaware” and concluded that “the threat that Insurer Defendants will initiate new collateral coverage actions in one or more jurisdictions necessitates the entry of the Injunction to preserve this Court's jurisdiction over the issues in this case and ensure that the overall resolution of this case is not delayed or impeded by the issuance of contradictory rulings from other courts.”

ACE argues that it will suffer substantial prejudice in Delaware if the Renewed Injunction remains in place, including being forced to “sit on the sidelines” while important issues are litigated. This is false. At present, no coverage issues are being litigated in Delaware while ABDC's motion to dismiss or stay the case is pending, and ACE and Arrowood have agreed that ACE need not respond to Arrowood's complaint until the

Delaware court resolves ABDC's motion. ACE is free to join ABDC's motion and articulate its concerns to the Delaware court. ACE's decision to stay silent in Delaware shows that its argument of being forced to "sit on the sidelines" in Delaware is a pretense. In any event, should the Delaware action move forward, the Renewed Injunction will not prevent ACE from litigating its dispute with Arrowood. The Renewed Injunction prevents ABDC and ACE from litigating the same or substantially similar disputes *against each other* in other forums. Allowing ACE to sue ABDC in Delaware regarding the same or substantially similar disputes—which ACE contends it should be permitted to do—would imperil the jurisdiction of the West Virginia courts and authorize still more forum shopping by the Insurer Defendants, which would undermine West Virginia's compelling interest in the resolution of this suit.

Finally, ACE contends that the Renewed Injunction is ambiguous as to the parties and policies that it covers. Not so. The Renewed Injunction clearly restricts "all parties" from litigating collateral actions pertaining to "policies issued to ABDC or its predecessors and affiliates" by "the Insurer Defendants in this case or their predecessors and affiliates" that are at issue in Phase 1 or 2 of this case or written on forms that are substantially similar to the forms at issue in this case.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

ABDC does not believe oral argument is needed because the issues are straightforward and the circuit court's opinion reflects a straightforward exercise of its discretion.

STANDARD OF REVIEW

This Court's review of a circuit court's decision to grant injunctive relief consists of a "three-pronged *deferential* standard of review." *State ex rel. E.I. DuPont de Nemours & Co. v. Hill*, 214 W. Va. 760, 767, 591 S.E.2d 318, 325 (2003) (emphasis added). First, this Court

“review[s] the final order granting the ... injunction and the ultimate disposition under an abuse of discretion standard.” *Id.* (citing *West v. Nat’l Mines Corp.*, 168 W. Va. 578, 590, 285 S.E.2d 670, 678 (1981)). Second, this Court reviews the circuit court’s underlying factual findings for clear error. *Id.* (citing *State by & Through McGraw v. Imperial Mktg.*, 196 W. Va. 346, 472 S.E.2d 792, Syl. Pt. 1 (1996)). Third, this Court reviews questions of law *de novo*. *Id.*

ARGUMENT

I. A Circuit Court Entering an Injunction is Guided by a Discretionary Standard

As this Court stated in its November 15, 2021 Opinion, “[a] circuit court entering an injunction is guided by the following discretionary standard”:

The granting or refusal of an injunction ... calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.

St. Paul Fire & Marine Ins. Co., 868 S.E.2d at 731 (quoting Syl. pt. 4, *State v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932)).

“[A]n anti-suit injunction is an order barring parties to an action in this state from instituting or prosecuting substantially similar litigation in another state.” *Id.* at 734. “An anti-suit injunction is an exceptional remedy but is appropriate when equity compels the circuit court: (1) to address a threat to the court’s jurisdiction; (2) to prevent the evasion of an important public policy; (3) to prevent a multiplicity of suits that result in delay, inconvenience, expense, inconsistency, or will be a ‘race to judgment’; or (4) to protect a party from vexatious, inequitable or harassing litigation.” *Id.*

II. The Circuit Court Properly Exercised Its Discretion In Entering The Renewed Injunction

In November 2021, this Court held that an injunction is warranted in this action. In particular, this Court held that entry of the injunction is supported by four equitable factors. While any one of the four equitable factors standing alone would justify an anti-suit injunction, all four factors are present here.

First, an injunction protects the jurisdiction of the West Virginia courts. This case has been ongoing for five years. Twelve motions for summary judgment addressing every legal issue related to insurance coverage for prescription opioid liability lawsuits are pending before the circuit court for resolution, after which the circuit court will set the Phase 1 bellwether case for trial, if necessary. SPApp.00100-07; SPApp.13070-72. The Insurer Defendants' competing lawsuits threaten (and will continue to threaten) that jurisdiction. The injunction protects the West Virginia court from being required to determine (constantly) whether another court's ruling constrains the parties or requires the court to reanalyze its work and request supplemental briefing. Indeed, this Court already has concluded that an injunction is "needed to prevent a threat to the court's jurisdiction and ability to resolve the West Virginia suit." *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 736.

And, as the circuit court recognized on remand, "notwithstanding that the California Coverage Action is not currently proceeding, an Injunction remains necessary to prevent the Insurer Defendants from instituting new collateral actions in other jurisdictions." SPApp.13035 ¶ 193.¹¹ "[V]arious insurers who had filed crossclaims against ABDC in St. Paul's California Coverage Action have now initiated claims against ABDC in the State of

¹¹ The next stay review hearing in California is scheduled for March 23, 2023.

Delaware.” SPApp.13036 ¶ 196. If the Renewed Injunction is narrowed, the circuit court’s jurisdiction would be imperiled by still more forum shopping, which would undermine West Virginia’s compelling interest in the resolution of this suit without interference from collateral proceedings. *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 735-36.

Second, an injunction prevents the erosion of an important public policy. The Defendant Insurers’ efforts to have coverage for the prescription opioid liability lawsuits determined elsewhere, despite the fact that the case was first filed in West Virginia, undermine important interests of this state. As this Court already has concluded, “the courts of this state have a compelling interest in determining whether the policies at issue in ABDC’s West Virginia suit provide coverage for the underlying claims brought by West Virginia entities, without competing rulings from a foreign court.” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 736. This has not changed.

Third, the injunction prevents a multiplicity of suits that will result in a race to judgment and risk inconsistent rulings. As this Court recognized, an injunction is required “to prevent a multiplicity of suits filed with the intent of causing delay, expense and inconsistent judgments.” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 736. The Defendant Insurers are currently colluding with their purported adversaries in California and Delaware to circumvent the West Virginia injunction (and California stay) and, on appeal, the Defendant Insurers admit their desire to pursue claims against ABDC in other jurisdictions. *See* St. Paul Brief at 35; ACE Brief at 25.

Fourth, the injunction protects the parties from vexatious, inequitable, and harassing litigation. The Defendant Insurers have already shown their willingness to file suits in other forums “for improper purposes, namely forum shopping and the disruption of the orderly

resolution of the West Virginia [Coverage Action].” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 736. St. Paul, in fact, has “admitted its intent to pursue other claims in other jurisdictions if the Injunction is lifted or narrowed.” SPApp.13035 ¶ 194. Nothing has changed since this Court endorsed the circuit court’s conclusion in this regard. Without the injunction, the Defendant Insurers will be free to pursue similar vexatious litigation in other jurisdictions.

Further to the point that equitable principles support the circuit court’s Renewed Injunction, the injunction is limited in ways that precisely address this Court’s concerns. This Court asked the circuit court to address “why [it] precluded the litigation of *any* issues between the parties, if those issues were unrelated to the interpretation of the sixteen insurance policies at issue in the West Virginia action.” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 737 (emphasis in original). To answer this question and address this concern, the circuit court clarified that the injunction will apply only to collateral suits concerning:

- “insurance policies issued to ABDC or its predecessors and affiliates”;
- “insurance policies issued by the Insurer Defendants in this case or their predecessors and affiliates”;
- “insurance policies that are either expressly at issue in this case, that are implicitly at issue in this case by virtue of the temporal scope of the claims asserted in the cases that make up Phase 2 of this case, which include all of defendants’ policies back to at least January 1, 1996, and/or that are written on forms that are substantially similar to the forms at issue in this case, or that follow form to such insurance policies”; and
- “insurance coverage for prescription opioid liability lawsuits of the same types that have been included in the National Opioid MDL or the West Virginia Opioid MLP”

SPApp.13040-41.

In other words, the Renewed Injunction does not preclude the litigation of issues that

are “unrelated” to the policies at issue in this lawsuit. Instead, the Renewed Injunction is expressly limited to issues related those insurance policies already before the circuit court and policies written on forms that are substantially similar to the forms at issue in this case or that follow form to such insurance policies.

This Court also asked whether the Injunction “precluded the parties from pursuing some agreed-upon resolution of the California action, or a resolution from the California court such as a stay or dismissal.” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 737. To address this, the circuit court clarified that “nothing in the Injunction will preclude any party from seeking a compromise resolution of any claims, whether through settlement or otherwise.” SPApp.13041. And indeed, St. Paul has already voluntarily dismissed nearly every single insurer defendant—including all insurer-defendants in this lawsuit—from the California action (to the extent it served those defendants in the first place). SPApp.13076.

This is a simple matter. This Court has confirmed the need for an injunction, and the circuit court issued a Renewed Injunction that addressed all of the considerations this Court asked it to address on remand—and did so in a way that fully comports with West Virginia law and reflects a proper exercise of the circuit court’s discretion. Affirmance is warranted.

III. ACE’s Arguments Lack All Merit

As explained below and contrary to ACE’s contentions: (A) the circuit court properly enjoined ACE from suing ABDC over the same or similar policies in all other forums, including Delaware; (B) the Renewed Injunction creates no unfair prejudice to ACE with respect to the Delaware action; and (C) the Renewed Injunction properly binds all parties and covers collateral litigation regarding insurance policies issued by the Insurer Defendants or their predecessors and affiliates.

A. The Circuit Court Properly Enjoined ACE from Suing ABDC Over the Same or Similar Policies in All Other Forums, Including Delaware

ACE argues that a court may enjoin the parties from litigating *only* those specific actions that already have been filed (improperly) in other courts—an argument that ACE declined to raise on appeal of the original injunction. According to ACE, the circuit court may have acted within its discretion by enjoining the parties from litigating against each other in California, where St. Paul filed a duplicative action for improper purposes, but the circuit court did not act within its discretion by enjoining the parties from litigating against each other elsewhere, including in Delaware. ACE contends that “[r]egardless of whether the Circuit Court substantiated such a connection [between the parties and bad-faith conduct] to the California Action, it is plain that it failed to do so as to the Delaware Actions” because “the order’s only mention of the Delaware Actions was to note their existence.” ACE Brief at 20. ACE is wrong on numerous levels.

First, courts need not style an anti-suit injunction to restrict the parties from litigating only the specific actions that were the impetus for the anti-suit injunction in the first place. It is no surprise that ACE has not previously raised this argument—because no legal authority supports it. Although one party’s attempt to re-litigate issues outside of West Virginia can serve as a basis for a West Virginia court’s conclusion that an anti-suit injunction is necessary to protect the court’s jurisdiction, the West Virginia court need not restrict its injunction to any specific action. Instead, where it is necessary to protect the court’s jurisdiction, the court may enjoin the parties from litigating anywhere outside of West Virginia—as long as the injunction is tailored to the circumstances of the case. *See St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 737. The threat to a West Virginia court’s jurisdiction can come from any court that issues

rulings that might influence, through preclusion or otherwise, what the West Virginia court is asked to decide. Here, as the circuit court recognized, “the threat that Insurer Defendants will initiate new collateral coverage actions in one or more jurisdictions necessitates the entry of the Injunction to preserve this Court’s jurisdiction over the issues in this case and ensure that the overall resolution of this case is not delayed or impelled by the issuance of contradictory rulings from other courts.” SPApp.13035 ¶ 195.

ACE contends that this Court’s decision affirming the need for an injunction but remanding for clarification on its scope supports ACE’s position on appeal. It does not. This Court did not return the case to the circuit court because the original injunction prevented the parties from litigating issues in *courts* other than in California (where the bad-faith conduct occurred). Instead, this Court returned the case to the circuit court for additional factual findings and clarity as to why the Injunction encompassed litigation pertaining to *policies* not at issue in the West Virginia action. *See St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 737. Accordingly, on remand, the circuit court made findings of fact and clarified that (1) the policies that ACE issued to ABDC’s parent or its predecessors in interest are identical in all material respects; and (2) all of these ACE policies are directly at issue this case. SPApp.13005 ¶¶ 77-79; SPApp.13015-16 ¶¶ 119-20; SPApp.13029-33 ¶¶ 171-82. The circuit court then refashioned the Injunction “to ensure the scope of the Injunction does not sweep more broadly than necessary to accomplish the purposes identified by the Supreme Court of Appeals.” SPApp.13040. The Renewed Injunction only restricts litigation pertaining to “policies issued to ABDC or its predecessors and affiliates” by “the Insurer Defendants in this case or their predecessors and affiliates” that are at issue in Phase 1 or 2 of this case or written on forms that are substantially similar to the forms at issue in this case. SPApp.13040-41.

In addition to lacking legal support, ACE's position is untethered to the realities of litigation. If a West Virginia court were limited to enjoining the parties from litigating the specific action that gave rise to the need for the injunction, the parties seeking to circumvent the West Virginia proceedings (such as St. Paul and ACE) could simply cease litigating that specific action and move on to another jurisdiction, which would then require the other party (here, ABDC) to seek another anti-suit injunction. This process could go on repeatedly, resulting in an immense waste of resources for the court and parties. It would tie up the West Virginia court with anti-suit injunction motions and effectively prevent the court from addressing the merits of the case before it. Make no mistake—ACE is arguing for the adoption of a legal rule that would gut the effectiveness of any anti-suit injunction that a West Virginia court issues to protect its jurisdiction.

Accordingly, the circuit court was under no obligation to make findings that the Delaware actions were filed in violation of the Injunction or for other improper purposes for the circuit court to issue a Renewed Injunction that prevents the parties from initiating or prosecuting duplicative litigation against each other in Delaware (or anywhere else) regarding insurance policies already before the circuit court and policies written on forms that are substantially similar to the forms at issue in this case or that follow form to such insurance policies.

Second, contrary to ACE's misstatements and hyperbole, the circuit court *did* account for the pending Delaware action and the prospect that the parties might file suits in Delaware and elsewhere that would threaten the court's jurisdiction—and the circuit court rightly concluded that the Delaware action and the prospect of other collateral litigation provided further support for the Renewed Injunction. ACE contends that the circuit court merely noted

the existence of the Delaware actions as an aside and did not make any findings or reach any conclusions based on the pending Delaware action and the threat of other collateral actions. That is false.

In issuing the Renewed Injunction, the circuit court explained that “notwithstanding that the California Coverage Action is not currently proceeding, an Injunction remains necessary to prevent the Insurer Defendants from instituting *new collateral actions* in other jurisdictions[,]” SPApp.13035 ¶ 193 (emphasis added) and that “the threat that Insurer Defendants will initiate *new collateral coverage actions* in one or more jurisdictions necessitates the entry of the Injunction to preserve this Court’s jurisdiction over the issues in this case and ensure that the overall resolution of this case is not delayed or impeded by the issuance of contradictory rulings from other courts.” *Id.* ¶ 195 (emphasis added).

In stating its rationale, the circuit court acknowledged that “various insurers who had filed crossclaims against ABDC in St. Paul’s California Coverage Action have now initiated claims against ABDC *in the State of Delaware*[,]” SPApp.13036 ¶ 196 (emphasis added), and concluded that “if the Injunction is lifted or narrowed, the jurisdiction of this Court would be imperiled by *still more forum shopping* by the Insurer Defendants, which would undermine the State of West Virginia’s ‘compelling’ interest in the resolution of this suit.” *Id.* ¶ 198 (emphasis added).

In short, the circuit court accounted for the Delaware action—and the prospect of other collateral actions—all of which supports the circuit court’s decision to enter the Renewed Injunction to prevent the parties before it from using those collateral actions to undermine the court’s jurisdiction and the compelling interests of West Virginia.

B. The Renewed Injunction Creates No Unfair Prejudice to ACE With Respect to the Delaware Action

The Delaware action is a suit that Arrowood filed against ABDC seeking a declaration that Arrowood is not required to provide insurance coverage for the prescription opioid liability lawsuits. In March 2022, after initially suing only ABDC and its parent, Arrowood amended its complaint to add St. Paul and ACE as defendants as well. SPApp.13164. Arrowood claims that, to the extent it is called upon to pay any sums for defense and indemnity costs to ABC incurred in the prescription opioid lawsuits in excess of Arrowood's equitable share of defense and indemnity costs, Arrowood is entitled to reimbursement from St. Paul and ACE. SPApp.03317.

In April 2022, ABDC moved to dismiss or stay Arrowood's Delaware complaint, explaining that the coverage actions should proceed in the order in which they were filed: West Virginia first, then California, and then Delaware. SPApp.13172. ACE did not join ABDC's motion or otherwise seek to be heard before the Delaware court. ABDC's motion is scheduled for a hearing on December 19, 2022. SPApp.13185. After ABDC moved to dismiss or stay Arrowood's Delaware complaint, St. Paul and ACE reached agreements with Arrowood, whereby St. Paul and ACE need not respond to Arrowood's complaint until 30 days after the Delaware court issues a ruling on ABDC's motion to dismiss or stay. SPApp.13168-71.

In arguing that it would suffer substantial prejudice in Delaware if the Renewed Injunction remains in place, ACE relies on multiple false assertions. According to ACE, "[r]egardless of this Court's ruling on appeal, unless the Delaware courts stay the Delaware Actions, [ABDC] will be litigating in Delaware issues of insurance coverage for opioid-related lawsuits under liability policies" and that "while [ABDC] is permitted to litigate those issues

against the Delaware plaintiffs, the injunction *forces ACE to sit on the sidelines* while important issues that may bear on ACE's policies are decided." ACE Brief at 24 (emphasis added). This is wrong. The Renewed Injunction does not prevent ACE from litigating disputes with third parties in other forums, including Delaware. The Renewed Injunction prevents ACE and ABDC from litigating the same or substantially similar disputes *against each other* in other forums. As such, ACE is free to respond to Arrowood in Delaware and defend its position.

Tellingly, ACE is unable to identify any West Virginia authorities supporting its argument. Instead, ACE relies on a Delaware Chancery Court denial of a motion for a permanent anti-suit injunction. *See North River Ins. Co. v. Mine Safety Appliances Co.*, Civil Action No. 8456-VCG, 2013 Del. Ch. LEXIS 307 (Del. Ch. Dec. 20, 2013). *North River*, however, involved different circumstances. In *North River*, an insurer sought to enjoin its policyholder from participating in a West Virginia case brought by third-party tort plaintiffs who sought a declaration regarding the insurer's duties to the policyholder and the plaintiffs. *Id.* at *2-3, *15. The Delaware court acknowledged that it could not prevent the third-party tort plaintiffs from proceeding with their West Virginia suit and held that it was "not disposed to enter an injunction when such a remedy would deprive the party enjoined of appearing in ongoing litigation about its rights under its own insurance policy." *Id.* at *31.

Here, in contrast, the Renewed Injunction does not enjoin ACE from appearing in Arrowood's ongoing litigation in Delaware and responding to Arrowood's Delaware complaint in the event that the Delaware court breaks with its sister courts and allows the suit to move forward without issuing a stay. Instead, the Renewed Injunction prevents ACE from initiating or prosecuting a collateral suit against ABDC regarding the same or substantially similar

disputes that are being litigated in West Virginia.

ACE, however, wants to file a collateral suit against ABDC in Delaware. According to ACE, if the Renewed Injunction remains in place, ACE would be “unable to assert crossclaims against [ABDC].” ACE Brief at 25. But ACE is not entitled to any special exemption from the injunction provisions that apply equally to ACE and ABDC. Allowing ACE to file the same or substantially similar claims against ABDC in Delaware would defeat the whole purpose of the injunction. As the circuit court explained:

- “[T]he threat that Insurer Defendants will initiate new collateral coverage actions in one or more jurisdictions necessitates the entry of the Injunction to preserve this Court’s jurisdiction over the issues in this case and ensure that the overall resolution of this case is not delayed or impeded by the issuance of contradictory rulings from other courts.” SPApp.13035 ¶ 195.
- “[I]f the Injunction is lifted or narrowed, the jurisdiction of this Court would be imperiled by still more forum shopping by the Insurer Defendants, which would undermine the State of West Virginia’s ‘compelling’ interest in the resolution of this suit.” SPApp.13036 ¶ 198.

ACE contends that it cannot properly defend against Arrowood’s contribution claim in Delaware unless it can sue ABDC in Delaware and seek a declaration that it is not required to provide coverage for the prescription opioid liability lawsuits. But the issue of whether ACE is required to provide coverage for the prescription opioid liability lawsuits is the same issue that the circuit court will address in its bellwether trial in this case—which was previously set to begin on October 4, 2022 and will now be scheduled after the court’s resolution of the 12 pending summary judgment motions, which were argued on October 17, 2022. SPApp.13070-72. Accordingly, ACE can protect its interests simply by proceeding with the case in the circuit court. For all of these reasons, the Renewed Injunction is fair to ACE with respect to the Delaware action.

C. The Renewed Injunction Properly Binds All Parties And Covers Collateral Litigation Regarding Insurance Policies Issued by the Insurer Defendants or Their Predecessors and Affiliates.

ACE argues that the Renewed Injunction is ambiguous as to the parties and policies it covers. ACE Brief at 25-27. The Renewed Injunction, however, speaks for itself: “All parties are hereby enjoined from instituting or prosecuting any collateral litigation or other proceeding against one another relating to insurance coverage for the prescription opioid liability lawsuits against ABC, ABDC, or any other affiliated entity subject to the limitations set forth in this Order” and for the injunction to apply “[t]he collateral suit must concern insurance policies issued by the Insurer Defendants in this case or their predecessors and affiliates.” SApp.13040-41.

The Renewed Injunction correctly encompasses policies issued by the Insurer Defendants’ predecessors and affiliates. Regardless of which Travelers entity¹² or Chubb entity¹³ has its name on the policy, collateral suits seeking coverage determinations for the prescription opioid liability lawsuits have the potential to threaten the jurisdiction of the circuit court.

The Renewed Injunction, of course, does not apply to all policies issued by the Defendant Insurers’ predecessors and affiliates. The circuit court included limitations to ensure that the Renewed Injunction does “not extend to insurance policies that are unrelated to the insurance policies at issue in the West Virginia action.” SApp.13024 ¶ 149. Thus, “to ensure

¹² The circuit court took judicial notice of the fact that St. Paul Fire and Marine Insurance Company and St. Paul Mercury Insurance Company, among others, are subsidiaries of The Travelers Companies, Inc. SApp.13008 ¶ 89.

¹³ The circuit court took judicial notice of the fact that ACE American Insurance Company, ACE Property and Casualty Insurance Company, and Federal Insurance Company, among others, are subsidiaries of Chubb Limited. SApp.13008-09 ¶ 90.

the scope of the Injunction does not sweep more broadly than necessary to accomplish the purposes identified by the Supreme Court of Appeals,” SPApp.13025 ¶ 152, the Renewed Injunction encompasses only collateral litigation over policies that are “expressly at issue in this case[,]” “implicitly at issue in this case by virtue of the temporal scope of the claims asserted in the case that make up Phase 2 of this case,” or “written on forms that are substantially similar to the forms at issue in this case, or that follow form to such insurance policies.” SPApp.13041.

CONCLUSION

This Court should affirm the circuit court’s entry of the Corrected Order Granting Plaintiffs’ Motion for Injunction dated June 10, 2022.

Dated this the 28th day of November, 2022.

/s/ Todd A. Mount

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of November, 2022, a copy of the foregoing Brief of Respondents was served upon all counsel via File&ServeXpress.

/s/ Todd A. Mount
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