

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 22-575

SCA EFiled: Oct 11 2022
03:29PM EDT
Transaction ID 68237508

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,

Defendant Below,
Petitioner,

**CONTAINS CONFIDENTIAL
MATERIALS**

v.

AMERISOURCEBERGEN DRUG
CORPORATION, and BELLCO DRUG
CORPORATION,

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

Plaintiffs Below,
Respondents.

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

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Dated: October 11, 2022

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I. ASSIGNMENTS OF ERROR

Respondents AmerisourceBergen Drug Corporation and Bellco Drug Corporation (collectively, “AmerisourceBergen” or “ABDC”) are alleged to be responsible for the opioid crisis in West Virginia. AmerisourceBergen seeks insurance coverage for opioid-related lawsuits filed against it in West Virginia under a liability policy issued by Petitioner St. Paul Fire and Marine Insurance Company (“St. Paul”) for the period May 1, 2006-May 1, 2007 (the “St. Paul Policy”), and 15 policies issued by four other insurers for periods from 2006 to 2013 (together with St. Paul, the “Insurers” or “Defendants”). All 16 policies were issued in Pennsylvania to a Pennsylvania company and are governed by Pennsylvania law.

St. Paul appeals a June 10, 2022 Order by the Boone County Circuit Court imposing an anti-suit injunction prohibiting St. Paul “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,” with respect to any “insurance policies issued to ABDC or its predecessors and affiliates” dating “back to at least January 1, 1996” (the “Second Injunction”). The Circuit Court previously entered a materially identical injunction on January 7, 2021 (the “First Injunction”), which this Court reversed in an opinion dated November 15, 2021. This Court held that the injunction was “overbroad” and an “abuse of discretion” because, among other reasons, it “impairs the parties’ ability to litigate, against each other or with third parties, over policies separate from the sixteen policies” at issue in this case. St. Paul appeals the Second Injunction on the following grounds:

1. The Second Injunction contravenes this Court’s November 15, 2021 opinion because it imposes an anti-suit injunction materially identical to, and equally broad as, the First Injunction that this Court reversed as overbroad and an abuse of discretion.
2. The Circuit Court abused its discretion by reinstating an injunction that this Court already ruled improperly prejudiced the Insurers.

3. The Circuit Court’s entry of the Second Injunction violates principles of comity between states and their independent court systems.

II. STATEMENT OF THE CASE

A. In 2012, The Attorney General Sues AmerisourceBergen, And AmerisourceBergen Concludes The Suit Is Not Covered By Its Insurance

In June 2012, the West Virginia Attorney General sued AmerisourceBergen for public harm that allegedly arose out of the opioid crisis in West Virginia (the “WVAG Lawsuit”).¹ The Attorney General claimed AmerisourceBergen had violated the law by selling opioid drugs “in excess of the amount . . . legitimately medically required.”² He alleged that AmerisourceBergen was “[o]n notice that an epidemic of prescription drug abuse existed in West Virginia” and that the opioids sold into the state “were being abused.”³ The Attorney General asserted that, in spite of its knowledge, AmerisourceBergen “inserted” itself “as an integral part of the Pill Mill process” and “profit[ed] from this epidemic” because it “supplied controlled substances to drugstores and pharmacies that then dispense those controlled substances often based upon bogus prescriptions.”⁴

Upon being served with the WVAG Lawsuit complaint in 2012, AmerisourceBergen’s in-house insurance professionals in the risk management department determined that the lawsuit was not covered under AmerisourceBergen’s liability insurance policies because the lawsuit did not seek payment of damages for any bodily injury. AmerisourceBergen’s Director of Risk Management explained in an email to her boss that it “does not appear there is coverage.”⁵

Courts across the country have agreed. Beginning in 2014, three years before

¹ See SPApp.00140 (ABDC Mar. 17, 2017 Compl. ¶ 15).

² SPApp.11337 (WVAG Lawsuit Jan. 13, 2015 SAC ¶ 8).

³ SPApp.11341 (WVAG Lawsuit Jan. 13, 2015 SAC ¶ 14).

⁴ SPApp.00343-44, SPApp.00346-47 (WVAG Lawsuit Jan. 13, 2015 SAC ¶¶ 3-4, 8).

⁵ See SPApp.11235 (Van Sant July 2, 2012 Email to Hope); see also SPApp.12136 (Van Sant May 14, 2021 Dep. Tr. at 203:5-22) (AmerisourceBergen concluded the WVAG Lawsuit was not covered because it involved “a state” seeking money for economic costs, and “not a person” who suffered any bodily injury).

AmerisourceBergen commenced this case, numerous courts have issued rulings that the WVAG Lawsuit was not covered under liability policies as a matter of law. These rulings included a 2015 decision—issued two years before AmerisourceBergen brought this coverage action—which found as a matter of law that the WVAG Lawsuit was not covered under another St. Paul liability policy with the same insuring agreement that appears in the St. Paul Policy issued to AmerisourceBergen that is the subject of AmerisourceBergen’s complaint here.⁶ Earlier this year, the Delaware Supreme Court ruled, in January 2022, that governmental-entity opioids lawsuits are not covered under liability policies like the one at issue here as a matter of Pennsylvania law—the same law that applies to the St. Paul Policy.⁷ The Ohio Supreme Court agreed in September 2022 that governmental-entity opioid lawsuits are not covered under liability policies.⁸ A series of other courts have reached the same conclusion as a matter of law.⁹

B. In 2017, AmerisourceBergen Commences This Insurance Coverage Action, And Limits The Scope To 16 Policies And West Virginia Claims

In January 2017, AmerisourceBergen settled the WVAG Lawsuit for \$16 million.¹⁰ Two months later, AmerisourceBergen filed this insurance coverage action, naming as defendants St. Paul and four other insurance companies: ACE American Insurance Company, ACE Property and Casualty Insurance Company (together, “ACE”), American Guarantee & Liability Insurance

⁶ See *Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 90 F. Supp. 3d 1308, 1313-15 (S.D. Fla. 2015).

⁷ See *ACE Am. Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239, 241 (Del. 2022).

⁸ See *Acuity v. Masters Pharm., Inc.*, --- N.E.3d ---, No. 2020-1134, 2022 WL 4086449, at *10-11 (Ohio Sept. 7, 2022).

⁹ See, e.g., *Cincinnati Ins. Co. v. Richie Enterp. LLC*, No. 1:12-CV-00186-JHM-HBB, 2014 WL 3513211 at *6 (W.D. Ky. July 16, 2014) (no coverage for WVAG Lawsuit); see also, e.g., *Cincinnati Ins. Co. v. AmerisourceBergen Drug Corp.*, No. CV2012103912, 2015 WL 13808271 at *1 (Ohio C.P., Butler Cty. Aug. 31, 2015) (same); *Westfield Ins. Co. v. Masters Pharm., Inc.*, No. A 1400064, 2015 WL 10478081 at *3 (Ohio C.P., Hamilton Cty. Dec. 17, 2015) (same); *Motorists Mut. Ins. Co. v. Quest Pharm., Inc.*, No. 5:19-cv-00187-TBR, 2021 WL 1794754 at *6-7 (W.D. Ky. May 5, 2021) (no coverage for opioid suits outside of West Virginia); *Westfield Nat’l Ins. Co. v. Quest Pharm., Inc.*, No. 5:19-cv-00083-TBR, 2021 WL 1821702, at *8 (W.D. Ky. May 6, 2021) (same).

¹⁰ See SPApp.00199, SPApp.00201 (ABDC July 18, 2018 Am. Compl. ¶¶ 26, 34).

Company, and Endurance American Insurance Company (collectively, the “Insurers”).¹¹ By the operative complaint, filed July 2018, AmerisourceBergen seeks a determination of coverage for opioid lawsuits filed against AmerisourceBergen **in West Virginia** under one liability policy issued by St. Paul and 15 other policies issued by the four other Insurers for certain periods from 2006 to 2013.¹² All 16 policies are governed by Pennsylvania law.¹³

As this Court recognized in its November 15, 2021 Opinion, the scope of AmerisourceBergen’s complaint in this case is limited to 16 insurance policies and underlying opioid-related lawsuits filed against AmerisourceBergen **in West Virginia**:

Our concern is that ABDC’s West Virginia complaint is limited in scope and seeks a declaratory judgment concerning only sixteen insurance policies issued by five insurance companies. As ABDC’s complaint is cast, it asks the circuit court for a judgment regarding whether those sixteen policies provide coverage for the growing number of West Virginia-based opioid lawsuits.¹⁴

Since this Court reversed the First Injunction on November 15, 2021, AmerisourceBergen has not sought leave to amend its complaint to expand the scope of this coverage litigation to include any additional insurance policies or any other claims outside of West Virginia. Indeed, from the outset of this case, AmerisourceBergen has deliberately limited the scope of litigation to these 16 policies and underlying opioid lawsuits filed **in West Virginia**. During a hearing in 2017, AmerisourceBergen affirmed, as a condition to receiving an extension of time to amend its original complaint, that AmerisourceBergen would not be expanding the limited scope of this coverage action to include any other insurance policies or claims. Specifically, AmerisourceBergen told the

¹¹ See SPApp.00135-51 (ABDC Mar. 17, 2017 Compl.).

¹² See SPApp.00194-95, SPApp.00202-16, SPApp.00218, SPApp.00240 (ABDC July 18, 2018 Am. Compl. ¶¶ 1, 40-89, 93 & Ex. A) (“This is an insurance coverage action . . . for all defense costs and any liability that ABDC and Belco incur in connection with prescription opioid lawsuits filed in this State.”).

¹³ See, e.g., SPApp.02674 (Def’s. Mar. 11, 2022 Opp’n to ABDC Mot. for TRO).

¹⁴ See *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Drug Corp.*, 868 S.E.2d 724, 737 (W. Va. 2021).

Circuit Court that AmerisourceBergen has “no intent of adding cases from other jurisdictions” 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.*”¹⁵ In entering the First Injunction, the Circuit Court gave AmerisourceBergen another opportunity to amend its complaint “to ensure that all issues, parties, and insurance policies the parties believe are necessary to protect their legitimate interests are included in this action,” but AmerisourceBergen again declined to expand its complaint.¹⁶

Under a February 22, 2018 Order, the parties are presently litigating coverage for the WVAG Lawsuit in the first phase of this litigation, and the second phase will address coverage for other underlying lawsuits filed against AmerisourceBergen in West Virginia: “Litigation concerning ABDC’s claim for coverage with respect to the WVAG Lawsuit will move forward, and . . . [l]itigation of ABDC’s claim for coverage with respect to the pending West Virginia Coverage Actions is stayed.”¹⁷ It is undisputed that opioid lawsuits filed against AmerisourceBergen outside of West Virginia are beyond the scope of this coverage action.

AmerisourceBergen has never provided an explanation for restricting the scope of this case to a small subset of insurance policies and excluding coverage for claims brought against it in the other 49 states, but its choice is final and dispositive of the issues presented. Insurance coverage for opioid suits filed outside of West Virginia is not and has never been the subject of this West-Virginia-specific litigation. Indeed, this litigation could only properly be about coverage for

¹⁵ See SPApp.00158-60 (Cir. Ct. Sept. 28, 2017 Hr’g Tr. at 5:19-20, 6:15-16, 7:20-22) (emphasis added); SPApp.00180 (Cir. Ct. Oct. 16, 2017 Or. at 1) (“[P]laintiff affirmed that . . . it is seeking and will only seek coverage for . . . opioid lawsuits filed against ABDC in West Virginia.”).

¹⁶ See, e.g., SPApp.02235 (St. Paul Jan. 20, 2021 Ltr. to Cir. Ct. at 1) (“Plaintiffs confirmed that they do not intend to seek leave to amend their complaint to add other insurers, insurance policies, or additional underlying claims for decision by the Court in this proceeding.”).

¹⁷ See SPApp.00188 (Cir. Ct. Feb. 22, 2018 Or. at 1).

underlying lawsuits filed in West Virginia, because those suits are the only connection that this case has to West Virginia—none of the parties are located in West Virginia, and none of the 16 policies were issued in West Virginia or to a West Virginia company.

C. AmerisourceBergen Is Sued By Governments Outside Of West Virginia, And Demands Insurance Coverage For A Multi-Billion-Dollar Settlement Of Non-West Virginia Claims

Notwithstanding the limited scope of this West-Virginia-specific coverage litigation, AmerisourceBergen and its affiliates also have been sued by thousands of other state and local governments outside of West Virginia, each of which has asserted claims related to AmerisourceBergen’s alleged improper distribution of opioids within those jurisdictions. AmerisourceBergen has demanded insurance coverage for those thousands of other claims from St. Paul and other insurance companies, including insurers that are not parties to this case.¹⁸

In 2020, a global settlement of non-West Virginia opioid claims was announced, in which AmerisourceBergen agreed to pay more than \$6 billion to governments outside of West Virginia (the “Global Settlement”).¹⁹ The Global Settlement, **which excludes claims filed against AmerisourceBergen in West Virginia**, became effective in April 2022.²⁰ AmerisourceBergen also reached other settlements with Native American Tribes, under which AmerisourceBergen and two other distributors agreed to pay more than \$500 million.²¹ AmerisourceBergen has requested

¹⁸ See, e.g., SPApp.02858-3002 (ABDC Aug. 1 & Oct. 16, 2019 Ltrs.).

¹⁹ See, e.g., Kevin Stawicki, *McKesson, 2 Other Distributors Ink \$21B Opioid Settlement*, LAW360, Nov. 3, 2020; Joel Achenbach, et al., *Johnson & Johnson, Three Other Companies Close in on \$26 Billion Deal on Opioid Litigation*, WASHINGTON POST, Nov. 5, 2020; *Distributors Announce Proposed Opioid Settlement Agreement*, AMERISOURCEBERGEN CORP., July 21, 2021; *Distributors Approve Opioid Settlement Agreement*, AMERISOURCEBERGEN CORP., Feb. 25, 2022; *Thousands of U.S. Communities To Receive Opioid Recovery Funds from \$26 Billion Global Settlements As Soon As May 2022*, NATIONAL PRESCRIPTION OPIATE MDL PLAINTIFFS’ EXECUTIVE CMTE., Feb. 25, 2022.

²⁰ See Press Release: *Distributors Approve Opioid Settlement Agreement*, AMERISOURCEBERGEN CORP., Feb. 25, 2022; Press Release: *Thousands of U.S. Communities To Receive Opioid Recovery Funds from \$26 Billion Global Settlements As Soon As May 2022*, NATIONAL PRESCRIPTION OPIATE MDL PLAINTIFFS’ EXECUTIVE CMTE., Feb. 25, 2022.

²¹ See Andrew Westney, *Tribes Reach \$590M Opioids Deal With J&J, Distributors*, LAW360, Feb. 1, 2022.

coverage for the Global Settlement and Native American Tribes' settlement from the Insurers and other non-party insurance companies.²² Coverage for the Global Settlement and Native American Tribes' settlement is not at issue in this case.

Since the scope of this case is limited to coverage for claims filed **in West Virginia**, shortly after the Global Settlement of non-West Virginia claims was announced, St. Paul and four affiliated insurers that are not parties to this case commenced a separate coverage litigation in California in November 2020 (the "California Action"), which aimed to address coverage questions related to the thousands of non-West Virginia claims.²³ The five plaintiff-insurers in the California Action (only one of which, St. Paul, is a Defendant here) sought coverage determinations regarding non-West Virginia claims under 18 insurance policies issued for certain periods from 1995 to 2007, including multiple policies that were issued to a California company, Bergen Brunswig Corporation.²⁴ Bergen Brunswig is a predecessor of AmerisourceBergen and merged with Amerisource Health Corporation, as part of a merger that formed AmerisourceBergen Corporation in 2001.²⁵ None of the policies issued to Bergen Brunswig are named in AmerisourceBergen's complaint in this case. In total, 17 of the 18 policies issued by the plaintiff-insurers in the California Action are not at issue here.²⁶

In an effort to make it clear that the California Action would not address any coverage questions for underlying claims filed in West Virginia, the California Action complaint stated:

In 2017, ABC settled an opioid-related lawsuit brought against it by the Attorney General of West Virginia. Coverage for that settlement and cases brought by certain West Virginia governmental entities against ABC and its affiliates is the subject of litigation pending in

²² See, e.g., SPApp.02858-3002 (ABDC Aug. 1 & Oct. 16, 2019 Ltrs.).

²³ See SPApp.11789-90 (Nov. 5, 2020 Cal. Action Compl. ¶¶ 1-5).

²⁴ See SPApp.11789, SPApp.11801, SPApp.11810 (*Id.* ¶¶ 2, 35 & Ex. A).

²⁵ See SPApp.11789 (*Id.* ¶ 2).

²⁶ Compare SPApp.11789, SPApp.11801, SPApp.11810 (*Id.* ¶¶ 2, 35 & Ex. A) with SPApp.00240 (ABDC July 18, 2018 Am. Compl. at Ex. A).

West Virginia, styled *AmerisourceBergen Drug Corp., et al. v. ACE American Insurance Co., et al.*, No. 17-C-36 (W.V. Cir. Ct., Boone Cty.), and is not intended to be the subject of this action.²⁷

Following the appeal of the First Injunction and to eliminate any uncertainty about the import of this statement in the California Action complaint, St. Paul advised the Boone County Circuit Court that “St. Paul will not litigate in the California Action coverage for underlying West Virginia settlements and cases that are the subject of this West Virginia coverage action.”²⁸

In late 2020 and early 2021, four non-party insurance companies filed cross-complaints against St. Paul and the other plaintiff-insurers in the California Action.²⁹ Subsequently, after AmerisourceBergen filed motions to dismiss those other insurers’ cross-complaints, in which AmerisourceBergen said that their cross-claims could not properly be litigated in California and that “Delaware” was a “far more suitable” venue for litigation between them,³⁰ those cross-claiming insurers withdrew their claims in California and instead filed complaints against AmerisourceBergen, ACE, and St. Paul in Delaware.³¹ To be clear, and as discussed in greater detail below, neither St. Paul nor ACE initiated the Delaware litigation, and both were named as defendants just like AmerisourceBergen. Accordingly, in light of AmerisourceBergen’s insistence that those other insurers’ cross-claims could not be litigated in California and those other insurers

²⁷ See SPApp.03183 (Nov. 5, 2020 Cal. Action Compl. ¶ 41 n.11).

²⁸ See SPApp.11211 (Defs. Apr. 20, 2022 Br. at 7).

²⁹ See SPApp.13085, SPApp.13091-92 (Cal. Action Dkt. at ROA 157 (12/14/2020 National Union Cross-Compl.), ROA 233 (1/14/2021 Arrowood Cross-Compl.), ROA 254 (01/19/2021 Hartford Cross-Compl.)); *see, e.g.*, SPApp.02210-33.

³⁰ *See, e.g.*, SPApp.02491 (ABDC Mar. 8, 2021 Mot. to Dismiss at 15) (“West Virginia, Pennsylvania, or Delaware are far more suitable forums . . .” than California).

³¹ *See, e.g.*, SPApp.13145 (Cal. Action Dkt. at ROA 1237 (July 28, 2022 Dismissal of Arrowood), ROA 1247 (July 28, 2022 Dismissal of National Union)); SPApp.03317-44 (Arrowood Mar. 1, 2022 Am. Compl. (Del. Super. Ct.)); *see also, e.g.*, SPApp.12548-50 (ABDC Mar. 21, 2022 Mot. to Dismiss National Union Compl. (Del. Super. Ct.)).

having filed in Delaware instead, St. Paul voluntarily dismissed its claims against those other insurers in the California Action.³²

The California Action is stayed, pursuant to a February 2021 order that was entered by the California Superior Court at AmerisourceBergen's request.³³

D. In January 2021, The Boone County Circuit Court Issues The First Injunction, Which This Court Reverses As Overbroad And An Abuse Of Discretion

On November 19, 2020, AmerisourceBergen moved the Circuit Court for an order enjoining St. Paul from prosecuting the California Action.³⁴ St. Paul and ACE opposed.³⁵ On January 7, 2021, the Circuit Court entered the First Injunction, which precluded St. Paul and the other 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.”³⁶ On January 19, 2021, St. Paul noticed and perfected an appeal from the First Injunction, and ACE subsequently intervened and joined in the appeal.³⁷

On November 15, 2021, this Court ruled that the First Injunction was “overbroad” and an “abuse of discretion,” including because it “impair[ed] the parties’ ability to litigate, against each other or with third parties, over policies separate from the sixteen policies identified by ABDC” in this action.³⁸ As the Court explained in its Opinion:

- i. “[H]aving reviewed the terms of the circuit court’s order, we do find an abuse of discretion in its breadth and focus.”³⁹

³² See, e.g., SPApp.13145 (Cal. Action Dkt. at ROA 1237 (July 28, 2022 Dismissal of Arrowood), ROA 1242 (July 28, 2022 Dismissal of Hartford), ROA 1247 (July 28, 2022 Dismissal of National Union)).

³³ See SPApp.03237-41 (Cal. Super. Ct. Feb. 19, 2021 Minute Or.); SPApp.02446-60 (ABDC Feb. 11, 2021 & Feb. 22, 2021 Ltrs.).

³⁴ See SPApp.00245-63 (ABDC Nov. 19, 2020 Mot.).

³⁵ See SPApp.00317-510 (St. Paul Dec. 9, 2020 Br. in Opp’n to ABDC Mot. for Inj.); SPApp.00511-15 (ACE Dec. 10, 2020 Joinder to St. Paul Opp’n to ABDC Mot. for Inj.).

³⁶ See SPApp.02031-32 (Cir. Ct. Jan. 7, 2021 First Inj. Or. ¶ 164).

³⁷ See SPApp.13073 (WVSCA Dkt. at 1); *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 731.

³⁸ See *id.* at 737.

³⁹ See *id.* at 736.

- ii. “[T]he circuit court’s order only enjoined ABDC and the five insurers who were parties to the West Virginia action from further litigation; it did nothing to enjoin the dozens of other parties to the California action who issued countless other policies to ABDC and its affiliates. ACE American points out that many of the California-only parties have proceeded to file cross-claims, counter-claims, and discovery requests in response to St. Paul’s complaint, but the circuit court’s order precludes ABDC and the five insurers who are parties to the West Virginia action from effectively responding.”⁴⁰
- iii. “[T]he anti-suit injunction order enjoins *all parties* to the West Virginia action from instituting or prosecuting *any* legal proceeding concerning ABDC’s insurance coverage” and therefore “impairs the parties’ ability to litigate, against each other or with third parties, over policies separate from the sixteen policies identified by ABDC” in its complaint in this West Virginia coverage action.⁴¹
- iv. “Our concern is that ABDC’s West Virginia complaint is limited in scope and seeks a declaratory judgment concerning only sixteen insurance policies issued by five insurance companies. As ABDC’s complaint is cast, it asks the circuit court for a judgment regarding whether those sixteen policies provide coverage for the growing number of West Virginia-based opioid lawsuits. . . . However, as it is written, the circuit court’s order impairs the parties’ ability to litigate, against each other or with third parties, over policies separate from the sixteen policies identified by ABDC. . . .”⁴²
- v. “We understand that the circuit court’s judgment interpreting the policies at issue will become precedent for future cases in sister states, but we do not yet see that as a compelling reason to prevent the parties from litigating comparable questions of coverage for opioid lawsuits, regarding different policies, in other forums.”⁴³
- vi. “Principles of comity require a court to act with restraint and to respect the idea that the courts of our sister states will likewise act with fairness and restraint.”⁴⁴
- vii. “The principle of comity requires that courts exercise the power to enjoin foreign suits sparingly and only in very special circumstances where a clear equity is presented requiring the interposition of the

⁴⁰ *See id.*

⁴¹ *See id.* at 737.

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.*

court to prevent manifest wrong and an irreparable miscarriage of justice.”⁴⁵

- viii. “[W]e find that the circuit court’s order should have clearly and finely tailored a connection between the relief sought in ABDC’s West Virginia action and the prohibition of the parties’ actions in California.”⁴⁶
- ix. “Accordingly, we find the circuit court’s order to be overbroad and, as currently drafted, to constitute an abuse of the court’s discretion. The order must therefore be reversed, and the case remanded for reconsideration.”⁴⁷

On December 14, 2021, AmerisourceBergen petitioned this Court for rehearing or modification of the Opinion. AmerisourceBergen requested that the Court “leave the Injunction in place” on remand to the Circuit Court.⁴⁸ This Court denied AmerisourceBergen’s petition.⁴⁹

E. In Early 2022, Insurance Companies That Are Not Party To This Case File Separate Insurance Coverage Actions Against AmerisourceBergen, ACE, And St. Paul In Delaware State Court

In the first three months of 2022, five separate insurance coverage actions were filed against AmerisourceBergen in Delaware Superior Court by multiple insurance companies that are not party to this case and are not affiliated with the Defendants here. One of those Delaware actions, brought by Arrowood Indemnity Company (which is not a party to this case, and is not affiliated with any party to this case), named ACE and St. Paul (which are Defendants here) as defendants alongside AmerisourceBergen.⁵⁰ The Delaware actions seek coverage rulings regarding policies issued to AmerisourceBergen, its predecessors, and its affiliates for certain

⁴⁵ See *id.* at 733.

⁴⁶ See *id.* at 737.

⁴⁷ See *id.*

⁴⁸ See SPApp.02654 (ABDC Dec. 14, 2021 Pet. for Reh’g at 11); see also SPApp.03293-312 (St. Paul & ACE Jan. 7, 2022 Resp. to Pet. for Reh’g).

⁴⁹ See SPApp.02529-30 (WVSCA Feb. 23, 2022 Or.); see also SPApp.02616 (WVSCA Mar. 3, 2022 Mandate).

⁵⁰ See SPApp.03318-44 (Arrowood Mar. 1, 2022 Am. Compl. (Del. Super. Ct.)).

periods from 1994 through 2018.⁵¹ AmerisourceBergen has filed motions to dismiss or stay the Delaware actions, which are pending before the Delaware Superior Court.⁵²

F. On Remand From This Court’s Reversal Of The First Injunction, AmerisourceBergen Moves To Reinstate An Equally Broad Injunction, And The Circuit Court Enters The Second Injunction In June 2022 In The Form AmerisourceBergen Proposed

On remand from this Court’s reversal of the First Injunction, AmerisourceBergen moved to reinstate the injunction on March 21, 2022.⁵³ AmerisourceBergen asked the Circuit Court to impose an injunction that is materially identical to the First Injunction.⁵⁴ St. Paul and the other Insurers opposed AmerisourceBergen’s motion.⁵⁵

On June 10, 2022, the Circuit Court granted AmerisourceBergen’s motion and entered a new injunction in the form proposed by AmerisourceBergen (the “Second Injunction”).⁵⁶ The Second Injunction imposes injunctive relief that is materially identical to—and as overly broad as—the First Injunction that this Court reversed as overbroad and an abuse of discretion. Like the Original Injunction Order, the Second Injunction prohibits the parties “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.”⁵⁷ Mirroring the First Injunction, the Second Injunction again enjoins the parties from litigating coverage issues with respect to *all* “insurance policies issued to ABDC or its

⁵¹ See, e.g., SPApp.03318-44 (*Id.*)

⁵² See SPApp.12545-50, SPApp.12598-600 (ABDC Mot. to Dismiss or Stay Filed In Del. Super. Ct.); see also SPApp.13154-85 (*Arrowood* Del. Super. Ct. Dkt.).

⁵³ See SPApp.03360-406 (ABDC Mar. 21, 2022 Renewed Mot. for Anti-Suit Inj.).

⁵⁴ See, e.g., SPApp.03361, SPApp.03396 (*Id.* at 1 & ¶ 136).

⁵⁵ See SPApp.11200-27 (Defs. Apr. 20, 2022 Opp’n to ABDC Renewed Mot. for Injunction).

⁵⁶ Compare SPApp.12858-70 (ABDC May 16, 2022 Prop. Or.); with SPApp.12978-3065 (Cir. Ct. June 10, 2022 Second Inj. Or.) (Second Injunction materially the same as ABDC’s proposed order).

⁵⁷ See SPApp.13041 (Cir. Ct. June 10, 2022 Second Inj. Or. at 63).

predecessors or affiliates”—including policies beyond the 16 at issue in this case.⁵⁸ The Circuit Court did not make any findings regarding how the injunction could be justified with respect to the new Delaware actions in which St. Paul and ACE were named as defendants.

Pursuant to an August 30, 2022 scheduling order, a Phase 1 trial that was previously set to begin in this case on October 4, 2022 has been adjourned, with no new trial date set at this time.⁵⁹

III. SUMMARY OF ARGUMENT

St. Paul appeals a June 10, 2022 anti-suit injunction entered by the Circuit Court, which prohibits St. Paul “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,” with respect to “insurance policies issued to ABDC or its predecessors and affiliates” dating “back to at least January 1, 1996” (the “Second Injunction”).⁶⁰ The Circuit Court previously entered a materially identical injunction (the “First Injunction”), which this Court reversed on November 15, 2021.⁶¹ St. Paul respectfully requests that this Court reverse and vacate the Second Injunction for the following reasons.

First, the Circuit Court abused its discretion in entering the Second Injunction because it imposes an anti-suit injunction that is materially identical to, and as overly broad as, the First Injunction that this Court reversed as “overbroad” and an “abuse of discretion.”⁶²

⁵⁸ See SPApp.13040-41 (Cir. Ct. June 10, 2022 Second Inj. Or. at 62-63). To the extent the Second Injunction could be read to apply to “predecessors and affiliates,” it is even broader than the First Injunction.

⁵⁹ See SPApp.13070-72 (Cir. Ct. Aug. 30, 2022 Scheduling Or.).

⁶⁰ See SPApp.13040-41 (Cir. Ct. June 10, 2022 Second Inj. Or. at 62-63).

⁶¹ See SPApp.01956-SPApp.02000 (Cir. Ct. Jan. 7, 2021 First Inj. Or.); *St. Paul v. AmerisourceBergen*, 868 S.E.2d 724.

⁶² To the extent that the Second Injunction could be read to further broaden the First Injunction to apply to St. Paul’s “predecessors and affiliates,” that is a further abuse of discretion. See, e.g., SPApp.13040 (Cir. Ct. June 10, 2022 Second Inj. Or. at 62).

In its November 15, 2021 Opinion, this Court ruled that the First Injunction “must” be “reversed” because, among other reasons, it “impairs the parties’ ability to litigate, against each other or with third parties, over policies separate from the sixteen policies” identified in AmerisourceBergen’s complaint in this West-Virginia-specific coverage litigation.⁶³ The Court explained: “Our concern is that ABDC’s West Virginia complaint is limited in scope and seeks a declaratory judgment concerning only sixteen insurance policies issued by five insurance companies. . . . However, as it is written, the circuit court’s order impairs the parties’ ability to litigate, against each other or with third parties, over policies separate from the sixteen policies identified by ABDC. . . .”⁶⁴ This Court ruled that the scope of any such injunction must have a “clearly and finely tailored” connection to “the relief sought in ABDC’s West Virginia action.” Accordingly, since the First Injunction enjoined the Insurers from litigating coverage regarding policies beyond the 16 policies identified in AmerisourceBergen’s complaint, this Court found that the First Injunction was “overbroad” and an “abuse of discretion,” and reversed it.⁶⁵

Notwithstanding the Court’s ruling, on remand, AmerisourceBergen did not move for a “finely tailored” injunction limited to the scope of AmerisourceBergen’s complaint, nor did AmerisourceBergen move for an injunction that is narrower *in any respect*. AmerisourceBergen also did not seek to amend its complaint to include any additional policies beyond the 16 policies listed in its complaint.⁶⁶ Instead, AmerisourceBergen moved to reinstate a materially identical injunction, and the Circuit Court entered it. To be clear, just like the First Injunction, the Second

⁶³ See *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ AmerisourceBergen affirmed to the Circuit Court at the outset of this case that it had “no intent of adding cases from other jurisdictions” 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.00158-SPApp.00160 (Cir. Ct. Sept. 28, 2017 Hr’g Tr. at 5:19-20, 6:15-16, 7:20-22) (emphasis added).

Injunction prohibits the parties from litigating against each other or with third parties over policies separate from the 16 policies identified in AmerisourceBergen’s complaint in this case—precisely the flaw that this Court concluded rendered the First Injunction overbroad.

In seeking entry of the Second Injunction, AmerisourceBergen told the Circuit Court that the First Injunction was, in AmerisourceBergen’s view, actually “appropriately tailored” because, according to AmerisourceBergen, additional insurance policies that are the subject of a separate coverage litigation in California “are identical in all material respects” to the 16 policies named in AmerisourceBergen’s complaint in this West Virginia coverage action. In support of this recycled argument—which AmerisourceBergen raised to this Court and this Court rejected before—AmerisourceBergen submitted to the Circuit Court copies of additional insurance policies that were not previously in the record, as well as certain additional demonstrative charts that AmerisourceBergen prepared that purported to compare select provisions of different policies stating that the policies provide coverage for damages for or because of “bodily injury.” However, although the volume of paper that AmerisourceBergen added to the record increased on remand, the substance of it did not—this was exactly the same type of evidence that AmerisourceBergen had presented to the Circuit Court in connection with the First Injunction, and it was precisely the type of evidence that this Court ruled on appeal was insufficient to support the overly-broad First Injunction that swept beyond the narrow scope of AmerisourceBergen’s complaint.

The Circuit Court’s entry of the Second Injunction cannot be squared with this Court’s November 15, 2021 Opinion. This Court already rejected the same argument that a similarity of certain terms in other policies could somehow justify an injunction applying to bar litigation of coverage questions under policies beyond the 16 policies named in AmerisourceBergen’s complaint. This Court did not reverse the First Injunction because AmerisourceBergen had not

put enough paper in the record to show that other policies contain certain language that is similar to the 16 policies named in AmerisourceBergen’s complaint. Rather, this Court rejected the very premise of AmerisourceBergen’s untenable argument that a mere similarity of policy language could justify enjoining litigation over “comparable questions of coverage for opioid lawsuits, regarding different policies, in other forums.” As this Court explained: “We understand that the circuit court’s judgment interpreting the policies at issue will become precedent for future cases in sister states, but we do not yet see that as a compelling reason to prevent the parties from litigating comparable questions of coverage for opioid lawsuits, regarding different policies, in other forums.”⁶⁷ In fact, this Court already heard AmerisourceBergen’s argument twice. After this Court reversed the First Injunction, AmerisourceBergen moved for rehearing, raising these same arguments again—including by pointing to policy language comparison charts that AmerisourceBergen claimed supported its assertion that the policies were “identical, or nearly identical.”⁶⁸ This Court denied the motion.⁶⁹

In addition, irrespective of any overlap in certain policy language in different policies, AmerisourceBergen cannot alter the fact that many of the policies at issue in the California Action—and the separate Delaware actions that have since been filed by non-parties naming ACE and St. Paul as defendants alongside AmerisourceBergen—were issued to different companies, cover different time periods, and are subject to different states’ laws. Indeed, a great many of these other policies were issued in California, to a California company, and are governed by California law. As the Circuit Court cannot and will not be called upon to determine how California law might impact the interpretation of any insurance policies (all 16 of the policies in this case are

⁶⁷ *See id.*

⁶⁸ *See* SPApp.12485, SPApp.12488 (ABDC Dec. 14, 2021 Pet. for Reh’g at 8, 11).

⁶⁹ *See* SPApp.02529-30 (WVSCA Feb. 23, 2022 Or.).

subject to Pennsylvania law), the mere fact that certain policy language may be similar, or even identical in some instances, is a red herring. This Court recognized these fundamental distinctions when it held that the First Injunction was overbroad because it applied to insurance policies beyond the 16 policies that are the subject of AmerisourceBergen's complaint.

Accordingly, the Circuit Court's reinstatement of an injunction that this Court already determined was unlawfully overbroad, based on the same arguments and same type of evidence that this Court already rejected, constitutes an abuse of discretion. AmerisourceBergen's complaint remains restricted in scope to seeking coverage rulings regarding 16 policies issued by the five Insurers that are party to this case; AmerisourceBergen made the deliberate choice not to expand its complaint on remand to include any other policies or any other insurers. And yet, like the First Injunction that this Court reversed, the Second Injunction continues to bar litigation of coverage disputes concerning policies beyond the 16 policies identified in AmerisourceBergen's complaint. The Second Injunction thus continues to lack the requisite "clearly and finely tailored" connection between the relief sought in AmerisourceBergen's complaint, on the one hand, and the scope of the injunction, on the other hand.

Furthermore, and importantly, the concerns that this Court previously noted with respect to the Circuit Court's statements in the First Injunction that the California Action had been initiated for purposes of forum shopping are not applicable on this appeal of the Second Injunction. Rather, the situation that exists today is that separate actions have been filed by non-parties in Delaware that are going to proceed, while the Second Injunction improperly bars the Insurers in this case from effectively responding to the claims asserted against them by those non-parties. Moreover, any issue of perceived forum shopping in the California Action has been remedied. As St. Paul affirmed to the Circuit Court on remand, St. Paul will not litigate in the California Action questions

of insurance coverage for West Virginia opioid lawsuits against AmerisourceBergen that are the subject of this case. And the scope of parties in the California Action has been significantly reduced as well. Yet, notwithstanding the changes circumstances, the Second Injunction focused exclusively on the California Action and did not make any findings at all regarding how the injunction could be justified with respect to the Delaware litigation. For all of these reasons, the Second Injunction should be reversed for overbreadth.

Second, the Second Injunction also should be reversed because it improperly prejudices the Insurers by preventing them from effectively responding to claims brought against them by non-parties in other actions. This Court ruled that the First Injunction had to be reversed for this same reason, explaining that the injunction constituted “an abuse of discretion in its breadth and focus” because it “precludes . . . the five insurers who are parties to the West Virginia action from effectively responding” to claims brought by non-parties in other actions.⁷⁰

Indeed, the prejudice to the Insurers has only been heightened since this Court reversed the First Injunction. Other insurance companies that are not party to this case and are not affiliated with the Insurers in this case have now commenced separate coverage actions against AmerisourceBergen in Delaware, including an action in which St. Paul and ACE have been named as defendants alongside AmerisourceBergen. The Delaware actions concern coverage disputes about policies beyond the 16 policies named in AmerisourceBergen’s complaint in this case and underlying opioid claims filed against AmerisourceBergen outside of West Virginia; issues that are not the subject of AmerisourceBergen’s complaint here. St. Paul did not initiate any of the Delaware actions, and instead is named as a party defendant, just as is AmerisourceBergen. Nevertheless, the Second Injunction impairs St. Paul’s ability to effectively respond to the claims

⁷⁰ *See id.* at 736-37.

brought against it in Delaware, such as by asserting responsive cross-claims of its own.

The Second Injunction unfairly prejudices the Insurers in connection with the Delaware litigation because it permits AmerisourceBergen to continue to litigate opioid-related coverage questions against non-party insurers—and those non-party insurers may continue to assert claims against St. Paul and the four other Insurers that are party to this case—while the Insurers here are enjoined and left unable to litigate on an equal footing. The Second Injunction allows AmerisourceBergen unencumbered access to the Delaware court, whereas St. Paul and the other Insurers must litigate with their hands tied—unable to assert claims or cross-claims against AmerisourceBergen as may be necessary to protect the Insurers’ interests, and hampered in their ability to pursue discovery from AmerisourceBergen relevant to resolution of coverage questions that may impact the Insurers. This inequity precludes the Insurers from fully protecting their interests in the Delaware action and any other litigations brought by non-parties in other forums—as those cases will proceed despite any injunction issued in this case. Therefore, the injunction “inequitably preclude[s] [the Insurers] from protecting [their] rights” in those other litigations.⁷¹

The prejudice to the Insurers is real and neither remote nor hypothetical. AmerisourceBergen has demanded that the Insurers pay billions of dollars of coverage for non-West Virginia settlements. And other insurance companies that are not party to this West-Virginia-specific coverage action have alleged that St. Paul and the other Insurers may be responsible for portions of those non-West Virginia settlements. Coverage for non-West Virginia settlements and under policies beyond the 16 at issue in this case is not before the Circuit Court, and it is inequitable and prejudicial to the Insurers for the Second Injunction to bar them from fully protecting their interests in other coverage actions, where such questions will be litigated by AmerisourceBergen

⁷¹ See *N. River Ins. Co. v. Mine Safety Appliances Co.*, No. 8456-VCG, 2013 WL 6713229, at *9 (Del. Ch. Dec. 20, 2013), *aff’d*, 105 A.3d 369 (Del. 2014).

and other insurance companies that are not party to this case and thus not subject to the Second Injunction. Indeed, it is entirely possible that AmerisourceBergen and the other non-party insurers in the Delaware litigation will obtain coverage rulings in Delaware before such rulings are issued in this case, and there is nothing stopping AmerisourceBergen from taking such rulings as it may obtain in Delaware and seeking to apply them as precedent against the Insurers in this West Virginia coverage litigation or anywhere else. Yet, under the Second Injunction, the five Insurers that are party to this case are sidelined in Delaware and unable to participate fully in the development of the facts and law that will guide such rulings that could become precedent against the Insurers. That is the opposite of equity; it is undue prejudice. The Second Injunction should be reversed because it improperly prejudices the Insurers, as this Court concluded once already.

Third, the Circuit Court's entry of the Second Injunction violates fundamental principles of comity and judicial restraint that underpin relations between the courts of different states. As this Court explained in reversing the First Injunction, "[t]he principle of comity requires that courts exercise the power to enjoin foreign suits sparingly and only in very special circumstances where a clear equity is presented requiring the interposition of the court to prevent manifest wrong and an irreparable miscarriage of justice."⁷² However, in reinstating an injunction materially identical to the injunction that this Court reversed for overbreadth and abuse of discretion, the Circuit Court not only improperly barred St. Paul and the other Insurers from protecting their interests in other litigations that are pending before other judges in other courts in other states, but also failed to accord due deference to the principles of comity that, as this Court explained, "require a court to act with restraint and to respect the idea that the courts of our sister states will [do] likewise." Principles of comity reinforce that the Second Injunction should be reversed.

⁷² See *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 733.

IV. STATEMENT REGARDING ORAL ARGUMENT

St. Paul requests oral argument on this appeal. Oral argument is warranted under Rule 19 because this appeal concerns an “error in the application of settled law,” “unsustainable exercise of discretion where the law governing that discretion is settled,” and the “insufficient evidence” to support the Circuit Court’s ruling.⁷³ In the alternative, oral argument is also appropriate under Rule 20, as the appeal involves issues of “fundamental public importance.”⁷⁴

V. ARGUMENT

A. Jurisdiction And Standard Of Review

“West Virginia Constitution, article VIII, section 3, . . . grants this Court appellate jurisdiction of civil cases in equity, [which] includes a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief.”⁷⁵ This Court has regularly considered on direct appeal—and reversed—interlocutory orders imposing injunctions.⁷⁶ Indeed, this Court accepted jurisdiction of a direct appeal from the First Injunction, and vacated the injunction.⁷⁷ An appeal from a circuit court’s order imposing a temporary or preliminary injunction is evaluated under a three-pronged standard of review:

We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, we review the circuit court’s underlying factual findings under a clearly erroneous standard, and we review questions of law de novo.⁷⁸

⁷³ W. Va. R. App. P. 19(a).

⁷⁴ W. Va. R. App. P. 20(a). This Court heard oral argument on St. Paul’s appeal of the First Injunction under Rule 20.

⁷⁵ See Syl. pt. 1, *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Drug Corp.*, 868 S.E.2d 724 (W. Va. 2021) (quoting Syl. pt. 2, *State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W. Va. 438, 582 S.E.2d 885 (W. Va. 2003)).

⁷⁶ See, e.g., *Markwest Liberty Midstream & Res. v. Nutt*, No. 17-0138, 2018 WL 527209, at *5 (W. Va. Jan. 24, 2018); *Hart v. NCAA*, 209 W.Va. 543, 550 S.E.2d 79 (W. Va. 2001); *Wheeling Park Comm’n v. Hotel and Restaurant Emps., Int’l Union, AFL-CIO*, 198 W.Va. 215, 479 S.E.2d 876 (W. Va. 1996); *Brady v. Smith*, 139 W.Va. 259, 79 S.E.2d 851 (W. Va. 1954).

⁷⁷ *St. Paul v. AmerisourceBergen*, 868 S.E.2d 724.

⁷⁸ Syl. pt. 3, *St. Paul*, 868 S.E.2d 724 (W. Va. 2021) (citations omitted).

As this Court explained in reversing the First Injunction, 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.”⁷⁹ Moreover, “[t]he principle of comity requires that courts exercise the power to enjoin foreign suits sparingly and only in very special circumstances where a clear equity is presented requiring the interposition of the court to prevent manifest wrong and an irreparable miscarriage of justice.”⁸⁰ The miscarriage-of-justice standard is in accord with the rulings of other courts.⁸¹ An anti-suit injunction should be issued only rarely because, among other reasons, it can undermine principles of “judicial restraint” and “comity,” and challenge the “dignity and authority” of the courts of other states.⁸²

B. The Second Injunction Contravenes This Court’s November 15, 2021 Opinion Because It Imposes An Anti-Suit Injunction That Is Materially Identical To, And At Least As Broad As, The First Injunction That This Court Reversed As “Overbroad” And An “Abuse of Discretion”

In its November 15, 2021 Opinion, this Court held that the First Injunction is “overbroad,” an “abuse of discretion,” and “must” be “reversed” because, among other reasons, it “impairs the parties’ ability to litigate, against each other or with third parties, *over policies separate from the*

⁷⁹ See *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 731.

⁸⁰ See SPApp.02501-02 (*Id.* at ii-iii, Syl. Pts. 7-8).

⁸¹ See, e.g., *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, 652 (Tex. 1996) (“Such a suit must be allowed to proceed absent some other circumstances which render an injunction necessary ‘to prevent an irreparable miscarriage of justice.’”); *Auerbach v. Frank*, 685 A.2d 404, 407 (D.C. 1996) (“[O]nly in the most compelling circumstances does a court have discretion to issue an antisuit injunction. . . . The test in each case is whether ‘the injunction is required to prevent an irreparable miscarriage of justice.’”).

⁸² *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697, 705-08, 59 P.3d 231, 236-37 (2002), *as modified* (Mar. 5, 2003) (citation omitted); see, e.g., *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928-29 (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 v. Ohio Power Co.*, 187 W. Va. 292, 300 n.9, 418 S.E.2d 738, 746 n.9 (1992)).

sixteen policies” at issue in this case.⁸³ This Court explained, “the circuit court’s order should have clearly and finely tailored a connection between the relief sought in ABDC’s West Virginia action and the prohibition of the parties’ actions in California.”⁸⁴ Under this ruling, it was an abuse of discretion for the Circuit Court to reinstate an injunction substantively the same as the First Injunction. The Second Injunction was not “clearly and finely tailored” to the scope of AmerisourceBergen’s complaint, and it should be reversed.

1. The Second Injunction Is At Least As Broad As The First Injunction That This Court Reversed For Overbreadth

The scope of the Second Injunction is not any narrower than the First Injunction. Like the First Injunction, the Second Injunction prohibits the parties from litigating against each other or with third parties over policies beyond the 16 policies issued by the five Insurers that are identified in AmerisourceBergen’s complaint in this case—precisely the feature that this Court found rendered the First Injunction overbroad and required its reversal. Indeed, the operative injunctive language of the First Injunction and the Second Injunction are materially identical:

| Jan. 7, 2021 First Injunction | June 10, 2022 Second Injunction |
|--|---|
| “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 lawsuits against ABC, ABDC, or any other affiliated entity.” ⁸⁵ | “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.” ⁸⁶ |

The Second Injunction was drafted by AmerisourceBergen and entered by the Circuit Court

⁸³ See *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.

⁸⁴ See *id.*

⁸⁵ See SPApp.02031-32 (Cir. Ct. Jan. 7, 2021 Or., ¶ 164).

⁸⁶ See SPApp.13041 (June 10, 2022 Cir. Ct. Or. at 63).

without any material revisions.⁸⁷ In an effort to make it appear as if the Second Injunction was narrower than the First Injunction, AmerisourceBergen included language in the Second Injunction saying that it is subject to “significant limitations.” However, these so-called “limitations” do not withstand scrutiny; none narrows the injunction in any meaningful way.

One such “limitation” says that the injunction applies only to litigation concerning policies “issued to ABDC or its predecessors and affiliates.”⁸⁸ But the First Injunction likewise applied to “collateral litigation . . . relating to insurance coverage for the prescription opioid lawsuits against ABC, ABDC, or any other affiliated entity.”⁸⁹ There is no daylight between the First Injunction and the Second Injunction in this respect; both bar any coverage litigation concerning any insurance policies issued to AmerisourceBergen and its affiliates.

The Second Injunction also states that it is subject to the “limitations” that it will only apply where “the collateral suit” concerns “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” and “policies issued by the Insurer Defendants in this case or their predecessors and affiliates” dating “back to at least January 1, 1996.” However, stating that the injunction applies only to policies issued by the Insurers or their predecessors or affiliates “dating back to *at least* January 1, 1996” is the same as saying it applies to all of their policies, because AmerisourceBergen has not requested coverage under any pre-1996 policies.⁹⁰

The Second Injunction also says that it is “temporary rather than permanent” because it applies only “while [the West Virginia action] remains pending.”⁹¹ That is no different from the

⁸⁷ Compare SPApp.12858-949 (May 16, 2022 Proposed Findings of Fact and Conclusions of Law), *with* SPApp.12978-3065 (Cir. Ct. June 10, 2022 Second Inj. Or.).

⁸⁸ See SPApp.13040 (Cir. Ct. June 10, 2022 Second Inj. Or. at 62).

⁸⁹ See SPApp.13040-41 (Cir. Ct. June 10, 2022 Second Inj. Or. at 63).

⁹⁰ See SPApp.02857-3165 (ABDC Aug. 1, 2019 & Oct. 16, 2019 Ltrs.).

⁹¹ SPApp.12980 (Cir. Ct. June 10, 2022 Second Inj. Or. at 2).

First Injunction, which likewise lasted “until this [West Virginia] action has concluded.”⁹²

All of the purported “limitations” listed in the Second Injunction are illusory. The Second Injunction is equally as broad as the First Injunction that this Court reversed for overbreadth.⁹³

2. This Court Already Rejected AmerisourceBergen’s Argument For Imposition Of This Overbroad Injunction

This Court ruled that the First Injunction was overbroad because it “impair[ed] the parties’ ability to litigate, against each other or with third parties, over policies separate from the sixteen policies identified by ABDC” in its complaint in this West Virginia coverage action.⁹⁴ Notwithstanding this Court’s ruling, on remand to the Circuit Court, AmerisourceBergen did not request entry of a narrower injunction confined to the 16 policies identified in its complaint. Instead, AmerisourceBergen moved the Circuit Court to enter an injunction equally as broad as the First Injunction, based on the same arguments and the same type of evidence that AmerisourceBergen already raised and that this Court already rejected.

Specifically, in support of its renewed motion, AmerisourceBergen submitted to the Circuit Court copies of certain insurance policies and demonstrative charts that AmerisourceBergen prepared that purport to compare select provisions from different policies stating that the policies provide coverage for damages for or because of “bodily injury.”⁹⁵ However, this Court already heard—and already rejected—AmerisourceBergen’s argument that a purported similarity of policy language justified an injunction barring litigation about policies beyond the 16 policies named in AmerisourceBergen’s complaint. Indeed, AmerisourceBergen raised this “similar policy

⁹² SPApp.02032 (Cir. Ct. Jan. 7, 2021 First Inj. Or. ¶ 165).

⁹³ To the extent that the Second Injunction Order could be construed as broadening the Original Injunction Order and applying to St. Paul’s “predecessors and affiliates,” this is a further abuse of discretion. *See, e.g.*, SPApp.13040 (Cir. Ct. June 10, 2022 Second Inj. Or. at 62).

⁹⁴ *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.

⁹⁵ *See, e.g.*, SPApp.03376-84 (ABDC Mar. 21, 2022 Mot. ¶¶ 65-88).

language” argument to this Court on the appeal of the First Injunction, and AmerisourceBergen likewise submitted to this Court demonstrative charts that AmerisourceBergen had prepared that purported to draw comparisons between provisions of various policies that AmerisourceBergen said were similar or identical.⁹⁶ The table below displays AmerisourceBergen’s argument to this Court on the prior appeal and its near-verbatim argument to the Circuit Court on remand:

| ABDC’s March 1, 2021 Argument To This Court | ABDC’s March 21, 2022 Argument To The Circuit Court |
|--|---|
| “[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)’ and . . . ‘[d]uring that period the St. Paul and ACE policies’ insuring agreements were identical in all material respects.’” ⁹⁷ | “[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 Brunswig Corporation (from 1995 to 2001) and during that period the St. Paul and ACE policies’ insuring agreements were identical in all material respects.” ⁹⁸ |

This Court considered and rejected this exact argument, finding it to be an insufficient basis for such an overbroad injunction. As this Court explained:

We understand that the circuit court’s judgment interpreting the policies at issue will become precedent for future cases in sister states, but we do not yet see that as a compelling reason to prevent the parties from litigating comparable questions of coverage for opioid lawsuits, regarding different policies, in other forums.⁹⁹

In fact, this Court already heard AmerisourceBergen’s argument twice. After this Court issued its Opinion reversing the First Injunction, AmerisourceBergen petitioned for rehearing and to modify the Opinion.¹⁰⁰ AmerisourceBergen argued again that the policies in the California

⁹⁶ See SPApp.12697-98 (ABDC Mar. 1, 2021 App. Br.) at 23-24 (citing SPApp.02014-15 (Cir. Ct. Jan. 7, 2021 First Inj. Or. ¶¶ 68-71)); SPApp.12485, SPApp.12488 (ABDC Dec. 14, 2021 Pet. For Reh’g at 8, 11); see also, e.g., SPApp.00525-29 (ABDC Dec. 13, 2020 Reply ISO Mot. for Inj. at Ex. 1).

⁹⁷ See SPApp.12698 (ABDC Mar. 1, 2021 Appeal Br. at 24 (quoting SPApp.02014-15 (Cir. Ct. Jan. 7, 2021 First Inj. Or. ¶¶ 68-71))).

⁹⁸ See SPApp.03399 (ABDC Mar. 21, 2022 Mot. ¶ 151).

⁹⁹ See *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.

¹⁰⁰ See SPApp.12488 (ABDC Dec. 14, 2021 Pet. for Reh’g at 11).

Action and the 16 policies named in its complaint in this case contained provisions that were “identical, or nearly identical,” and pointed to policy language comparison charts.¹⁰¹ This Court denied AmerisourceBergen’s petition.¹⁰²

On remand to the Circuit Court, AmerisourceBergen submitted copies of additional policies and comparison charts that had not been placed in the record previously. But that does not change the fact that AmerisourceBergen’s argument and caliber of evidence remains the same as this Court considered and twice found insufficient to support the First Injunction. This Court did not reverse the First Injunction merely because AmerisourceBergen had not put enough paper in the record to show that other insurance policies beyond the 16 policies named in AmerisourceBergen’s complaint contain language that is similar to the 16 policies that are the subject of AmerisourceBergen’s complaint. Rather, this Court rejected the concept that a mere similarity of policy language could justify imposition of an injunction that sweeps beyond the narrow scope of AmerisourceBergen’s complaint in this case. As the Court made clear: “We understand that the circuit court’s judgment interpreting the policies at issue will become precedent for future cases in sister states, but we do not yet see that as a compelling reason to prevent the parties from litigating *comparable questions of coverage for opioid lawsuits, regarding different policies, in other forums.*”¹⁰³

In any event, AmerisourceBergen’s assertion that the 16 policies named in its complaint here are “materially identical” to those in the California Action is not accurate and is insufficient to support the sweeping overbreadth of the Second Injunction. That is because, among other reasons, many of the policies in the California Action—and the Delaware actions, as to which the

¹⁰¹ See SPApp.12485, SPApp.12488 (ABDC Dec. 14, 2021 Pet. for Reh’g at 8, 11).

¹⁰² See SPApp.02529-30 (WVSCA Feb. 23, 2022 Or.); see also SPApp.02667 (WVSCA Mar. 3, 2022 Mandate).

¹⁰³ See *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.

Circuit Court made no substantive findings whatsoever—were issued for different policy periods, are subject to different states’ laws, were issued to different insured entities, and concern underlying claims filed by different state and local governments outside of West Virginia. These fundamental distinctions mean that litigation of coverage questions under the policies at issue in the California Action and Delaware actions could involve examination of factual issues concerning different time periods, different conduct and knowledge by different companies in different jurisdictions, and nuances of legal doctrines under the laws of different states. In other words, different facts about different time periods and different companies, as well as different states’ laws, are at issue in the California Action and Delaware actions, as explained further below:

1. Different Policy Periods: The policies in the California Action and the Delaware actions concern a broader time period than the 16 policies at issue in this case. The policies in the California Action and Delaware actions include policies dating from the mid-1990s through at least 2018.¹⁰⁴ AmerisourceBergen’s complaint here, by contrast, is expressly limited to consideration of coverage questions under 16 policies issued for periods from 2006 to 2013 only.¹⁰⁵ This means that, regardless of any similarity in policy terms, a different set of facts, evidence, and legal issues will be relevant to the determination of coverage under different periods—including in order to answer the threshold question of whether any claims involve damages for injury that took place during any given policy periods, which is a fundamental prerequisite for any coverage under a liability policy to be “triggered” in the first place.
2. Different States’ Laws: There are important potential differences between California insurance law, which governs a majority of the policies issued by St. Paul and affiliated plaintiff-insurers in the California and Delaware actions, and Pennsylvania law, which governs the single St. Paul Policy (and 15 other policies issued by the four other Insurers) that are the subject of AmerisourceBergen’s complaint in this case. California Insurance Code § 533 provides that “[a]n insurer is not liable for a loss caused by the willful act of the insured,” which could bar coverage for claims such as those that

¹⁰⁴ See SPApp.11789, SPApp.11801, SPApp.11810 (Cal. Action Compl. ¶¶ 2, 35 & Ex. A); SPApp.03318-44 (Arrowood Compl. (Del. Super. Ct.)).

¹⁰⁵ See SPApp.00194-95, SPApp.00202-16, SPApp.00218, SPApp.00240 (ABDC July 18, 2018 Am. Compl. ¶¶ 1, 40-89, 93 & Ex. A).

have been asserted in opioid lawsuits brought against AmerisourceBergen.¹⁰⁶ The California courts have a compelling interest in addressing these California-law questions.

3. Different Insured Entities: The 16 policies identified in AmerisourceBergen’s complaint in this case—which include a single St. Paul Policy—were issued to AmerisourceBergen Corporation, a Delaware corporation with headquarters in Pennsylvania. By contrast, a majority of policies issued by St. Paul and affiliated insurers in the California and Delaware actions were issued to a California-based company in 2001 and prior: Bergen Brunswig Corporation. Thus, resolution of coverage questions under the policies issued to Bergen Brunswig could involve facts and evidence related to the conduct and knowledge of Bergen Brunswig in and before 2001, in order to evaluate, *inter alia*, whether insurance coverage is precluded by various knowledge-based defenses and doctrines of insurance law.¹⁰⁷

AmerisourceBergen’s repetition of the same “similar policy language” argument to the Circuit Court on remand cannot justify reinstating an injunction that is materially identical to the First Injunction that this Court reversed.¹⁰⁸ As this Court recognized, the mere fact that separate policies at issue in the California Action or other litigations—such as the Delaware action in which St. Paul and ACE have been named as defendants alongside AmerisourceBergen—may present

¹⁰⁶ Cal. Ins. Code § 533; *see, e.g., AIU Ins. Co. v. McKesson Corp.*, No. 20-cv-07469-JSC, 2022 WL 1016575, at *1 (N.D. Cal. Apr. 5, 2022); *Certain Underwriters at Lloyd’s of London v. ConAgra Grocery Prods. Co.*, No. CGC-14-536731, 2020 WL 3096821, at *2-4, 6-7 (Cal. Super. Ct. Feb. 26, 2020), *judgment aff’d*, 77 Cal. App. 5th 729 (Cal. Ct. App. Apr. 19, 2022); *Travelers Prop. Cas. Co. of Am. v. Actavis, Inc.*, 16 Cal. App. 5th 1026, 1038-42 (Cal. Ct. App. 2017).

¹⁰⁷ Moreover, the California Action and Delaware actions address coverage disputes about thousands of lawsuits brought by states and local governments outside of West Virginia, which assert allegations related to the distribution of opioids within specific jurisdictions. Thus, the California Action and Delaware actions might address facts specific to non-West Virginia jurisdictions, including, for example, the nature and timing of any alleged economic loss that the underlying claimants seek to recover from AmerisourceBergen.

¹⁰⁸ *See, e.g.,* Syl. Pt. 3, *In re Name Change of Jenna A.J.*, 234 W. Va. 271, 272, 765 S.E.2d 160, 161 (2014) (“[W]hen a question has been definitely determined by [the Supreme Court of Appeals] its decision . . . is regarded as the law of the case.” (citation omitted)); Syl. Pt. 4, *Bass v. Rose*, 216 W. Va. 587, 588, 609 S.E.2d 848, 849 (2004) (“[U]pon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court’s opinion and the circumstances it embraces.”); *accord* Syl. Pt. 3, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 805, 591 S.E.2d 728, 731 (2003).

certain “comparable questions of coverage for opioid lawsuits” is not a sufficient reason to warrant issuance of a blanket anti-suit injunction that “enjoins *all parties* to the West Virginia action from instituting or prosecuting *any* legal proceeding concerning ABDC’s insurance coverage.”¹⁰⁹

Moreover, and importantly while this Court held that an injunction narrower than the First Injunction could potentially be supported by the Circuit Court’s statements that the California Action had been initiated for purposes of forum shopping, those concerns do not have any application to the Delaware actions. The Delaware actions were not initiated by any of the Insurers that are party to this case or any entities affiliated with the Insurers. And those Delaware actions are moving forward regardless of any injunction entered in this case while the Insurers in this case are improperly sidelined by the Second Injunction. Additionally, sensitive to the Circuit Court’s concerns regarding the California Action, St. Paul expressly affirmed to the Circuit Court on remand that St. Paul will not litigate in the California Action insurance coverage for West Virginia opioid lawsuits against AmerisourceBergen that are the subject of this West Virginia coverage action—and, furthermore, the scope of the California Action has been greatly reduced, removing any perceived semblance of forum shopping.¹¹⁰ Yet, notwithstanding the changed circumstances, the Circuit Court entered the Second Injunction Order based entirely on its statements about the California Action, and without considering or making any substantive findings regarding how such an injunction could be justified with respect to the Delaware litigation.¹¹¹ It cannot.

¹⁰⁹ *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.

¹¹⁰ The parties to the California Action are now limited to St. Paul and affiliated entities as plaintiffs and AmerisourceBergen and affiliated entities as defendants.

¹¹¹ St. Paul respectfully disagrees with the Circuit Court’s statements about the purpose for which the of the California Action was filed, which are not supported by the factual record. Rather, as detailed above, *see supra* §§ II.B-II.C, before the California Action was filed, the Circuit Court had inquired as to whether AmerisourceBergen intended to expand the scope of this coverage litigation to include additional underlying claims, and AmerisourceBergen informed the Circuit Court that it would not be amending its complaint to include any of the thousands of other opioid-related claims that have been brought against AmerisourceBergen outside of West Virginia. And, in that context, the California Action was filed shortly

3. The Second Injunction Should Be Reversed Because, Like The First Injunction, It Improperly Enjoins Litigation Of Coverage Questions Regarding Policies Beyond The 16 Policies That Are The Subject Of AmerisourceBergen’s Complaint In This Case

As this Court found on the prior appeal, AmerisourceBergen’s complaint in this case is “limited in scope and seeks a declaratory judgment concerning only sixteen insurance policies issued by five insurance companies.”¹¹² That remains true to this day. On remand from this Court’s reversal of the First Injunction, AmerisourceBergen did not seek leave to amend its complaint to include other policies or other insurance companies. It was AmerisourceBergen’s deliberate choice to restrict the scope of litigation to only 16 policies, only the five Insurers, and only West Virginia claims. AmerisourceBergen told the Circuit Court when this case began that it had “no intent of adding cases from other jurisdictions” 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.*”¹¹³ In the years since, AmerisourceBergen has declined to amend its complaint to add more policies or parties.

Since AmerisourceBergen’s complaint remains restricted to 16 policies issued by the five Insurers, this Court’s November 15, 2021 ruling reversing the First Injunction because it impaired the parties’ ability to litigate coverage questions about policies beyond the 16 policies named in AmerisourceBergen’s complaint continues to apply on all fours:

[T]he anti-suit injunction order enjoins *all parties* to the West Virginia action from instituting or prosecuting *any* legal proceeding concerning ABDC’s insurance coverage.

after a proposed multi-billion global settlement of non-West Virginia opioid claims was announced in 2020, for which AmerisourceBergen has demanded indemnification under insurance policies issued by St. Paul and other insurance companies dating back to the 1990s and forward to 2018, including a number of policies issued in California to a California company that are not among the 16 policies that are the subject of AmerisourceBergen’s complaint in this case.

¹¹² *Id.* at 737.

¹¹³ *See* SPApp.00158-60 (Sept. 28, 2017 Hr’g Tr. at 5:19-20, 6:15-16, 7:20-22) (emphasis added).

Our concern is that ABDC’s West Virginia complaint is limited in scope and seeks a declaratory judgment concerning only sixteen insurance policies issued by five insurance companies. As ABDC’s complaint is cast, it asks the circuit court for a judgment regarding whether those sixteen policies provide coverage for the growing number of West Virginia-based opioid lawsuits. . . .

However, as it is written, the circuit court’s order impairs the parties’ ability to litigate, against each other or with third parties, over policies separate from the sixteen policies identified by ABDC. . . .

We understand that the circuit court’s judgment interpreting the policies at issue will become precedent for future cases in sister states, but we do not yet see that as a compelling reason to prevent the parties from litigating comparable questions of coverage for opioid lawsuits, regarding different policies, in other forums. . . .

[W]e find that the circuit court’s order should have clearly and finely tailored a connection between the relief sought in ABDC’s West Virginia action and the prohibition of the parties’ actions in California.

Accordingly, we find the circuit court’s order to be overbroad and, as currently drafted, to constitute an abuse of the court’s discretion. The order must therefore be reversed.¹¹⁴

Just like the First Injunction, the Second Injunction still bars litigation of coverage disputes concerning policies beyond the 16 policies identified in AmerisourceBergen’s complaint, and it still lacks any “clearly and finely tailored” connection between “the relief sought in ABDC’s West Virginia action” and the scope of the injunction.¹¹⁵ Accordingly, the Second Injunction remains overbroad and should be reversed for these same reasons.

In a strained effort to justify an injunction that extends beyond the 16 policies identified in AmerisourceBergen’s complaint without actually amending the complaint to include any other policies, AmerisourceBergen inserted into the proposed order that the Circuit Court signed without material alteration a passage that states—without citation to any record evidence in this case—that

¹¹⁴ See *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.

¹¹⁵ See *id.*

“all or at least some of the West Virginia opioid cases that are bifurcated and stayed in Phase 2 of this case . . . involve claims potentially dating back to January 1, 1996” and on that basis purports to conclude that other policies that are not named in AmerisourceBergen’s complaint “dating back to January 1, 1996” may potentially be “at issue” in a later phase of this case.¹¹⁶ But, as noted above, AmerisourceBergen has refused to amend the scope of its complaint to include any such other policies or other insurers and, indeed, AmerisourceBergen told the Circuit Court at the start of this case that it would not be adding any other insurers or policies. In any event, the sweeping scope of the Second Injunction cannot be justified by the mere suggestion that, at some point in the future, AmerisourceBergen may seek leave to amend its complaint to add more policies.¹¹⁷

AmerisourceBergen cannot have it both ways. Having chosen to restrict the scope of its complaint to 16 policies issued by five insurers, AmerisourceBergen cannot, consistent with this Court’s November 15, 2021 Opinion, obtain an anti-suit injunction that extends beyond those 16 policies. The Second Injunction should be reversed as overbroad.

C. The Circuit Court Abused Its Discretion When It Reinstated An Injunction That This Court Already Ruled Improperly Prejudiced The Insurers

This Court ruled that the First Injunction was “overbroad” and an “abuse of discretion” for reasons including that it improperly prejudiced the Insurers by preventing them from “effectively responding” to claims brought by non-parties in other actions. As the Court explained:

¹¹⁶ See SPApp.13015-16 (Cir. Ct. June 10, 2022 Second Inj. Or. ¶¶ 118-19).

¹¹⁷ The Second Injunction does not identify any evidence in the record here that could support a finding that pre-2006 policies are “at issue” in this case. Instead, in language AmerisourceBergen drafted, the Second Injunction “takes judicial notice” of two filings from other courts’ dockets. SPApp.13020-21 (Cir. Ct. June 10, 2022 Second Inj. Or., at ¶¶ 118-19). But neither document says anything about whether the other West Virginia claims that will be the subject of “Phase 2” of this case concerned damages for any bodily injury that happened prior to 2006; those filings thus provide no indication, much less any proof, about whether or which pre-2006 policies may be “at issue” in Phase 2. One of the filings addresses discovery rulings in the federal opioid multi-district litigation, and states that distributors were required to produce certain documents from periods dating back to 2006, and other documents dating back to 1996. The other filing is a summary order that lists a series of motions by title alone and indicates that, among other motions, a motion for summary judgment related to statutes of limitations was denied.

[T]he circuit court’s order only enjoined ABDC and the five insurers who were parties to the West Virginia action from further litigation; it did nothing to enjoin the dozens of other parties to the California action who issued countless other policies to ABDC and its affiliates. . . . [M]any of the California-only parties have proceeded to file cross-claims, counter-claims, and discovery requests in response to St. Paul’s complaint, but the circuit court’s order precludes ABDC and the five insurers who are parties to the West Virginia action from effectively responding.¹¹⁸

Yet, the Second Injunction again prevents the Insurers from effectively responding to claims brought by non-parties in other cases—including new actions by non-parties in Delaware. The Second Injunction should be reversed because it continues to improperly prejudice the Insurers.

In the beginning of 2022, other insurance companies that are not party to this West Virginia coverage action and are not affiliated with the Insurers in this case filed separate coverage actions against AmerisourceBergen in Delaware Superior Court, including an action in which ACE and St. Paul have been named as defendants alongside AmerisourceBergen. Those non-party insurers are not subject to the Second Injunction, and so the actions they have brought in Delaware will proceed irrespective of whether the Second Injunction is reversed (as it should be) or remains in place. The Delaware actions are broader in scope than this West-Virginia-specific coverage action. The Delaware actions encompass coverage questions related to AmerisourceBergen’s settlements of non-West Virginia opioid lawsuits and under policies beyond the 16 policies at issue in this case. Those issues—which are not being litigated in this case—are going to be litigated in Delaware by those non-party insurance companies and AmerisourceBergen.

As a result, the Second Injunction allows AmerisourceBergen to continue to litigate against non-party insurers in Delaware (and in any other jurisdictions) without any impediment—and the injunction inherently does nothing to stop those non-party insurers from continuing to assert claims

¹¹⁸ See *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 736.

against AmerisourceBergen and against the five Insurers that are party to this case. But the Second Injunction inequitably enjoins the Insurers from prosecuting any claims or cross-claims against AmerisourceBergen as may be necessary to protect their interests in the Delaware actions, and further impairs the Insurers from fully participating in taking discovery involving AmerisourceBergen in the Delaware litigation, notwithstanding the fact that the record and law developed in Delaware could set the stage for precedential decisions impacting the Insurers in Delaware and elsewhere. The Second Injunction forces the Insurers to effectively sit on the sidelines in Delaware and attempt to defend themselves with a hand tied behind their back. That is manifestly unfair. Indeed, as this Court explained in reversing the First Injunction, it constituted “an abuse of discretion in its breadth and focus” precisely because it “precludes . . . the five insurers who are parties to the West Virginia action from effectively responding” to claims such as those that have been brought by non-parties in other coverage actions.¹¹⁹ Other courts have likewise recognized that enjoining a party from fully participating in another litigation that will proceed despite any injunction “inequitably preclude[s] [the enjoined party] from protecting its rights,” including by filing cross-claims of its own in the other litigation.¹²⁰

The prejudice to the Insurers from the Second Injunction is real. AmerisourceBergen has demanded that the five Insurers that are party to this case pay for settlements of opioid-related claims filed outside of West Virginia, and other insurance companies have alleged that the five Insurers in this case may be responsible to pay portions of those settlements. Insurance coverage for non-West Virginia settlements and under policies beyond the 16 at issue in this case is not going to be addressed by the Circuit Court in this West-Virginia-specific coverage litigation. But

¹¹⁹ See *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 736.

¹²⁰ See *N. River Ins. Co. v. Mine Safety Appliances Co.*, No. 8456-VCG, 2013 WL 6713229, at *9 (Del. Ch. Dec. 20, 2013), *aff'd*, 105 A.3d 369 (Del. 2014).

the Second Injunction nonetheless impairs the Insurers' ability to fully protect their interests in the Delaware actions, where such coverage questions are going to be litigated by non-party insurance companies *and AmerisourceBergen*. The Second Injunction thus inflicts tremendous prejudice on the Insurers by barring them from obtaining a judicial determination in Delaware or any other court regarding coverage for non-West Virginia settlements under different insurance policies, different states' laws, and different facts—all while the Circuit Court in this West-Virginia-specific coverage litigation is addressing coverage issues under a handful of policies as part of a multi-phased litigation that will take several more years through final appeal, at best.

Indeed, the prejudice to the Insurers is even more extensive than before. The Second Injunction says that it will last until the end of this West-Virginia-specific coverage litigation, and the timeline of this litigation was recently extended indefinitely—a trial addressing the first phase of this litigation that was previously scheduled to begin on October 4, 2022 has been continued, and no new trial date is anticipated to be placed on the calendar until next year, at the earliest.¹²¹ At this juncture, AmerisourceBergen and the other non-party insurers against in Delaware could obtain coverage rulings in Delaware sooner than coverage rulings may emanate from the Circuit Court below. Just as any rulings entered by the Circuit Court may serve as precedent elsewhere, the rulings of the Delaware Superior Court likewise may serve as precedent in this case and in other cases before other courts. Yet, under the Second Injunction, the Insurers are barred from participating in the Delaware action on equal footing with AmerisourceBergen where such precedential rulings may be obtained by AmerisourceBergen and non-parties that could be detrimental to the Insurers.

¹²¹ See SPApp.13071 (Cir. Ct. Aug. 30, 2022 Scheduling Or. at 2).

The Second Injunction incorrectly states, in language written by AmerisourceBergen, that the Insurers’ concerns about being prejudiced by the injunction were moot because the California Action was stayed, and non-party cross-claims that had previously been filed in the California Action by had been voluntarily withdrawn.¹²² However, this overlooks the fact that, as the Insurers advised the Circuit Court in briefing their opposition to AmerisourceBergen’s renewed motion:

[M]any of the non-party insurers that withdrew their cross-claims against AmerisourceBergen in California have now filed claims against AmerisourceBergen in Delaware—and, moreover, ACE and St. Paul have been named as defendants alongside AmerisourceBergen in a Delaware litigation brought by one of those non-parties. Accordingly, the exact same concern that this Court identified remains a live issue.¹²³

Indeed, the Second Injunction continues to prejudice the Insurers by impinging their ability to fully defend their rights against claims brought against them by non-parties in other forums, which now include the Delaware litigation in which St. Paul and ACE have been named as defendants. The Circuit Court ignored this crucial fact—indeed, the Second Injunction makes *zero* substantive findings about the Delaware litigation or any basis for imposing an injunction barring the Insurers’ full participation in the Delaware litigation. The Circuit Court thus erroneously overlooked the ongoing and undue prejudice to the Insurers from the overbroad Second Injunction.

D. The Circuit Court’s Entry Of The Second Injunction Violates Principles Of Comity Between States And Their Independent Court Systems

The Second Injunction should be reversed for the further reason that it fails to accord due deference to bedrock principles of comity and judicial restraint. As this Court explained in reversing the First Injunction, “[t]he principle of comity requires that courts exercise the power to enjoin foreign suits sparingly and only in very special circumstances where a clear equity is

¹²² See SPApp.13034-35 (Cir. Ct. June 10, 2022 Second Inj. Or. ¶¶ 188-92).

¹²³ See SPApp.11222 (Defs. Apr. 20, 2022 Opp’n to Renewed Mot. for Inj. at 18); see also SPApp.13154-85 (*Arrowood* Del. Super. Ct. Dkt.).

presented requiring the interposition of the court to prevent manifest wrong and an irreparable miscarriage of justice.”¹²⁴ However, the Second Injunction, like the First Injunction before it, undermines those principles of “judicial restraint” and “comity,” and unduly challenges the “dignity and authority” of the courts of other states.¹²⁵

Fundamentally, as this Court explained in reversing the First Injunction, there is no compelling reason for imposition of an overbroad injunction that, like the Second Injunction, bars litigation of “comparable questions of coverage for opioid lawsuits, regarding different policies, in other forums.”¹²⁶ Indeed, it is a routine occurrence in the common-law judicial system of this country that multiple courts will have occasion to address comparable legal issues in different cases in parallel with one another. “[P]arallel proceedings are common, and an anti-suit injunction is not appropriate every time parallel proceedings may occur,” because “[o]therwise, such injunctions would be commonplace rather than extraordinary.”¹²⁷

In fact, this case is far from the first to address comparable questions of law related to the availability of liability insurance coverage for governmental-entity opioid lawsuits. Even before AmerisourceBergen filed this West-Virginia-specific coverage action in 2017, several other courts already had taken up comparable questions. Indeed, a multitude of courts across the country already have issued rulings that there is no coverage for governmental-entity opioid lawsuits under liability policies as a matter of law.¹²⁸ These other courts include a federal district court that ruled

¹²⁴ See *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 733.

¹²⁵ *Advanced Bionics*, 29 Cal. 4th at 705-08 (citation omitted).

¹²⁶ See *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 733.

¹²⁷ *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 480 (4th Cir. 2018), as amended (Mar. 27, 2018); see also, e.g., *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987); *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d at 651.

¹²⁸ See *Rite Aid Corp.*, 270 A.3d at 241; *Masters Pharm., Inc.*, --- N.E.3d ---, 2022 WL 4086449, at *10-11; *Richie*, 2014 WL 3513211 at *6; *Cincinnati*, 2015 WL 13808271 at *1; *Masters Pharm., Inc.*, 2015 WL 10478081 at *3; *Quest Pharm., Inc.*, 2021 WL 1794754 at *6-7; *Quest Pharm., Inc.*, 2021 WL 1821702 at *8.

two years before AmerisourceBergen filed this coverage action that there could be no coverage for the WVAG Lawsuit under another St. Paul liability policy that contains the same insuring agreement as the St. Paul Policy issued to AmerisourceBergen that is the subject of this case.¹²⁹ Just as the Circuit Court’s rulings interpreting the 16 policies at issue here may become precedent for other courts in sister states, it is likewise true that the manifold decisions addressing opioid-related coverage questions that already have been issued by other courts may serve as precedent for the Circuit Court’s consideration of comparable questions here. As this Court recognized, the mere possibility that other courts might issue decisions on “comparable questions of coverage for opioid lawsuits, regarding different policies, in other forums” cannot support entry of an overbroad anti-suit injunction that sweeps far beyond the narrow scope of AmerisourceBergen’s complaint in this case.¹³⁰ Indeed, “the possibility of . . . potentially inconsistent adjudications does not outweigh the respect and deference owed to independent foreign proceedings.”¹³¹ To the contrary, as this Court explained, “[p]rinciples of comity require a court to act with restraint and to respect the idea that the courts of our sister states will [do] likewise.”¹³² These principles require that the Second Injunction be reversed.

Moreover, in order to respect comity owed to other courts, a court should take into account whether the party seeking an anti-suit injunction has other legal remedies available to it in other courts that render the extraordinary relief of an anti-suit injunction unnecessary. Indeed, it is well recognized that “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,” since such matters “are better addressed through motions in the other court to stay or dismiss the

¹²⁹ *Anda*, 90 F. Supp. 3d at 1313-15.

¹³⁰ *See St. Paul v. AmerisourceBergen*, 868 S.E.2d at 731.

¹³¹ *Laker Airways*, 731 F.2d at 928-29.

¹³² *See St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.

proceedings.”¹³³ More broadly, injunctive relief is generally deemed “inappropriate when there is an adequate remedy at law.”¹³⁴ These considerations render the Second Injunction inappropriate for the further reason that AmerisourceBergen indisputably has other legal remedies available to it in the California Action, the Delaware litigation, and in any other courts. Indeed, after the Original Injunction was issued by the Circuit Court (at AmerisourceBergen’s request), AmerisourceBergen then moved the California Superior Court to dismiss or stay the California Action. And, when a stay was subsequently entered by the California Superior Court, AmerisourceBergen reported to the Circuit Court that the stay in California provided “effectively *the identical relief* . . . granted in [the January 2021] Injunction Order.”¹³⁵ Likewise, AmerisourceBergen has already filed motions to stay or dismiss the Delaware actions, which are pending before the Delaware Superior Court. The jurists presiding over the California and Delaware courts are fully capable of determining whether any relief as AmerisourceBergen may seek—such as a stay or dismissal—is or is not warranted. The availability of such normal-course legal remedies in other courts reinforces that the overbroad Second Injunction is neither necessary nor appropriate; it should be reversed.

VI. CONCLUSION

For the reasons set forth herein, St. Paul respectfully requests that this Court reverse and vacate the Circuit Court’s June 10, 2022 Order Granting Plaintiffs’ Motion for WVRCP Rule 65 Injunctive Relief.

¹³³ *Auerbach*, 685 A.2d at 409.

¹³⁴ *Hechler v. Casey*, 175 W. Va. 434, 440, 333 S.E.2d 799, 805 (1985) (citations omitted).

¹³⁵ *See* SPApp.02450 (ABDC Feb. 22, 2021 Ltr. to Cir. Ct. at 1) (emphasis added).

Dated: October 11, 2022

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VERIFICATION

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

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 22-575

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,

Defendant Below,
Petitioner,

**CONTAINS CONFIDENTIAL
MATERIALS**

v.

AMERISOURCEBERGEN DRUG
CORPORATION, and BELLCO DRUG
CORPORATION,

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

Plaintiffs Below,
Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, hereby certifies that on the 11th day of October, 2022, a true copy of the foregoing “*Petitioner St. Paul Fire and Marine Insurance Company’s Opening Brief*” and “*Appendix*” were served upon the following individuals via Lexis Nexis File & Serve or by electronic mail:

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