IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 22-575

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ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Defendant Below,
Petitioner,

v.

AMERISOURCEBERGEN DRUG CORPORATION, and BELLCO DRUG CORPORATION,

Plaintiffs Below,
Respondents.

CONTAINS CONFIDENTIAL MATERIALS

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

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

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Petitioner St. Paul respectfully submits this reply brief in further support of its appeal and in response to the November 28, 2022 brief of Respondent AmerisourceBergen ("ABDC Br.").[1]

I. SUMMARY OF ARGUMENT

This Court's November 15, 2021 Opinion reversed the First Injunction as "overbroad" and "an abuse of discretion." The Second Injunction also should be reversed because it is materially identical to the First. The Second Injunction is overbroad, improperly prejudices St. Paul by preventing it from effectively responding to claims brought against it by non-parties in other pending litigation, and runs afoul of principles of comity between the courts of sister states of this country. AmerisourceBergen's response brief only underscores that the Second Injunction is fundamentally inconsistent with this Court's November 2021 order and should be reversed.

First, as this Court explained in reversing the First Injunction:

> ***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***. . . .
>
> [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***.[2]

[1] Capitalized terms are defined in St. Paul's October 11, 2022 opening brief ("St. Paul Op. Br.").
[2] *See St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Drug Corp.*, 868 S.E.2d 724, 737 (W. Va. 2021) (emphasis added).

Each of these reasons applies with equal force to the Second Injunction. To this day, AmerisourceBergen's complaint remains "limited in scope" and it still seeks insurance coverage rulings "concerning only sixteen insurance policies issued by five insurance companies."[3] AmerisourceBergen does not dispute that, "as it is written, the circuit court's [Second Injunction] order impairs the parties' ability to litigate, against each other or with third parties, over policies separate from the sixteen policies identified by ABDC."[4] Therefore, as this Court found with respect to the First Injunction, the Second Injunction lacks the requisite "clearly and finely tailored" connection to the relief sought in AmerisourceBergen's narrow complaint.[5] Thus, the Second Injunction remains "overbroad," "an abuse of the court's discretion," and "must therefore be reversed."[6]

AmerisourceBergen also repeats an argument that this Court already rejected—namely that, because certain terms in the 16 policies named in AmerisourceBergen's complaint are similar to or overlap with terms in different policies at issue in the California Action and the Delaware actions, the Second Injunction is somehow justified. As this Court explained in reversing the First Injunction, a mere overlap of certain language in different policies is not enough to support the overly-broad injunction that AmerisourceBergen seeks. This Court stated: "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."[7]

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[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

Second, the Second Injunction should be reversed as overbroad for the further reason that the Circuit Court's order did not make *any findings whatsoever* to support an injunction against St. Paul participating in the Delaware actions in which St. Paul has been named as a defendant alongside AmerisourceBergen. The Second Injunction rests exclusively on the Circuit Court's statements that the earlier California Action had been initiated by St. Paul for purposes of "forum shopping." However, the Delaware actions were not initiated by St. Paul or any of the Insurers that are party to this case, and so the Circuit Court's prior statements regarding supposed forum shopping in the California Action have no applicability to the Delaware actions. Since the Second Injunction makes no findings concerning the Delaware actions, and articulates no reasoning regarding how the injunction could be justified with respect to the Delaware actions, there is simply no basis for the Circuit Court's injunction against the Delaware actions.

Third, the First Injunction was "an abuse of discretion in its breadth and focus" because it improperly prejudiced the Insurers by "preclud[ing] . . . the five insurers who are parties to the West Virginia action from effectively responding" to claims brought by non-parties in other actions.[8] Because the Second Injunction prejudices the Insurers in precisely the same manner, it should likewise be reversed.

AmerisourceBergen concedes that the non-party insurance companies that filed the Delaware actions against St. Paul, ACE, and AmerisourceBergen are not subject to the Second Injunction, and thus the Second Injunction will not prevent the Delaware actions from proceeding. Therefore, those non-party insurers and AmerisourceBergen remain free to litigate questions concerning liability insurance coverage for AmerisourceBergen's opioid-related liabilities without impediment, while the Second Injunction purports to bar St. Paul from participating in such

[8] *Id*. at 736.

litigation on equal footing. AmerisourceBergen ignores the reality that the Second Injunction leaves St. Paul unable to fully protect its interests in other litigation, including by following Delaware court rules and orders. The Second Injunction purports to require St. Paul to sit on the sidelines in Delaware and allow AmerisourceBergen and non-parties to take the wheel as they litigate coverage issues that could impact St. Paul's rights. That is extraordinary prejudice and outright inequity.

Given the absence of any findings or conclusions in the Second Injunction with respect to the Delaware actions and the undisputed prejudice the Insurers will suffer, there is no basis on which the Second Injunction could be upheld. It should be vacated.

Fourth, AmerisourceBergen's response brief does not reckon with St. Paul's argument that the Second Injunction should be reversed in the interest of comity because, among other reasons, the extraordinary relief of an anti-suit injunction is unnecessary and inappropriate in light of the fact that other, normal-course remedies are available to AmerisourceBergen in the California and Delaware actions. AmerisourceBergen has *already* moved to dismiss and/or stay the litigations in California and Delaware and, when the California Superior Court entered a stay of the California Action in 2021, AmerisourceBergen admitted to the Boone County Circuit Court that the stay accorded AmerisourceBergen the "identical" relief that AmerisourceBergen seeks through the anti-suit injunction. The courts of Delaware and California should be allowed to manage their own dockets without the interference of an overbroad anti-suit injunction that this Court has reversed once already.

The Second Injunction should be reversed and vacated.

II. ARGUMENT

A. The Second Injunction Should Be Reversed As Overbroad Because, Like The First Injunction That This Court Reversed For Overbreadth, It Improperly Enjoins St. Paul From Litigating Coverage Questions Regarding Policies Beyond The 16 Policies That Are The Subject Of AmerisourceBergen's Complaint In This Case

This Court reversed the First Injunction as "overbroad" and "an abuse of discretion" because there was a fundamental disconnect between: (a) the limited scope of AmerisourceBergen's complaint in this West Virginia insurance coverage action, which seeks rulings regarding 16 insurance policies issued by the five Insurers named as defendants in this case; and (b) the far broader scope of the injunction, which barred St. Paul and the other Insurers from litigating coverage questions regarding policies beyond the 16 policies named in AmerisourceBergen's complaint. As this 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***.[9]

The Second Injunction makes this same error, and it should be reversed for the same reasons as the First. Nothing in AmerisourceBergen's response brief alters that conclusion.

1. It Is Undisputed That AmerisourceBergen's Complaint Identifies Only 16 Policies Issued By Five Insurers, And That AmerisourceBergen Has Declined To Amend Its Complaint To Add Any Other Policies

AmerisourceBergen's operative complaint expressly states that it seeks insurance coverage rulings regarding 16 policies issued by the five Insurers named as Defendants. Specifically, the complaint "ask[s] the Court to construe the meaning of and enforce certain . . . liability insurance

[9] *Id.* at 737.

policies issued by Defendants . . . from 2006-2013," defines those policies as "the 'Insurance Policies,'" and specifies that "[t]hese insurance policies are identified in the list attached as Exhibit A."[10] In turn, "Exhibit A" contains a list of ***16 insurance policies*** that are identified by insurer, policy number, and policy period. Those are the 16 policies that are the subject of AmerisourceBergen's complaint in this case.[11] AmerisourceBergen does not dispute that, to this day, "ABDC's West Virginia complaint is limited in scope and seeks a declaratory judgment concerning only sixteen insurance policies."[12] And AmerisourceBergen has *refused* to amend its complaint to include any additional policies, even after being invited by the Circuit Court to do so.[13]

Even though AmerisourceBergen's complaint identifies only 16 policies issued by the five Insurers for periods between 2006 and 2013, the Second Injunction prohibits St. Paul and the other Insurers "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*."[14] Thus, on its face, "the circuit court's [Second Injunction] order impairs the parties' ability to litigate, against each other or with third parties, over policies separate from the sixteen policies identified by ABDC"—precisely the flaw that this Court identified as requiring reversal of the First Injunction.[15]

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[10] *See* SPApp.00195 (ABDC July 18, 2018 Am. Compl. at 2).
[11] *See* SPApp.00240 (ABDC July 18, 2018 Am. Compl. at Ex. A).
[12] *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.
[13] *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.").
[14] *See* SPApp.13040-41 (Cir. Ct. June 10, 2022 Second Inj. Or. at 62-63) (emphasis added).
[15] *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.

AmerisourceBergen argues that the sweeping scope of the Second Injunction is justified because, AmerisourceBergen says, additional policies beyond the 16 policies named in its complaint could be relevant to a hypothetical second phase of this West Virginia coverage action, even though the pleadings do not support such a hypothesis. AmerisourceBergen has "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."[16] Even after this Court reversed the First Injunction because of the disconnect between the narrow scope of AmerisourceBergen's complaint and the broader scope of the injunction, AmerisourceBergen did not seek leave to amend the complaint to add in any other policies.

AmerisourceBergen knew this Court reversed the First Injunction for overbreadth due to the Court's "concern . . . 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."[17] On remand, AmerisourceBergen could have moved to amend its complaint to add more policies. But AmerisourceBergen did not do so. Instead, AmerisourceBergen inserted a line in the Second Injunction that the Circuit Court signed, saying the Circuit Court took "judicial notice" of a discovery order and a non-substantive summary order entered in certain underlying opioid litigations, neither of which were in the Circuit Court record and which are not in the record before this Court. Those orders supposedly indicate there may be facts at issue in those cases going back to 1996.[18] Of course, that has nothing to do with the operative pleadings or insurance

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[16] *See, e.g.*, SPApp.02235 (St. Paul Jan. 20, 2021 Ltr. to Cir. Ct. at 1).
[17] *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.
[18] AmerisourceBergen also cites for the first time in its appeal response brief additional briefs associated with the barebones summary order from an underlying opioid litigation. None of these briefs is in the record, the briefs were not provided to the Circuit Court below, *and the Second Injunction does not even purport to have taken "judicial notice" of these briefs*. These briefs are therefore irrelevant to this Court's evaluation of the propriety of the Circuit Court's entry of the Second Injunction. The briefs indicate only that the court was presented with a defense motion for application of a one-year limitations period to certain

policies at issue in this coverage action (which only go back to 2006), and it does not support an overbroad anti-suit injunction. AmerisourceBergen has made a deliberate choice to confine the scope of this coverage action to the 16 policies listed in its complaint that were issued by the five Insurers named as defendants in its complaint. Having made that choice, AmerisourceBergen cannot at the same time obtain from the West Virginia judiciary an anti-suit injunction to bar the Insurers from seeking coverage rulings anywhere in the country with respect to other policies, other insurers, and other underlying actions that AmerisourceBergen has chosen to exclude from its complaint here.

AmerisourceBergen's apparent reason for refusing to expand its complaint in this case to include any other policies while simultaneously pursuing a nationwide anti-suit injunction to bar the Insurers from seeking coverage rulings regarding any other policies in any court is both obvious and legally flawed. AmerisourceBergen hopes to achieve a ruling in favor of coverage under a narrow subset of policies issued by a handful of insurers regarding only West-Virginia-based opioid lawsuits, and then attempt to parlay that ruling into a finding of coverage relating to thousands of non-West-Virginia opioid lawsuits under dozens of other insurance policies that AmerisourceBergen has deliberately excluded from this case, many of which were issued to other policyholders in different years and in different states. But AmerisourceBergen's decision to restrict this West-Virginia-specific coverage action to a subset of 16 policies should not hinder any other court from hearing and deciding coverage issues pertaining to non-West Virginia claims under other policies. That unassailable conclusion formed the basis for this Court's reversal of the First Injunction, and it applies with equal force today to the Second Injunction.

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underlying opioid complaints that were filed in 2017. The denial of a summary judgment motion regarding a statute of limitations defense that might have limited a cause of action to a period from 2016 to 2017 does not even come close to establishing that *pre-2006* insurance policies will be "at issue" in "Phase 2" of this West Virginia insurance coverage case.

Accordingly, like the First Injunction, the Second Injunction lacks a "clearly and finely tailored . . . connection" to "the relief sought in ABDC's West Virginia action," and it still improperly "impairs" the Insurers' "ability to litigate, against each other or with third parties, over policies separate from the sixteen policies identified" in AmerisourceBergen's complaint. The Second Injunction should therefore be reversed.[19]

2. This Court Already Rejected AmerisourceBergen's Flawed Argument That A Mere Similarity Or Overlap Of Certain Terms In Different Policies Could Justify An Overbroad Injunction That Exceeds The Scope Of AmerisourceBergen's Narrow Complaint In This Case

AmerisourceBergen incorrectly argues that the scope of the Second Injunction is justified by the fact AmerisourceBergen attached to its "renewed" motion for an injunction copies of additional insurance policies not at issue in the Circuit Court and lawyer-drafted charts purporting to compare excerpts of language from different policies. AmerisourceBergen contends that certain terms of the 16 policies at issue in the Circuit Court are similar or in some cases identical to certain terms in other policies at issue in the California Action. However, none of this changes the fact that AmerisourceBergen has deliberately chosen to exclude any and all other policies from the scope of its complaint in this case. And none of this alters the fact that St. Paul has been named as a defendant in another jurisdiction where other policies have been put at issue, and St. Paul must appear and defend its interests in that case.

In any event, this Court already considered and rejected AmerisourceBergen's unremarkable argument that many insurance policies contain certain terms that are similar and sometimes identical. As this Court explained in reversing the First Injunction, a mere overlap of certain language in different policies is not enough to support an anti-suit injunction because, while "[w]e understand that the circuit court's judgment interpreting the policies at issue will become

[19] *St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.

precedent for future cases in sister states," "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."[20]

AmerisourceBergen misleadingly asserts that the 16 policies named in its complaint are "materially identical" to other policies at issue in the California Action and the Delaware actions and that the Insurers rely on similar contract defenses in each case. Tellingly, however, AmerisourceBergen does not rebut the undisputed facts laid out in St. Paul's opening brief that many of the policies in the California Action and the Delaware actions 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*.[21] Thus, regardless of whether or not any snippets of certain policy language or defenses may be similar or identical, litigation of insurance coverage questions under the policies at issue in the California Action and Delaware actions may implicate 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.

Again, AmerisourceBergen's argument is not rescued by its hypothetical assertion that all policies dating back to 1996 will be "at issue" in "Phase 2" of this case. That argument falls flat for the reasons addressed above—*i.e.*, AmerisourceBergen has deliberately refused to amend its

[20] *See id.* St. Paul accepts and agrees with the Court's holding that the injunction could not be supported by the mere fact that the Circuit Court's decisions might later serve as precedent for future cases in sister states, subject of course to the nuance that the precedential value of any given court decision will vary from case to case and will depend on myriad factors including, among other considerations, the applicable states' laws at issue in different cases and whether one court's decision constitutes binding or only persuasive authority for another court.

[21] *See* St. Paul Op. Br. at 27-30.

complaint to include any such policies, and its actual complaint in this case remains expressly limited to just 16 policies issued by five Insurers for certain periods between 2006 and 2013.

At bottom, as this Court recognized in reversing the First Injunction for overbreadth, the mere fact that different policies at issue in the California Action—and the Delaware action in which St. Paul and ACE have been named as defendants alongside AmerisourceBergen—may present 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."[22] This Court already ruled that an overlap or similarity in certain policy language did not justify the injunction. AmerisourceBergen's scattershot attempts to distract from this basic truth should be rejected, and the Second Injunction should be reversed.

B. The Second Injunction Should Be Reversed As Overbroad Because It Made No Findings Regarding The Delaware Actions But Nonetheless Purports To Bar St. Paul From Fully Participating In The Delaware Litigation

AmerisourceBergen's argument for affirmance of the overly-broad scope of the Second Injunction rests in large part on certain language in the Second Injunction regarding the Circuit Court's prior statements in the First Injunction that the California Action had been initiated for purposes of "forum shopping." However, the Second Injunction does not make *any substantive factual findings* about the Delaware actions to support an anti-suit injunction against them. Nor does the Second Injunction provide any reasoning or any other discussion regarding how the injunction could be justified with respect to the Delaware actions. The Delaware actions were not initiated by St. Paul or any of the Insurers that are party to this case, and so the Circuit Court's prior statements regarding "forum shopping" in connection with the California Action have no

[22] *Id.*

applicability to the Delaware actions. The absence of any findings in the Second Injunction regarding the Delaware actions means that there is no basis for the scope of the Second Injunction to extend to the Delaware actions. The Second Injunction should be reversed for this reason alone.

Moreover, the circumstances of the California Action have fundamentally changed and the Circuit Court's prior concerns regarding forum shopping have been addressed. Specifically, on remand from reversal of the First Injunction, St. Paul clarified and expressly advised the Circuit Court in writing 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."[23] In addition, since the First Injunction was issued, the scope of the California Action has been narrowed and includes only St. Paul and affiliated entities as plaintiffs and AmerisourceBergen and affiliated entities as defendants. In light of these changed circumstances—which AmerisourceBergen notably does not contest in its response brief—the Second Injunction's reliance on outdated statements regarding the California Action are misplaced and cannot justify the overly-broad nationwide scope of the Second Injunction.[24]

C. The Second Injunction Should Be Vacated Because, As This Court Recognized In Reversing The First Injunction, It Improperly Prejudices St. Paul By Precluding St. Paul From Effectively Responding To Claims Brought By Non-Parties In Other Actions

In reversing the First Injunction, this Court held that the injunction constituted "an abuse of discretion in its breadth and focus" because it improperly prejudiced the Insurers by "preclud[ing] . . . the five insurers who are parties to the West Virginia action from effectively responding" to claims brought by non-parties in other actions.[25] The Second Injunction prejudices

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[23] *See* SPApp.11211 (Defs. Apr. 20, 2022 Br. at 7).
[24] For the reasons explained in St. Paul's opening brief, St. Paul also respectfully notes its disagreement with the Circuit Court's statements that the California Action was filed for purposes of forum shopping, which is not supported by the facts. *See* St. Paul Op. Br. at 30-31 n.111.
[25] *See St. Paul v. AmerisourceBergen*, 868 S.E.2d at 736.

the Insurers in exactly the same way—by barring them from participating in other actions brought against them by non-parties who are not subject to the injunction. And, in fact, the extent of the prejudice has only increased in the wake of the new actions that were filed by non-parties in early 2022 in Delaware Superior Court, which named St. Paul and ACE as defendants alongside AmerisourceBergen. For these reasons, the Second Injunction should be reversed because it unfairly prejudices the Insurers by preventing them from effectively responding to claims brought by non-parties in other actions that will proceed regardless of any injunction in this case.

In its response brief, AmerisourceBergen does not dispute that the Delaware actions address coverage disputes about policies beyond the 16 policies named in AmerisourceBergen's complaint here and underlying opioid claims filed against AmerisourceBergen outside of West Virginia that are not the subject of this case either. AmerisourceBergen also does not dispute that, since the non-parties that filed the Delaware actions are not subject to the Second Injunction, the Second Injunction will not prevent the Delaware actions from proceeding. Accordingly, those non-party insurers and AmerisourceBergen remain free to litigate insurance coverage questions concerning AmerisourceBergen's opioid-related liabilities in Delaware Superior Court without any impediment, while the Second Injunction purports to bar St. Paul and ACE from participating in such litigation on equal footing in order to protect their interests.

AmerisourceBergen argues that St. Paul is not actually prejudiced by being hamstrung in its ability to litigate alongside AmerisourceBergen and the non-parties in the Delaware actions because, AmerisourceBergen says, St. Paul remains free to *respond* to the non-parties' complaints and somehow can defend its interests in the Delaware actions by proceeding only with this West Virginia action. These arguments ignore the reality of the untenable situation that St. Paul faces in Delaware as a result of the Second Injunction. The prejudice that the Second Injunction inflicts

on St. Paul stems from the fact that the injunction inequitably allows AmerisourceBergen complete leeway to litigate against the non-party plaintiffs in Delaware Superior Court, whereas St. Paul and the other Insurers must litigate with their hands tied by the Second Injunction. Without being able to participate in the Delaware litigation on equal footing with AmerisourceBergen and the non-party insurers, the Second Injunction may require St. Paul to stand back and let AmerisourceBergen and the non-parties take the wheel as they litigate coverage questions that could be held against St. Paul as precedent in the Delaware actions or elsewhere.

By way of illustration, because AmerisourceBergen chose to limit this West Virginia coverage action to 16 policies issued by five insurers, the Circuit Court does not have pending before it any policies that were issued outside of Pennsylvania. All parties to this action have stated that the law of Pennsylvania should be applied to the 16 policies pending before the Circuit Court. But that is not the case in Delaware; rather, the non-party plaintiffs' complaints in Delaware expressly seek coverage rulings regarding policies dating back to 1996, including policies issued to different policyholders in different states and that are governed by different states' laws. The Delaware Superior Court will therefore be called upon to apply laws of other states to the different and much broader scope of insurance policies at issue in that litigation, including the law of California where many St. Paul policies were issued. Enforcement of the Second Injunction thus could cause the Delaware Superior Court to issue rulings about California-law policies without St. Paul being able to weigh in as to how its California-law policies should be interpreted.

Tellingly, AmerisourceBergen does not dispute that the Second Injunction hamstrings St. Paul in the Delaware actions in this very way—indeed, AmerisourceBergen fails even to address this key source of prejudice to St. Paul in its response brief, choosing instead to ignore it. This

Court did not ignore this undue prejudice in reversing the First Injunction, and it should reverse the Second Injunction for this same reason.

AmerisourceBergen also asserts that St. Paul cannot be harmed by the Second Injunction because St. Paul has not yet paid AmerisourceBergen money in connection with AmerisourceBergen's demands for insurance coverage for opioid-related liabilities. However, AmerisourceBergen notably does not contest the facts, as St. Paul described in its opening brief, that the prejudice to St. Paul and the other Insurers that are party to this case is nonetheless real and imminent because (i) AmerisourceBergen has demanded that St. Paul and the other Insurers pay billions of dollars of coverage for non-West Virginia settlements, (ii) other insurance companies that are not party to this action and not subject to the Second Injunction also have alleged that the Insurers may be responsible for portions of those non-West Virginia settlements, and (iii) coverage for those non-West Virginia settlements will be litigated in the Delaware actions by AmerisourceBergen and those non-party insurers regardless of any injunction entered against the Insurers that are party to this case. Yet, under the Second Injunction, the Insurers have their hands tied in the Delaware actions and are barred from participating in the development of the facts and law that will guide coverage rulings in Delaware that could become precedent against them in Delaware and elsewhere. That is truly prejudicial, and AmerisourceBergen does not deny it.

In a last-ditch effort, AmerisourceBergen argues that the Court should simply ignore the prejudice that the Second Injunction will inflict on St. Paul in the Delaware actions because, AmerisourceBergen baldly asserts, St. Paul has supposedly "collude[d]" with a plaintiff in one of the Delaware actions. AmerisourceBergen's spurious assertion is baseless. The reality is that, 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. 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, those cross-claiming insurers independently chose to withdraw their claims in California and instead filed complaints against AmerisourceBergen, ACE, and St. Paul in Delaware. Accordingly, in light of AmerisourceBergen's insistence that those other insurers' cross-claims could not be litigated in California and those other insurers having filed in Delaware instead, St. Paul voluntarily dismissed its claims against those other insurers in the California Action.[26] Astonishingly, AmerisourceBergen attempts to paint St. Paul's mere agreement with AmerisourceBergen's contention that Delaware is the better forum for those non-party insurers to litigate their coverage disputes with AmerisourceBergen as gamesmanship by St. Paul. It is not.

D. The Second Injunction Should Be Reversed Because It Violates Principles Of Comity Between States And Their Independent Court Systems

In its November 2021 ruling reversing the First Injunction, this Court stressed that "[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."[27] The Second Injunction should be reversed because it undermines the principles of comity and judicial restraint, and it unduly challenges the "dignity and authority" of the courts of other states.[28]

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[26] *See* St. Paul Op. Br. at 8-9.
[27] *See St. Paul v. AmerisourceBergen*, 868 S.E.2d at 733.
[28] *See 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).

In its response brief, AmerisourceBergen does not rebut St. Paul's argument that the Second Injunction should be reversed in the interest of comity because AmerisourceBergen has other, normal-course remedies available to it in the California Action and Delaware actions, which renders the entry of an extraordinary anti-suit injunction by a West Virginia court entirely unnecessary and inappropriate. Indeed, AmerisourceBergen *already* has sought such normal-course remedies from both the California court and the Delaware court, and, after the California court entered a stay in 2021, AmerisourceBergen admitted to the Boone County Circuit Court that the stay in California provided "effectively the identical relief" that AmerisourceBergen has sought in the injunction.[29]

The California Superior Court and the Delaware Superior Court should, out of respect to the principle of comity, be permitted to manage their own dockets and decide motions presented to them without the interference of an anti-suit injunction from the Boone County Circuit Court that even AmerisourceBergen admits is redundant of the routine motions to stay or dismiss that AmerisourceBergen has already filed in both courts. Indeed, it is for precisely this reason 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 proceedings."[30] The California Superior Court has already elected to stay its action, and the Delaware Superior Court has a motion to stay pending before it. The Delaware Superior Court may, in its judgment, choose to enter a stay or to press forward with its action. Either way, it is inappropriate for AmerisourceBergen, through the Second Injunction, to attempt to tie the Delaware Superior Court's hands and prevent it from moving forward as to all parties before it or, worse yet, require

[29] *See* SPApp.02450 (ABDC Feb. 22, 2021 Ltr. to Cir. Ct. at 1).
[30] *Auerbach v. Frank*, 685 A.2d 404, 409 (D.C. 1996).

it to conduct a second action involving St. Paul and ACE at some later date because those parties were impaired from participating in the currently-pending Delaware action as a result of the overbroad Second Injunction.

AmerisourceBergen argues that any violation of comity caused by the Second Injunction is necessary because, AmerisourceBergen says, AmerisourceBergen had no choice but to seek an anti-suit injunction after St. Paul filed the California Action. But, as noted above, AmerisourceBergen also moved the California Superior Court for a stay and the California Action has been stayed, making an injunction as to that action entirely unnecessary and inappropriate—particularly given that AmerisourceBergen has conceded that the stay in California has already afforded it "identical relief" to what it seeks through the injunction.

AmerisourceBergen also asserts that St. Paul has "admitted" an "intent to pursue other claims in other jurisdictions if the Injunction is lifted or narrowed." That is false. The only statement by St. Paul that AmerisourceBergen cites for this claim is a line in a motion by which St. Paul moved the Circuit Court to stay enforcement of the First Injunction pending appeal because, St. Paul explained, the injunction threatened to prejudice St. Paul while the appeal to this Court was pending insofar as the injunction barred St. Paul from participating in litigation concerning policies, claims, parties, and issues that were not before the Circuit Court but were pending before other courts. That was not a "threat" to file other suits in other jurisdictions, it was a statement of fact regarding the extreme prejudice that the injunction was (and still is) inflicting on St. Paul.[31]

[31] Further attempting to mislead the Court, AmerisourceBergen falsely asserts that St. Paul failed to comply with the First Injunction because it submitted a response to AmerisourceBergen's motion to dismiss the California Action in 2021. As St. Paul previously explained to this Court and the Circuit Court at the time, AmerisourceBergen, in collaboration with five other entities that are not party to this West Virginia Action, deliberately filed a motion to dismiss the California Action *after the First Injunction was entered*, which required St. Paul—and the four other plaintiff-insurers in the California Action that are not party to this

Moreover, rather than being any "threat," St. Paul's statement accurately predicted that, in light of the growing number of opioid-related insurance coverage cases that have been filed across the country by policyholders and insurers alike, the prospect of additional litigation regarding other insurance policies that AmerisourceBergen has deliberately excluded from its complaint in this West Virginia coverage action was all but inevitable. And that prediction has certainly come to pass.[32] Indeed, numerous courts across the country *already* have addressed "comparable

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case—to file a response in accordance with the rules governing proceedings in the California Superior Court. AmerisourceBergen's conduct in filing a motion to dismiss after the injunction was issued was unjustifiable gamesmanship of the worst sort, as AmerisourceBergen baselessly tried to force St. Paul into defaulting in California by threatening, without any merit, to seek sanctions if St. Paul simply responded to that motion as required by the rules of the California courts. *See* St. Paul Jan. 19, 2021 Rule 28(b) Mot. To Stay Enforcement Of Inj. Or. at 6-7, 8-10, *St. Paul v. AmerisourceBergen*, Case No. 21-0036 (W. Va.); *see also* SPApp.02047 (St. Paul Jan. 18, 2021 Cir. Ct. Mot. To Stay Enforcement Of Inj. Or. Pending Appeal).

[32] *See, e.g.*, *ACE Am. Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239, 241 (Del. 2022) (opioid-related insurance coverage action filed in 2019 by a policyholder against various insurers, including St. Paul and ACE, in which the Delaware Supreme Court ruled that there is no coverage for governmental-entity opioid lawsuits under liability insurance policies as a matter of Pennsylvania law because such lawsuits do not involve damages for or because of "bodily injury"); *Acuity v. Masters Pharm., Inc.*, --- N.E.3d ---, No. 2020-1134, 2022 WL 4086449, at *10-11 (Ohio Sept. 7, 2022) (separate opioid-related insurance coverage litigation filed in 2017, in which the Ohio Supreme Court ruled that there is no coverage for governmental-entity opioid lawsuits under liability insurance policies as a matter of Ohio law due to the absence of damages for "bodily injury"); *Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 90 F. Supp. 3d 1308, 1313-15 (S.D. Fla. 2015) (separate opioid-related coverage action filed in 2012, in which St. Paul was granted summary judgment because, the court concluded, the WVAG Lawsuit is not covered under another St. Paul policy containing the same "for" "bodily injury" language as the St. Paul Policy in this case because the WVAG Lawsuit did not involve damages "for" "bodily injury"), *aff'd*, 658 F. App'x 955 (11th Cir. 2016); *AIU Ins. Co. v. McKesson Corp.*, No. 20-cv-07469-JSC, 2022 WL 1016575, at *1 (N.D. Cal. Apr. 5, 2022) (opioid-related coverage case filed in 2020, in which the court held that an opioid distributor is not entitled to coverage for government opioid lawsuits under a liability insurance policy because the suits had "no potential to allege that an accident produced the injury"); *see also, 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 due to lack of damages for bodily injury); *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 because government plaintiffs' damages were not for "bodily injury"); *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); *Cincinnati Ins. Co. v. Discount Drug Mart, Inc.*, No. CV-19-913990 (Ohio Ct. Com. Pl., Cuyahoga Cty. Dec. 1, 2022) (following the Ohio Supreme Court's ruling in *Acuity* and finding no coverage for governmental-entity opioid lawsuits under liability insurance policies because such suits do not involve damages for "bodily injury").

questions" of insurance coverage for the opioid lawsuits that have been brought against AmerisourceBergen and other companies in the pharmaceutical supply chain—and many such courts have already ruled that no coverage is available for such lawsuits under liability insurance policies as a matter of law.[33] In the common-law judicial system of this country, "parallel 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."[34] Indeed, it is well established that "the possibility of . . . potentially inconsistent adjudications does not outweigh the respect and deference owed to independent foreign proceedings."[35]

As this Court explained in reversing the First Injunction, "[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."[36] The Second Injunction should be reversed for this reason too.

III. CONCLUSION

For the reasons set forth herein and in its October 11, 2022 opening brief, 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.

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[33] *See supra* note 32.
[34] *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 649, 651–52 (Tex. 1996).
[35] *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928–29 (D.C. Cir. 1984).
[36] *See St. Paul v. AmerisourceBergen*, 868 S.E.2d at 737.

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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,

v.

AMERISOURCEBERGEN DRUG CORPORATION, and BELLCO DRUG CORPORATION,

Plaintiffs Below,
Respondents.

CONTAINS CONFIDENTIAL MATERIALS

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

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, hereby certifies that on the 11th day of January, 2023, a true copy of the foregoing "***Petitioner St. Paul Fire and Marine Insurance Company's Reply Brief***" was served upon the following individuals via Lexis Nexis File & Serve or by electronic mail:

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