

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.

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

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

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INTRODUCTION

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

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

In 2021, after the circuit court entered an anti-suit injunction (the “Injunction”) based on St. Paul’s bad-faith litigation tactics, this Court held that the circuit court correctly determined that an injunction was needed to prevent a threat to the court’s jurisdiction and to protect compelling interests of West Virginia.² It remanded for clarification of the scope of the

¹ *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804, 2019 U.S. Dist. LEXIS 165494, at *54 (N.D. Ohio Sept. 26, 2019).

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

Injunction and a further articulation of the circuit court’s reasoning for the particulars of the Injunction. On remand, the parties submitted thousands of pages of supplemental briefing and exhibits, after which the circuit court heard argument regarding the proper scope and duration of the Injunction. The circuit court then issued the Renewed Injunction in a detailed and well-reasoned opinion. St. Paul has appealed. This Court should affirm.

* * *

As this Court is now familiar, AmerisourceBergen Drug Corporation (“ABDC”) initiated this coverage action in March 2017 against St. Paul, ACE American Insurance Company, ACE Property and Casualty Insurance Company, American Guarantee & Liability Insurance Company, and Endurance American Insurance Company (the “Insurer Defendants”).³ The events leading to the Injunction began in November 2020, when St. Paul filed a duplicative suit in California (the “California Coverage Action”) against the same parties, relating to the same insurance policies, and raising the same issues that had been pending in West Virginia for nearly four years. St. Paul served the California Coverage Action complaint on the *same day* that the circuit court *issued a summary judgment ruling against St. Paul* on what St. Paul called the “threshold” issue of whether the underlying prescription opioid liability lawsuits seek damages for “bodily injury” as required to trigger coverage under the insurance policies’ insuring agreements.

To prevent further procedural gamesmanship, and to protect the jurisdiction and compelling interests of West Virginia, the circuit court enjoined the parties to the West Virginia action from prosecuting duplicative litigation relating to the issues pending in the

³ ACE American Insurance Company and ACE Property and Casualty Insurance Company (together, “ACE”), along with St. Paul, have appealed the circuit court’s June 10, 2022 Renewed Injunction Order.

circuit court while the case is pending. On appeal, this Court affirmed the circuit court's finding that St. Paul filed its collateral California suit for improper purposes—namely “forum shopping and the disruption of the orderly resolution of th[is] West Virginia suit”—and held that an anti-suit injunction is warranted to halt St. Paul's bad-faith litigation tactics. This Court recognized that “the courts of this State have a compelling interest in determining whether the policies at issue in ABDC's West Virginia suit provide coverage for the underlying claims brought by West Virginia entities, without competing rulings from a foreign court” and that the Injunction was “needed to prevent a threat to the court's jurisdiction and ability to resolve the West Virginia coverage suit, and to prevent a multiplicity of suits filed with the intent of causing delay, expense and inconsistent judgments.”

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

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

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

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

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

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

The circuit court also addressed this Court’s second question and held that “[t]he Injunction is modified to clarify that nothing in the Injunction will preclude any party from

seeking a compromise resolution of any claims, whether through settlement or otherwise.” Also, the Renewed Injunction is “temporary” and “shall remain in effect until the conclusion of Phase 1 of this dispute, at which time the Court will hear argument on whether any changed circumstances alter the equities involved or require further modification.”

On appeal, St. Paul argues that the Renewed Injunction is “overbroad” because it encompasses St. Paul policies dating back to 1996. The Renewed Injunction is not overbroad. Based on uncontroverted facts, the circuit court found that the St. Paul policies dating back to 1996 are at issue in this action—specifically, in Phase 2, which will go forward (according to the parties’ Bifurcation and Stay agreement) after the parties litigate the bellwether issues in Phase 1. The circuit court also found that the St. Paul policies dating back to 1996 are materially identical to the St. Paul Policy at issue in Phase 1.⁴

Based on these findings, the circuit court held that “the Injunction must extend beyond coverage for a subset of prescription opioid liability lawsuits or just the sixteen insurance policies at issue in Phase 1 of this suit” because “[a]ny interpretation of ABDC’s policies or primary policy language by the California court—or any other court Insurer Defendants might seek to file a collateral coverage action in—presents the threat of inconsistent rulings identified by this Court and acknowledged by the Supreme Court of Appeals and the California Superior Court” which is “especially so as all of the Insurer Defendants’ policies—not just the sixteen

⁴ The California Court of Appeal reached this same conclusion when it affirmed a stay of St. Paul’s duplicative California action. After St. Paul refused to comply with the Injunction, ABDC was forced to file a motion to stay the California action, which the California trial court granted and the California Court of Appeal affirmed because “[t]he coverage actions here and in West Virginia arise from the same underlying circumstances as the MDL” and “the West Virginia case can serve to educate the parties (whether or not the same) and the trial court about the issues and how to streamline the litigation here.” *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Corp.*, 80 Cal. App. 5th 1, 17, 295 Cal. Rptr. 3d 400, 412-13 (2022).

at issue in Phase 1—are directly at issue in Phase 2 of this case.”

The Renewed Injunction is narrowly tailored and sweeps only so far as needed to prevent the disruption of the orderly resolution of this West Virginia suit and ensure that the courts of this State can determine whether the policies at issue in ABDC’s West Virginia suit provide coverage for the underlying claims brought by West Virginia entities, without competing rulings from a foreign court. Because St. Paul lacks grounds to question the circuit court’s exercise of its discretion in issuing the Renewed Injunction, this Court should affirm.

STATEMENT OF THE CASE

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

On June 26, 2012, the West Virginia Attorney General filed suit in the Circuit Court of Boone County against ABDC, alleging that ABDC negligently distributed prescription opioid medications, causing bodily injury and death to West Virginia residents and creating a public nuisance. *State of West Virginia ex rel. Darrell v. McGraw, Jr., Attorney General. v. AmerisourceBergen Drug Corporation, et al.*, Civil Action No. 12-C-141 (Boone Cnty. Cir. Ct., W. Va.) (“WVAG Lawsuit”); SPApp.12989 ¶ 2. The West Virginia Attorney General sought damages against ABDC to reimburse it for costs that the State allegedly paid to address those injuries and deaths, including the costs of providing medical care, treatment, and services to West Virginians. *Id.* ¶ 3.⁵ On December 1, 2016, ABDC and the West Virginia Attorney General reached an agreement in principle on the material terms of a settlement to resolve the WVAG Lawsuit. SPApp.00289 ¶ 8.

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

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

After the settlement of the WVAG Lawsuit, West Virginia political subdivisions and other plaintiffs began filing prescription opioid liability lawsuits against ABDC similar to the WVAG Lawsuit. SPApp.01913 ¶ 21; SPApp.12990 ¶ 8. These were followed by thousands of similar lawsuits against ABDC in West Virginia and across the country by other government entities, third-party payors, individual and putative class action plaintiffs, and Native American Tribes. SPApp.12991 ¶ 10.

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

The National Opioid MDL court has categorized the lawsuits consolidated in that action by the type of plaintiff bringing the suit, including lawsuits by (i) government entities; (ii) individuals and putative class actions; (iii) third-party payors, providers, and hospitals; and (iv) Native American Tribes. SPApp.12991 ¶ 11. For each category, the National Opioid

MDL court has identified bellwether cases that have determined (and will determine) core issues relevant to all of the prescription opioid liability lawsuits, including the West Virginia prescription opioid liability lawsuits. With the exception of Native American Tribe lawsuits, for each of the categories of cases in the National Opioid MDL, there is at least one equivalent West Virginia prescription opioid liability lawsuit.⁶ SPApp.12991-92 ¶ 12 n.9.

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

C. ABDC Initiates this Coverage Action

On July 28, 2016, ABDC provided notice of the WVAG Lawsuit to the Insurer Defendants and sought insurance coverage for defense costs and any liability. SPApp.00291 ¶ 15; SPApp.00294 ¶ 38. St. Paul denied all coverage obligations for the WVAG Lawsuit and all other prescription opioid liability lawsuits ABDC tendered. SPApp.12992 ¶ 16.

On March 16, 2017, ABDC filed its complaint for breach of contract and declaratory judgment against the Insurer Defendants, seeking insurance coverage for the defense and indemnification of the WVAG Lawsuit and all other then-pending prescription opioid liability

⁶ By way of example only, see *Wyoming County v. AmerisourceBergen Drug Corp., et al.*, No. 5:17-cv-02311 (S.D. W. Va.); N.D. Ohio (1:17-op-45051) (government entity case pending in the National Opioid MDL, coverage for which is at issue in this case and which is the subject of the circuit court's Bifurcation and Stay Order); *Mary Tilley, as next friend of K.B. Tilley, a minor child under the age of 18*, No. 2:19-cv-00566 (S.D. W. Va.); N.D. Ohio (1:19-op-46166) (lawsuit pending in the National Opioid MDL, coverage for which is at issue in this case and which is the subject of the circuit court's Bifurcation and Stay Order); *West Virginia University Hospitals Inc., et al., v. Purdue Pharma, L.P., et al.*, No. 19-C-69 (Circuit Court of Marshall County, W. Va.) (hospital case pending before the West Virginia MLP, coverage for which is at issue in this case and which is the subject of the circuit court's Bifurcation and Stay Order); SPApp.12992 ¶ 12 n.9.

lawsuits (the “West Virginia Coverage Action”). SPApp.00133. ABDC stated in its original complaint that “[a]dditional counties, towns and/or cities in West Virginia have publicly announced that they intend to file prescription opioid lawsuits against ABDC” and “ABDC reserves the right to include additional lawsuits in this civil action.” SPApp.00145 ¶ 36.

On July 18, 2018, ABDC filed an amended complaint for breach of contract and declaratory judgment in this action.⁷ SPApp.00194. In the Amended Complaint, ABDC identified additional West Virginia prescription opioid liability lawsuits that had been filed against ABDC since the original complaint, confirmed that many of the prescription opioid liability lawsuits for which ABDC was seeking insurance coverage had been consolidated in the National Opioid MDL, and confirmed that it would be seeking coverage for all subsequently filed West Virginia prescription opioid liability lawsuits. SPApp.00216-18 ¶¶ 90-93.

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

⁷ Bellco Drug Corporation (“Bellco”) is also a plaintiff in the Amended Complaint. SPApp.00194. As stated in the Amended Complaint, “Belco is a legal subsidiary of ABDC” and “[s]ince its acquisition by ABC in October 2007, Bellco conducts its operations through ABDC.” SPApp.00196 ¶ 10.

cases there. SPApp.00188; SPApp.12994 ¶ 24.

The circuit court designed the Bifurcation and Stay Order to enable the parties and the court to resolve (efficiently) the coverage issues for all prescription opioid lawsuits against ABDC by using the coverage dispute for the WVAG Lawsuit as a bellwether that will resolve the core coverage issues likely to repeat across the prescription opioid liability lawsuits. SPApp.12994-95 ¶¶ 26-27. These core coverage issues include:

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

SPApp.12995 ¶ 27.⁸

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

⁸ As the California Court of Appeal recognized, this West Virginia case is a “bellwether case of national importance.” *St. Paul Fire & Marine Ins. Co.*, 80 Cal. App. 5th at 5. “Employing a bellwether case in a complex matter like this can serve to winnow and sharpen not only discovery, but claims, defenses, calendaring decisions, motion practice, arguments, hearings or trial, adjudication, indeed every aspect of the litigation process—to the benefit of the parties, the court, and the public alike.” *Id.* at 16.

for injuries suffered by their citizens.” SPApp.00302 ¶ 82; SPApp.12996 ¶ 34.

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

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

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

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

addressing every legal issue in dispute. SPApp.00100-07.⁹ Those motions are fully briefed, and the circuit court heard argument on October 17, 2022. SPApp.13070-72. Trial had been scheduled for October 4, 2022, but the circuit court postponed trial so that it would have adequate time to resolve the 12 pending summary judgment motions. *Id.* The circuit court will set a trial schedule, if needed, within one week of resolving the summary judgment motions.

D. St. Paul Initiates Duplicative Litigation in California

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

St. Paul’s California complaint also names as defendants certain additional entities affiliated with ABDC’s parent company, AmerisourceBergen Corporation (“ABC”), which St. Paul identifies as “Bergen-Brunswig Affiliates,” referring to a California corporation named Bergen Brunswig Corporation. SPApp.00479 ¶ 2. Bergen Brunswig Corporation is not,

⁹ The parties filed 13 summary judgment motions, but one has since been resolved via stipulation. SPApp.00121.

however, a party to St. Paul's California Coverage Action. SPApp.13009 ¶ 95. That is because, in August 2001, Bergen Brunswig Corporation merged with and into AmeriSource Health Corporation, a Delaware corporation with its principal place of business in Pennsylvania. SPApp.00776; SPApp.13010 ¶ 97. AmeriSource Health Corporation was the surviving entity of the merger, and Bergen Brunswig Corporation ceased to exist upon the completion of the merger in August 2001. SPApp.13010 ¶ 98. Following the merger, AmeriSource Health Corporation changed its name to AmerisourceBergen Corporation. The entities St. Paul refers to as the "Bergen-Brunswig Affiliates" in its California Complaint, including the Plaintiffs in this action (*i.e.*, ABDC and Bellco), are actually current or former subsidiaries of ABC, a named policyholder on all of the insurance policies at issue here. SPApp.00971; SPApp.01132; SPApp.00952; SPApp.13010-11 ¶ 101.

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

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

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

circumstances” and prohibiting all parties from “instituting or prosecuting any collateral litigation or other proceeding against one another relating to insurance coverage for the prescription opioid lawsuits against ABC, ABDC, or any other affiliated entity.” SPApp.01937 ¶ 157; SPApp.01938 ¶ 164. The court further found that “St. Paul has filed the California Coverage Action for improper purposes, namely, delay and forum shopping and further finds that permitting St. Paul to pursue a collateral action would cause irreparable harm to ABDC and would undermine the important governmental and judicial interests of West Virginia and this Court.” SPApp.01937 ¶ 157.

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

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

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

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

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

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

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

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

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

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

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

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

H. St. Paul Colludes With Other Insurers to Undermine the West Virginia Coverage Action and Litigate Coverage Issues in Delaware.

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

On March 1, 2022, Arrowood amended its complaint to add St. Paul and ACE as defendants. SPApp.13164. On April 22, 2022, ABDC moved to dismiss or stay Arrowood's Delaware complaint, explaining that the coverage actions should proceed in the order in which they were filed: West Virginia first, then California, and then Delaware. SPApp.13172. ABDC's motion to dismiss or stay Arrowood's Delaware complaint is scheduled for argument on December 19, 2022. SPApp.13154.

In response to ABDC's motion to dismiss or stay, Arrowood and St. Paul—supposedly adverse parties in both California and Delaware—reached an agreement on a procedural maneuver aimed at circumventing the West Virginia injunction (and the California stay) and persuading the Delaware court not to dismiss or stay the case: Arrowood dismissed its California cross-complaint against St. Paul and, on the very same day, St. Paul dismissed its California complaint against Arrowood. SPApp.13076 (docket showing requests for dismissals filed on July 28, 2022). St. Paul now points to the pending Delaware case as a reason to reverse the Renewed Injunction—arguing that it needs to be able to file suit against ABDC in Delaware (in addition to the suit it already filed in California) to protect its interests.

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

On March 4, 2022, after this Court remanded to the circuit court for further clarification of the Injunction, ABDC moved for an emergency temporary anti-suit restraining order to give the parties time to argue and brief the issues, SPApp.02531, which the circuit court granted. On March 21, 2022, ABDC moved for a Renewed Injunction, SPApp.03360, and the parties submitted thousands of pages of briefing and exhibits, including insurance policies that are at issue in other actions as well as detailed evidence regarding proceedings in those other jurisdictions where the Defendant Insurers are attempting the relitigate coverage

issues. SPApp.00086-91 (docket); SPApp.12979 ¶ 1; SPApp.13023 ¶ 146. The circuit court then heard argument on the motion. SPApp.00094. On June 10, 2022, the circuit court conducted additional fact finding and issued the Renewed Injunction. SPApp.12978.

Fact-Finding. Based on the parties' submission of additional briefing, evidence, and argument, the circuit court entered the following findings:

- “[T]he primary policies St. Paul and ACE sold to ABDC, which are at issue in this litigation, are standard form policies.” SPApp.13029 ¶ 171.
- “Standard form policies are designed to be used by many different insurers and have identical or materially identical provisions, regardless of the insurer selling the policy.” *Id.*
- “[F]rom 1995 to 2018, St. Paul and ACE were the only insurers that issued primary layer insurance to ABC (from 2001 to 2008) or Bergen Brunswick Corporation (from 1995 to 2001).” *Id.* ¶ 172.
- “[D]uring that period the St. Paul and ACE policies’ insuring agreements were identical in all material respects.” *Id.*
- “The underlying claims against distributors, including ABDC, in the National Opioid MDL have been found to potentially reach back to January 1, 1996.” SPApp.13015 ¶ 118.
- “[B]ecause all or at least some of the West Virginia opioid cases that are bifurcated and stayed in Phase 2 of this case (including all West Virginia suits included in the National Opioid MDL) involve claims potentially dating back to January 1, 1996, all of the Insurer Defendants’ policies dating back to January 1, 1996 are directly at issue in this case.” SPApp.13015-16 ¶ 119.
- “[T]he 16 policies that are specifically listed in ABDC’s Amended Complaint are the policies that are directly at issue in Phase 1 of this case, as determined by the temporal scope of the claims and legal rulings of this Court in the WVAG matter. However, all of Insurer Defendants’ other policies, dating back to January 1, 1996, are also directly at issue in Phase 2 of this case, as determined by the temporal scope of the claims and legal rulings of the federal courts in the Track 2 National Opioid MDL as well as the temporal scope of the claims and legal rulings of the West Virginia Mass Litigation Panel.” SPApp.13016 ¶ 120.

Limitations on the Injunction. The circuit court clarified and limited the scope of the

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

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

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

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

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

iii. The collateral suit must concern insurance policies that are either expressly at issue in this case, that are implicitly at issue in this case by virtue of the temporal scope of the claims asserted in the cases that make up Phase 2 of this case, which include all of defendants’ policies back to at least January 1, 1996, and/or that are written on forms that are substantially similar to the forms at issue in this case, or that follow form to such insurance policies; and

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

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

d. Finally, the Court further modifies the Injunction to confirm that the Court will

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

SPApp.13040-41.

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

- “[A]n overly restrictive Injunction would fail to capture the reality of the litigation among the parties and would undermine the legitimate purposes to be served by the Injunction.” SPApp.13024 ¶ 148.
- “[T]he Injunction must extend beyond coverage for a subset of prescription opioid liability lawsuits or just the sixteen insurance policies at issue in Phase 1 of this suit; it must extend to all policies related to all the West Virginia opioid cases.” SPApp.13025 ¶ 151.
- “Any interpretation of the ABDC’s policies or primary policy language by the California court—or any other court Insurer Defendants might seek to file a collateral coverage action in—presents the threat of inconsistent rulings identified by this Court and acknowledged by the Supreme Court of Appeals and the California Superior Court. This is especially so as all of the Insurer Defendants’ policies—not just the sixteen at issue in Phase 1—are directly at issue in Phase 2 of this case.” SPApp.13033 ¶ 182 (citations omitted).
- “[A]n Injunction encompassing all policies issued by the Insurer Defendants to ABDC or its predecessors or affiliates on the same or substantially similar terms is, therefore, consistent with the needs of this nationwide litigation. It permits this Court, which has already ruled on certain threshold coverage legal issues, to address these issues and render a ruling without the threat of conflicting rulings or interference from later-filed cases or courts in other states.” *Id.* ¶ 183.
- “[N]otwithstanding that the California Coverage Action is not currently proceeding, an Injunction remains necessary to prevent the Insurer Defendants from instituting new collateral actions in other jurisdictions.” SPApp.13035 ¶ 193.
- “St. Paul has admitted its intent to pursue other claims in other jurisdictions if the Injunction is lifted or narrowed.” *Id.* ¶ 194.

- “[T]he threat that Insurer Defendants will initiate new collateral coverage actions in one or more jurisdictions necessitates the entry of the Injunction to preserve this Court’s jurisdiction over the issues in this case and ensure that the overall resolution of this case is not delayed or impeded by the issuance of contradictory rulings from other courts.” *Id.* ¶ 195.
- “[T]he Insurer Defendants will not suffer any prejudice from the Injunction.” SPApp.13036 ¶ 199.

This appeal followed.

SUMMARY OF THE ARGUMENT

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

St. Paul takes issue with the circuit court’s finding that “all of the Insurer Defendants’ policies dating back to January 1, 1996 are directly at issue in this case” and conclusion that “the Injunction must extend beyond coverage for a subset of prescription opioid liability lawsuits or just the sixteen insurance policies at issue in Phase 1 of this suit.” In making that argument, St. Paul overlooks uncontroverted facts on which the Renewed Injunction is based: *First*, after ABDC settled the WVAG Lawsuit in 2016, thousands of government entities—led by West Virginia political subdivisions—filed similar prescription opioid liability lawsuits against ABDC. *Second*, many of those lawsuits have been consolidated in the National Opioid

MDL, which is designating bellwether trials that will inform the resolution of the lawsuits brought by the West Virginia political subdivisions. *Third*, the lawsuits in the National Opioid MDL—including the lawsuits filed by West Virginia political subdivisions—involve claims dating to 1996, as evidenced by the allegations and court rulings in those cases. *Fourth*, in this case, ABDC confirmed that many of the prescription opioid liability lawsuits for which ABDC is seeking insurance coverage have been consolidated in the National Opioid MDL, and ABDC also confirmed that it will be seeking coverage for all subsequently filed West Virginia prescription opioid liability lawsuits, including those that have been consolidated in the National Opioid MDL.¹⁰

St. Paul also argues that it should not be subject to the same restrictions as ABDC and that the Renewed Injunction is unfair because it “enjoins Insurers from prosecuting any claims or cross-claims against AmerisourceBergen as may be necessary to protect their interests in the Delaware actions” However, allowing St. Paul to sue ABDC in Delaware regarding policies at issue in this litigation would contravene the purpose of the Renewed Injunction and the agreed Bifurcation and Stay Order that has been in place since February 2018.

In any event, St. Paul cannot prevail on any fairness argument that is based on the pending Delaware litigation, where St. Paul is colluding with its purported adversaries to threaten the circuit court’s jurisdiction and ability to resolve this case without competing rulings from other courts. St. Paul and Arrowood—two insurance companies on opposite sides of the “v” in Delaware—conveniently dismissed their California claims against each other on the same day after ABDC moved for dismissal or a stay of Arrowood’s Delaware complaint

¹⁰ SPApp.00145 ¶ 36; SPApp.00216-18 ¶¶ 90-93.

on the grounds that there were pending actions in West Virginia and California that should proceed first. This was an unabashed attempt to allow St. Paul and ACE to evade the West Virginia anti-suit Injunction and the independent order staying proceedings in California.

Finally, St. Paul argues that the Renewed Injunction “should be reversed for the further reason that it fails to accord due deference to bedrock principles of comity and judicial restraint.” This is false. ABDC did not create a comity threat—*St. Paul* did. It is only because St. Paul threatened the circuit court’s jurisdiction by filing the duplicative suit in California before the conclusion of long-standing proceedings in the circuit court that the circuit court was required to issue the Injunction and the California court was required to issue the stay.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

STANDARD OF REVIEW

This Court’s review of a decision to grant injunctive relief consists of a “three-pronged *deferential* standard of review.” *State ex rel. E.I. DuPont de Nemours & Co. v. Hill*, 214 W. Va. 760, 767, 591 S.E.2d 318, 325 (2003) (emphasis added). First, this Court “review[s] the final order granting the ... injunction and the ultimate disposition under an abuse of discretion standard.” *Id.* (citing *West v. Nat’l Mines Corp.*, 168 W. Va. 578, 590, 285 S.E.2d 670, 678 (1981)). Second, this Court reviews the circuit court’s underlying factual findings for clear error. *Id.* (citing *State by & Through McGraw v. Imperial Mktg.*, 196 W. Va. 346, 472 S.E.2d 792, Syl. Pt. 1 (1996)). Third, this Court reviews questions of law *de novo*. *Id.*

ARGUMENT

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

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

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

St. Paul Fire & Marine Ins. Co., 868 S.E.2d at 731 (quoting Syl. pt. 4, *State v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932)). “[A]n anti-suit injunction is an order barring parties to an action in this state from instituting or prosecuting substantially similar litigation in another state.” *Id.* at 734. “An anti-suit injunction is an exceptional remedy but is appropriate when equity compels the circuit court: (1) to address a threat to the court’s jurisdiction; (2) to prevent the evasion of an important public policy; (3) to prevent a multiplicity of suits that result in delay, inconvenience, expense, inconsistency, or will be a ‘race to judgment’; or (4) to protect a party from vexatious, inequitable or harassing litigation.” *Id.*

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

In November 2021, this Court held that an injunction is supported by equitable factors. *St. Paul* does not appear to contest the circuit court’s determination on remand that the Injunction is warranted—and for good reason. While any of the four equitable factors identified by this Court would justify an anti-suit injunction, all four factors point in favor of an injunction here.

First, an injunction protects the jurisdiction of the West Virginia courts. This case has been ongoing for five years. Twelve motions for summary judgment—addressing every legal

issue related to insurance coverage prescription opioid liability lawsuits—are pending before the circuit court for resolution, after which the circuit court will set the Phase 1 bellwether case for trial, if necessary. The Insurer Defendants’ competing lawsuits threaten (and will continue to threaten) that jurisdiction. Indeed, this Court already has concluded that an injunction is “needed to prevent a threat to the court’s jurisdiction and ability to resolve the West Virginia suit.” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 736. And, as the circuit court recognized on remand, “notwithstanding that the California Coverage Action is not currently proceeding, an Injunction remains necessary to prevent the Insurer Defendants from instituting new collateral actions in other jurisdictions.” SPApp.13035 ¶ 193.¹¹ This is because “St. Paul has admitted [and not disputed on appeal] its intent to pursue other claims in other jurisdictions if the Injunction is lifted or narrowed.” *Id.* ¶ 194; SPApp.02052. Additionally, “various insurers who had filed crossclaims against ABDC in St. Paul’s California Coverage Action have now initiated claims against ABDC in the State of Delaware.” SPApp.13036 ¶ 196. If the Renewed Injunction is narrowed, the circuit court’s jurisdiction would be imperiled by still more forum shopping, with St. Paul engaging in a bicoastal strategy in California and Delaware to undermine the West Virginia courts’ jurisdiction, which would undermine West Virginia’s compelling interest in the resolution of this suit without interference from collateral proceedings. *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 735-36.

Second, an injunction prevents the erosion of an important public policy. The Defendant Insurers’ efforts to have coverage for the prescription opioid liability lawsuits

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

determined elsewhere, despite the fact that the case was first filed in West Virginia, undermine important interests of this state. As this Court noted, “the courts of this state have a compelling interest in determining whether the policies at issue in ABDC’s West Virginia suit provide coverage for the underlying claims brought by West Virginia entities, without competing rulings from a foreign court.” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 736. This has not changed.

Third, an injunction prevents a multiplicity of suits that will result in a race to judgment. As this Court recognized, an injunction is required “to prevent a multiplicity of suits filed with the intent of causing delay, expense and inconsistent judgments.” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 736. St. Paul informed the circuit court on February 2, 2021 that it intended to pursue other claims in other jurisdictions if the Injunction is lifted or narrowed, SPApp.13035 ¶ 194; SPApp.02403, and the records in collateral litigation demonstrate that St. Paul is colluding with its purported adversaries in California and Delaware to interfere with the circuit court’s ability to resolve issues in the Phase 1 bellwether without competing rulings in other jurisdictions. When ABDC moved to dismiss or stay Arrowood’s Delaware complaint and explained that the coverage actions should proceed in the order in which they were filed—West Virginia first, then California, and then Delaware—St. Paul and Arrowood arranged to dismiss their California claims against each other on the same day. SPApp.13145 (showing St. Paul’s and Arrowood’s requests for dismissal in California both filed on July 28, 2022). This was an attempt to undermine ABDC’s Delaware motion and circumvent the West Virginia proceedings. Thus, this factor pertaining to the multiplicity of suits that will result in a race to judgment continues to apply as well.

Fourth, an injunction protects the parties from vexatious, inequitable, and harassing

litigation. This Court already has found that the circuit court “fairly concluded that St. Paul’s parallel suit in California was filed for improper purposes, namely forum shopping and the disruption of the orderly resolution of the West Virginia [Coverage Action].” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 736. Nothing has changed since this Court endorsed the circuit court’s conclusion in this regard. Without the Renewed Injunction, St. Paul will be free to pursue similar vexatious litigation in other jurisdictions.

In addition to these four reasons, the Renewed Injunction also is warranted because it avoids harm to ABDC and creates no unfair prejudice to St. Paul. During argument on St. Paul’s appeal of the California Stay Order, St. Paul conceded that, because it denied ABDC’s claim and refused to pay any funds toward that claim, it will suffer no real, tangible prejudice by not being permitted to litigate in California (or elsewhere) at this time. SPApp.12570-72; SPApp.13036-37 ¶¶ 199-200. If, as St. Paul’s counsel stated, St. Paul is interested in “know[ing] as an insurer what do you owe, if anything, [and] when do you owe it,” the best way to quickly achieve that outcome is to focus on moving this Phase 1 bellwether coverage action efficiently to trial as soon as possible. SPApp.13037 ¶ 201.

Further to the point that St. Paul is not unfairly prejudiced by the Renewed Injunction, the circuit court limited the Renewed Injunction in ways that precisely address this Court’s concerns. This Court asked the circuit court to address “why [it] precluded the litigation of *any* issues between the parties, if those issues were unrelated to the interpretation of the sixteen insurance policies at issue in the West Virginia action.” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 737 (emphasis in original). To answer this question and address this concern, the circuit court clarified that the Renewed Injunction will apply only to collateral suits concerning:

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

SPApp.13040-41. In other words, the Renewed Injunction does not preclude the litigation of issues that are “unrelated” to the policies at issue in this lawsuit. Instead, the Renewed Injunction is expressly limited to issues related those insurance policies already before the circuit court and policies written on forms that are substantially similar to the forms at issue in this case and policies that follow form to such policies.

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

This is a simple matter. This Court has confirmed the need for an injunction, and the circuit court issued a Renewed Injunction that addressed all of the considerations this Court

asked it to address on remand and did so in a way that fully comports with West Virginia law and reflects a proper exercise of the circuit court’s discretion.

III. St. Paul’s Arguments Lack All Merit

A. The Scope of the Renewed Injunction is Consistent with This Court’s November 15, 2021 Opinion and Order

St. Paul argues that the Renewed Injunction is overbroad and is inconsistent with this Court’s November 15, 2021 Opinion and Order because it extends beyond the 16 policies that are the subject of Phase 1 of this case. St. Paul’s contentions misconstrue both this Court’s order and the circuit court’s rationale for the Renewed Injunction.

This Court instructed the circuit court to clarify whether it was necessary to preclude “the litigation of *any* issues between the parties, if those issue were unrelated to the interpretation of the sixteen insurance policies at issue in the West Virginia action.” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 737 (emphasis in original). The circuit court acknowledged this Court’s concerns, stating, “this Court agrees that the Injunction should not broadly extend to ‘*any* issues’ between the parties” SPApp.13024 ¶ 148 (emphasis in original), and “the Court agrees that the Injunction should not extend to insurance policies that are unrelated to the insurance policies at issue in the West Virginia action.” *Id.* ¶ 149.

Importantly, based on a substantially enhanced record and its fact finding, the circuit court determined that a comparison of the ABDC policies before the West Virginia court and the ABDC policies at issue in courts outside of West Virginia confirmed that the latter set of policies are not at all unrelated to the policies at issue in this case because (1) many of the policies at issue in cases outside of West Virginia are the same policies at issue in Phase 1 of this action; (2) the remaining policies issued by the Defendant Insurers, including St. Paul, were issued on the same standard forms as the policies issued in Phase 1 of this action—that is,

they contain the same exact terms and conditions as the policies at issue in this case or incorporate those terms by reference; and (3) all of the policies identified in the Renewed Injunction order are directly at issue in Phase 2 of this action. SPApp.13024 ¶ 149.

On this final point, the circuit court took judicial notice of the fact that, according to the National Opioid MDL court, the underlying claims against distributors, including ABDC, involve alleged conduct beginning on or before January 1, 1996. SPApp.12991 ¶ 118. The circuit court made clear that, “because all or at least some of the West Virginia opioid cases that are bifurcated and stayed in Phase 2 of this case (including all West Virginia suits included in the National Opioid MDL) involve claims potentially dating back to January 1, 1996, all of the Insurer Defendants’ policies dating back to January 1, 1996 are directly at issue in this case.” SPApp.13015-16 ¶ 119.

The circuit court further explained that an overly narrow injunction “would fail to capture the reality of the litigation among the parties and would undermine the legitimate purposes to be served by the Injunction.” SPApp.13024 ¶ 148. For this reason, the circuit court concluded, “the Injunction must extend beyond coverage for a subset of prescription opioid liability lawsuits or just the sixteen insurance policies at issue in Phase 1 of this suit; it must extend to all policies related to all the West Virginia opioid cases.” SPApp.13025 ¶ 151. “Any interpretation of the ABDC’s policies or primary policy language by the California court—or any other court Insurer Defendants might seek to file a collateral coverage action in—presents the threat of inconsistent rulings identified by this Court and acknowledged by the Supreme Court of Appeals and the California Superior Court” and “[t]his is especially so as all of the Insurer Defendants’ policies—not just the sixteen at issue in Phase 1—are directly at issue in Phase 2 of this case.” SPApp.13033 ¶ 182 (citations omitted).

Based on this—and contrary to St. Paul’s contention—the circuit court did *not* issue an injunction untethered to the concerns of this Court. Instead, the court acknowledged that limits were needed “to ensure the scope of the Injunction does not sweep more broadly than necessary to accomplish the purposes identified by the Supreme Court of Appeals,” stating:

[T]his Court limits the scope of the Injunction to litigation regarding: (a) those insurance policies issued to ABDC or its predecessors and affiliates; (b) by the insurers in this case; (c) that are either expressly at issue in this case or written on forms that are substantially similar to the forms at issue in this case; (d) for lawsuits regarding insurance coverage for prescription opioid liabilities of the type that have been included in the National Opioid MDL or the West Virginia Opioid MLP, both of which are at issue in this West Virginia Coverage Action; and (e) only so long as the West Virginia Coverage Action has not reached final judgment or settlement.

SPApp.13025 ¶ 152.

The circuit court’s approach to the Renewed Injunction is consistent with the circuit court’s February 2018 Bifurcation and Stay Order, *which St. Paul asked the circuit court to enter*. The Bifurcation and Stay Order enables the parties and the court to resolve the coverage issues for all prescription opioid liability lawsuits against ABDC by using the coverage dispute for the WVAG Lawsuit as a bellwether that will resolve the core coverage issues likely to repeat across all prescription opioid liability lawsuits. SPApp.12994 ¶ 25. As the Renewed Injunction states: “[I]n light of the substantial overlap in the underlying prescription opioid liability lawsuits and the standard form nature of the insurance policies at issue in this case, the resolution of the core coverage issues for the WVAG Lawsuit can be broadly applied to all other prescription opioid liability lawsuits.” *Id.* ¶ 26. The California Court of Appeal endorsed this same approach in affirming the stay of St. Paul’s California complaint because this West Virginia case is a “bellwether case of national importance” and “the West Virginia case can serve to educate the parties (whether or not the same) and the trial court about the issues”

St. Paul Fire & Marine Ins. Co., 80 Cal. App. 5th at 5, 17.

In a strained attempt to argue error, St. Paul takes issue with the circuit court's reliance on the following factual findings that pertain to "materially identical" nature of the policies St. Paul issued to ABDC:¹²

- "[T]he primary policies St. Paul and ACE sold to ABDC, which are at issue in this litigation, are standard form policies." SPApp.13029 ¶ 171.
- "Standard form policies are designed to be used by many different insurers and have identical or materially identical provisions, regardless of the insurer selling the policy." *Id.*
- "[F]rom 1995 to 2018, St. Paul and ACE were the only insurers that issued primary layer insurance to ABC (from 2001 to 2008) or Bergen Brunswick Corporation (from 1995 to 2001)." *Id.* ¶ 172.
- "[D]uring that period the St. Paul and ACE policies' insuring agreements were identical in all material respects." *Id.*

St. Paul argues that the materially identical nature of the policies should not matter because "[t]he policies in the California Action and Delaware actions include policies dating from the mid-1990s through at least 2018" whereas "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." St. Paul Brief at 28. However, all of St. Paul's policies issued to ABDC dating back to 1996 are directly at issue in Phase 2 of this case, SPApp.13015-16 ¶¶ 119-20; SPApp.13024-25 ¶ 149-50, and any interpretation of ABDC's policies by another court presents the threat of inconsistent rulings that this Court identified, SPApp.13033 ¶ 182; *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 736.

¹² St. Paul does not contest the actual finding that the policies are materially identical—nor could it. At oral argument before the California appellate court, when asked, "What are the significant differences between the policies at issue in West Virginia and the policies at issue in California?," St. Paul's attorney conceded, "The policy language is similar if that's what you're getting at." SPApp.12569-70.

St. Paul also argues that the materially identical nature of the policies should not matter because, in California, St. Paul is asserting a statutory intentional wrongful acts coverage defense based on Insurance Code 533, which states: “[a]n insurer is not liable for a loss caused by the willful act of the insured[.]” St. Paul Brief at 28. As confirmed by the Answers and summary judgment briefing in this case, St. Paul and ACE also assert an intentional wrongful acts coverage defense in West Virginia, relying on contractual language in place of the California statute. In fact, the parties raise this very issue in the pending summary judgment motions in the circuit court. SPApp.00100-07. Thus, both the West Virginia and California courts will address the viability of an intentional wrongful acts defense.

St. Paul additionally contends that the circuit court should not have concerned itself with the materially identical nature of the policies St. Paul issued to ABDC because the pre-2001 policies were issued to “Bergen Brunswig” instead of ABDC. *See* St. Paul Brief at 29. The circuit court, however, correctly saw through this ruse because:

- “[F]rom 1995 to 2018, the Defendants, St. Paul, and ACE, were the only insurers that issued primary layer insurance to ABDC (from 2001 to 2018) or Bergen Brunswig Corporation (from 1995 to 2001).” SPApp.13001 ¶ 60 (citing SPApp.00485 ¶¶ 23(a) & (e); SPApp.04052 ¶¶ 10-11).
- “[I]n August 2001, Bergen Brunswig Corporation merged with and into AmeriSource Health Corporation, a Delaware corporation with its principal place of business in Pennsylvania.” SPApp.13010 ¶ 97 (citing SPApp.00776).
- “AmeriSource Health Corporation was the surviving entity of the merger, and ... Bergen Brunswig Corporation ceased to exist upon the completion of the merger in August 2001.” SPApp.13010 ¶ 98 (citing SPApp.00776).
- “[F]ollowing the merger, AmeriSource Health Corporation changed its name to AmerisourceBergen Corporation (“ABC”).” SPApp.13010 ¶ 99 (citing SPApp.00776).

- “[T]he policies St. Paul and ACE issued to ABDC (from 2001 to 2018), and Bergen Brunswig Corporation (from 1996 to 2001) contain materially identical terms and conditions.” SPApp.13030 ¶ 175.

Accordingly, just like the policies that St. Paul issued to ABC after 2001, the policies that St. Paul issued to Bergen Brunswig (one of ABC’s predecessors) are at issue in this case.

St. Paul also takes issue with the circuit court’s recognition of the fact that “all or at least some of the West Virginia opioid cases that are bifurcated and stayed in Phase 2 of this case (including all West Virginia suits included in the National Opioid MDL) involve claims potentially dating back to January 1, 1996” and thus “all of the Insurer Defendants’ policies dating back to January 1, 1996 are directly at issue in this case.” SPApp.13015-16 ¶¶ 118-19; St. Paul Brief at 32-33. St. Paul argues that there is no support for the finding that policies dating back to 1996 are at issue in this case. *Id.* at 33 n.117. St. Paul, however, overlooks the basic facts on which the Renewed Injunction is based:

First, after ABDC settled the WVAG Lawsuit in 2016, thousands of government entities—including West Virginia political subdivisions—filed similar prescription opioid lawsuits against ABDC. SPApp.12990-91 ¶¶ 8-10.

Second, those lawsuits have been consolidated in the National Opioid MDL, which is designating cases for bellwether trials that will inform the resolution of the lawsuits brought by the West Virginia political subdivisions. SPApp.12991-92 ¶¶ 10-13.

Third, the lawsuits consolidated in the National Opioid MDL involve claims dating to 1996, as evidenced by the allegations and court rulings in those cases. SPApp.13015 ¶ 118. The court addressing the lawsuits filed West Virginia political subdivisions denied a defense motion for summary judgment that was based on the statute of limitations. In the motion, the defendants acknowledged that “Plaintiffs base their nuisance claim on alleged wrongful

conduct that began in the late 1990s” and argued that “[t]he statute of limitations for nuisance is one year, however[.]” ECF No. 241, March 20, 2020 Memorandum in Support of Motion for Summary Judgment filed in *City of Huntington v. AmerisourceBergen, et al.*, No. 3:17-01362 (S.D. W. Va.). In opposition, the plaintiffs argued that the statute of limitations should not apply. *See* ECF No. 288, April 6, 2020 Opposition to Motion for Summary Judgment filed in *City of Huntington v. AmerisourceBergen, et al.*, No. 3:17-01362 (S.D. W. Va.). The court denied the defendants’ summary judgment motion. *See* ECF No. 1247, March 31, 2021 Order Denying Summary Judgment on Statute of Limitations Grounds filed in *City of Huntington v. AmerisourceBergen, et al.*, No. 3:17-01362 (S.D. W. Va.).¹³

Consistent with that ruling, the Special Master for the National Opioid MDL addressed the fact that “Plaintiffs’ discovery requests are made without any time limit, and generally seek documents dating back to 1995 or even earlier” and held that “[t]he distributor defendants shall produce transaction data and Suspicious Order Reports with a cut-off date of January 1, 1996.” ECF No. 693, June 30, 2018 Discovery Ruling No. 2 Regarding Scope filed in *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (N.D. Ohio).¹⁴

Fourth, ABDC stated in its original complaint that “[a]dditional counties, towns and/or cities in West Virginia have publicly announced that they intend to file prescription opioid

¹³ The circuit court took judicial notice of filings in these cases. SPApp.13015 ¶ 118. As the circuit court noted, “[i]n addition to the evidence submitted in connection with the parties’ briefing, the Court is entitled to take judicial notice of any fact that is not subject to reasonable dispute, including the dockets of other courts and public filings.” SPApp.12988 n.4 (citing WVRE 201(b); *Arnold Agency v. W. Va. Lottery Comm’n*, 206 W. Va. 583, 596, 526 S.E.2d 814, 827 (1999); *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 881 (4th Cir. 2014); *Acord v. Colane Co.*, No. 04-C-151-0, 2009 W.V. Cir. LEXIS 58 (W.V. Cir. Ct. – Logan Cty. Aug. 27, 2010); *Formulak v. Bank of Charles Town*, No. 15-0643, 2016 W. Va. LEXIS 343, at *4 n.2 (May 20, 2016); *State v. Hobbs*, 168 W. Va. 13, 41, 28 S.E.2d 258, 274 (1981)).

¹⁴ The circuit court took judicial notice of these orders. SPApp.13015 ¶ 118.

lawsuits against ABDC” and “ABDC reserves the right to include additional lawsuits in this civil action.” SPApp.00145 ¶ 36. And, in the Amended Complaint, ABDC identified additional West Virginia prescription opioid lawsuits that had been filed against ABDC since the original complaint, confirmed that many of the prescription opioid liability lawsuits for which ABDC was seeking insurance coverage had been consolidated in the National Opioid MDL, and confirmed that it would be seeking coverage for all subsequently filed West Virginia prescription opioid liability lawsuits. SPApp.00216-18 ¶¶ 90-93.

In recognition of this, in February 2018, at the request of *all parties*, the circuit court issued its Bifurcation and Stay Order to enable the parties and court to resolve (efficiently) the coverage issues for all prescription opioid lawsuits against ABDC and its affiliates by using the coverage dispute for the WVAG Lawsuit as a bellwether that will resolve the core coverage issues likely to repeat across the prescription opioid lawsuits. SPApp.12994-95 ¶¶ 26-27.

The circuit court thus properly found that “because all or at least some of the West Virginia opioid cases that are bifurcated and stayed in Phase 2 of this case (including all West Virginia suits included in the National Opioid MDL) involve claims potentially dating back to January 1, 1996, all of the Insurer Defendants’ policies dating back to January 1, 1996 are directly at issue in this case.” SPApp.13015-16 ¶ 119. “[T]he injunction must extend to all policies related to all the West Virginia opioid cases.” SPApp.13025 ¶ 151. Any interpretation of the ABDC’s policies or primary policy language—in any court St. Paul seeks to file a collateral coverage action in—presents the threat of inconsistent rulings identified by the circuit court and acknowledged by this Court and the California Superior Court. This is especially so because all of the Insurer Defendants’ policies—not just the sixteen at issue in Phase 1—are directly at issue in Phase 2 of this case. SPApp.13033 ¶ 182.

B. The Renewed Injunction Allows St. Paul to Respond to Third-Party Claims

St. Paul also argues that the Renewed Injunction is too broad because it “prevents the Insurers from effectively responding to claims brought by non-parties in other cases—including new actions by non-parties in Delaware.” St. Paul Brief at 34. Not so. By its plain language, the Renewed Injunction does not prevent St. Paul from responding to *non-parties*. The Renewed Injunction states, “All parties are hereby enjoined from instituting or prosecuting any collateral litigation or other proceeding *against one another*” SPApp.13041 (emphasis added).

According to St. Paul, it should not be subject to the same restrictions as ABDC, and the Renewed Injunction is unfair because it “enjoins Insurers from prosecuting any claims or cross-claims against AmerisourceBergen as may be necessary to protect their interests in the Delaware actions” St. Paul Brief at 35. However, this restriction (which applies equally to all parties) is perfectly consistent with the fundamental reasons for the injunction. Allowing St. Paul to file claims against ABDC in Delaware regarding policies related to this litigation would defeat the whole purpose of the injunction. As the circuit court explained:

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

St. Paul argues that it cannot properly defend against Arrowood’s contribution claim in Delaware (which St. Paul is not required to respond to until the Delaware court resolves ABDC’s motion to dismiss or stay Arrowood’s complaint) unless it can sue ABDC in

Delaware and seek a declaration that it is not required to provide coverage for the prescription opioid liability lawsuits. St. Paul is wrong. The issue of whether St. Paul is required to provide coverage for the prescription opioid liability lawsuits is the same issue that the circuit court will address in its bellwether trial in this case—which was set to begin on October 4, 2022 and will now be scheduled after the court’s resolution of the 12 pending summary judgment motions, which were argued on October 17, 2022. SPApp.13070-72.

In any event, St. Paul cannot prevail on any fairness argument that is based on the pending Delaware litigation, where St. Paul is colluding with its purported adversary to threaten the circuit court’s jurisdiction and ability to resolve this case without competing rulings from other courts. As noted, in March 2022, Arrowood—one of the defendants in St. Paul’s California Coverage Action—sued ABDC, St. Paul, and ACE in Delaware. SPApp.13164. In April 2022, ABDC moved to dismiss or stay Arrowood’s Delaware complaint, explaining that the coverage actions should proceed in the order in which they were filed: West Virginia first, then California, and then Delaware. SPApp.13172.¹⁵ St. Paul did not join ABDC’s Delaware motion or otherwise seek to advise the Delaware court of its position here that allowing the Delaware case to proceed would prejudice St. Paul. Instead, St. Paul reached an agreement with Arrowood—a party on the opposite side of the “v” in both California and Delaware—on a ploy aimed at getting around the West Virginia injunction (and the California stay) and staving off a stay of the Delaware action: Arrowood dismissed its California cross-complaint against St. Paul and, on the very same day, St. Paul dismissed its California complaint against Arrowood. SPApp.13076 (docket showings requests for

¹⁵ ABDC’s motion to dismiss or stay Arrowood’s Delaware complaint is scheduled for argument on December 19, 2022. SPApp.13154.

dismissals filed on July 28, 2022).

St. Paul has a history of interfering (improperly) with the circuit court’s jurisdiction. Delaware is more of the same. Given St. Paul’s improper conduct in California—including its refusal to dismiss the California action after the Injunction was issued—and St. Paul’s collusion with so-called adversaries in other courts to get around the West Virginia Injunction and the California Stay Order, equity does not favor St. Paul.

C. The Renewed Injunction Advances Principles of Comity Between States

St. Paul argues that the Renewed Injunction “should be reversed for the further reason that it fails to accord due deference to bedrock principles of comity and judicial restraint.” St. Paul Brief at 37. In an effort to support this argument, St. Paul points to this Court’s statement 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.” *Id.* at 37-38.

St. Paul has it backwards. ABDC did not create a comity threat—St. Paul did. It is only because *St. Paul* threatened the circuit court’s jurisdiction by filing the duplicative suit in California that the circuit court was required to issue the Injunction and the California court was required to issue the stay. And, making matters even worse, St. Paul now appears poised to further hedge its bets by filing yet another collateral suit in yet another court. As the circuit court acknowledged, “St. Paul has admitted its intent to pursue other claims in other jurisdictions if the Injunction is lifted or narrowed[.]” SPApp.13035 ¶ 194, which is further evidenced by St. Paul’s appellate position that this Court should reverse the Renewed Injunction so that St. Paul can bring suit against ABDC in Delaware.

St. Paul also fails to contend with the fact that, as this Court recognized, “there is no question that West Virginia courts are empowered to issue injunctions to prevent parties from going forward with parallel or duplicative litigation in a sister state.” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 731. “[A] court has a duty, as well as power, to protect its jurisdiction over a controversy in order to decree complete and final justice between the parties and may issue an injunction for that purposes.” *Id.* at 732 (citation omitted).

Taking into consideration the totality of the interests at stake, this Court clarified that an anti-suit injunction is appropriate when equity compels the circuit court “(1) to address a threat to the court’s jurisdiction; (2) to prevent the evasion of an important public policy; (3) to prevent a multiplicity of suits that result in delay, inconvenience, expense, inconsistency, or will be a ‘race to judgment’; or (4) to protect a party from vexatious, inequitable or harassing litigation.” *St. Paul Fire & Marine Ins. Co.*, 868 S.E.2d at 734. The circuit court issued an injunction that fully aligns with this framework. And the circuit court imposed significant limitations—based on this Court’s concerns and its own further fact-finding—to ensure the scope of the Injunction does not sweep more broadly than necessary to prevent a threat to the circuit court’s jurisdiction and protect West Virginia’s compelling interest in determining whether the policies at issue in ABDC’s West Virginia suit provide coverage for the underlying claims brought by West Virginia entities without competing rulings from a foreign court.

CONCLUSION

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

Dated this the 28th day of November, 2022.

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CERTIFICATE OF SERVICE

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

/s/ Todd A. Mount
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