EFiled: Mar 10 2014 04:13PM EDT
Filing ID 55120026
Case Number 8,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE NORTH RIVER INSURANCE COMPANY,	)	
Plaintiff Below-Appellant,	)	No. 8, 2014
v.	)	On Appeal From The Court of Chancery of the State of Delaware, C.A. No. 8456-VCG
MINE SAFETY APPLIANCES COMPANY,	)	
Defendant Below-Appellee.	)	

APPELLANT'S OPENING BRIEF

Of Counsel:

Alan S. Miller, Esquire
Bridget M. Gillespie, Esquire
Picadio Sneath Miller & Norton, P.C.
Four Gateway Center
444 Liberty Avenue, Suite 1105
Pittsburgh, PA 15222

Dated: March 10, 2014

MORRIS JAMES LLP

Peter B. Ladig (#3513)
Jason C. Jowers (#4721)
David J. Soldo (#4309)
500 Delaware Avenue, Suite 1500
Wilmington, Delaware 19801
(302) 888-6800
Attorneys for Plaintiff Below, Appellant The North River Insurance Company

TABLE OF CONTENTS

EXHIBITS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

NATURE OF PROCEEDINGS

Fundamentally, the issue here is whether the Court of Chancery erred in refusing to issue an injunction to protect the Superior Court's jurisdiction over insurance coverage litigation (the "Delaware Action" as described more fully below), by enjoining Defendant Below-Appellee Mine Safety Appliances Company ("MSA") from seeking to litigate the same insurance coverage issues in West Virginia state court against Plaintiff Below-Appellant The North River Insurance Company ("North River"). Ironically, it is MSA that invoked the jurisdiction of the Superior Court of Delaware in the first place in 2010. As will be explained, MSA has become disenchanted with certain of Judge Johnston's rulings – rulings designed to allow important issues of Pennsylvania law to be decided by Pennsylvania's courts – as well as its inability to obtain interlocutory review of those rulings by this Court. Thus, in 2012, MSA began engineering a series of state-court actions against North River in West Virginia, one of the states where it has been sued in the tort cases underlying the coverage dispute.

Seeking to put an end to MSA's improper gamesmanship, North River sought the aid of the Court of Chancery, filing the action below on April 4, 2013, seeking to enjoin MSA from prosecuting then-three existing West Virginia cases, and to prospectively enjoin MSA from fomenting any further claims in West Virginia – or in any other states where MSA is being sued by alleged tort victims.

MSA answered the Verified Complaint on May 3, 2013. The parties then cross-moved for judgment on the pleadings. Following briefing and oral argument on June 25, 2013, the Court of Chancery deferred resolution of the cross-motions to allow the West Virginia court to consider (for a third time) whether it would stay its hand in the later-filed actions before it. On July 8, 2013, MSA voluntarily filed a motion to stay one of the actions pending in West Virginia which, after a settlement between North River and the plaintiff, involved only MSA and North River. After the West Virginia court refused to stay the other proceedings before it, on December 20, 2013, the Court of Chancery issued a Memorandum Opinion granting MSA's Motion for Judgment on the Pleadings and denying North River's Motion for Judgment on the Pleadings, *North River Ins. Co. v. Mine Safety Appliances Co.*, 2013 WL 6713229 (Del. Ch. Dec. 20, 2013) (the "Opinion" or "Op."). On January 7, 2014, North River filed a Notice of Appeal and an Amended Notice of Appeal.

SUMMARY OF ARGUMENT

1. The Court of Chancery committed reversible error by refusing to issue an injunction barring MSA from prosecuting a series of actions it filed in West Virginia involving issues already being litigated in prior pending actions in Delaware and Pennsylvania on the grounds that an injunction, if issued, would be ineffective to prevent the risk of inconsistent judgments because the underlying tort plaintiffs could continue to pursue claims against North River even without the assignment from MSA. This conclusion is flawed for at least two reasons. *First*, as a matter of law the doctrine announced in *Christian v. Sizemore*, 383 S.E.2d 810, 812 (W. Va. 1989), permitting tort claimants in West Virginia to file declaratory judgment actions against an alleged tortfeasor's insurer is inapplicable here because the underlying tort plaintiffs settled with MSA and released MSA in exchange for a payment, which is inconsistent with the policy reasons behind *Christian* and the underlying tort claimants sued as assignees, not as strangers to the policy. *Second*, it speculative for the court below to assume that any of the underlying tort plaintiffs actually *would* continue prosecuting these actions if MSA were enjoined and no longer a participating party, an assumption lacking support in the record. Thus, the court below made the perfect injunction the enemy of the good injunction by refusing to enjoin the party before it who – the record showed – was the entire source of the irreparable harm, and rewarded MSA's inequitable

conduct in creating the situation by refusing to do anything to stop it.

2. North River has established its right to a permanent injunction barring MSA from prospectively assigning additional tort plaintiffs rights under insurance policies issued by North River. Again, the Court of Chancery's conclusion that its injunction would be ineffective is speculative, unsupported by the record and, therefore, not entitled to any deference. The lower court reached this conclusion because it assumed that the tort plaintiffs already had a right to bring such actions, so any injunction preventing MSA from assigning its rights would not prevent completely the risk of inconsistent judgments. Although a court of equity may not issue a "useless" injunction, the law does not require the injunction to remedy completely the harm it is intended to prevent. Here, the risk of inconsistent judgments arose only from actions where MSA assigned rights under a North River policy already at issue in Delaware as part of a settlement and the assignee plaintiff then amended its complaint to add North River as an additional defendant. Where there is no evidence in the record of a single tort plaintiff seeking such a declaration of rights under a policy issued by North River without the assignment of rights through a settlement with MSA, the court below should have enjoined MSA from continuing this practice to prevent the harm within the power of the court below to prevent.

STATEMENT OF FACTS

A. The Parties

North River is a liability insurer incorporated and having a principal place of business in New Jersey. (A12-13 ¶ 2.) MSA, a Pennsylvania-incorporated and headquartered corporation, advertises itself as "the world's leading manufacturer of high-quality safety products since 1914." (A13 ¶ 3.)

As is relevant here, MSA manufactures breathing masks for use in industrial and mining operations. MSA has been and continues to be sued by purchasers and users of its masks, the majority of whom claim that MSA's masks are defective, causing the claimants to develop respiratory diseases such as asbestosis, silicosis and coal worker's pneumoconiosis ("CWP" or "Black Lung Disease"). (*Id.* ¶ 4.) MSA also faces a stream of asbestos personal injury claims arising from asbestos-containing products MSA allegedly manufactured and sold (collectively, the "Underlying Claims"). (*See* A281-82 ¶¶ 35-37.) MSA believes that several layers of liability insurance it purchased from various liability insurers, including North River, which is responsible for thirteen policies issued to MSA covering periods from March 30, 1973 through April 1, 1986, provide insurance coverage for these Underlying Claims. (A3 ¶ 4; A282-85 ¶¶ 39-51; *see also* A288-90.)

B. The Pennsylvania Actions

Since 2006, MSA has been engaged in coverage litigation over the Underlying Claims in numerous fora. An initial action in New Jersey was

dismissed on the grounds that Pennsylvania law would govern the resolution of the issues, and New Jersey had no interest in the dispute. Then, in September 2007, MSA commenced an action (the "2007 Action") via writ against North River in the Allegheny County, Pennsylvania Court of Common Pleas ("Allegheny CCP). (A15-16 ¶ 10.)[1]

MSA discontinued the 2007 Action in March 2009, but filed a new action in the United States District Court for the Western District of Pennsylvania styled, *Mine Safety Appliances Company v. The North River Insurance Company*, No. 2:09-cv-00348 (the "W.D. Pa. Action"). (A17 ¶ 14.) In the W.D. Pa. Action, MSA seeks judgment in its favor that pursuant to North River Policy JU 1225, North River has a duty to both defend and indemnify MSA against thousands of Underlying Claims. (*See* A80-93.)

In April 2010, North River filed a declaratory judgment action against MSA and Allstate in the Allegheny CCP styled, *North River Ins. Co. v. Mine Safety Appliances Co., et al.*, Case No. G.D. 10-7432 (the "Pa. State Court Action," and, together with the W.D. Pa. Action, the "Pa. Actions"). (A17-18 ¶ 15; *see also* A94-201.) In the Pa. State Court Action, North River sought a judicial determination of North River's and MSA's respective rights and obligations under

[1] For a complete summary all of the actions relating to MSA's insurance coverage filed prior to the 2007 MSA v. North River Action, *see* A13-17, ¶¶ 6-13.

three North River excess policies ***other than*** the JU 1225 policy at issue in the W.D. Pa. Action): JU 0830, JU 0988, and JU 1123, effective for consecutive 1-year periods from April 1, 1980 through April 1, 1983. (A94-201.) Specifically, North River sought a declaration that the bodily injury allegedly suffered in those CWP claims filed against MSA postdated the policy periods of, and therefore did not trigger coverage under, these three policies. (*Id.*)

In June 2010, MSA filed, among other things, counterclaims in the Pa. State Court Action asserting claims against North River for breach of contract and bad faith under Pennsylvania's bad faith statute with respect to CWP, asbestos and silicosis claims. (A18 ¶ 16; A202-71.)[2]

C. The Delaware Action

On June 26, 2010, MSA filed still another action, this time here in the Delaware Superior Court and naming as defendants all of MSA's insurers, including North River, styled, *Mine Safety Appliances Co. v. AIU Ins. Co., et al.*, C.A. No. 10C-07-241 (MMJ) (the "Delaware Action"). (A19 ¶ 18.) In the Delaware Action, MSA sought, among other things, a declaratory judgment that North River has a duty to defend and indemnify MSA for the Underlying Claims pursuant to the following policies: JU 0010; XS 2526; JU 0139; JU 0157; JU 0158; JU 0171; JU 0653; JU 1319; and 5220518409; as well as the policies that already

[2] The Allegheny CCP stayed North River's declaratory judgment action and the Pa. State Court Action has proceeded on MSA's Counterclaims.

were the subject of the Pa. State Court Action (JU 0830; JU 0988; and JU 1123) and the W.D. Pa. Action (JU 1225). (A282-85 ¶¶ 39-51; *see also* A288-90.) MSA later argued to Judge Johnston that the Delaware Action was more "comprehensive" and thus the appropriate forum for a determination of its coverage rights under the policies it included in the Delaware Action, such as JU 1319 – the policy that MSA has been utilizing in its efforts to manufacture the West Virginia claims against North River. (A720; A728; A731.)

In September 2010, North River, joined by other defendants, filed a motion to dismiss or stay the Delaware Action because the Pa. Actions were prior pending actions covering the same parties and issues, including issues of Pennsylvania law, relying, *inter alia*, upon *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970). (A19-20 ¶ 19.) On January 24, 2011, the Superior Court granted North River's motion and stayed the Delaware Action as to all parties. *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2011 WL 300252 (Del. Super. Jan. 24, 2011).[3]

Meanwhile, in the Pa. Actions, the state and federal court judges decided to coordinate discovery, and in November 2010, both courts entered orders

---

[3] MSA unsuccessfully sought certification of that decision for interlocutory appeal, *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2011 WL 743389 (Del. Super. Feb. 23, 2011), and, thereafter, this Court refused to accept the interlocutory appeal. *Mine Safety Appliances Co. v. North River Ins. Co.*, 15 A.3d 217 (TABLE), 2011 WL 743050 (Del. Mar. 3, 2011).

appointing a common special discovery master to resolve discovery disputes among the parties. (A20 ¶ 20.) This was not enough for MSA, however, and in September 2011, MSA filed a motion to lift the stay in the Delaware Action for discovery purposes as to all defendants other than North River and Allstate.[4] (A21 ¶ 21.) Judge Johnston denied MSA's lift-stay motion on October 11, 2011, and directed the parties to file a status report on January 24, 2012. (*Id.*)

On January 24, 2012, MSA filed a second motion in the Delaware Action, this time seeking to lift the stay for discovery purposes as to ***all*** parties (A21 ¶ 22), but not for adjudicatory purposes. Indeed, MSA emphasized that "it **does not** request that this Court rule on substantive issues while the Pennsylvania Actions are pending." (A362 ¶ 8 (emphasis in original); *see also* A21 ¶ 22.) On March 16, 2012, Judge Johnston granted in part MSA's second lift-stay motion, permitting discovery to proceed as to all defendants ***except*** for the insurer parties in the Pa. Actions, North River and Allstate. (A408-10; *see also* A21-22 ¶ 23.) After Judge Johnston lifted the stay, MSA commenced discovery into the umbrella policy immediately underlying North River policy JU 1319, and as to which several other insurer defendants in the Delaware Action are excess. (*See* A433-39; A440-54.)

D. In 2012, MSA Begins Engineering Claims Against North River In West Virginia Under Policy JU 1319

Apparently not content with the progress of the Pa. Actions, which Judge

[4] Allstate was also a party to the Pa. Actions.

Johnston had appropriately determined should be the courts to make substantive rulings on issues of Pennsylvania insurance coverage law, and its ability to pursue discovery from all other insurers in the Delaware Action, MSA decided to make an end run around Judge Johnston's decisions. This time, MSA engineered a "dispute" in a brand new jurisdiction – West Virginia.

On March 8, 2010, Norman Moore and his wife Lisa sued MSA in the Circuit Court of Wyoming County, West Virginia in *Moore v. Mine Safety Appliances Co.* (the "Moore Action"). (A23 ¶ 26.) On January 27, 2012, MSA made a "Request for Settlement Authority to North River" in connection with the Moore Action under North River Policy JU 0830, one of the policies at issue in the Pa. State Court Action, to which MSA had tendered the claim. (*Id.*) On April 25, 2012, however, MSA withdrew its tender of the Moores' claim to North River. (*Id.*) (*See* A411-16.)

On May 18, 2012, the Moores and MSA allegedly executed a confidential settlement agreement. (A23-24 ¶ 27.) Then, on May 24, 2012, the Moores filed a First Amended and Supplemental Complaint for Declaratory Judgment Relief and to Enforce Settlement Against North River Insurance Company (the "Supplemental Complaint"). (*Id.*) In the Supplemental Complaint, the Moores alleged that "[a]s part of the consideration for settlement, MSA assigned to Plaintiffs the right to certain insurance proceeds under The North River Insurance Company Policy No.

JU1319." (*Id.*) In the Supplemental Complaint, the Moores sought:

> a. A declaratory judgment that North River "must provide insurance coverage for Plaintiffs' claims against MSA under Policy No. JU 1319"; and
>
> b. An order enforcing the "Confidential Settlement and Release and mandating that The North River Insurance Company pay Plaintiffs the Assignment Amount."

(*Id.*) Prior to receiving the Supplemental Complaint, North River had never been notified that MSA sought coverage for the Moores' claim under North River Policy JU 1319. (*Id.*)

Despite having (i) obtained a complete release from the Moores and (ii) already sought a declaratory judgment of its rights under JU 1319 in the pending Delaware Action, MSA remained a party defendant in the Moore Action for the sole purpose of pursuing claims against North River that had been stayed by Judge Johnston. On May 31, 2012 – almost two years after commencing the Delaware Action – MSA moved to add a cross-claim against North River, which the West Virginia Court granted. (A24-25 ¶ 28.) In its cross-claim, MSA asserted two counts against North River:

> a. A count for a declaratory judgment that North River Policy JU 1319 covers the Moores' claims; and
>
> b. A count for compensatory damages for the amounts incurred in the settlement and in defending the Moores' claims.

(A426-28 ¶¶ 31-41.) MSA's cross-claim expressly seeks a declaratory judgment that the appropriate "trigger" of coverage for coal dust claims is the "continuous

trigger" applicable under Pennsylvania decisional law to asbestosis claims. (A25 ¶ 29.) This precise issue, which both parties agree is governed by Pennsylvania substantive law, is already the subject of the Pa. Actions, and is now the subject of cross-motions for summary judgment in the Pa. Actions. (*Id.* ¶ 30). Indeed, deferring to Pennsylvania's courts on such issues of Pennsylvania law was a paramount reason why Judge Johnston stayed the Delaware Action in the first place. *Mine Safety Appliances Co.*, 2011 WL 300252, at *6; (A283 ¶ 42; A285-86 ¶¶ 50-52).

Seeking to restore the *status quo* as determined by Judge Johnston, on December 3, 2012, North River filed a motion to stay the Moore Action in favor of the Pa. Actions. (A26 ¶ 32.) On December 12, 2012, the West Virginia court denied the motion to stay the Moore Action. (*Id.*)

MSA continued its machinations in West Virginia, entering into additional settlements with plaintiffs in Underlying Claims that included assignments of rights under a North River policy. On February 20, 2013, two other plaintiffs in Underlying Claims sought leave to amend their complaints to add North River as a defendant in the Wyoming County Circuit Court in actions styled *Persinger, v. MSA, et al.*, Civ. Action No. 11-C-45 ("Persinger Action") and *Lambert v. MSA, et al.*, Civ. Action No. 10-C-69 ("Lambert Action"). (A27 ¶ 34.)

The Persingers allegedly executed a confidential settlement agreement with

MSA on June 25, 2012. (A27 ¶ 35.) Like the Moores, the Persingers allege that "[a]s part of the consideration for the settlement, MSA assigned to Persingers the right to certain insurance proceeds under The North River Insurance Company Policy No. JU 1319." (A513 ¶ 1-A.) The Lamberts, too, allegedly signed a confidential settlement agreement on February 10, 2013 (A27-28 ¶ 36; A536-40), and likewise alleged that MSA "agreed, as additional consideration for the settlement, to assign Plaintiff the right to certain insurance proceeds under North River Policy No. JU1319." (A528 ¶ 1-A.)

On February 21, 2013, MSA moved for leave to file a cross-claim against North River in the Persinger and Lambert Actions, which was granted in early March 2013. (A28 ¶ 37.) MSA then moved to consolidate the Persinger and Lambert Actions with the Moore Action. (*Id.* ¶ 38.) In its brief in support of that motion, MSA argued that

> *Persinger, Moore* and the present case [*Lambert*] all present the same fundamental issue – whether the North River Policy [JU 1319] covers tort claims alleging injury from CWP. In all three cases, the Court must decide the same legal issues, including (a) whether CWP necessarily involves and constitutes "personal injury" under the North River Policy; and (b) the period during which 'personal injury' from CWP takes place for the purpose of triggering insurance coverage.

(A594.)

North River then settled the Moores' claims and renewed its motion to dismiss and/or stay MSA's cross-claims, but the court denied that motion as well

on March 20, 2013 from the bench. (A26 ¶ 32). At a June 3, 2013 status conference held before a new judge assigned to the Moore Action, the Court indicated that it would give North River an opportunity to reargue the renewed Motion on July 15, 2013. One week before that motion was to be argued (and after the Court of Chancery held oral argument on the cross-motions for judgment on the pleadings in this case), MSA advised the West Virginia Court that it agreed to the entry of a stay in the Moore Action. On July 15, 2013, the West Virginia Court entered an order staying the Moore Action and scheduled argument on North River's motion to dismiss or stay the Lambert and Persinger Actions. On August 20, 2013, following oral argument, the West Virginia Court denied from the bench North River's motion to stay the Lambert and Persinger Actions. On September 4, 2013, the West Virginia court issued an order explaining its reasons for refusing to stay the Lambert and Persinger Actions. (A681-88.)

North River expects that MSA will continue engineering additional lawsuits against North River in West Virginia (and potentially other states) through this assignments strategy. Indeed, in opposing a stay of its cross-claim against North River in the Moore Action, MSA admitted that it has "continued to use assignments" since it sued North River in the Moore Action. (A549; *see also* A78 (chart listing policies at issue in all actions between MSA and North River)).

As further proof of MSA's intent to continue to use assignments, on July 3,

2013, while the Court of Chancery action was pending, MSA assigned rights under North River policy JU 1319 in a settlement with a ***fourth*** West Virginia tort claimant, Linda McVey, who then amended her complaint (the "McVey Action")[5] to include claims against North River for a declaration of insurance coverage and for payment of the "Assignment Amount" under the terms of the Confidential Settlement Agreement and Release. MSA, however, has not yet filed a cross-claim or sought leave to file a cross-claim against North River in the McVey action.

E. The Current Status of the Delaware Action

Given the progress of the Delaware Action and the plain intent of MSA to litigate its declaratory relief actions in a forum MSA considers more "friendly", on February 20, 2013, North River filed a motion in the Delaware Action, opposed by MSA, to lift the stay in that action as to all North River policies – including JU 1319 – except those at issue in the Pa. Actions. (A29-30 ¶¶ 41-42.) On March 22, 2013, Judge Johnston granted North River's motion in part, lifting the stay for those North River policies not at issue in Pennsylvania (including JU 1319), to allow North River to participate in depositions. (A30 ¶ 43, A663 at 71:5-72:9.) The Order continued the stay "with respect to North River and Allstate in connection with the filing of any motions seeking substantive rulings on insurance coverage that are at issue in the Pennsylvania action" (*id.* at 72:5-9), and provided

[5] The Moore, Persinger, Lambert, and Mcvey Actions are collectively referred to as the "West Virginia Actions."

the stay would automatically terminate entirely "as of the date the decision or decisions are issued in the Pennsylvania state case, regarding motions which were argued [there] on March 12, 2013." (*Id.* at 72:14-17.)

On November 26, 2013, MSA moved again to lift the stay as to North River. On January 28, 2014, MSA and North River filed a Stipulation and [Proposed] Order lifting the stay as to North River with certain conditions, such as prohibiting the parties from filing summary judgment motions in the Delaware Action on issues that were already the subject of summary judgment motions in the Pa. Actions. The Superior Court approved the Stipulation on February 25, 2014.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN REFUSING TO ENJOIN MSA FROM LITIGATING COVERAGE DISPUTES WITH NORTH RIVER IN WEST VIRGINIA

A. Question Presented

Did the Court of Chancery err in refusing to enjoin MSA from prosecuting the Persinger, Lambert, and McVey Actions on the grounds that such relief would be ineffective, where its determination was based on an inapplicable provision of West Virginia law and hypothetical future events lacking support in the record? (*See* A35-79.)

B. Standard and Scope of Review

This court generally reviews the grant or denial of injunctive relief under an abuse of discretion standard. The Chancery Court's legal conclusions, however, are reviewed by this Court *de novo*. *Lawson v. Meconi*, 897 A.2d 740, 743 (Del. 2006). Here, there is no factual dispute that MSA continues to file actions in West Virginia and assign to tort claimants there rights under policies already at issue in the Delaware Action. Because the court below based its decision to deny injunctive relief on purely legal conclusions, this Court's review should be *de novo*. *Lawson*, 897 A.2d at 743 (applying *de novo* review to denial of injunction where appellant challenged legal issues); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993).

C. Merits of Argument

The standards for seeking permanent injunctive relief are identical to those for preliminary relief, except that the party seeking the injunction must show actual success on the merits. *Qwest Commc'ns Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 821 A.2d 323, 327-28 (Del. Ch. 2002). To be entitled to the relief it seeks in the Complaint, North River therefore must show (i) actual success on the merits, (ii) immediate and irreparable harm if an injunction is not issued, and (iii) that the harm to North River if relief is denied outweighs the harm to MSA if the relief is granted. *Id.* at 327. The Court of Chancery did not address the first two prongs of this test. Instead the court below assumed North River met the first two prongs, but held that it could not meet the balancing of the equities test. Op. at *7. Because North River proved all three elements required for the court to issue a permanent injunction, the lower court's ruling amounted to reversible error.

1. North River Has Proven Actual Success on the Merits

In the context of claims for injunctions in aid of jurisdiction, the moving party must show "success in regard to the propriety of the forum chosen by the moving party," rather than any type of finding of likely success on the merits of the underlying dispute itself. *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 5.03, 5-58 ("Wolfe & Pittenger"). For example, in *Air Products & Chemicals, Inc. v.*

Lummus Co., 235 A.2d 274, 277-278 (Del. Ch. 1967), in preliminarily enjoining a party from suing in Puerto Rico, the Court of Chancery found that the plaintiff had proven "likelihood of success" by showing that the parties should be required to litigate their dispute in Delaware Superior Court rather than in Puerto Rico. Here, MSA should not be permitted to proceed with the later-filed Persinger and Lambert Actions because MSA is litigating its rights to coverage for coal dust claims in the earlier-filed Delaware Action, and in the Pa. Actions to which the Superior Court has determined to defer. Similarly, it should not be permitted to cross-claim against North River in the McVey Action, where MSA again has assigned policy rights to the plaintiff, but has not yet itself cross-claimed.[6]

"The propriety of confining litigation to the forum in which it is first commenced has repeatedly been recognized by courts of equity, and an injunction will generally be allowed to prevent either party from removing the litigation into another court." *Household Int'l, Inc. v. Eljer Indus., Inc.*, 1995 WL 405741, at *2 (Del. Ch. June 19, 1995) ("*Household III*") (quoting *Connecticut Mut. Life Ins. Co. v. Merritt-Chapman & Scott Corp.*, 163 A. 646, 648 (Del. 1932)). Accordingly, the Court of Chancery has exercised its discretion to enjoin a party to a Delaware

[6] The Court of Chancery, of course, has the power to prevent the harm from occurring in the first place by issuing an anti-suit injunction even before the forum-shopping party has commenced suit in the foreign jurisdiction. *See Air Products*, 235 A.2d at 276-78.

Superior Court action from instituting or prosecuting a later-filed action in another forum. *See Air Products*, 235 A.2d at 276-78 (enjoining Lummus from bringing a second action outside of Delaware against Air Products for breach of contract); *Household III*, 1995 WL 405741, at *2 (enjoining prosecution of second-filed action when foreign court refused to stay its hand).

2. North River Has Demonstrated that It Will Suffer Irreparable Harm if the Remaining West Virginia Actions Are Prosecuted by MSA

Where courts in other jurisdictions fail to stay their hands in later-filed actions involving the same subject matter, Delaware courts repeatedly have found that the risk of inconsistent judgments constitutes irreparable harm mandating an injunction. *See Williams Nat'l Gas Co. v. BHP Petroleum Co.*, 574 A.2d 264 (Del. 1990) (TABLE), 1990 WL 38329, at *2 (Del. Mar. 12, 1990) (enjoining prosecution of later-filed suit in Texas between the same parties concerning the same controversy after Texas court refused to grant stay); *Household III*, 1995 WL 405741, at *2 (enjoining prosecution of later-filed Texas action after Texas court refused to enter stay).

To be sure, mindful of comity considerations, the Court of Chancery exercises its injunctive powers cautiously, and normally will give the courts of a sister state the opportunity to "do the right thing" by staying the later-filed action itself. *See Rapoport v. Litig. Trust of MDIP Inc.*, 2005 WL 3277911, at *8 (Del.

Ch. Nov. 23, 2005) (refusing to issue injunction in part because Ohio court had not yet addressed whether it should stay the Ohio action); *Household Int'l, Inc. v. Eljer Indus., Inc.*, 1994 WL 469169, at *3 (Del. Ch. Aug. 12, 1994) ("*Household II*") (initially refused to grant an injunction until Texas court had an opportunity to stay the second-filed Texas action).

Importantly, however, as *Williams* illustrates, such comity considerations must yield, and the need to prevent irreparable harm to a Delaware litigant must prevail, when the foreign court refuses to stay its hand, thereby putting that party at risk of suffering inconsistent judgments. In that case, Williams filed a declaratory judgment action in the Court of Chancery arising out of a contract dispute. A few days later, BHP filed a "mirror-image" action in Texas. *Id.* at *1. After the Texas court refused to stay its hand, the Court of Chancery responded by staying the first-filed Delaware action to avoid the risk of inconsistent judgments. *Id.* This Court flatly rejected the chancellor's "solution" and reversed, stating:

> We have concluded that the Court of Chancery erred, as a matter of law, in holding that the Delaware action should be stayed solely because the Texas court, in a subsequently-filed "mirror-image" action, had refused to stay the proceedings in Texas. ***The "collision course" envisioned by the Court of Chancery should have been avoided by entering an injunction, in aid of its jurisdiction to proceed with the first-filed Delaware action, which enjoined the parties from proceeding in the subsequently-filed Texas action.***

Id. at *2 (citation omitted, emphasis added); *see also Household III*, 1995 WL 405741, at *2 (enjoining prosecution of later-filed Texas action after Texas court

refused to enter stay).

Here, the Court of Chancery acknowledged that the remaining West Virginia Actions pose the "risk of inconsistent judgments in Delaware and West Virginia." Op. at *9. Moreover, like the Texas courts in *Williams* and *Household III*, the West Virginia court here has repeatedly refused to defer to the prior Delaware Action as a matter of comity between the states and, more importantly, to prevent the risk of inconsistent judgments. In the Moore Action, the Court twice denied North River's stay motions – once ***after*** North River settled with the Moores, leaving as parties only MSA and North River, the Delaware (and Pennsylvania) litigants. (A26 ¶ 32; A659.) MSA subsequently agreed to a stay in the Moore Action, but only after the Vice Chancellor below indicated at oral argument that the court was more likely to impose an anti-suit injunction where the West Virginia plaintiff was no longer a party.

In the Persinger and Lambert Actions, pending before the same judge presiding over the Moore Action, North River also sought a stay, but its motion again was denied. (A681-88.) Because West Virginia's judiciary has repeatedly been afforded the opportunity to stay its hand and has repeatedly refused to do so, the court below should have followed this Court's teachings in *Williams* and entered an injunction to preserve the jurisdiction of the Delaware Superior Court.

3. The Equities Plainly Weigh in Favor of an Injunction

Ultimately, the Court of Chancery denied North River's request for a permanent injunction prohibiting MSA from prosecuting the Persinger and Lambert Actions because the Vice Chancellor concluded that the equities did not tip in favor of entry of an injunction. The Court of Chancery concluded, erroneously, that the injunction North River sought would be an "ineffective" or "useless thing" because, that court surmised, the underlying tort plaintiffs would continue to prosecute their claims against North River even if MSA were enjoined from prosecuting the Persinger and Lambert Actions. Therefore, the Court held, the injunction could not prevent risk of inconsistent judgments and MSA would be prejudiced if it could not protect its interests in these cases.

The lower court's conclusion is wrong for two reasons. First, *Christian v. Sizemore*, 383 S.E.2d 810 (W.Va. 1989), and its progeny are inapplicable based on the unique facts of this case, as explained in the next subsection. Second, as a factual matter, it was speculative for the court to conclude from the record that the underlying tort plaintiffs would and/or could continue to prosecute their claims if MSA, their assignor, were enjoined from prosecuting its claims and no longer a participating party.

a. *Christian v. Sizemore* Is Inapplicable To This Case

The court below concluded, in part, that even if it enjoined MSA from

prosecuting its claims, the plaintiffs in West Virginia would still have the right, independent of their assignments, to pursue North River under West Virginia's Declaratory Judgment Act, mistakenly relying on *Christian v. Sizemore. Id.* In *Christian,* the West Virginia Supreme Court ruled that West Virginia's Declaratory Judgment Act permitted an injured plaintiff, a stranger to the insurance contract between a tortfeasor and its insurer, to seek a determination whether there was coverage for plaintiff's injuries "before obtaining a judgment against the defendant in the personal injury action where the defendant's insurer has denied coverage." *Id.*; *see also Robinson v. Cabell Huntington Hosp., Inc.*, 498 S.E.2d 27, 32 (W. Va. 1997). Thus, a tort plaintiff has standing to challenge the tortfeasor's insurer's denial of insurance coverage before deciding whether to undertake the effort and expense of obtaining a judgment against the tortfeasor (as well as to foster settlement). *Id.*

Christian, however, has no applicability in the context of a settlement where the injured plaintiff ***releases the tortfeasor*** and receives, as part of a settlement agreement, an assignment of the tortfeasor's rights under the policy. Indeed, after the release and assignment, the plaintiff is no longer a stranger to the policy, but has stepped into the policyholder's shoes. *See Lightner v. Lightner,* 124 S.E.2d 355, 362 (W. Va. 1962) ("Ordinarily [an] assignee acquires no greater right than that possessed by his assignor, and he stands in his shoes; [and an] assignee takes

subject to all... defenses and all equities which could have been set up against [an] instrument in the hands of [an] assignor at the time of the assignment."); *see also Strahin v. Sullivan,* 647 S.E.2d 765, 773 (W. Va. 2007) (citing *Lightner*).

Here, MSA assigned to Persinger and Lambert (and now McVey) rights to coverage under JU 1319 for the assignment amount. In addition, MSA also expressly assigned to Persinger and Lambert "the causes of action, choses in action, and other rights to pursue and receive proceeds totaling the Assignment Amount that Mine Safety . . . would otherwise have under the Insurance Policy." (A526; A542.) As assignees, Lambert and Persinger proceeded in accordance with MSA's assignment by utilizing the procedural remedy afforded under the West Virginia Declaratory Judgments Act that MSA had possessed and assigned to them. In the settlement agreement, however, plaintiffs relinquished all claims to recovery from MSA. (A520; A536.) As such, the only rights to coverage they can enforce are those granted by the assignment. The policy reason behind *Christian* – to permit an injured party to determine whether the tortfeasor has insurance coverage *before* obtaining a judgment against him – no longer applies because the claims of the injured parties against the tortfeasor have been released. Put another way, the need to determine whether MSA has coverage was obviated by the settlement with and release of MSA. The only way the West Virginia plaintiffs would have standing to pursue a claim against North River, therefore, is by

standing in the shoes of MSA.

b. The Lower Court Incorrectly Speculated that the Plaintiffs in the Remaining West Virginia Actions Would Continue to Prosecute Those Actions

Delaware law, as exemplified by *Williams*, is clear: were MSA and North River the only parties to the West Virginia Actions, an injunction should issue against MSA's further prosecution of those actions. MSA tacitly admitted as much when it voluntarily agreed to stay the Moore Action after North River and MSA were the only parties left in that action. The lower court, however, refused to enjoin MSA from continuing to participate in the remaining West Virginia Actions, speculating that those actions would proceed "with or without MSA, and that North River will inevitably face the risk of inconsistent judgments in Delaware and West Virginia" and therefore that an injunction would be ineffective. Op. at *9.[7]

This conclusion, however, was speculative and lacked support in the evidentiary record. It is unknown whether the tort plaintiffs in the remaining West Virginia Actions would or could prosecute those actions without MSA's

[7] The lower court wrote that "the West Virginia action is proceeding" and that the court has no jurisdiction over "West Virginia tort plaintiffs." Op. at *8-9. However, their status as MSA's assignees may suffice to confer personal jurisdiction over them in Delaware. Nonetheless, as explained in Argument Section II.C., below, entry of the requested injunction certainly would prevent MSA from further inflicting irreparable harm on North River by multiplying the risks of inconsistent judgments through repetition of its settlement/assignment artifice with other claimants in West Virginia and possibly other states.

involvement (and the implicit, if not explicit, support of the party that engaged in and bore the expense of the extensive discovery with North River in the Pa. Actions on the coverage issues). Furthermore, were the Court of Chancery's assumption correct that the underlying tort plaintiffs legally could, or actually would, proceed separate and apart from their assignments, one would anticipate that out of the hundreds of underlying tort claimants, at least ***one*** would have sought a declaratory judgment of North River's obligations ***without*** MSA being a party and ***without*** MSA assigning its rights under a policy issued by North River. Yet, the facts in the record show that in the W.D. Pa. Action MSA seeks reimbursement from North River for $20,274,186 paid in settlement of "Underlying Claims brought by approximately 400 claimants." (A80-93.) In the Pa. State Action, MSA seeks defense costs and indemnity from MSA for over 500 claimants, approximately 40 of which have settled. (A291-357.) Despite these hundreds of claimants and tens of millions of dollars in settlements, prior to the four plaintiffs in the West Virginia Actions who received an assignment from MSA, ***not a single tort plaintiff has sought to bring an independent declaratory judgment action against North River*** without MSA's being a party and giving an assignment of rights under the policy as part of its settlement with the plaintiff. Based on the record before it, the court below incorrectly refused to enjoin what it knew it could stop based on speculation that it could not completely stop the risk of

inconsistent judgments.

c. MSA Is Not an Innocent Actor Deserving of the Court's Protection

Finally, the court below concluded that "because the actions between North River and certain West Virginia tort plaintiffs will be proceeding, it would be inequitable to exclude MSA from participating in that litigation." Op. at *9. From this premise, the court further concluded that an injunction "would inequitably preclude MSA from protecting its rights under North River Policy JU 1319, while North River continues to litigate, and to vigorously argue that MSA lacks coverage under this policy, in West Virginia." *Id.* This conclusion is erroneous for two reasons.

First, the lower court's conclusion is belied by MSA's own conduct in the McVey Action where, faced with the injunction proceedings in the Court of Chancery, MSA made the tactical decision to ***refrain*** from cross-claiming against North River in the McVey action – and then emphasized this fact to the Chancellor in opposing North River's requested injunction. (A691 n.1.) Thus, MSA has explicitly demonstrated by its actions and representations to the court below that it suffers no prejudice when a partial assignee proceeds against North River in West Virginia without MSA's simultaneous prosecution of an identical claim against North River.

Second, and perhaps even more to the point, in "balancing the equities" the lower court improperly rewarded MSA's own inequitable conduct. That court completely ignored the fact that MSA created this entire dilemma – and it did so intentionally and with eyes wide open. MSA strategically crafted these partial-assignment settlements ***after*** MSA already had invoked the judicial machinery of Delaware to seek a declaration of its rights under the JU 1319 policy. Moreover, MSA continued its settlement-assignment strategy even after North River filed this action. To the extent there is a risk that MSA could be harmed because Persinger, Lambert or McVey could pursue a claim determining MSA's rights under JU 1319, it is purely a problem of MSA's own, intentional making. MSA thus stands before the courts of Delaware with unclean hands. Obviously, no "balancing of the equities" analysis should reward such an actor who has intentionally acted to create the crisis, and then repeated its conduct even in the face of pending injunction proceedings aimed at enjoining that precise conduct. By refusing to issue the injunction, the court below in effect rewarded MSA for concocting and executing a plan to circumvent Judge Johnston's carefully considered case management rulings in the Delaware Action to allow issues of Pennsylvania law to be decided by Pennsylvania courts (after both that court and this Court rebuffed MSA's efforts to appeal certain of those rulings), and rejected an injunction that would have eliminated that sole risk of inconsistent judgments supported by the record.

II. THE COURT OF CHANCERY ERRED BY REFUSING TO ENJOIN MSA PROSPECTIVELY FROM ASSIGNING RIGHTS UNDER INSURANCE CONTRACTS TO ADDITIONAL TORT PLAINTIFFS

A. Question Presented

Did the Court of Chancery err by refusing to enjoin MSA from continuing to assign rights to underlying tort plaintiffs in future settlements? (*See* A35-79.)

B. Standard and Scope of Review

For the reasons set forth in Section I.B., this Court's review should be *de novo*. *See supra* at 17.

C. Merits of Argument[8]

In denying North River's request for an injunction barring MSA from assigning its rights under insurance contracts with North River prospectively to additional tort plaintiffs in settlement agreements, the Court of Chancery stated it would not bar MSA from continuing to assign its rights under policies issued by North River because

> North River would still face the risk of inconsistent judgments, as personal injury tort plaintiffs in at least West Virginia may seek declaratory relief against North River directly, without an assignment from or judgment against MSA. Further, as I have found above, it would be inequitable for this Court to grant such an injunction, which would result in North River continuing to litigate against certain tort plaintiffs about MSA's rights as an insured party, without MSA being able to defend itself. Moreover, an injunction preventing MSA from assigning any rights under the policies to its tort victims would

[8] The success on the merits and irreparable harm arguments in sections I.C.1. and 2. apply equally to this section. *See supra* at 18-22.

> hamper MSA's ability to settle claims, without providing relief from the possibility of inconsistent judgments.

Op. at *9. This conclusion suffers from three reversible errors.

First, the court below incorrectly assumed that just because West Virginia tort plaintiffs could bring claims against North River independent of any action taken by MSA, that such tort plaintiffs actually would bring such actions. It is of course true, as the Court of Chancery noted, that "[e]quity will not do a useless thing." *Walker v. Lamb*, 259 A.2d 663, 663 (Del. 1969). However, here, the record is devoid of evidence supporting an argument that an injunction would be useless. Out of hundreds of claimants and obviously millions of dollars at stake, not a single claimant has independently brought a declaratory judgment action against North River outside of an action in which MSA is a party and has settled with the plaintiff assigning policy rights. The Court of Chancery's decision to deny a prospective injunction of additional assignments of rights under insurance policies to additional tort plaintiffs until the trigger issue has been litigated in the earlier-filed litigation was error as it is based on unsupported speculation that the underlying tort plaintiffs will do something they have in fact never done.

Second, the lower court incorrectly concluded that an injunction that does not completely eliminate the irreparable harm would be "useless." A court can and should issue an injunction even if it would not effect a complete remedy. For example, in *In re Del Monte Foods Co. Shareholders Litigation*, 25 A.3d 813 (Del.

Ch. 2011), the Court of Chancery issued an injunction it acknowledged would only be partially effective:

> An injunction along the lines requested by the plaintiffs *does not perfectly remedy the harm* Barclays caused, but it does go *part of the way*. The core injury inflicted on the stockholders was Barclays' steering the deal to KKR. Barclays won by doubling up on fees. KKR won by getting Del Monte, free of meaningful competition, and securing a leg-up on potential competing bidders through the defensive measures in the Merger Agreement. The injunction sought by the plaintiffs *partially cures this injury* by limiting KKR's leg-up and providing a final window during which a topping bid could emerge.

Id. at 839 (emphasis added). Similarly, enjoining MSA from future assignments may not eliminate all risk of inconsistent judgments, but given that the only cases in the record involved plaintiffs who had received assignments and the lack of evidence of tort plaintiffs independently seeking declaratory judgments of their rights without an assignment with MSA, that injunction cannot be characterized as "useless." Indeed, the Chancellor's reasoning illustrates Voltaire's admonition that "the perfect is the enemy of the good."

This case is a far cry from the situations presented by the cases cited by the court below, where the requested injunctions likely would have been "useless" or ***completely ineffective***: *Walker v. Lamb*, 259 A.2d 663 (Del. 1969) (injunction mandating return of fingerprints and photographs taken during arrest denied as useless because claimant had since been indicted such that his fingerprints and photographs legally could be taken); *New Castle County v. Peterson*, 1987 WL

13099 (Del. Ch. June 30, 1987) (mandatory injunction to force New Castle County Council to meet, consider, and adopt budget ordinance by date certain denied because "even if the Council could validly be ordered to meet, . . . Council cannot be judicially coerced to agree upon a particular budget and even if approved, there could be "no assurance that the County Executive would approve it").

The injunction sought here would be far more effective than those sought in *Walker* or *Peterson*. There is a complete absence of any evidence in the record that the underlying tort plaintiffs have prosecuted coverage actions against North River, or would do so, without: 1) receiving an assignment from MSA; 2) receiving settlement funds from MSA; and 3) MSA's presence in those cases.

Third, there is no basis in the record to conclude that MSA would be hampered in its ability to settle claims if it were enjoined from assigning its rights under policies already at issue in the Superior Court Action (or at least enjoined from assigning rights in a manner that would not require the assignee to agree to be subject to the jurisdiction of Judge Johnston in the Delaware Action). In the absence of any record evidence that MSA was in financial distress or otherwise could not settle the Underlying Claims without utilizing the assignments, it was improper for the court below to reach this conclusion. In fact, the only evidence in the record is to the contrary. MSA has settled over 450 claims without relying on assignment of its rights under a policy issued by North River. There is no basis to

conclude that MSA has a need to assign its rights under insurance policies issued by North River, nor that such a need causes the equities to tip in favor of MSA.[9]

Once again, the equities tip decidedly in favor of North River on this issue. A Delaware court cannot be powerless to enjoin MSA from litigating the Persinger, Lambert, and McVey Actions *and* prevent MSA from continuing to assign its rights to future West Virginia plaintiffs. If that were the case, then MSA will be able to continue to seek additional rulings on the very policies it voluntarily elected to place at issue in the Delaware Action. There is no basis in equity for rewarding MSA for this conduct. At the very least, the Court of Chancery should have enjoined MSA prospectively from continuing to assign insurance rights in the settlement process, and thus creating additional litigation on the trigger issue, until that issue is decided by the Pa. Actions and Delaware Action.

---

[9] Indeed, it would not be inequitable for MSA to be enjoined from using assignments as part of underlying settlements since it will be able to obtain payment of the settlement amount if it prevails on its coverage action in Delaware. If MSA does not prevail in the coverage action, then it would have paid an amount it presumably thought was fair and reasonable to settle the claim.

CONCLUSION

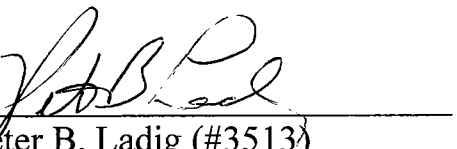
For all of the foregoing reasons, North River respectfully requests that the Court reverse the opinion of the Court of Chancery and remand this matter with instructions to enter an injunction prohibiting MSA from continuing to litigate the Persinger and Lambert Actions, filing a cross-claim in the McVey Action and assigning rights under any North River policies as part of a settlement with a tort claimant until the Delaware Action is concluded.

Of Counsel:

Alan S. Miller, Esquire
Bridget M. Gillespie, Esquire
Picadio Sneath Miller & Norton, P.C.
Four Gateway Center
444 Liberty Avenue, Suite 1105
Pittsburgh, PA 15222

Dated: March 10, 2014

MORRIS JAMES LLP



Peter B. Ladig (#3513)
Jason C. Jowers (#4721)
David J. Soldo (#4309)
500 Delaware Avenue, Suite 1500
Wilmington, Delaware 19801
(302) 888-6800
Attorneys for Plaintiff Below, Appellant The North River Insurance Company