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 REPLY BRIEF

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ARGUMENT[1]

On March 27, 2014, after North River filed its Opening Brief in this appeal, the West Virginia Supreme Court of Appeals denied North River's petition for a writ of prohibition to stay the pending West Virginia Actions. *State of West Virginia ex rel. North River Ins. Co. v. Chafin*, --- S.E.2d. ---, 2014 WL 1272852 (W.Va. Mar. 27, 2014). As a result of that ruling, North River respectfully withdraws its first argument on appeal, *i.e.*, that the Court of Chancery erred in refusing to enjoin MSA from continuing to litigate the West Virginia Actions. While North River continues to believe that this argument has merit, given the holding of the West Virginia Supreme Court of Appeals allowing those specific actions to proceed in West Virginia, it appears that the damage to the Superior Court's jurisdiction represented by those actions filed by MSA in West Virginia cannot be undone. North River therefore believes it is no longer in the interests of the parties or this Court to advance that argument. North River continues to pursue its second argument, and believes for the reasons set forth in the Opening Brief and set forth below that the Court of Chancery erred in denying North River's request for an injunction preventing MSA from continuing to settle tort claims by an assignment of MSA's rights under insurance policies issued by North River.

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[1] For consistency and clarity, North River continues the use of terms previously defined in its Opening Brief.

I. THE COURT SHOULD REVERSE THE COURT OF CHANCERY'S DENIAL OF NORTH RIVER'S REQUEST FOR AN INJUNCTION PREVENTING FUTURE ASSIGNMENTS BY MSA

Even if it is too late to undo the damage that MSA has already visited upon the jurisdiction of the Superior Court and the sound administration of justice in this state by engineering satellite litigation in West Virginia through its settlement-assignment strategy, the Vice Chancellor erred in declining to enjoin MSA from continuing this deleterious practice. This Court should now exercise its supervisory authority to vacate this aspect of the Court of Chancery's ruling and remand for entry of an injunction restraining MSA from continuing to foment multiplicity of litigation in West Virginia (or elsewhere) of the same issues pending before Judge Johnston in our Superior Court.

It may be that West Virginia law permits an underlying tort claimant to sue North River independently for a declaration of MSA's rights to coverage under a North River policy, but it is clear from the record below that *no* tort plaintiff has ever done so, save for the instances where plaintiffs have received assignments of rights from MSA as part of a settlement. It is this practice, which MSA admitted it intended to continue, that North River asked the Court below to enjoin because it was plain from the record below that the assignments were intended by MSA to result, and in fact did result, in new claims against North River seeking a

declaration of MSA's rights under a policy that MSA had placed at issue in the Delaware Action.

In MSA's Answering Brief, MSA makes two technical arguments and two substantive ones. MSA argues that this Court should review the decision of the Court below for an abuse of discretion, even though the Court below issued its decision on a paper record, and after making clear legal conclusions. MSA also argues that although the utility of the injunction requested by North River had been argued below, North River somehow waived this argument.

Substantively, MSA argues that an injunction preventing assignment of its rights would be "useless" because tort plaintiffs could sue North River anyway, so the injunction would not stop the threat of inconsistent judgments. But the only known threat of inconsistent judgments comes from MSA's assignments, and the Court of Chancery should have entered an injunction to prevent the harm it knew about, rather than refuse to issue an injunction because it could not stop a harm that there was no record evidence to show was imminent, let alone present.

Finally, MSA argues that as a matter of equity, the Vice Chancellor properly refused to enter the injunction because it would have impaired MSA's ability to settle cases. Yet, the record showed that MSA had settled over 450 claims without assignment of rights. Moreover, North River is not MSA's only insurer. MSA has coverage from over 30 insurers who issued MSA over 120 policies, and, according

to MSA's own litigation position, MSA could seek reimbursement from any policy in effect when an underlying tort claimant was exposed to coal dust while wearing an MSA mask. This was, to repeat, a calculated strategy by MSA to frustrate the judicial administration of the Delaware Action by Judge Johnston.

For the reasons set forth below, the Court should reverse the Court of Chancery's denial of an injunction preventing MSA from entering into future assignments of rights under North River policies.

A. The Court Should Exercise *De Novo* Review

MSA argues that the Court should review the Court of Chancery's decision for abuse of discretion. (Ans. Br. at 21.) In support of this contention, MSA claims that the Court of Chancery rendered no legal conclusions warranting *de novo* review. (*Id.* at 7.) But MSA's attempt to couch all of the Vice Chancellor's conclusions, both factual and legal, as "factual determinations" is misleading, and ultimately unavailing.

To be sure, the Court generally reviews the grant or denial of injunctive relief for abuse of discretion. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998). The trial court's determination of "embedded" questions of law, however, is reviewed *de novo*. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996); *see, e.g., Activision Blizzard, Inc. v. Hayes,* -- A.3d --, 2013 WL 6053804, at *3 (Del. Nov. 15, 2013) (applying *de novo* review to denial of

injunction where appellant challenged legal issues); *Lawson v. Meconi*, 897 A.2d 740, 743 (Del. 2006) (same). Moreover, where, as here, the Court of Chancery's decision to grant or deny an injunction is based entirely on a paper record, such that there were no credibility findings to which any deference is due, "the standard and scope of review on appeal requires this Court to review the entire record and draw its own conclusions with respect to the facts if the findings below are clearly wrong and justice requires." *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1340-41 (Del. 1987). This is particularly so where the findings arise from "deductions, processes of reasoning or logical inferences." *Fiduciary Trust Co. of N.Y. v. Fiduciary Trust Co. of N.Y.*, 445 A.2d 927, 930 (Del. 1982).

In its Opinion, the Court of Chancery rendered several legal conclusions pertinent to this aspect of the appeal. The Court of Chancery opined that an injunction preventing MSA from assigning to any claimants the right to recover under any North River insurance policy would be "useless" based on a legal determination that North River may still face the risk of inconsistent judgments as West Virginia permits tort victims to seek declaratory relief against insurance carrier directly, without an assignment from or judgment against MSA. Plainly, these rulings, which rely upon, interpret and synthesize West Virginia law, constitute "legal conclusions" subject to *de novo* review.

B. North River Did Not Waive Any Arguments

MSA also devotes one line of Section II of its argument to contend that North River waived an argument by failing to raise it below. (Ans. Br. at 21.) Although MSA does not identify which argument it believes North River waived, presumably MSA claims, as it did in its response to North River's first argument, that North River waived its right to "argue" that "not a single tort plaintiff has sought to bring an independent declaratory judgment action against North River without MSA[] ... giving an assignment of rights." (Ans. Br. at 14.) Supreme Court Rule 8, however, does not bar North River from raising this factual issue in support of a properly preserved argument. It simply bars a party from advancing for the first time a new theory.

Delaware Supreme Court Rule 8 provides that only questions fairly presented to the trial court may be presented for review on appeal unless the interests of justice require the consideration and determination of a question not so presented. In other words, Rule 8 prevents a litigant from advancing a *legal argument* on appeal that was not presented to the trial court. *See Tumlinson v. Advanced Micro Devices Inc.*, -- A.3d --, 2013 WL 4399144, at *3 (Del. Aug. 16, 2013) ("Under Supreme Court Rule 8, a party may not raise new arguments on appeal.") (citation omitted). Here, contrary to MSA's argument, North River is not advancing a new theory. In both the Complaint and North River's Opening Brief

in Support of Its Motion for Judgment on the Pleadings, North River argued that MSA should be permanently enjoined from issuing any future assignments to additional tort claimants. (B15-16; A32-33.) The theory has not changed. Moreover, it cannot be seriously disputed that whether an injunction prohibiting MSA from continuing to assign its rights under North River policies would be "useless" was fairly raised below. The Vice Chancellor and counsel for North River engaged in an extended colloquy about that topic during the oral argument, with counsel for North River explaining the need for an injunction of future assignments. (AR3-5.) Thus, the theory or *argument* that the injunction was necessary and not useless was raised fairly below. *See Watkins v. Beatrice Cos.*, 560 A.2d 1016, 1020 (Del. 1989) ("In determining whether an issue has been fairly presented to the trial court, this Court has held that the mere raising of the issue is sufficient to preserve it for appeal.") MSA cites to no authority for the proposition that Supreme Court Rule 8 prevents a party from supporting an argument properly raised below with undisputed *facts* from the record.

Even more to the point, the fact that no underlying tort claimant had proceeded with an action against North River other than those four who received assignments from MSA (and the assistance of MSA's participation as a party to the litigation) was fairly presented to and addressed by the Court of Chancery. In its opinion, the Vice Chancellor implicitly recognized that, thus far, all of the tort

victims suing North River had received an assignment of rights from MSA. (Op. at 9.) Indeed, in concluding that an injunction would be "useless," the Vice Chancellor explained that even absent an assignment from MSA, tort plaintiffs in West Virginia *might* nonetheless seek declaratory relief against North River directly via the West Virginia Declaratory Judgments Act. (*Id.*) The Court of Chancery's reference to this issue plainly suffices to preserve it for appeal. *Watkins*, 560 A.2d at 1020 ("In a case where the trial court noted in passing that it finds an argument unpersuasive, such issue was deemed to have been fairly raised for the purpose of Supreme Court Rule 8.") (citing *Sergeson v. Del. Trust Co.*, 413 A.2d 880, 881-82 (Del. 1980)).

C. An Injunction Proscribing Further Assignments Would Not Be Useless, But Instead Would Protect The Jurisdiction Of The Superior Court And Prevent Parties From Frustrating That Court's Ability To Effectively Manage The Cases Before It

The Court below and MSA both incorrectly focus on the possibility that the underlying tort claimants could prosecute claims independently of MSA, arguing thereform that any injunction would be "useless" to prevent the irreparable harm posed by the risk of inconsistent judgments. (Ans. Br. at 22.) The proper question is whether an injunction prohibiting MSA from continuing to assign its rights under North River policies would have a substantial beneficial effect. The record below supports the argument that it would.

The record shows that in each of the West Virginia Actions, MSA assigned its rights under a North River policy to the underlying tort claimants *before* they moved to amend their complaints to add North River as a party. (Op. Br. at 10-13.) There is no evidence in the record that any other tort plaintiff has sought to proceed against North River unilaterally, and MSA cannot point to any evidence to the contrary.[2] Based on the record, therefore, the Court below *knew* that when MSA assigned its rights under a North River policy to an underlying tort plaintiff, that tort plaintiff would then file a claim against North River in that action, at which point the Court also concluded that it would be unfair to prevent MSA from participating in that action. What the Court below did not know, and what it could only speculate about, is whether in the absence of an assignment from MSA, any of the underlying tort claimants would proceed directly against North River under West Virginia's declaratory judgment act.

Rather than issue an injunction to prevent what it *knew* would happen if MSA assigned its rights, however, the Court refused to issue the injunction based on the speculation that the injunction requested was useless because it could not prevent what had *never* occurred. As the Court of Chancery noted in *In re Del*

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[2] Although MSA criticizes North River for failing to cite to the record to support this argument (Ans. Br. at 14.), North River cannot provide a specific record cite to prove a negative. More importantly, MSA does not provide a specific cite to the record to show that, in fact, underlying tort claimants are proceeding against North River unilaterally without an assignment of rights from MSA.

Monte Foods Co. Shareholders Litigation, 25 A.3d 813 (Del. Ch. 2011), the Court may issue an injunction that does not completely remedy the harm. The injunction sought here would eliminate the actual harm shown in the record – when underlying tort plaintiffs receive an assignment of rights, they assert claims against North River. That is the harm that is known and which could be stopped by an injunction preventing MSA from continuing to assign rights under North River policies. It may not be perfect to stop all risk of inconsistent judgments, but it will stop the risk that was present in the record below.

D. The Balance of the Equities Favors North River

MSA argues that the balance of equities tipped in its favor because without the ability to assign its rights under North River policies, its ability to settle the tort claims against it would "impaired." This argument has no foundation in the record.

MSA asserts that because North River denied coverage, MSA was "[l]eft alone to defend itself against thousands of lawsuits . . ." (Ans. Br. at 23), creating the impression that without North River's coverage, MSA had no means to protect itself. This contention suffers from several flaws. None of the policies issued by North River contains any obligation to defend MSA, nor has MSA asked North

River, or any of its other insurers, to defend it against the Underlying Claims.[3] In fact, the record shows that MSA is fully capable of defending itself without assigning rights under North River policies. MSA has settled at least 450 claims for over $20 million dollars without a single assignment of MSA's rights under a North River policy. (Op. Br. at 27, 33-34.) MSA cites to no portion of the record to support the contention that without the ability to assign its rights under North River policies, MSA will not have the financial ability to settle underlying tort claims. (*See* Ans. Br. at 23-24.)

Moreover, MSA fails to disclose that North River is one of *many* insurers who provided coverage to MSA during the relevant periods. That fact is evident merely from the caption of the Delaware Action, which seeks declaratory relief as to the liability of 31 separate insurers on over 120 separate policies. (A272; A288-90.) MSA's counsel admitted at argument before the Vice Chancellor that certain of these insurers have paid MSA, thus providing MSA with a separate source of funds from which to pay tort claims. (AR6.) In addition, under MSA's theory of the "trigger" of liability under the multiple policies issued by multiple insurance

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[3] The only "defense" disputes between MSA and its insurers revolve around two issues: (1) for policies that include defense costs within the definition of "ultimate net loss," whether the costs of paying defense are inside or outside the indemnity limits, or (2) for certain policies, such as the one at issue in the W.D. Pa. Action and JU1319, which is at issue in the Delaware Action and the West Virginia Action, whether there is any obligation to indemnify for any defense costs at all.

companies, MSA asserts that it can assign the liability for a claim to *any* policy in effect during the period in which an underlying tort claimant was exposed to a harmful substance while wearing an MSA respirator. *North River Ins. Co. v. Mine Safety Appliances Co.*, Civ. Div. No. GD-10-007432, slip op. at 7 (Pa. Ct. Comm. Pl. Feb. 13, 2014) (summarizing MSA's argument that "the continuous trigger approach adopted in *J.H. France* determines what insurance policies apply to bodily injury claims involving mesothelioma or asbestos-related lung cancer.") (AR7-25.) Put simply, MSA cannot seriously contend that North River is the sole source of potential insurance coverage for any claim it wishes to settle.

MSA does not attempt to excuse its inequitable conduct in contributing to the proliferation of litigation in any other manner. In the absence of any rational justification for these actions, MSA's inequitable conduct should not be condoned. As argued in the Opening Brief, a court of equity cannot be powerless to enjoin MSA from litigating the Persinger, Lambert and McVey Actions on the grounds that it would be improper to prevent MSA from participating in an action in which it is a party, while at the same time be powerless to prevent MSA from continuing to create that very situation. MSA voluntarily chose to litigate its rights under North River policies in the Delaware (and Pennsylvania) courts. That voluntary choice carries with it certain logical consequences, such as having to litigate the claims MSA voluntarily chose to put before the Superior Court. MSA should not

be able to avoid those consequences by engineering litigation elsewhere in plain violation of principles of equity and comity.

CONCLUSION

For all of the foregoing reasons, North River respectfully requests that the Court reverse the portion of the opinion of the Court of Chancery denying North River's request for an injunction prohibiting MSA from assigning rights under any North River policies as part of a settlement with a tort claimant until the Delaware Action is concluded, and remand the matter with instructions to enter the injunction requested by North River.

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