

35738  
~~No. 10-1417-~~

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE EX REL. STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY,

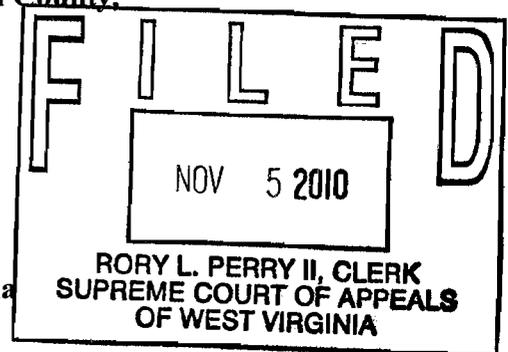
Petitioner,

v.

THE HONORABLE THOMAS A. BEDELL,  
Judge of the Circuit Court of Harrison County,  
West Virginia,

Respondent.

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From the Circuit Court of  
Harrison County, West Virginia  
Civil Action No. 09-C-67-2



**BRIEF OF AMICUS CURIAE NATIONAL INSURANCE CRIME BUREAU**  
**IN SUPPORT OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S**  
**PETITION FOR WRIT OF PROHIBITION**

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As set forth with more specificity in its initial *amicus curiae* brief before this Court in this action, the National Insurance Crime Bureau (“NICB”) is a national not-for-profit organization dedicated to preventing, detecting and defeating insurance fraud through data analytics, investigations and other activities. NICB has a particular interest in State Farm Mutual Automobile Association’s (“State Farm”) Petition for Writ of Prohibition (the “Petition”) as NICB is specifically mentioned on page 7 of the renewed Protective Order that is the subject of the Petition. NICB returns to this Court to underscore the extraordinary adverse impact that protective orders such as the one State Farm is challenging here will have on efforts of governmental law enforcement agencies, insurance regulators and the insurance industry itself to combat organized, criminal insurance fraud in West Virginia.

#### INTRODUCTION

The Circuit Court's October 25, 2010 order imposed terms and conditions with respect to the production of plaintiff's medical records that, *inter alia*, directly contravene West Virginia Insurance Commission regulations and which prohibit the use of plaintiff's medical records consistent with the parameters carefully set out in those regulations. For example, the Insurance Commissioner has explicitly addressed the circumstances and extent of permissible use of medical information and records by insurers, individually, collectively and in cooperation with government law enforcement, to investigate and deter insurance fraud. Yet, in conflict with these directives, the court below entered an order that flatly “PROHIBITS the Defendants from sharing any confidential, non-public information to the NICB, or any third-party in general, without the Plaintiffs' consent.” Oct. 25, 2010 Protective Order at 7. For the reasons set forth

below, and in State Farm's brief in support of its Petition, this Court should grant the Petition and vacate the Protective Order.

1. The Regulation of Claim Information in West Virginia

The West Virginia Insurance Commission, like its counterparts in other states across the country, has been vested by the state Legislature with the authority to oversee the protection and use of consumers' claim information. In West Virginia, the Insurance Commissioner has exercised that authority by implementing and enforcing numerous privacy regulations, including the privacy requirements of the federal Gramm-Leach-Bliley Act, codified at 15 U.S.C. § 6801 *et seq.*, which requires state regulatory authorities to establish appropriate standards relating to administrative, technical and physical safeguards to: "(a) [e]nsure the security and confidentiality of customer information; (b) [p]rotect against any anticipated threats or hazards to the security or integrity of the information; and (c) [p]rotect against unauthorized access to or use of the information that could result in substantial harm or inconvenience to any customer." 114 C.S.R § 62.4.

These West Virginia laws and regulations, which were enacted after extensive hearings, notice and comment and lengthy deliberation, reflect a careful balance between numerous competing interests, including the legitimate privacy interest in limiting disclosure of intimate and personal information, the benefits to consumers of lower insurance premiums and more efficient and timely claim-handling, and the public interest in reducing insurance and medical fraud, including Medicare fraud. Like parallel laws in numerous other jurisdictions, the West Virginia insurance regulations that protect nonpublic health information against improper use and dissemination require

authorization before such information is shared with third parties. However, also in common with other jurisdictions, the regulations contain an explicit exception for the limited, authorized use of such information to investigate and prosecute instances of fraud. This is not an anomaly of West Virginia law; virtually identical provisions exist in statutes and insurance regulations across the country. This consensus is no accident, as these provisions derive from the National Association of Insurance Commissioners (NAIC) Insurance Information and Privacy Protection Model Act, which encourages the sharing of claim information among insurers for antifraud purposes.

In West Virginia, this interest is embodied in 114 C.S.R. § 57.15, which prohibits a licensee from “disclos[ing] nonpublic personal health information about a consumer or customer unless an authorization is obtained from the consumer or customer whose nonpublic personal health information is sought to be disclosed.” The regulation goes on to carve out specific exceptions to this requirement, one of which is “the disclosure of nonpublic personal health information by a licensee by or on behalf of the licensee . . . [for] detection, investigation or reporting of actual or potential fraud, misrepresentation or criminal activity.” 114 C.S.R. § 57.15.2.

The regulations promulgated by the Insurance Commissioner deserve deference both as a matter of law and as a practical matter. As a matter of law, the delegation of regulatory duties to the office of the Insurance Commissioner must be respected and upheld by this Court. *See, e.g., Simpson v. W. Va. Office of the Ins. Comm’r*, 223 W.Va. 495, 678 S.E.2d 1 (2009). As a practical matter, the balancing of the numerous competing interests that went into shaping the privacy laws and regulations at stake here is a complicated and technical task, fraught with potential errors and oversights. The fact

that this is now the second time it has been necessary for State Farm to petition for a writ of prohibition concerning a Protective Order in this case is a clear illustration of just how difficult it is to account for all relevant interests and to make appropriate compromises to accommodate the many competing considerations at stake.

When plaintiffs and courts in individual cases usurp the Legislature's policy-making role or second-guess the Insurance Commission's expertise by imposing restrictions contrary to West Virginia law and regulations, they upset the balance between legitimate privacy interests and fraud prevention struck by the Insurance Commissioner. Further, because individual cases lack the benefit of public comment, public hearings and consideration of all relevant interests, the results are likely to ignore compelling concerns or overlook the legitimate needs of insurers and law enforcement. Indeed, the result is likely to look very much like the counterproductive renewed Protective Order in this case. For this reason, given the need for deference to the existing, carefully-balanced legislative and regulatory determinations governing the treatment of non-public health information, the Court should grant the writ of prohibition and reverse the October 25, 2010 Order.

2. The Impact of the Protective Order on Fraud-fighting Activities in West Virginia.

The simple reality is that, if the Protective Order in this case is allowed to stand, comparable protective orders will be sought and obtained not only before Judge Bedell but throughout the West Virginia legal system, as they were prior to this Court's ruling in July 2010. The effect of that development will be to punch a large hole in the effort of law enforcement and insurers to protect the citizens of this state from insurance fraud.

Fraud detection and prosecution is a compelling public interest. According to data developed by the national Coalition Against Insurance Fraud, insurance fraud “costs Americans ... nearly \$950 for each family” annually.<sup>1</sup> Moreover, major insurance fraud in West Virginia, as throughout the United States, is not typically driven by individual accident claimants, as the court below implied in referring dismissively to Mr. Blank’s inability to commit fraud on account of his death. *See* Oct. 25, 2010 Protective Order at 7 (“The Defendants can be assured that Lynn Blank, their former policy holder, will not be defrauding any insurance companies in the future due to his untimely passing from this Earth.”). This is a common misperception.

When the benefits of insurer antifraud programs and cooperation with law enforcement investigations are raised as compelling interests justifying the careful and limited sharing of nonpublic health information pursuant to state law, plaintiffs often object that no fraud has been alleged in the case at bar, so the antifraud concern is irrelevant. This is not a fair objection. Fraudulent claims are, of course, carefully concealed and made to look innocuous. The nature of insurance and medical fraud – not just by individual claimants but by health care providers, attorneys and other persons – is such that, while an individual claim may not raise any red flags, a pattern of claims by the same person or involving the same third parties may. If, for example, another claim is made by the same party in the future and that claim attempts to conceal prior injuries, an insurer will be unaware of the potential for fraud unless it can access the relevant prior claim information. Similarly, if a health-care provider is fraudulently inflating the value of treatment for reimbursement purposes (a practice known as “up-coding”), an insurer is

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<sup>1</sup> *See* Coalition Against Insurance Fraud, Consumer Information, Insurance Fraud Backgrounder *available at* [http://www.insurancefraud.org/fraud\\_backgrounder.htm](http://www.insurancefraud.org/fraud_backgrounder.htm).

powerless to detect a pattern of misbehavior unless it retains complete files for every claim. Thus, while no fraudulent activity of the plaintiffs here may be alleged, that is not a sufficient reason to exempt plaintiffs' claim information from State Farm's legally-mandated antifraud program. The same argument could be made by virtually every claimant and, if courts were to agree, effective fraud detection would become impossible.

Some very recent examples of cases in which NICB has been involved in West Virginia illustrate how the kind of analysis of information regarding seemingly routine automobile accidents systematically reported by insurers has proven to be critical to developing important insurance fraud cases that have resulted in the conviction of physicians in this state of serious criminal charges.

Dr. John Sharp operated a clinic in Marlinton. He solicited accident patients for unnecessary imaging and other abuses and established a separate company known as WV Imaging and medical facilities in various regions of West Virginia. NICB's investigation, which was prompted by the suspicions of one insurer, began with the identification and review of 196 claims in which Dr. Sharp and his clinic and imaging company allegedly had provided medical services. Those claims were identified through the computerized index of bodily injury claims maintained by ISO; this is the same data base to which State Farm could not provide information under the terms of the order at issue here. In 2009, Dr. Sharp was convicted in federal court for the Northern District of West Virginia of 29 counts of health care fraud, sentenced to many months of imprisonment, and ordered to forfeit more than \$542,000 in assets. His facilities were all closed and their assets forfeited. His conviction was affirmed on appeal. *United States v. Sharp*, Cr. No 2:07cr19 (N.D. W. Va., indictment returned July 20, 2007), *aff'd*, No. 09-

4932 (4th Cir. Nov. 5, 2010). The Sharp prosecution was possible only because of precisely the computerized compilations of insurer accident reports that the protective order here under review would make impossible.

The so-called “Justice Clinic” in Wayne County is another example of how the use of centrally-compiled data about seemingly innocuous automobile accidents of the precise sort that would be barred by the protective order has led to criminal conviction of health care providers. In that case, patients faked injuries in staged accidents in order to obtain narcotics. After an insurer became suspicious regarding one claim it was reviewing, critical information was developed through NICB analysis of claimant information submitted to the ISO databases about 56 prior claims in which that Clinic was identified as providing medical services. This led to a covert undercover investigation at the clinic. Dr. Augusto T. Abad, the medical director of the clinic, and Dr. Theodore Tiano, a partner, have pled guilty and the facility and three linked pharmacies have been dismantled. *United States v. Abad*, Cr. No. 2:10-00024 (S.D. W. Va., information filed Jan. 22, 2010); *United States v. Tiano*, Cr. No. 2:09-00259 (S.D. W. Va., information filed Nov. 18, 2009). Had those auto insurers been subject to protective orders of the type at issue here, that case likely would not have been discovered, investigated and prosecuted.

There are many other comparable cases in West Virginia alone. The crucial common factor is that, if State Farm and other insurers are precluded from providing information about automobile and other accidents to the central data bases maintained by the industry, as the court below has ordered, the cost of insurance to the premium paying public of this state will go up and insurance fraud in this state will go undetected. This is

not a theoretical concern. Insurance fraud in this state is being actively thwarted by the use of these databases in criminal investigations. That, and not the possibility of fraud being perpetrated by a deceased accident victim, as the court below suggested, will be the real consequence if protective orders such as the one issued below are allowed to stand.

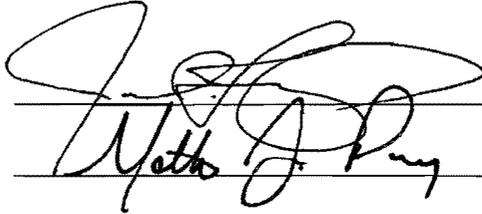
In light of the central importance of the indexing tool to fighting insurance fraud and the minimal character of the medical information compiled, it is not surprising that Judge Stamp of the federal Northern District of West Virginia recently held in *Standiford v. Rodriguez-Hernandez*, Civ. No. 5:10cv24 (Memorandum and Order, Sept. 15, 2010), that “the success of State Farm’s antifraud plan depends on its ability to maintain and access comprehensive indices of prior claims.” *Slip op. at 15*. The federal court went on to determine that “the transmission of [the claimant’s] personal information to [an] indexing bureau [provides] essential information to insurers seeking to prevent fraudulent conduct.” *Id.* It found that “[p]rohibiting State Farm from participating in the BI Index [operated by ISO] would impair State Farm’s business interests in reducing fraud and its attendant costs would burden public interests in combating fraud.” *Id.*

#### CONCLUSION

Under the oversight of West Virginia insurance regulators, strong protections of legitimate privacy interests are already in place and effective. The Court has, in its prior ruling in this matter, precluded the Protective Order at issue here, finding that there was no showing of “good cause” in light of the existing protections of non-public health information under federal and state law and regulations. It is important to the interests of the people of West Virginia that this Court forcefully reiterate that prior ruling now. The National Insurance Crime Bureau respectfully submits that, unless reversed by this Court,

the October 25 Protective Order, both by its own terms and as a precedent for other comparable protective orders, will significantly harm the public interest in ways that are concrete and foreseeable today.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew J. Perry", is written over a horizontal line. The signature is stylized and cursive.

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**CERTIFICATE OF SERVICE**

The undersigned counsel for Amicus Curiae, National Insurance Crime Bureau, hereby certify that I served a true copy of the foregoing Motion for National Insurance Crime Bureau for Leave to File a Brief as Amicus Curiae and Brief of Amicus Curiae National Insurance crime Bureau in Support of State Farm Mutual Automobile Insurance Company's Petition for Writ of Prohibition upon the following individuals, by placing the same in the U.S. Mail, First Class, postage prepaid, on this the 5th day of November, 2010:

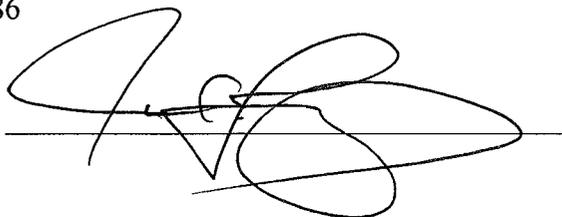
The Honorable Thomas A. Bedell  
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