

COPY

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

F I L E D
10 - 9 2010
ROBY L. PERRY CLERK
SUPREME COURT
OF WEST VIR.

**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.

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

PETITION FOR WRIT OF PROHIBITION

**MARTIN & SEIBERT, L.C.
E. Kay Fuller
(W.Va. Bar No. 5594)
Michael M. Stevens
(W.Va. Bar No. 9258)
Post Office Box 1286
1453 Winchester Avenue
Martinsburg, WV 25402-1286
(304) 262-3209**

*Counsel for State Farm Mutual
Automobile Insurance Company*

TABLE OF CONTENTS

	<u>Page</u>
I. ISSUE PRESENTED	2
II. PROCEEDINGS AND RULINGS BELOW	4
III. ASSIGNMENT OF ERROR	8
IV. ARGUMENT	8
A. PROHIBITION IS THE ONLY REMEDY TO CORRECT A CLEAR LEGAL ERROR.	8
B. THE RESPONDENT EXCEEDED HIS AUTHORITY WHEN HE FOUND GOOD CAUSE FOR THE ISSUANCE OF A PROTECTIVE ORDER IN DIRECT CONTRAVENTION OF THIS COURT'S PRIOR FINDINGS. . . .	9
C. THE RESPONDENT EXCEEDED HIS AUTHORITY BY REQUIRING STATE FARM TO IGNORE VALID JUDICIAL PROCESS AND TO VIOLATE AFFIRMATIVE REPORTING REQUIREMENTS PER W.VA. CODE §33-41-5.	11
D. THE RESPONDENT EXCEEDED HIS AUTHORITY BY REQUIRING STATE FARM TO DESTROY BUSINESS RECORDS.	13
1. The proposed destruction date is less than certain statutes of limitations and would mandate destruction of records before claims expire.	14
2. The Order's destruction period would place State Farm at odds with obligations to preserve rather than destroy evidence when litigation is reasonably anticipated	16
3. State Farm, an Illinois company, must comply with Illinois law which does not permit destruction of insurer business records without prior written consent.	18
E. THE ORDER CONTAINS A NUMBER OF OTHER IMPROPER TERMS AND CONDITIONS, COMPLIANCE WITH WHICH IS EITHER IMPOSSIBLE OR UNDULY BURDENSOME.	19

1.	Persons receiving confidential medical records are already subject to state, federal and State Farm –specific laws, regulations and guidelines and need not be required to execute an additional acknowledgement of privacy.	19
2.	The requirement of certificates of counsel as to destruction is also inappropriate.	20.
3.	The Order advances no legitimate privacy interest.	20
V.	CONCLUSION	22.

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Handley v. Cook</i> , 162 W.Va. 629, 252 S.E.2d 147 (1979)	8
<i>Hinkle v. Black</i> , 164 W.Va. 112, 262 S.E.2d 744 (1979)	9
<i>Seattle Times Co. v. Rinehart</i> , 467 U.S. 20 (19984)	10
<i>Slider v. State Farm, et al.</i> , Civil Action No. 98-C-310, Circuit Court of Ohio County, WV	15
<i>State ex rel. Kees v. Sanders</i> , 192 W.Va. 602, 453 S.E.2d 436 (1994)	8
<i>State ex rel. State Farm Mut. Auto. Ins. Co. v. Stephens</i> , 188 W.Va. 622, 425 S.E.2d 577 (1992)	8
<i>State ex rel. USF&G v. Canady</i> , 194 W.Va. 431, 460 S.E.2d 677 (1995)	8
<i>State Farm Mut. Auto. Ins. Co. v. Bedell</i> , 226 W.Va. 138, 697 S.E.2d 730 (2010)	3, 5, 10, 11, 13, 14, 20
<i>Warren, et al. v. Rodriguez, et al</i> , Civil Action No. 5:10-cv-25, (N.D.W.Va.2010)	10
<i>Zubulake v. USB Warburg, LLC</i> , 220 F.R.D. 212 (S.D.N.Y. 2004)	16

STATUTES and RULES

42 U.S.C. §1395y(b)(7)	15
50 ILAC §901.20	18
215 ILCS 5/133(2)	18
Ohio Rev Code Ann 2305.06	15
W.Va. Code §33-41-1	12
W.Va. Code §33-41-5	2, 11, 12
W.Va. Code §53-1-1	8

W.Va. Code §55-2-4.	15
W.Va. Code §55-2-6.	14
W.Va. Code §55-2-15.	15
W.Va. Code §58-5-20.	11
W.Va. R. App. P. 14.	9
W.Va. R. Civ. P. 26.	9, 10
114 CSR §15-4.2(b).	13
114 CSR §15-4.4(a).	13
114 CSR Series 62.	5
114 CSR §71-3.1.	12

OTHER

Offices of the West Virginia Insurance Commissioner, Informational Letter No.172	13
West Virginia Lawyer Disciplinary Board LEI 2002-01.	15
2009 Annual Report, http://www.wvinsurance.gov	13

I. ISSUE PRESENTED

This Petition arises from an October 25, 2010 Order which makes findings directly contrary to this Court's findings as to whether Plaintiff below established good cause for the issuance of a protective Order. The ruling also violates public policy and requires State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") to ignore or violate other statutory obligations. The Order is outside the mainstream of law across the country. It mandates destruction of business records and in a time frame which violates statutes in West Virginia and deprives State Farm of its own information necessary to defend its interests. It also requires action by State Farm beyond express direction of its domestic regulator in its home state of Illinois.

On October 25, 2010, the Circuit Court of Harrison County entered a Protective Order – its second such Order. The Order, *inter alia*, prohibits State Farm from providing "medical information" to third parties which necessarily includes the Fraud Unit of the West Virginia Insurance Commission. State Farm, however, is statutorily obligated to report suspected fraudulent activity to the Commissioner's Fraud Unit pursuant to W.Va. Code §33-41-5. Any direction by a Circuit Court to ignore statutory obligations is erroneous and must be reversed. Additionally, any attempt to subvert reporting of suspected fraudulent activity is contrary to West Virginia public policy designed to thwart insurance fraud in this State. Additionally, the Order compels destruction of business records, not limited to medical records. State Farm can not destroy its business records under the time frame ordered as such would violate other statutes in West Virginia such as the statute of limitations for breach of contract claims, thus depriving State Farm of information necessary to defend its interests. Moreover, because of the Court's use of the term

“medical information,” the Order’s breadth is so extreme as to call for destruction of substantive contents of a claim file. Destruction of business records, however, is contrary to affirmative duties to preserve information, particularly if other litigation is pending or anticipated. Furthermore, State Farm, an Illinois insurance company, can not destroy any business records without express written permission of the Director of the Illinois Department of Insurance.

The Order is also directly contrary to this Court’s findings in *State Farm Mut. Auto. Ins. Co. v. Bedell*, 226 W.Va. 138, 697 S.E.2d 730 (2010). This Court in *Bedell* specifically found plaintiff had not demonstrated good cause for the issuance of a Protective Order. *Id.*, 697 S.E.2d at 739. Since this Court divested itself of jurisdiction and the case returned to the Circuit Court, there has been no new evidence added to the record below, yet the Circuit Court interjected its findings above this Court’s holding Plaintiff below has now met her burden noting only that medical records are private in nature and protected by privilege between patient and physician and that medical records have the potential to contain embarrassing facts. These findings are true in every case and do not constitute the “particular and specific demonstration of fact” this Court demands before issuance of a Protective Order is appropriate. The Circuit Court acted in excess of its jurisdiction by ignoring the prior findings of this Court and superimposing its own findings with no change in facts in the record.

Although couched in terms of privacy, the import of the Order is to permit the Plaintiff below to be an anonymous claimant. Anonymity, however, is not realistic when insurance claims are made. Plaintiff has placed her medical condition at issue by her claim and her pleadings. She must, therefore, present the evidence to support that claim with the

knowledge privacy is already protected by federal, state and State Farm-specific laws and guidelines. Because Plaintiff's privacy interests are protected by existing law and policies, good cause does not exist for the onerous terms imposed in the October 25, 2010 Order.

The issues raised herein impact all insurance-related personal injury litigation. If the present Order is permitted to stand, no insurer may respond to Insurance Commissioner or law enforcement inquiries or subpoenas. Key business records will be destroyed, thus leaving a party without the ability to defend itself and potentially facing spoliation of evidence claims. The Order does nothing to advance the privacy interests of any claimant but rather harms the public as a whole by emasculating any anti-fraud initiatives and requiring insurers to destroy business records.

Due to an impending trial date and discovery depositions which hinge upon the medical records at issue herein, this matter must be resolved via Petition for Writ of Prohibition as there is no other remedy available.

II. PROCEEDINGS AND RULINGS BELOW

This case arises from a March 20, 2008, two-vehicle accident in which Lynn Robert Blank was killed and Carla Blank was injured. Also killed was Jeremy Thomas, driver of the other vehicle involved. Mr. Thomas and the Blanks were both insured by State Farm. Very shortly after the accident, State Farm offered all available liability and underinsured motorist limits to the Estate of Lynn Blank which has been repeatedly rejected. State Farm received limited medical records concerning the bodily injury claim of Carla Blank and an offer was extended. It too was rejected. Upon appearance of counsel, Mrs. Blank then halted submission of any further medical records to support her higher demands. She alleges she is continuing to be treated for accident-related injuries.

Carla Blank, individually and as administratrix of the Estate of Lynn Robert Blank, filed suit in the Circuit Court of Harrison County on February 12, 2009. The Plaintiff alleges a liability claim against the Estate of Jeremy Thomas, an underinsured motorist claim against State Farm and also includes a declaratory judgment action about available underinsured motorist limits¹ and a generic "bad faith" claim. State Farm repeatedly requested medical records and/or an authorization to obtain the medical records. All such requests were denied with Mrs. Blank demanding a medical Protective Order, the terms of which were overbroad and called for State Farm to violate Insurance Commissioner regulations.

The Respondent issued an Order which was reversed by this Court. *Bedell, supra*. In reversing the prior Order, this Court found Plaintiff below did not establish good cause for the issuance of a Protective Order. When this case was returned to the Circuit Court, there was no change in the record to establish good cause.² The only action which has taken place since this case returned to the Circuit Court's jurisdiction is the filing of a subpoena *duces tecum* for internal confidentiality procedures and safeguards employed by State Farm, State Farm's Motion to Quash said subpoena on multiple grounds, the noticing of the depositions of Plaintiff Blank and Defendant Lana Luby, Administratrix of the Estate of Jeremy Thomas, and a pre-trial conference wherein the Circuit Court set this matter for

1 The specific challenge has never been articulated.

2 Upon return to the Circuit Court, plaintiff issued a subpoena *duces tecum* to State Farm seeking extensive information concerning all safeguards employed by State Farm to protect the security, confidentiality and integrity of customer information. State Farm has moved to quash and for entry of a Motion for Protective Order because the discovery sought is in violation of the Separation of Powers doctrine and impinges upon the Insurance Commissioner's duties to regulate insurer practices to preserve confidentiality of customer information, 114 CSR Series 62, among other grounds. Moreover, exposing the sensitive information sought in the subpoena would not provide the type of evidence advancing either of the two methods this Court has announced is necessary before a Protective Order is warranted. *Bedell, supra*.

trial December 13, 2010. The deposition of Plaintiff Carla Blank is set for November 10, 2010, hence the urgency of this Petition for Writ of Prohibition since Mrs. Blank's medical records will be instrumental in deposition questioning. Without medical records, depositions of physicians have not been scheduled.

On October 25, 2010, the Respondent issued a second Protective Order (see Appendix, **Exhibit A**). The Order, however, is directly contrary to this Court's findings in *Bedell, supra*, which found Plaintiff had not demonstrated good cause for the issuance of a Protective Order. Ignoring that finding and the record which has not been supplemented in any manner, the Respondent has now found Plaintiff below has demonstrated good cause. The terms of this second Protective Order, however, are overly broad and violative of West Virginia law and public policy.

The purported basis for finding good cause is that "medical records are private in nature and are protected by privilege between the treating physician or care provider and the patient. Further, medical records have the potential to contain facts that are embarrassing to the patient, and the law recognizes that the dissemination of medical records must be done with the patient's consent." (See Exhibit A, p. 3).

After finding good cause for the entry of an Order, the Respondent then imposed a number of terms, conditions and restrictions on the parties and their counsel as to the receipt and use of medical records and "medical information," a term which is undefined in the Order.

The Order requires any person receiving "information" to obtain a copy of the Protective Order, agree in writing to be bound by all of its terms and be subject to the jurisdiction of the Circuit Court of Harrison County for enforcement purposes, with copies of

these acknowledgements provided to plaintiff's counsel. (See Exhibit A, p. 5).

The Order further requires destruction or return of all medical records and "medical information" with a certificate from defendants' counsel pursuant to the time frames set forth in the Insurance Commissioner's market conduct examination record retention regulations (See Exhibit A, pp. 5-6). While there is a caveat for defense counsel to further access the information to respond to lawful process or Order of another court with jurisdiction, there is no such caveat for insurers. This, therefore, places insurers in the untenable position of violating either this Order or lawful process or Order of another court as well turning away from affirmative reporting obligations set forth by statute.

The Order then prohibits Defendants from sharing "medical information" with "any third party in general" without the Plaintiffs' consent. (See Exhibit A, p. 7). This too requires State Farm to ignore or violate its affirmative statutory reporting obligations.

Each of the aforementioned terms, restrictions and prohibitions either violate West Virginia public policy and/or require State Farm to violate statutes, valid judicial process and Orders of other courts. It likewise requires destruction of claim files, far beyond medical records, contrary to State Farm's legal obligations to retain such information.

Upon entry of the Order, plaintiff below tendered her medical records. The records, however, remain in the office of counsel, unopened, because State Farm can neither accept nor use the records due to the onerous terms of the October 25, 2010 Order. This places State Farm at a disadvantage to prepare for the upcoming deposition of the Plaintiff and for trial.

This Petition should be granted to obtain judicial finality on the issue of medical Protective Orders – assuming they are even necessary given the plethora of state and

federal laws protecting confidentiality. This continued insistence upon onerous and overbroad Protective Orders with no good cause shown has halted the claim process and further development of this case and has again consumed judicial resources. No good purpose is served under the terms and conditions imposed by the Order if insurers are required to destroy business records. Moreover, harmful results, including higher premiums and costs to all West Virginians, will occur if insurers are specifically prohibited from engaging in fraud-fighting activity.

III. ASSIGNMENT OF ERROR

Did the Respondent exceed his judicial authority and violate West Virginia public policy in contravening the earlier findings of this Court also prohibiting the dissemination of claim information to anti-fraud authorities and mandating destruction of business records?

IV. ARGUMENT

A. PROHIBITION IS THE ONLY REMEDY TO CORRECT A CLEAR LEGAL ERROR.

Prohibition lies as a matter of right where a lower court, having proper jurisdiction over a matter, exceeds its legitimate powers. West Virginia Code §53-1-1; see also, *Handley v. Cook*, 162 W.Va. 629, 252 S.E.2d 147 (1979). Prohibition will issue where the trial court has no jurisdiction, or having such jurisdiction, exceeds its legitimate powers. *State ex rel. Kees v. Sanders*, 192 W.Va. 602, 453 S.E.2d 436 (1994). A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of discretion in regard to discovery Orders. *State ex rel. USF&G v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995); *State ex rel. State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992).

The court below exceeded any legitimate power it possesses when it issued an Order contravening West Virginia public policy designed to prevent insurance fraud. The court below further exceeded its authority when it mandated destruction of business records and when it found good cause for the very issuance of a medical Protective Order despite findings to the contrary by this Court.

In determining whether to grant a rule to show cause in prohibition, this Court must consider the adequacy of other available remedies such as appeal and the overall economy of effort and money among litigants, lawyers, and courts. *Syl. Pt. 1, Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979). Here, no other remedy is available. Immediate relief from this Court is necessary because State Farm cannot accept the records per the terms of the Order and place itself in jeopardy of violating statutes of West Virginia, agreeing to destroy records without the express consent of its Illinois regulator where it is domiciled and agreeing to destroy its entire claim file due to the prohibition on maintaining "medical information." Without receipt of the medical records, State Farm cannot evaluate Plaintiff's claims nor prepare a defense to the claim which deprives it of due process. Thus State Farm requests this Court exercise its original jurisdiction pursuant to Rule 14 of the West Virginia Rules of Appellate Procedure and accept this Petition for Writ of Prohibition, issue a Rule to Show Cause and thereafter grant the Writ of Prohibition reversing the October 25, 2010 Order of the Circuit Court of Harrison County.

B. THE RESPONDENT EXCEEDED HIS AUTHORITY WHEN HE FOUND GOOD CAUSE FOR THE ISSUANCE OF A PROTECTIVE ORDER IN DIRECT CONTRAVENTION OF THIS COURT'S PRIOR FINDINGS.

A Protective Order is proper only upon a demonstration of good cause. Rule 26, West Virginia Rules of Civil Procedure. This Court has already held Plaintiff Blank failed

to meet that burden. In its prior decision, this Court instructed plaintiffs on the two methods by which the burden is met: a showing of either a past failure of State Farm to comply with the state privacy rule and Insurance Commissioner regulations or a reasonable basis that State Farm intended to disseminate private medical information without the claimant's consent in the future. *Bedell*, 697 S.E.2d at 739. Each requires particularized and specific demonstrations of fact. Lacking proof of one of the foregoing, an additional Protective Order is not warranted.

This Court further instructed plaintiffs as to what information may be necessary before seeking an Order that is duplicative of or in addition to federal and state privacy rules already in place. In that regard, Plaintiff must demonstrate why the Insurance Commissioner's rule governing confidentiality – which adopts federal privacy rules - is insufficient. *Id.*, 697 S.E.2d at 739. Subsequent to this Court's opinion, the U.S. District Court for the Northern District of West Virginia considered an identical request and issued an Order holding that existing protections are sufficient to satisfy privacy interests. *Warren, et al. v. Rodriguez, et al.*, Civil Action No. 5:10-cv-25 (entered September 15, 2010) (Appendix, **Exhibit B**).

It is well settled that the imposition of a Protective Order under Rule 26 raises concerns under the First Amendment of the United States Constitution. See, *Seattle Times Co. v. Rinehart*, 467 U.S. 20, 34 (1984). There, the Supreme Court of the United States recognized that restrictions on the ability of a party to use information obtained in civil discovery raises constitutional concerns again reiterating that such Orders are to be entered only upon an appropriate good cause showing because the Order is not a mere formality, but an infringement of the opposing party's constitutional rights. Such an

imposition, the Court held, requires a hard showing of the likelihood of a real threat of injury. Unsubstantiated or unarticulated "fears" or hypotheticals do not suffice.

Plaintiff Blank advanced only those unsubstantiated "fears" and hypothetical situations which this Court rejected. *Bedell*, 697 S.E. 2d at 740. Upon return to the Circuit Court, the Respondent ignored this Court's finding and, with nothing new in the record, reached the opposite conclusion, finding Plaintiff did meet her burden of proving good cause. This Court may take judicial notice of the Circuit Court's docket which demonstrates no addition to the record to support Plaintiff's burden of proof. (Appendix, **Exhibit C**).

The Respondent's contrary finding is based solely on the premise that medical records are private in nature, protected by privilege between patient and physician and have the potential to contain embarrassing facts. (Exhibit A, p.3). Those statements, however, are true in every case involving medical records and does not meet the "particular and specific demonstration of fact" required by this Court to justify the entry of a Protective Order. Circuit Courts are inferior to this Court and are not free to ignore or contravene the findings or directives of this Court. See W.Va. Code § 58-5-20. Absent some additional facts, *i.e.*, those which this Court outlined as necessary to demonstrate the need for a protective Order, such an Order is not warranted. Thus, reversal of the October 25, 2010 Order is justified on this ground alone.

C. THE RESPONDENT EXCEEDED HIS AUTHORITY BY REQUIRING STATE FARM TO IGNORE VALID JUDICIAL PROCESS AND TO VIOLATE AFFIRMATIVE REPORTING REQUIREMENTS PER W.VA. CODE §33-41-5.

West Virginia public policy is designed to fight insurance fraud. In enacting the Fraud Unit, the West Virginia Legislature specifically found:

The Legislature finds that the business of insurance involves many transactions of numerous types that have potential for fraud and other illegal activities. This article is intended to permit use of the expertise of the commissioner to investigate and help prosecute insurance fraud and other crimes related to the business of insurance more effectively, and to assist and receive assistance from state, local and federal law-enforcement and regulatory agencies in enforcing laws prohibiting crimes relating to the business of insurance.

W.Va. Code §33-41-1.

Moreover, any person engaged in the business of insurance has an affirmative duty to report suspected fraudulent activity. W.Va. Code §33-41-5(a), 114 CSR §71-3.1

Despite this clear pronouncement of public policy, the Respondent's Order specifically prohibits State Farm from meeting its affirmative obligation to report suspected fraudulent activity. State Farm is not accusing Carla Blank of fraud. However, State Farm would not at this juncture know if Mrs. Blank has engaged in fraud since the Respondent's multiple Orders have prohibited it from receiving the necessary medical records for review. Moreover, it is usually medical providers, not patients, who are the targets of Fraud Unit investigations for which claim file materials are requested. Under the terms of this Order, State Farm can not respond to any inquiry from the Commissioner's Fraud Unit nor can it respond to any other law enforcement request.

Fraud is a costly endeavor for the citizens of West Virginia. In 2008 alone, the Commissioner's Fraud Unit arrested or indicted 49 individuals on 184 felony counts and obtained 51 convictions. Prosecutions included staged motor vehicle crashes, fraudulent "slip, trip and fall" cases and claims against businesses. Many of the cases investigated

resulted in restitution of funds fraudulently obtained. See 2009 Annual Report at <http://www.wvinsurance.gov>. Such results are not possible without participation by insurers, the very participation barred by the Respondent's October 25, 2010 Order. Without a cooperative atmosphere, fraud will either go undetected or unprosecuted, resulting in higher costs and premiums to all citizens of this State. The Insurance Commissioner made this finding in Informational Letter 172 which states:

Record retention is also an important tool in detecting fraudulent insurance claims. Insurance fraud is a serious and growing problem, which has been conservatively estimated as accounting for ten percent (10%) of the cost of insurance premiums. Consistent maintenance of essential claim records by insurers is crucial to a comprehensive investigation of potentially fraudulent claims. Additionally, use of such claim information is necessary to protect the citizens of West Virginia from insurance fraud.

Any prohibition on providing this critical information is violative of West Virginia law and overriding public policy. For these reasons as well, enforcement of the October 25, 2010 Order must be prohibited.

D. THE RESPONDENT EXCEEDED HIS AUTHORITY BY REQUIRING STATE FARM TO DESTROY BUSINESS RECORDS.

This Court has previously held a circuit court may not issue a Protective Order directing an insurance company to return or destroy a claimant's medical records prior to the time period set forth by the Insurance Commissioner of West Virginia in §§114-15-4.2(b) and 114-15-4.4(a) of the West Virginia Code of State Rules for the retention of such records. Syl Pt. 7, *Bedell, supra*. (emphasis added).

The time frame set forth in the Code of State Rules is the minimum, not maximum, retention period. However, the Respondent now construes this minimum time as a mandatory destruction date without regard to other reasons an insurer must maintain

records for a longer period of time. Moreover, the Respondent's co-mingling of the terms "medical information" and medical records requires destruction of an entire claim file since "medical information" may be contained throughout a claim file apart from discrete medical records. This Court was explicit in its prior finding limiting it to medical records with no such pronouncement concerning "medical information." Syl. Pt. 7, *Bedell*.

The Respondent's Order does not define the term "medical information." Any description of a claimant's injury could be construed as "medical information." Such "medical information" is routinely included in a claim evaluation seeking settlement authority or other entries in a claim file. Per the terms of the October 25, 2010 Order, those entries must likewise be destroyed at an early date without regard to other reasons why that information should be retained.

The West Virginia Insurance Commissioner's record retention regulations are designed for market conduct examination purposes. Thus, they contain only the minimum retention requirements. It is telling that the regulations do not call for the destruction of any business record, only a minimum retention period of records for examination. There is no prohibition against an insurer maintaining documents in excess of these minimums and valid business and public policy reasons mandate longer retention beyond the time frame necessary for a market conduct examination.

- 1. The proposed destruction date is less than certain statutes of limitations and would mandate destruction of records before claims expire.**

West Virginia has adopted a 10-year statute of limitations for breach of contract claims. W.Va. Code §55-2-6. Although such a claim is already filed in the present civil action, it could have been filed after the conclusion of the underlying tort claim up to 10

years from the date of the alleged breach. Under the terms of the October 25, 2010 Order, information critical to a breach of contract claim, however, would be destroyed before that claim expired.³ State Farm is also presently involved in cases in West Virginia which have been pending for several years and can not be expected or called upon to destroy claim file materials relevant to those cases.⁴

In addition, claims of minors and those under disability are granted an extended statute of limitations which again mandates records be maintained for a longer period of time than permitted by the Respondent's Order. Those claims toll the applicable statute of limitations until two years after the minor attains the age of majority or the disability has been removed. W.Va. Code §55-2-15; W.Va. Code §55-2-4.⁵ Additionally, files regarding structured settlements with periodic future payments must be maintained beyond the date of closing of the underlying claim. Reporting requirements imposed by federal law also mandate the retention of claim file materials beyond the period set forth in the Respondent's Order. State Farm must retain medical records and related information to comply with obligations such as coordinating private and public payments to Medicare recipients. See, e.g., Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), 42 U.S.C. §1395y(b)(7). There are severe penalties for not properly reporting such payments to Medicare beneficiaries and State Farm must maintain records even after claims are

³ Bordering states which often involve West Virginia State Farm policyholders have longer statutes of limitations. See, e.g., Ohio Rev Code Ann 2305.06 which carries a 15-year statute of limitations.

⁴ *Slider v. State Farm, et al.* is currently pending in the Circuit Court of Ohio County, West Virginia, Civil Action No. 98-C-310. The underlying case concluded in 1996 and a separate "bad faith" claim was filed. Under the terms of the Respondent's Order, State Farm would have been required to destroy its claim file before the breach of contract/bad faith claim was concluded since it was filed as a separate action.

⁵ The West Virginia Lawyer Disciplinary Board addressed a similar issue in LEI 2002-01, reminding attorneys that client files involving minors must be maintained for a longer period of time than the suggested document retention period.

resolved to determine when or whether there is a duty to report payments and to later demonstrate the basis for its determination.

As a national insurer, State Farm is also subject to class action allegations in West Virginia and other states. Such cases often require claim files in multiple jurisdictions be retained. Those interests likewise are compromised if the destruction period mandated in the October 25, 2010 Order is permitted to stand.

2. The Order's destruction period would place State Farm at odds with obligations to preserve rather than destroy evidence when litigation is reasonably anticipated.

In federal litigation, there is an obligation to maintain records – regardless of any destruction policy or Order – once a party reasonably anticipates litigation. See *Zubulake v. USB Warburg, LLC, (Zubulake V)*, 220 F.R.D. 212, 218 (S.D.N.Y. 2004). This duty imposed by the federal courts includes a duty to suspend routine retention/destruction policies to ensure the preservation of relevant documents. Acceptance of the Respondent's October 25, 2010 Order and its required document destruction without any legal support therefore, places West Virginia outside the mainstream of law in this country concerning evidence preservation. Furthermore, it places State Farm in direct violation of this duty imposed by federal courts.

As a national enterprise, State Farm must adhere to overarching privacy policies as well as take all steps to comply with every state's statutes of limitations and record retention policies. As a result, and in an effort to effectively minimize costs, State Farm has established a uniform record retention policy. This policy sets one standard for the retention of claim file materials. This policy takes into consideration document retention regulations, statutes of limitations, internal hold orders for litigation purposes, and the

expense involved to store as well as purge documents. To do otherwise creates havoc and imposes an unworkable system of purging documents on a case-by-case basis. It would be impractical for State Farm or any other national business to constantly set differing standards on a case-by-case basis as to when documents are to be removed from storage or purged, yet the October 25, 2010 Order imposes such a case-by-case destruction. To permit individual courts to impose differing record retention schedules is an undue intrusion upon business operations, adds significant cost and increases risk to State Farm and its policyholders that is simply not warranted. State Farm has gone to great lengths to create a uniform retention policy so as to meet its evidence preservation obligations, yet this Order mandates just the opposite ordering document destruction. Such destruction mandates are disruptive, fail to consider other legitimate necessities for maintaining records and forces State Farm to violate either this Order or its domestic regulator.

State Farm is involved in litigation each year either directly or on behalf of insureds throughout the state and federal courts. Absent consistent record retention, State Farm faces conflicting risks. Federal courts in particular are extremely sensitive to a party's obligation to maintain evidence and it would be considered inexcusable for State Farm not to maintain records for sufficient time to avoid spoliation of evidence claims. Moreover, State Farm faces conflicting demands for the record retention period with most plaintiffs calling for document retention far greater than the five or six-year time frame set forth in the October 25, 2010 Order. State Farm can not be placed in this lose-lose situation and be placed in jeopardy of sanctions and other penalties if it destroys documents unnecessarily or too early. These competing policy interests alone mandate that courts allow business entities the prerogative to set business-specific record retention schedules. The interests of

claimants are factored into State Farm's document retention schedule and its adherence to federal, state and company-specific privacy statutes, rules, regulations and protocols. State Farm's adherence to these requirements is not contested. Therefore, Plaintiff's attempt to dictate business activities, now adopted by the Respondent, must be rejected.

3. State Farm, an Illinois company, must comply with Illinois law which does not permit destruction of insurer business records without prior written consent.

State Farm must comply with Illinois statutes and administrative codes governing insurers domiciled in the State of Illinois. The Illinois Insurance Code sets forth that no insurer's business records may be destroyed without express authority secured from the Illinois Director of Insurance. 215 ILCS 5/133(2). Furthermore, the Illinois Administrative Code sets forth the procedure to obtain authority to destroy records. 50 ILAC §901.20 sets forth a procedure to compile and submit a list and schedule of records for destruction and requires an affidavit from the Illinois Director of Insurance before any destruction may occur. (Appendix, Exhibit D).

Each of the foregoing provisions was either rejected or ignored by the Respondent in the October 25, 2010 Order, yet each mandates that the Order be reversed.

E. THE ORDER CONTAINS A NUMBER OF OTHER IMPROPER TERMS AND CONDITIONS, COMPLIANCE WITH WHICH IS EITHER IMPOSSIBLE OR UNDULY BURDENSOME.

In addition to the clear violations of West Virginia law and public policy and the requirement State Farm destroy information necessary to its business operations, the Order contains a number of other terms and conditions which are either impossible or unduly burdensome to meet.

1. **Persons receiving confidential medical records are already subject to state, federal and State Farm–specific laws, regulations and guidelines and need not be required to execute an additional acknowledgement of privacy.**

First, the Order requires any person receiving “information” to execute an acknowledgement of receipt of the Protective Order, agree to be bound by its terms and agree to the jurisdiction of the Circuit Court of Harrison County (See Exhibit A, p. 5). This requirement is burdensome and needless. State Farm employees are already bound by all state and federal privacy laws. Additionally, State Farm employees annually execute a Code of Conduct, a copy of which has previously been provided to the Circuit Court, whereby each acknowledges the impropriety of accessing a claim file without a legitimate business need. To require an additional acknowledgement when claims are instituted is practically impossible. Claims are sometimes handled in a team environment or may be moved to other claim representatives upon filing of suit or to handle other lines of coverage which may also need medical records or “information” such as medical payments claims. There is no need to require acknowledgement of the obvious – that medical records are confidential. If the stated goal of the Plaintiff below is to protect the confidentiality of her medical information, that goal is accomplished with state and federal privacy laws and regulations as well as State Farm–specific guidelines and protocols. This additional acknowledgement is superfluous to the laws in existence in this country and serves no legitimate purpose.

To the extent this acknowledgment requirement applies to those outside the claim environment, it is likewise unworkable and unnecessary. For example, the Court may need

to review confidential medical information for purposes of discovery disputes, ruling on evidentiary motions or for trial. Per the Respondent's Order, the Respondent, who already has duties imposed upon him to protect confidential medical records, would be required to sign an acknowledgement and provide same to plaintiff's counsel pursuant to the October 25, 2010 Order.

2. The requirement of certificates of counsel as to destruction is also inappropriate.

The Order imposes obligations upon defense counsel to present certificates of destruction. First, counsel for the Thomas Estate does not represent State Farm and could not direct the actions of State Farm. This Court previously recognized this predicament when it nullified the first protective Order which also included this provision. Counsel for the Thomas Estate owes its duty to the Estate, not to State Farm. As this Court previously held: "Counsel for the Estate, therefore, is not able to bind State Farm to any agreements or otherwise assert control over State Farm." *Bedell*, 697 S.E.2d at 738.

To the extent that requirement also applies to outside counsel for State Farm, again counsel can not secure such a certificate, particularly in light of the Illinois statute whereby State Farm could not destroy the information absent express written permission of the Director of the Illinois Department of Insurance. Terms which are impossible to comply with and which again serve no legitimate purpose in advancing the claims presented further demonstrate why this Order must be reversed.

3. The Order advances no legitimate privacy interest.

Plaintiff below alleges necessity of a medical Protective Order to protect the confidentiality of her medical records. The Respondent agreed and expanded the scope of

the request to include "medical information." However, it is a given that medical records are confidential and are extended heightened security and treatment in the insurance and other industries. Those protections are in place via the Gramm-Leach-Bliley Act, the state Privacy Rule, Insurance Commissioner regulations and through State Farm-specific procedures and protocols. Nothing in the October 25, 2010 Order grants to the Plaintiff below protections any greater than already provided. Moreover, nothing in the October 25, 2010 Order inures to the benefit of insurance consumers in West Virginia. Despite an accident which occurred two years ago and the multiple offers of insurance proceeds, the case has not been resolved due to plaintiff's insistence on "protections" she already has. This is further demonstrated by the issuance of a subpoena *duces tecum* by plaintiff below against State Farm seeking internal policies, procedures and protocols as to accessibility, confidentiality and destruction of information. (Appendix, **Exhibit E**). The irony of the situation is the plaintiff cries out for heightened protection of her medical records before she will validate the claim she filed but simultaneously seeks information that if disclosed would breach the very protections already in place to safeguard her confidential information. Neither the October 25, 2010 Order nor the subpoena *duces tecum* advances plaintiff's claims, again warranting reversal.

To the extent the Respondent has expanded the restrictions on the use of "medical information," such expansion is again unfounded. "Medical information" concerning Carla Blank is already in the public domain. Facts about the accident and "medical information" were published in local newspapers, were televised in news reports and are contained in a plaintiff's attorney's blog, each of which are found using a simple Google search. "Medical information" publicly available about Mrs. Blank includes the fact she was flown to Ruby

Memorial Hospital, that she had no life-threatening injuries and that she was in good condition while hospitalized. (Appendix, website printouts attached collectively as **Exhibit F**). Given that "medical information" is already in the public domain, requiring its destruction from a State Farm claim file will not eliminate the accessibility of the information and serves no legitimate purpose in a Protective Order.

V. CONCLUSION

Plaintiff Blank placed her medical condition at issue when she presented a claim for insurance benefits. She has the right to do so, but she can not then seek to impose undue restrictions on the use of the information necessary to evaluate her claim. All interested parties are acutely aware of the necessity to protect the confidentiality of medical records. Congress, the West Virginia Legislature, the West Virginia Insurance Commissioner and State Farm have each promulgated laws, regulations and guidelines that more than adequately address the issue. Additional "protection" is not necessary and actually impedes the process of evaluating the claim. While all claimants are entitled to confidentiality, they are not entitled to such harsh restrictions that the evaluation process is hampered or to the extent an insurer is called upon to violate other statutes and public policy or forced to risk destruction of information necessary to defend its interests. The terms of the October 25, 2010 Order as so overreaching that they prohibit compliance with other statutes in West Virginia designed to protect all consumers in the State. The terms are also so restrictive as to call upon State Farm to destroy business records before the expiration of time for other legitimate uses of the records and places it at odds with competing duties to preserve, not destroy, business records. Furthermore, the terms of the Order would require State Farm to destroy records in advance of receiving express

authorization to do so by its domestic regulator.

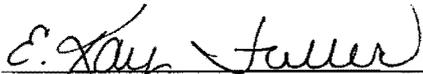
WHEREFORE, the Petitioner, State Farm Mutual Automobile Insurance Company, respectfully requests this Court issue a Rule to Show Cause and thereafter grant a Writ of Prohibition against enforcement of the October 25, 2010 Order of the Circuit Court of Harrison County, West Virginia.

Respectfully submitted,

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**
By Counsel

MARTIN & SEIBERT, L.C.

BY:



E. Kay Fuller
(WV Bar No. 5594)
Michael M. Stevens
(WV Bar No. 9258)
P.O. Box 1286
Martinsburg, WV 25402-1286
(304) 262-3209

VERIFICATION

Rosetta Miller, team manager of State Farm Mutual Automobile Insurance Company, Petitioner in the foregoing Petition for Writ of Prohibition, being duly sworn, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information and belief, and that so far as they are stated to be upon information, she believes them to be true.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

BY: Rosetta Miller
Rosetta Miller
Its: Team Manager

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

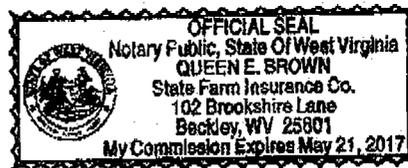
I, Queen E Brown, a notary public in and for said state, do hereby certify that Rosetta Miller who signed the writing above, bearing date the 29th day of October, 2010 for State Farm Mutual Automobile Insurance Company, has this day acknowledged before me the said writing to be the act and deed of said company.

Given under my hand this 29th day of October, 2010.

Queen E Brown
Notary Public

My Commission Expires:

May 21, 2017



MEMORANDUM OF PERSONS TO BE SERVED

Persons to be served the Rule to Show Cause should this Court grant the relief requested by this Petition for Writ of Prohibition are as follows:

The Honorable Thomas A. Bedell
CIRCUIT COURT OF HARRISON COUNTY
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301-2967

Joseph Shaffer, Esquire
Prosecuting Attorney
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301-2967

David J. Romano, Esquire
J. Tyler Slavey, Esquire
ROMANO LAW OFFICE
363 Washington Avenue
Clarksburg, WV 26301

Tiffany R. Durst, Esquire
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, WV 26508

CERTIFICATE OF SERVICE

I, E. Kay Fuller, counsel for the Petitioner, State Farm Mutual Automobile Insurance Company, hereby certify that I served a true copy of the foregoing ***Petition for Writ of Prohibition*** upon the following individuals, via overnight UPS delivery, on this the **4th** day of **November, 2010**:

The Honorable Thomas A. Bedell
CIRCUIT COURT OF HARRISON COUNTY
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301-2967

Joseph Shaffer, Esquire
Prosecuting Attorney
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301-2967

David J. Romano, Esquire
J. Tyler Slavey, Esquire
ROMANO LAW OFFICE
363 Washington Avenue
Clarksburg, WV 26301

Tiffany R. Durst, Esquire
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, WV 26508



E. Kay Fuller

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE