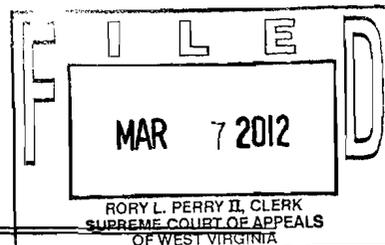


No. *12-0304*



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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STATE EX REL. STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY,

*Petitioner,*

v.

THE HONORABLE JOHN LEWIS MARKS, JR.,  
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. 10-C-176-1*

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PETITION FOR WRIT OF PROHIBITION

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## **QUESTIONS PRESENTED**

Did Respondent exceed his judicial authority by refusing to modify a protective order that:

- (1) was issued without “good cause” under Rule 26(c) because it lacks a showing of clearly defined and serious injury, discounts affidavit testimony without requesting live testimony concerning the adverse impacts on State Farm, and erroneously undervalues the important public, regulatory and private insurer interests at stake;
- (2) does not clearly define the “medical records and medical information” that is subject to its scope;
- (3) applies to evidentiary depositions in which any expectation of privacy is waived, retroactively governs medical records and medical information exchanged before it was entered and even before the litigation commenced, and otherwise violates insurers’ First Amendment, Due Process and contractual rights, thus creating serious adverse consequences for insurers, regulators and West Virginia citizens;
- (4) imposes restrictions contrary to governing laws and regulations thereby usurping the West Virginia legislature’s policy-making role and the insurance commissioner’s expertise;
- (5) prohibits Nationwide and State Farm from accessing, using and retaining “medical records and medical information” to perform vital business and insurance functions, including federal statutory and state regulatory obligations, with potentially calamitous consequences; and
- (6) reflects a fundamental misunderstanding of the role of liability insurance in the resolution of automobile-related tort claims in West Virginia and the needs of defense counsel with respect to medical records and information in such cases.

## **STATEMENT OF THE CASE**

This case stems from an automobile accident on June 6, 2008 involving Plaintiff Matthew Huggins and Defendant Thomas Shuman. Plaintiff’s amended complaint asserts claims against Shuman, his employer, Woodward Video, LLC, and Brian Woodward, the owner of Woodward Video. Defendants are insured by Nationwide Mutual Insurance Company (“Nationwide”), which intervened to address the terms under which insurers could access, use and retain medical

information and records. Plaintiff Huggins is insured by State Farm; the amended complaint includes a medical payments and underinsured motorist (“UIM”) claim against State Farm.

The case proceeded on Plaintiff’s claims against the Defendants, including discovery implicating their insurer, Nationwide. A dispute arose between Plaintiff and Nationwide concerning the terms under which medical information and records would be shared, and this issue was briefed extensively between Nationwide and Plaintiff below. State Farm, as the UIM carrier of Plaintiff, was not at that time actively involved in the discovery or initial aspects of the litigation.<sup>1</sup> However, on May 11, 2011, State Farm sought to stay further action in the Circuit Court with respect to medical protective order issues. *See* Pet. for Stay on Any Action with Regard to Entry of Protective Order, App. at 75-108. Recognizing that the law was evolving and that it was desirable for the parties and the trial court to have as much guidance as possible on the important constitutional and public policy issues at stake, State Farm pointed out that proceedings in *Bedell II* were ongoing (*see infra*) and urged the trial court to await a final determination in *Bedell II* before moving ahead.

On May 23, 2011, without awaiting the final outcome in *Bedell II* or further elucidation of the issues, and in response to Plaintiff’s motion and over the objections of the insurers, the Circuit Court (by order of Respondent Judge John Lewis Marks, Jr.) entered a protective order expressly modeled after the one in *State ex rel. State Farm Mutual Automobile Insurance Co. v. Bedell*, --- W.Va. ---, --- S.E.2d ---, 2011 WL 1486100 (Apr. 1, 2011) (“*Bedell II*”), *cert denied*

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<sup>1</sup> Plaintiff’s policy provides that State Farm “will pay only if the full amount of all available limits of all bodily injury liability and property damage liability bonds, policies, and self-insurance plans that apply to the insured’s damages have been used up by payment of judgments or settlements, or have been offered to the insured in writing.” Policy, Underinsured Motor Vehicle Coverage, Insuring Agreement, App. at 318. *See also State ex rel. All State Ins. Co. v. Karl*, 190 W. Va. 176, 178 437 S.E.2d 749, 751 (1993) (“An underinsured motorist carrier occupies the position of an excess or additional insurer in regard to the tortfeasor’s liability carrier, which is deemed to have the primary coverage. Consequently, the tortfeasor’s liability carrier, having primary coverage, should ordinarily control the litigation on behalf of the tortfeasor insured.” Syl. Pt. 4).

*State Farm Mut. Auto. Ins. Co. v. Bedell*, 132 S. Ct. 761 (2011). See Protective Order Granting Plaintiff Protection for his Confidential Medical Records & Medical Information (the “Protective Order”), App. at 1 (“This Protective Order is consistent with the West Virginia Supreme Court’s Opinion in [*Bedell II*].”). The Protective Order prohibits the use of Plaintiff’s medical records other than for purposes of this litigation. See Protective Order, App. at 1-2.<sup>2</sup> And the Protective Order requires the return or destruction of Plaintiff’s medical records “upon conclusion of the appropriate period established by W. Va. C.S.R. § 114-15-4.2(b).” *Id.* at 2. It also purports to apply its restrictions to medical records obtained or obtainable outside of the discovery process. See *id.* at 4 (“[A]ny medical records previously received by or on behalf of any party in this case or any other person including an employee of any insurance carrier, even if received prior to the Court’s ruling on this Protective Order, are protected regarding the confidentiality and privacy of such records in accordance with the Court’s ruling herein.”).

State Farm petitioned promptly to stay enforcement of the Protective Order pending resolution of a petition for certiorari to the U.S. Supreme Court in *Bedell II*. See State Farm’s Pet. for Stay of Enforcement of the Protective Order, App. at 116-27. State Farm and Nationwide also sought to vacate the Protective Order, and submitted briefs and affidavits demonstrating why the Protective Order should be modified, including materials explicitly addressing issues left unresolved by this Court in *Bedell II*. See State Farm’s Mem. in Supp. of Petition for Stay of Enforcement, App. at 130-79; Supplemental Mem. of Law Concerning Medical Protective Orders & Mot. for Stay of Enforcement of Protective Order, App. at 180-232;

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<sup>2</sup> Although the Protective Order purports to apply to both “medical records” and “medical information,” it was modeled after the *Bedell II* protective order, as to which this Court made clear that the terms “medical record” and “medical information” are used “interchangeably” such that the term “medical information” has “no separate, distinct meaning.” *Bedell II*, 2011 WL 1486100, at \*15. As discussed below, however, this formulation (coupled with the Protective Order’s application as well to “summaries” of protected material), still presents grave problems.

State Farm's Resp. & Joinder to Nationwide's Supplemental Mem. of Law, App. at 233-61; State Farm's Supplemental Mem. Concerning Medical Protective Orders, App. at 272-83. Through these submissions, State Farm and Nationwide fully presented to the trial court the issues posed by the form of Protective Order it entered, in light of the ongoing *Bedell II* litigation, the guidance provided by the rulings to date in that case, and the remaining issues on which this Court had reserved judgment. On November 28, 2011, the U.S. Supreme Court denied the petition for certiorari in *Bedell II* and, on November 30, 2011, this Court issued its mandate in *Bedell II*. Shortly thereafter, in an order dated December 7, 2011, the Circuit Court denied State Farm's requests for it to vacate, stay enforcement and modify the Protective Order. See Order Upon Various Mots. & Issues Considered at the Pretrial Conference of Nov. 7, 2011 ("December 7, 2011 Order"), App. at 11-15.

This petition for a writ of prohibition seeks review of the Circuit Court's December 7, 2011 order, along with a January 13, 2012 further order, which the Circuit Court issued in response to briefing by Nationwide, titled "Combined Order Affirming Medical Protective Orders Entered In These Civil Actions" ("January 13, 2012 Order"). App. at 16-21.

The January 13, 2012 Order reflects the Circuit Court's final determinations as to the medical protective order issues, and refused all relief sought by State Farm and Nationwide. It stated therein, *for the first time*, that the court's prior May 23, 2011 Protective Order was "law of the case" and that State Farm and Nationwide were prohibited from raising further factual or legal issues after the entry of that Order. That statement conflicts with the Circuit Court's own continuing consideration of such issues after May 23, 2011, leading to its December 7, 2011 Order. In addition to this petition for a writ, notices of appeal have been filed by State Farm and Nationwide from the January 13, 2012 Order.

As the case has proceeded toward trial, the application of Respondent's Protective Order has led to significant disputes, including claims that Plaintiff has waived application of the Protective Order, and that a lawyer defending State Farm should be held in contempt for allegedly violating the Protective Order. *See* Order, App. at 6-10. Further, Respondent has ruled that, although the Protective Order's restrictions will not apply at trial, they should apply to evidentiary depositions conducted by Plaintiff in advance of trial, December 7, 2011 Order, App. at 13, and even that they also should "protect medical records and medical information that may have been exchanged before the Protective order was entered . . . ." January 13, 2012 Order, App. at 19.

#### SUMMARY OF ARGUMENT

A writ of prohibition lies where a lower court, having proper jurisdiction over a matter, exceeds its legitimate powers. *See* W. Va. Code § 53-1-1; *Handley v. Cook*, 162 W. Va. 629, 252 S.E.2d 147 (1979). A circuit court "exceed[s] its legitimate powers" in issuing a protective order that contravenes law and regulations of West Virginia and its sister states, the federal Medicare Secondary Payer statute, and the United States Constitution. *See State ex rel. State Farm Mutual Automobile Insurance Co. v. Bedell*, 226 W.Va. 138, 146, 697 S.E.2d 730, 738 (2010) ("*Bedell I*"). In this case, the court below entered orders that are clearly erroneous, and reflect a disregard for both procedural and substantive law. This Court should grant the writ of prohibition to correct the Circuit Court's action and to enable this Court to fully review the appropriateness of judicially-crafted limitations on insurers' access, use and retention of medical records and information.

Important questions of law both were left unresolved after *Bedell I* and *Bedell II*,<sup>3</sup> and

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<sup>3</sup> In *Bedell I*, this Court held unanimously a protective order that imposes restrictions inconsistent with a properly promulgated statute or regulation is invalid. 697 S.E.2d at 737. The Court furthermore struck down a

have emerged in the wake of those decisions. This Court's review is necessary to correct the legally defective orders issued by Respondent, and avoid unintended, unworkable and unconstitutional results. If permitted to stand, the refusals to modify the Protective Order will have calamitous adverse consequences for Nationwide and State Farm and, more broadly, for insurers, regulators and the citizens of West Virginia. Some of these adverse impacts were foreseen by the dissents of Justices Benjamin and Ketchum in *Bedell II*, which noted the grave potential for confusion with respect to application of the phrase "medical records, and medical information or any copies or summaries thereof."

This Court should resolve the issues deferred in *Bedell II*, foreshadowed in Justices Benjamin and Ketchum's dissents, and presented by newly-issued United States Supreme Court precedent on commercial First Amendment rights. First, this Court should now address the issues it consciously deferred in its earlier rulings. Under the rule of *Bedell I*, a protective order

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provision prohibiting State Farm from storing medical records in an electronic format, noting that the West Virginia Insurance Commissioner expressly has permitted the use and maintenance of electronic claims files (W.Va. C.S.R. § 114-15-4.2) and has adopted privacy rules regulating insurers' use of claimant information to perform authorized insurance functions while maintaining appropriate confidentiality of the claimant's "nonpublic personal health information" (W.Va. C.S.R. §§ 114-57-15.1, -15.2). *Id.* at 738-39. The Court also recognized that a claimant's interests in a protective order protecting confidentiality of his medical records vanish once the claimant "consents to their dissemination or until they are introduced at trial." *Id.* at 740.

When the *Bedell* case returned to the Circuit Court for Harrison County, the court entered a modified protective order acknowledging the record retention obligations imposed under West Virginia C.S.R. §§ 114-15-4.2(b), 114-15-4.4(a). *See Blank v. State Farm Mut. Auto. Ins. Co.*, No. 09-C-67-2 (W. Va. Cir. Ct., Harrison County Oct. 25, 2010). However, the protective order remained in conflict with other obligations imposed on insurers under West Virginia law, the laws of other States (including the insurance code of State Farm's home state, Illinois), and under the federal Medicare Secondary Payer statute. It also did not comport with State Farm's contractual rights under the insurance policy or its constitutional rights under the First Amendment and Due Process Clause.

On a second writ of prohibition, this Court reiterated its ruling from *Bedell I* -- that a protective order is invalid if it contravenes a statute or regulation -- but declined to consider the remaining conflicts between the modified protective order and State Farm's statutory and regulatory obligations. *See Bedell II*, 2011 WL 1486100. The Court did address the Protective Order's references to "all medical records, and medical information or any copies or summaries thereof." While determining that "medical information" should be read to mean nothing more than "medical records," *Bedell II* also indicated that the Protective Order reached any "portions" of State Farm's records containing or constituting such "medical records" or "medical information" would be subject to the order, as well as any "summaries of the original instruments." *Id.* at \*16.

that imposes restrictions inconsistent with a properly promulgated statute or regulation is invalid. In *Bedell II*, the Court declined to address conflicts with the federal Medicare Secondary Payer statute,<sup>4</sup> West Virginia insurance regulations other than W. Va. C.S.R. § 114-15-4.2(b), and the Illinois insurance code,<sup>5</sup> believing them not sufficiently developed in the trial court. *See id.* at \*10-11. In the Circuit Court below, State Farm and Nationwide fully presented those issues, but the Circuit Court nevertheless refused to modify a Protective Order that jeopardizes insurers' ability to comply with those obligations. In doing so, the Circuit Court erroneously discounted affidavit testimony provided about the impacts of the order on State Farm, without undertaking an evidentiary hearing to allow live testimony where credibility could be judged. The resulting orders are both clearly erroneous as a matter of law and, because the court below disregarded the evidentiary materials in the record, its orders also manifest disregard for procedural and substantive law.

The Circuit Court incorrectly found that plaintiff's desire for anonymity outweighs public, regulatory and private insurer interests in uses of medical information authorized by law. And it overrode State Farm's contractual and constitutional rights to obtain, use and retain medical information for those authorized insurance functions. Insurers' use and disclosure of nonpublic health information, without customer authorization, is expressly protected under West Virginia insurance regulations for the performance of important insurance functions such as "ratemaking," the detection, investigation or reporting of "actual or potential fraud, misrepresentation or criminal activity," and "actuarial, scientific, medical or public policy

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<sup>4</sup> Insurers will not be in a position to make the required statutory reports or address other secondary payer claims if they may not retain claimants' medical information in their systems.

<sup>5</sup> The State of Illinois requires State Farm to maintain *all* records generated in the operation of its business unless and until instructed to the contrary by the Illinois Insurance Department. Ill. Admin. Code tit. 50, §§ 901.5, 901.20.

research,” along with “internal administration of compliance, managerial, and information systems.” W. Va. C.S.R. § 114-57-15.2. The rulings below not only interfere with State Farm’s necessary use of medical information to perform these functions, they also conflict with West Virginia law and interfere with the authority and responsibilities delegated to the Commissioner of Insurance by the West Virginia legislature.

If the Court leaves the disputed orders uncorrected, it would effectively green-light every West Virginia trial court to enter a similar protective order. The result would be a case-by-case patch-work of judicially-constructed privacy requirements, often contradicting federal and state law, and impeding important insurance functions. This approach would give no deference to the legislative and administrative bodies charged with oversight of insurers, and would directly override the applicable West Virginia regulations that govern insurer use of nonpublic medical records.

Review also is needed to resolve serious issues foreshadowed by the dissenting Justices in *Bedell II*. Specifically, phrases such as “medical records, and any documents containing medical information,” coupled with the “return or destroy” provision in the trial court’s Protective Order, create fundamental and devastating conflicts with the operation of modern relational databases,<sup>6</sup> such as those used by State Farm and other insurers, which rely upon claimant medical information as the basis for database applications that perform critical insurance functions. Indeed, one of State Farm’s Systems Architects most familiar with claims data, Nestor Gutierrez, warned in the court below that excising “medical records, and medical

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<sup>6</sup> Protective orders like the one at issue here are out-of-step with modern electronic record-keeping that actually enhances the protection of confidential records. State Farm operates a secure, uniform electronic claim-handling system that meets the privacy standards of West Virginia law, as well as all other state and federal requirements. That system protects the private information of State Farm’s customers and claimants, while also promoting much more efficient resolution of claims. If Plaintiff—and the tens of thousands of other insurance claimants with whom State Farm deals each day—can obtain different privacy safeguards for their individual files, then a uniform electronic claim-handling system is unsustainable.

information or any copies or summaries thereof” from State Farm’s systems would create “a serious risk that bills would not be paid, mandatory external financial reporting to regulators would be inaccurate, that State Farm could not properly price its products, and/or could not comply with statutorily-required fraud bureau reporting obligations.” Affidavit of Nestor Gutierrez, October 17, 2011 (“Gutierrez Aff.”) at ¶ 8, attached as Ex. B to State Farm’s Supplemental Mem. Concerning Medical Protective Orders, App. at 282. The refusal to modify the Protective Order below thus has calamitous unintended, unworkable and unlawful consequences.

Review also is necessary because the judicially-imposed limits on the insurers’ access, use and retention of medical information violate Nationwide and State Farm’s contractual and constitutional rights. The Protective Order impermissibly restricts use of information that State Farm is contractually entitled to under the insurance policy under which Plaintiff is seeking medical payments and underinsured motorist coverage. *See* Policy, Insured’s Duties, Section 6(a)(3), App. at 331 (requiring the policyholder, when making a claim, to provide State Farm with “written authorization . . . to obtain” not only “medical records” but also “any other information we deem necessary to substantiate the claim”). In light of the U.S. Supreme Court’s recent decision in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), issued after *Bedell II*, this petition is especially well-timed for the Court to consider the important First Amendment concerns these restrictions pose. In *Sorrell*, a Vermont statute was struck down because it (i) “imposed a restriction on access to information in private hands” and (ii) “prohibit[ed] a speaker from conveying information that the speaker already possess[e]d.” *Id.* at 2665 (internal quotation marks and citation omitted). The Protective Order here goes much further than “impos[ing] a restriction” on specified documents – it orders State Farm and Nationwide to

destroy them. The refusal to modify it was therefore clear error.

The Protective Order has other defects, as well. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984), the U.S. Supreme Court made clear that, to be consistent with the First Amendment and the trial court's delegated authority under Rule 26(c) to manage discovery, a protective order can govern only information gained through use of the discovery process. *See also In re Rafferty*, 864 F.2d 151, 155 (D.C. Cir. 1988) (Mikva, J.). Here, the Circuit Court ruled that "extending the medical Protective Order to protect medical records and medical information that may have been exchanged before the Protective Order was entered is appropriate . . . ." January 13, 2012 Order, App. at 19. Absent immediate relief, the Protective Order also will be applied to Plaintiff's evidentiary depositions, despite longstanding authority that evidentiary depositions are the equivalent of trial testimony, and that a party taking such a deposition necessarily waives any objections to its admissibility at trial. And, the Protective Order violates the Full Faith and Credit Clause and the Due Process Clause because it conflicts with state and federal laws and regulations that reasonably require insurers to retain and report claimants' medical information.

The Court should grant this petition to resolve urgent constitutional issues and provide needed guidance to West Virginia trial courts. For all the reasons noted, a writ of prohibition is warranted with respect to the trial court's December 7, 2012 and January 13, 2012 Orders.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure. This case is appropriate for a Rule 20 argument because it involves issues of first impression, issues of fundamental public importance, and constitutional questions regarding the validity of a court ruling.

## ARGUMENT

### **I. THIS PETITION, COUPLED WITH THE PENDING APPEALS, IS AN EXCELLENT VEHICLE FOR THE COURT TO ADDRESS IMPORTANT UNRESOLVED ISSUES CONCERNING INSURER ACCESS, USE AND RETENTION OF MEDICAL INFORMATION AND RECORDS.**

State Farm's petition here, in which it seeks a writ of prohibition in connection with the December 7, 2011 and January 13, 2012 orders, is appropriate and timely. It complements the Notices of Appeal filed in this Court seeking review via direct appeal of the Circuit Court's January 13, 2012 Combined Order Affirming Medical Protective Orders, pursuant to the Collateral Order Doctrine. *See* Notice of Appeal, No. 23-0210 (W. Va. Feb. 13, 2012), App. at 284-302.<sup>7</sup> To the extent all issues herein are not accepted for review via State Farm's Notice of Appeal, the Court should grant this writ of prohibition.

State Farm respectfully submits that this Court should grant this request for a Writ of Prohibition directed to the Circuit Court's December 7, 2011 and January 13, 2012 orders. This Court has recognized that review of orders denying reconsideration may be addressed via writ of prohibition, and that no higher standard of review applies in such cases. *State ex. rel. Crafton v. Burnside*, 207 W. Va. 74, 528 S.E.2d 768, 771 (2000). In fact, the Court recognized in *Crafton* that it was appropriate for trial courts to revisit significant constitutional and public policy issues before them (as State Farm invited the Circuit Court to do), such as those presented by the medical protective order. *Crafton*, 207 W. Va. at 77 n.3, 528 S.E.2d at 771 n.3. ("This Court has recognized the desirability of circuit courts revisiting issues of substantial importance when fundamental rights are at stake: 'We welcome the efforts of trial courts to correct errors they

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<sup>7</sup> As State Farm explained in its Notice of Appeal, by retroactively attributing "law of the case" effect to the Court's medical protective order determinations, the January 13, 2012 Order constituted by its own terms a final order as to an important collateral matter in the case, which is subject to immediate appeal under the Collateral Order Doctrine. *See., e.g., Adkins v. Capehart*, 202 W. Va. 460, 463, 504 S.E.2d 923, 926 (1998).

perceive before judgment is entered and while the adverse affects can be mitigated or abrogated.”) (citation omitted)).

In the December 7, 2011 Order, the Circuit Court denied State Farm’s motions to vacate, stay enforcement and modify the medical Protective Order after the provision of a substantial record of materials to the Circuit Court identifying the various problems it presented.<sup>8</sup> By its January 13, 2012 Order, the court below also refused reconsideration of its May 21, 2012 Order. The January 13, 2012 Order is further in error because it should have been limited to the only pending request for relief, *i.e.*, the request of Nationwide for relief from the application of the order to materials received prior to its entry. In its Order of December 7, 2011, consistent with its correspondence to all parties dated November 9, 2011, the Court had denied all motions “to stay the enforcement or to modify the provisions of the Court’s May 23, 2011, Medical Confidentiality Protective Order.” App. at 13. However, Respondent’s January 13, 2012 Order goes much further and purports to find that Nationwide and State Farm “waived” factual and legal issues respecting the Medical Protective Order to the extent not raised prior to the initial entry of the Order on May 23, 2011, and to hold that the Medical Protective Order at that time became the “‘Law of the Case’ which is a *res judicata* and collateral estoppel principle . . . .” App. at 18 (citing *State ex rel. TermNet Merchant Servs., Inc.*, 217 W. Va. 696, 702 n.14, 619 S.E.2d at 215 n.14 (2005), and *Binkley v. Loughram*, 714 F. Supp. 766 (M.D.N.C. 1989)). This is clear error. This Court expressly has rejected any suggestion that trial court rulings become “set in stone” once they are entered. *See State ex. rel. Crafton v. Burnside*, 207 W. Va. 74, 528

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<sup>8</sup> The January 13, 2012 Order, that is the subject of State Farm’s Notice of Appeal, was entered by the Circuit Court in response to a further application from Nationwide, not State Farm, to modify the medical protective order to except from its operation medical records obtained by Nationwide prior to the original entry of May 23, 2011 Order. App. at 16-18. Accordingly, the last order entered by the Circuit Court addressing the merits of State Farm’s claims respecting the medical protective order was the December 7, 2011 Order.

S.E.2d 768 (2000).<sup>9</sup> A writ of prohibition should be granted to correct the clear legal errors in the trial court's handling of these issues.

For all of the reasons stated, this Court should grant a writ of prohibition with respect to both the Circuit Court's December 7, 2011 and January 13, 2012 Orders.

**II. THE WRIT MUST BE GRANTED TO AVOID UNINTENDED, UNWORKABLE AND UNCONSTITUTIONAL RESULTS AND TO ADDRESS UNRESOLVED ISSUES FROM *BEDELL I* AND *BEDELL II*.**

The specific examples of how Respondent exceeded his authority in refusing to modify or vacate the Protective Order must be considered in their proper context. State Farm and Nationwide are not somehow strangers to this process. Rather, they provide liability insurance (and UIM coverage) to individuals in West Virginia pursuant to legislative mandates. *See* W. Va. Code § 17D-2A-1, *et seq.*; W. Va. Code § 33-6-31(b). Coupled with the legislative mandate that individuals obtain automobile liability insurance is a robust regulatory scheme that governs how insurers must operate in this arena. That scheme, imposed by the West Virginia legislature and others and implemented and regulated by state insurance departments, restricts insurers' ability to use private medical records obtained in connection with the processing and defense of automobile liability claims. However, this same scheme recognizes that insurers must retain and use confidential medical records and information in certain ways for the common benefit – *e.g.*,

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<sup>9</sup> In *State ex. rel. Crafton v. Burnside*, 207 W. Va. 74, 528 S.E.2d 768 (2000), the Court expressly ruled that a decision before it was not subject to the higher standard of review contemplated by Rule 60(b) of the West Virginia Rules of Civil Procedure because it came before the Court on the denial of reconsideration by the trial court respecting an interlocutory case management order. Rather, the Court observed that such interlocutory determinations by a trial court remain subject to review and revision by the trial court pursuant to its inherent powers:

In the instant case, the plaintiffs' motion for reconsideration "should have been viewed as a routine request for reconsideration of an interlocutory . . . decision . . . Such requests do not necessarily fall within any specific . . . Rule. They rely on the 'inherent power of the rendering . . . court to afford such relief from interlocutory judgments . . . as justice requires.'"

*Crafton*, 207 W. Va. at 77, 528 S.E.2d at 771 (citing *Greene v. Union Mut. Life Ins. Co. of Am.*, 764 F.2d 19, 22 (1st Cir. 1985)).

to prevent fraud, to allow for the evaluation of proper claim handling, to price and underwrite insurance products, etc. Review is needed because Respondent's December 7, 2012 and January 13, 2012 Orders provide absolutely no deference to this legislative public policy judgment, which is further supported by insurance regulatory expertise.

Respondent failed to recognize the statutory and regulatory obligations that State Farm must satisfy and in fact prohibited State Farm from meeting those obligations. This works a fundamental hardship upon State Farm, without providing any corresponding additional privacy benefit to the claimant. And, the impact is not solely upon State Farm; such restrictions compromise defense counsel for the insured defendant, in the performance of their duties to their clients. The impact on the tripartite system is thus pervasive, and as State Farm demonstrates below, not justified once the relevant interests are balanced. This Court's consideration of these issues should start from this perspective, and the writ should be granted to address the very problematic consequences to insurers, and the tort system as a whole, posed by such protective orders.

**A. Respondent's Prohibition Of The Use Of Medical Information Other Than For Purposes Of This Litigation And Document Destruction Requirements Prevent State Farm From Performing Necessary And Required Insurance Functions.**

Respondent exceeded his authority by refusing to vacate or modify a Protective Order that is unnecessary to protect Plaintiff's privacy interests, yet prevents State Farm from carrying out necessary insurance functions, including its compliance with West Virginia regulations concerning anti-fraud efforts, and other states' records retention and insurance regulations, as well as with its federal Medicare Secondary Payer obligations.

**1. The Protective Order Creates Unnecessary Conflicts With West Virginia Laws And Regulations Relating To The Provision Of Insurance.**

A Protective Order is not needed to protect Plaintiff's medical records from public dissemination by State Farm. West Virginia insurance regulations generally prohibit insurers from "disclos[ing] nonpublic personal health information about a consumer or customer unless an authorization is obtained from the consumer or customer." W. Va. C.S.R. § 114-57-15.1. However, this same regulation expressly authorizes insurers to use and disclose nonpublic personal health information—without authorization from the consumer—for the performance of specified "insurance functions." W. Va. C.S.R. § 114-57-15.2. By prohibiting State Farm's use of Plaintiff's personal health information other than for purposes of this litigation, the Protective Order nullifies this regulation.<sup>10</sup> Insurer use of claimants' medical information is permitted in the performance of "claims administration; claims adjustment and management; detection, investigation or reporting of actual or potential fraud, misrepresentation or criminal activity; underwriting; policy placement or issuance; loss control; ratemaking ... ; actuarial, scientific, medical or public policy research; ... internal administration of compliance, managerial, and information systems; ... auditing; [and] reporting." *Id.* Notably, West Virginia regulations expressly authorize insurers' disclosure of medical information made in the performance of "insurance functions as permitted by law, required pursuant to governmental reporting authority, or to comply with legal process." *Id.*

The Protective Order below allows State Farm only to retain medical records for the minimum record retention requirement under West Virginia C.S.R. §§ 114-15-4.2(b), 114-15-

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<sup>10</sup> By prohibiting the use of medical information other than for the purposes of this litigation and requiring its return or destruction, the Protective Order in this case imposes restrictions that are inconsistent with properly promulgated West Virginia regulations and statutes. It does so without any finding that the statutorily-permitted uses of medical records would cause a clearly defined and serious injury to Plaintiff.

4.4(a), but does not accommodate any longer record retention advisable for statute of limitations tolling or other reasons. It also does not allow for State Farm's use of medical records and information in other activities permitted by law. For instance, State Farm is permitted under West Virginia insurance regulations to use claimants' medical records and information in the "detection, investigation or reporting of actual or potential fraud," W.Va. C.S.R. § 114-57-15.2, and required by West Virginia law to report suspected fraudulent activity. *See* W. Va. Code § 33-41-5(a); W. Va. C.S.R. § 114-71-3.1 ("All persons identified in W. Va. Code § 33-41-5(a) shall report in writing all suspected fraudulent insurance acts to the Insurance Fraud Unit."). This is a key component of the Insurance Fraud Prevention Act, codified at W. Va. Code § 33-41-1 *et seq.*, which was enacted to ferret out "insurance fraud and other crimes related to the business of insurance." W. Va. Code § 33-41-1(b). Although there was no showing – or finding – in the court below of a particularized interest sufficient to override the government, insurer and public interests in the detection, investigation or reporting of actual or potential fraud,<sup>11</sup> the Protective Order strips State Farm of its right to use medical records in fraud prevention efforts.<sup>12</sup>

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<sup>11</sup> As the Fourth Circuit held under analogous circumstances, the government's interest in identifying illegal activity outweighs a patient's privacy interest in his or her medical records. *United States v. Bailey* (In re Subpoena Duces Tecum), 228 F.3d 341, 351 (4th Cir. 2000). In rejecting the argument that a patient's privacy interest shielded medical records from investigative review, the court explained:

[A]ny disclosure of information in the files of Bailey's patients is not "meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care." *Whalen v. Roe*, 429 U.S. 589, 602 (1977). *The government has a compelling interest in identifying illegal activity and in deterring future misconduct. And this interest outweighs the privacy rights of those whose records were turned over to the government.*

*Id.* at 351 (emphasis added) (citation omitted).

<sup>12</sup> State Farm does not suggest or suspect that Plaintiff is engaged in insurance fraud. In fact, insurance fraud is most common at the health-care provider level. However, the only way to identify provider-level insurance fraud is through the use of complete medical records of individual insurance claimants. Only then can records be accurately analyzed and provider-level fraud be identified and prosecuted.

In fact, in Informational Letter 172, the West Virginia Insurance Commissioner emphasized the importance of record retention in investigating and prosecuting insurance fraud:

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 of insurers is crucial to a comprehensive investigation of potentially fraudulent claims. Additionally, use of such claims information is necessary to protect the citizens of West Virginia from insurance fraud.

App. at 340. As Justice Ketchum has emphasized, “the insurance industry should be allowed to hold down costs by maintaining data banks of medical records to identify malingerers and cheaters and double-dippers.” *State Farm v. Bedell II*, 2011 WL 1486100, at \*20 (Ketchum, J., dissenting).<sup>13</sup>

In this case, the evidence in the record below shows that, to fulfill its West Virginia statutory and regulatory responsibilities regarding detection and reporting of suspected fraudulent activity, State Farm must be allowed to gather and maintain claimants’ medical records and information. *See* Affidavit of Goldie C. Rhodes, July 26, 2011 (“Rhodes Aff.”) at ¶ 4, attached as Ex. B to State Farm’s Resp. & Joinder to Nationwide’s Supplemental Mem. of Law, App. at 246. Detecting insurance fraud not only involves the investigation of individual insureds, but also doctors, lawyers, or other individuals or organizations involved in insurance claims. The process of investigating insurance fraud requires looking at patterns of activity—

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<sup>13</sup> Insurance fraud is a serious issue that negatively impacts the public. *See, e.g.,* Kelly Kennedy, *Government triples money recovered from Medicaid scams*, USA Today, Oct. 19, 2011, available at <http://www.usatoday.com/news/washington/story/2011-10-19/medicaid-fraud-money/50831614/1> (noting that the federal government recovered \$1.85 billion through fraud prosecutions in 2010, from Medicaid fraud alone). The Coalition Against Insurance Fraud (CAIF) estimates that insurance fraud already costs Americans at least \$80 billion a year on the whole, an estimate that equates to *nearly \$950 in costs per American family on an annual basis*. As Justice Benjamin stated in *State Farm v. Bedell II*, “[i]n addition to placing State Farm ‘between a rock and a hard place,’ this Protective Order and others like it have the potential to frustrate the policy goals of the fraud prevention sections of the West Virginia Code.” *State Farm v. Bedell II*, 2011 WL 1486100, at \*22 (Benjamin, J., dissenting).

information which cannot be identified without access to claim information, including medical information, from multiple claim files. *Id.* at ¶¶ 6-7, App. at 246.<sup>14</sup> Fraud detection and investigation require patience, careful scrutiny, and analytical tools capable of processing information across millions of claims. State Farm’s fulfillment of its fraud detection and reporting duties therefore depends on its ability to maintain, analyze and, when appropriate, disclose to appropriate regulators and authorities medical records and information. *Id.* at ¶ 11, App. at 247. Further, a compelling interest in preventing and detecting insurance fraud is shared by the government and the public, along with State Farm.

Because the December 7, 2012 Order and January 13, 2012 Order erroneously refused to reconsider the form of Protective Order to accommodate State Farm’s obligations and the West Virginia regulatory and public interests, a writ of prohibition should issue.

## **2. The Protective Order Conflicts With The Laws Of Other States.**

Respondent’s Protective Order requires State Farm to return or destroy Plaintiff’s medical records and to delete medical information from its documents and files, thus directly conflicting with other states’ laws, including specifically New York and Illinois law, governing retention of insurance company records. *See, e.g.*, 215 Ill. Comp. Stat. 5/133(2); Ill. Admin. Code tit. 50, §§ 901.5, 901.20; *see also* N.Y. Comp. Codes R. & Regs. tit. 11, § 243.2.

In the record below, Dan Cochran, a manager familiar with State Farm’s information retention program, testified by affidavit that State Farm is headquartered in Bloomington, Illinois and must follow the applicable document and record retention requirements of its home jurisdiction, Illinois. *See* Affidavit of Dan Cochran, July 27, 2011 (“Cochran Aff.”) at ¶ 3,

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<sup>14</sup> Indeed, on any given day, over 50,000 casualty insurance claims are filed with numerous insurers across the country. Investigations often take years to develop sufficient evidence, yet the Protective Order at issue would thwart these efforts by insurers, regulators and law enforcement. Ultimately, this harms all West Virginia citizens and insurance consumers, not just State Farm.

attached as Ex. C to State Farm's Resp. & Joinder to Nationwide's Supplemental Mem. of Law, App. at 248. Illinois prohibits the destruction of an insurer's "books, records, documents, accounts and vouchers, or such reproductions thereof" unless "authority to destroy or otherwise dispose of such records is secured from the [Illinois] Director [of Insurance]." 215 Ill. Comp. Stat. 5/133(2); Ill. Admin. Code tit. 50, §§ 901.5, 901.20.<sup>15</sup> The Illinois Administrative Code sets out a detailed process for the destruction of such records, *see* Ill. Admin. Code tit. 50, §§ 901.5, 901.20; *see also* Cochran Aff. at ¶¶ 5, 7, App. at 248-49, and violations of these obligations will "subject the company to a fine or other appropriate regulatory action." Cochran Aff. at ¶ 7, App. at 249. While *Bedell II* was pending on rehearing, the Illinois Department of Insurance specifically advised State Farm that "authority from the [Illinois] Director of Insurance must be secured before destroying or otherwise disposing of claim file materials," and that destroying or disposing of such files without the Director's permission "shall constitute a violation and subject the company to a fine or other appropriate regulatory action." *Id.* (quoting Letter from Ill. Dep't of Ins. to Charles M. Feinen, Counsel, State Farm Insurance (Apr. 29, 2011)). None of this evidence was properly addressed by the Circuit Court, and its December 7, 2012 and January 13, 2012 Orders reflect a persistent disregard for procedural law by wholly discounting key affidavit testimony without any contrary evidence in the record and without holding any evidentiary hearing on the matter.

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<sup>15</sup> Under applicable Illinois regulations, to destroy or dispose of any records, State Farm must submit to the Illinois Director of Insurance:

[L]ists or schedules of records in its custody that are not needed in the transaction of current business or for the final settlement or disposition of any claim arising out of a policy of insurance issued by the company and are not required to determine the financial condition of the company for the period since the date of the last examination report of the company officially filed with the Department of Insurance and that do not have sufficient administrative legal or fiscal value to warrant their further preservation, or that the retention of the records is an unnecessary expense to the company and such records serve no useful purpose.

Ill. Admin. Code tit. 50 § 901.20.

A writ should issue because, without the requested modification, the Protective Order conflicts with other states' fraud reporting requirements, as well as their regulations governing records retention. Again using State Farm's home jurisdiction as an example, the Illinois Director of Insurance is authorized to promulgate reasonable rules requiring Illinois insurers "to report factual information in their possession that is pertinent to suspected fraudulent insurance claims, fraudulent insurance applications, or premium fraud," and "may designate one or more data processing organizations or governmental agencies to assist him in the gathering of such information and making compilations thereof." 215 Ill. Comp. Stat. § 5/155.23. Pursuant to this authority, the Illinois Department of Insurance ("DOI") "officially designate[d] the NICB [National Insurance Crime Bureau] as the repository and developer of a database for questionable insurance claims."<sup>16</sup> Illinois insurers, including State Farm, thus are required to report questionable claims information to the National Insurance Crime Bureau ("NICB"). See 215 Ill. Comp. Stat. § 5/155.23(1) (reported claim information may include, among other things, "[d]ates and description of accident or loss," "[n]ame of claimant's or insured's physician, or any person rendering or purporting to render medical treatment," "[d]escription of alleged injuries, damage or loss," and "[p]laces of medical treatment").<sup>17</sup>

Put simply, without any basis for a determination that these other states' interests are outweighed by a serious risk of embarrassment, oppression or harassment to Plaintiff, State Farm has been placed in the untenable position of being forced to choose between violating the Protective Order or violating the insurance laws and regulations of other states, including

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<sup>16</sup> See Memorandum of Understanding Between the Illinois Department of Insurance and the NICB ("Memorandum of Understanding"), attached as Ex. A to State Farm's Supplemental Mem. Concerning Medical Protective Orders, App. at 277-80. Notably, the NICB is required to "ensure that the information gathered will be kept confidential and that it will only be forwarded to those agencies designated [by law]." *Id.*, App. at 278.

<sup>17</sup> See State Farm's Supplemental Mem. Concerning Medical Protective Orders, App. at 272-83.

Illinois. A writ regarding the denial of motions to stay, modify or vacate the Protective Order should be granted to protect State Farm from being placed in this untenable and unconstitutional position.<sup>18</sup>

### **3. The Protective Order Conflicts With State Farm’s Obligations Under The Federal Medicare Program.**

Since 1980, the Social Security Act (“SSA”), as amended by the Medicare Secondary Payer (“MSP”) statute, has required that Medicare be the secondary payer when coordinating payment for medical services provided to Medicare beneficiaries with certain insurance carriers, referred to in the MSP statute as “primary plans.” 42 U.S.C. §1395y(b)(2)(A). If Medicare has made payments for medical services related to an injury for which a Medicare beneficiary obtained a settlement or judgment, “Medicare can recover the amount of those ‘conditional payments’ from the beneficiary, his or her counsel, the insurer, and other individuals and entities.”<sup>19</sup> In order to evaluate a demand by Medicare for recovery of a conditional payment,<sup>20</sup> an insurer often must rely on a claimant’s medical records to determine whether the conditional payments made by CMS warrant reimbursement. *See Grimes Aff.* at ¶ 9, App. at 243.<sup>21</sup> Because

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<sup>18</sup> As discussed below, the Protective Order violates the Full Faith and Credit Clause and the Due Process Clause of the U.S. Constitution. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 583 U.S. 408, 416 (2003) (due process prohibits imposing “arbitrary punishments”); *North Carolina v. Pearce*, 395 U.S. 711, 738-39 (1969) (Black, J., concurring in part and dissenting in part) (making it impossible for persons “to know which one of [ ] two conflicting laws to follow” would “violate one of the first principles of due process”); *Credit Suisse v. U.S. Dist. Court*, 130 F.3d 1342, 1345 (9th Cir. 1997).

<sup>19</sup> *See* Affidavit of Robin Grimes, July 28, 2011 (“Grimes Aff.”) at ¶ 3, attached as Ex. A to State Farm’s Resp. & Joinder to Nationwide’s Supplemental Mem. of Law, App. at 242 (citing 42 C.F.R. § 411.24).

<sup>20</sup> In some instances, Medicare may seek reimbursement for conditional payments from the beneficiary and/or the insurer that the parties do not believe are related to the injury alleged by the claimant and paid for by the insurer. For example, Medicare may mistakenly seek to recover the costs of medical services rendered after the settlement or judgment took place. Also, Medicare reimbursement issues can arise concerning payments for medical expenses for a condition or injury that is not accident-related where a Medicare beneficiary seeks care for illnesses that are unrelated to the automobile accident and Medicare seeks reimbursement of these unrelated charges.

<sup>21</sup> To coordinate benefits for medical services to Medicare beneficiaries, Congress has required insurers to provide data to the Centers for Medicare and Medicaid Services (“CMS”), which administers the Medicaid and

of the nature of the federal Medicare Secondary Payer conditional payment recovery process, moreover, State Farm must retain claimant medical records well past the date of dismissal, settlement or judgment of a claim. *See Grimes Aff.* at ¶ 11, App. at 244.

A writ should be granted because, despite the evidentiary record below, Respondent improperly failed to accommodate the need to retain and use medical records to address Medicare recovery interests. *See Grimes Aff.* at ¶ 16, App. at 245. Realistically, insurers need flexibility to have each case processed through the same automated information systems to enable timely and cost-efficient identification of any Medicare interests in claims without case-by-case intervention. This is especially so for a national insurer like State Farm, which processes over 30,000 claims on a daily basis. Even for the subgroup of claims in litigation, it is not feasible for State Farm to return separately to each court to request permission to use medical information to address any Medicare recovery interest, nor has Plaintiff shown any basis to impose such a requirement particularly given the explicit West Virginia statutory authorization of insurer use of private health information “as required pursuant to government reporting authority.” W. Va. C.S.R. § 114-57-15.2.

**4. The Protective Order Impedes State Farm’s Compliance With Other Court Orders Or Rules, Such As Litigation Holds.**

As a large insurer, State Farm is a party to litigations throughout the country, including cases in which plaintiffs purport to represent a nationwide class of injured persons. In anticipation of discovery, State Farm must preserve evidence as explained by seminal cases such as *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004). Thus, State Farm’s role as

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Medicare programs. In addition, Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 imposes mandatory obligations on “responsible reporting entities,” including automobile liability insurers like State Farm, to report any payment made to Medicare beneficiaries. *See* 42 U.S.C. § 1395y(b)(8). The objective of the reporting requirements is to allow Medicare to ensure that those parties who are primarily responsible for payment of medical costs pay them, rather than Medicare, which is a secondary payer (and thus not the primary payer).

a litigant in other cases may independently require State Farm to retain and preserve unaltered claim files. Because State Farm's record retention practices must accommodate such litigation-driven preservation orders, Respondent's refusals to stay, modify or vacate the Protective Order risk conflict with State Farm's duties to sister courts.

**B. Requiring Insurers To "Return Or Destroy" All "Medical Records And Medical Information Or Any Copies Or Summaries Thereof" Will Cause Calamitous Consequences In Light Of The Practical Operation Of Modern Information Systems.**

The problems outlined above have a common theme. In all instances, the Protective Order issued by Respondent improperly restricts State Farm's ability to use and disclose medical records and information as authorized by law in the performance of its insurance functions, including obligations under state and federal law. *See supra* Section I.A.; *see also* W. Va. C.S.R. § 114-57-15.2. In all instances, the Protective Order improperly overrides state and federal law without any finding of a serious and particularized injury to Plaintiff of leaving in place the existing regulation of State Farm's use of private health information. West Virginia law explicitly permits insurer use of medical records and information to, *inter alia*, facilitate the timely and efficient processing of claims; ensure sufficient regulatory oversight by appropriate governmental bodies; and protect against fraud and abuse. W. Va. C.S.R. § 114-57-15.2. But by refusing to modify the order, Respondent forbid use of Plaintiff's medical records and information for these statutorily authorized and required insurance functions. This poses practical and concrete problems. In fact, there would be unintended and potentially insurmountable harm from applying the "return or destroy" requirements of the Protective Order to all "medical records and medical records and any copies or summaries thereof."

Protective orders like the one at issue here appear to contemplate a paper file world where a file may be readily excised of certain pieces of paper, which have not themselves

generated any related or derivative data within a company.<sup>22</sup> They are fundamentally out-of-step with modern electronic record-keeping and information systems. As explained further below, requiring State Farm to return or destroy Plaintiff's nonpublic medical records will disrupt State Farm's information systems and impair State Farm's ability to promptly process insurance claims and to perform other important insurance functions. This is both undesirable and impermissible, because State Farm's administration of its information systems is itself a protected insurance function. *See* W. Va. C.S.R. § 114-57-15.2 ("internal administration of compliance, managerial, and information systems").

If left uncorrected, the orders below could result in calamitous consequences, because insurers' business systems, including State Farm's database systems, depend in large part on interconnected computer-based systems that use nonpublic medical data. *See* Gutierrez Aff. at ¶ 3, App. at 281 ("Claims data is used to support over 100 claim application functions that enable claim handling business activities and feed data to over 150 non-claims business activities."). As one of State Farm's Systems Architects, Nestor Gutierrez, explained, business activities reliant on claims data include:

(a) Processing of consolidated payments, in which, for example, State Farm aggregates payments across multiple claims into a single payment to a given provider, or multiple payments within a given claim can be aggregated into one payment to a medical provider who might provide ongoing treatment (such as physical therapy);

(b) Financial/Statistical Reporting -data is reported outside of claims to State Farm's Financial/Statistical areas where the data is used to do statistical reporting as well as used to update State Farm's general ledger. State Farm's statistical reporting and ledger reporting must be kept in balance, and some of this information must also be reported to external regulators;

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<sup>22</sup> A single paper claim file would frustrate the efficient and effective processing of a claim. Electronic claim records may be accessed simultaneously by multiple units handling a single claim, such as medical payments, liability, uninsured or underinsured motorist, property damage, and subrogation units. Customer service and timely payment of claims is dependent on electronic access to and processing of data and would be seriously impaired by a requirement to maintain only a single paper claim file.

(c) Ratemaking, in which State Farm uses claim payment and other data as part of an internal process to set rates, which in some jurisdictions must be actuarially justified and approved by state insurance departments;<sup>23</sup> and

(d) Fraud detection, including jurisdictions in which State Farm must broadly report claims data to state-mandated clearinghouses to enable fraud analysis which helps prevent unnecessary rate increases.<sup>24</sup>

*See* Gutierrez Aff. at ¶ 4, App. at 281.<sup>25</sup>

By seeking destruction or return of nonpublic medical information without regard to its use in systems necessary for approved insurance functions, *see* W. Va. C.S.R. § 114-57-15.1, the Protective Order “create[s] a significant risk of serious instability to the database environment itself or applications reliant on that data.” *See* Gutierrez Aff. at ¶ 5-6, App. at 281. Further, deleting medical records and information from State Farm’s electronic databases “would create a serious risk that bills would not be paid, mandatory external financial reporting to regulators

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<sup>23</sup> Insurers use medical records in ratemaking, underwriting, and pricing insurance. The provision of insurance coverage is predicated on the “law of large numbers.” Insurers thus must continually analyze an expanding base of aggregated data gleaned from medical records in order to better refine their actuarial research and analysis. Doing so enables insurers to properly price insurance and to better serve consumers in a cost-efficient manner. By impeding access to relevant medical records, protective orders like the one issued by Respondent harm policyholders because decisions based on incomplete records are more likely to result in inaccurate claim adjustment, inefficient analysis, and correspondingly higher insurance costs.

<sup>24</sup> Protective orders like the one in this case, which are increasingly being sought, severely undercut the ability of regulators, law enforcement agencies and insurers to detect and prosecute fraud effectively in two ways. First, they impose prior restraints that prevent fraud reporting in the first instance. Second, the restraints and mandatory document destruction requirements preclude law enforcement or others from access to impacted files should they become relevant to an investigation.

<sup>25</sup> Public safety and health research is another insurance function protected by West Virginia law. *See* W. Va. C.S.R. § 114-57-15.2 (“medical or public policy research”). Such research and analysis serves as an early detection system, uncovering health and safety risks that may be useful to support federal highway safety efforts. For example, a study of automobile claims involving State Farm insureds reporting injuries to children in an automobile accident showed that exposure to front seat passenger airbags increased the risk of both minor injuries, including facial and chest abrasions, and more serious injuries, particularly upper extremity fractures in children seated in the front seat in cars where airbags deployed. *See* Durbin, D., Kallan, M., Elliott, M., Arbogast, K., Cornejo, R., & Winston, F., *Risk of injury to restrained children from passenger airbags*, Annual Proceedings Association for the Advancement of Automotive Medicine Association for the Advancement of Automotive Medicine, 46, 15-25 (2002), available at <http://www.ncbi.nlm.nih.gov/pubmed/14522663>. Further, it enables insurers to better allocate health and safety risks and thus to provide insurance to American consumers more cost-efficiently.

would be inaccurate, that State Farm could not properly price its products, and/or could not comply with statutorily-required fraud bureau reporting obligations.” Gutierrez Aff. at ¶ 8, App. at 281.

Moreover, these risks are exacerbated where a protective order employs vague or ambiguous terms. The Protective Order, by its terms, purports to apply not only to medical records but also to “medical information, or any copies or summaries thereof,” vague terms left undefined in the Protective Order. In recognition of the “confusion over the meaning of the phrase ‘medical information,’” this Court stated in *Bedell II* that the terms “medical record” and “medical information” are used “interchangeably” such that the term “medical information” has “no separate, distinct meaning.” 2011 WL 1486100, at \*15. Even with this limitation, however, the Protective Order also extends to “summaries” of information and it remains highly unclear, at best, as to whether or when the extraction of medical information from any records produced by the Plaintiff will constitute a “summary” of information.

Importantly, at least certain uses of nonpublic medical information in State Farm’s electronic database systems may be mandated by law. There is rapid movement towards widespread adoption of electronic health records (“EHR”) which proponents urge should be used by all stakeholders: patients, insurers and the government, as well as health care providers. The federal government is leading the way through the federal Health Information Technology for Economic and Clinical Health Act (“HITECH Act”), which was enacted as part of the American Recovery and Reinvestment Act of 2009. *See* 42 U.S.C. § 300jj, *et seq.*<sup>26</sup> Electronic record-keeping reduces costs and facilitates the exchange of medical information among members of the

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<sup>26</sup> The HITECH Act aims to accelerate adoption of EHR and facilitate the use and exchange of information in order to improve health care and facilitate health care research, while safeguarding the privacy of patient health information. *See* 42 U.S.C. § 300jj-11. To that end, one specific objective of the HITECH Act is the “utilization of an electronic health record for each person in the United States by 2014.” 42 U.S.C. § 300jj-11(c)(3)(A)(ii).

health care industry in order to improve medical care. But the Protective Order prohibits the use of Plaintiff's medical records other than for purposes of this litigation. *See* Protective Order, App. at 1-2. By forbidding the retention and use of nonpublic medical information in electronic databases designed to support insurance functions as approved by law, *see* W. Va. C.S.R. § 114-57-15.1, the Protective Order is at odds with the modern day use of electronic systems in all facets of business, including increasing federal and state *mandated* uses of electronic records by insurers. For example, the State of Minnesota requires “all group purchasers”—a term that includes State Farm<sup>27</sup>—and health care providers to “exchange claims and eligibility information electronically.” *See* Minn. Stat. § 62J.536(1)(g).<sup>28</sup> Minnesota is not an outlier. It is in fact a good example of the widespread movement across the nation to adopt standardized electronic data interchange standards for the electronic submission of claims and electronic payment transactions involving health care services. *See, e.g.*, Colo. Rev. Stat. § 10-4-642(4)(a)(II) (permitting claims to be submitted to insurers electronically).

By disrupting State Farm's information systems and insurance functions, the Protective Order, given the court's refusals to modify it, has unintended, unworkable and impermissible effects. In addressing insurer rights to access, use and maintain nonpublic medical information, this writ petition presents issues of great importance which merit immediate review.

**C. The Protective Order's Prior Restrictions On Speech And Document Destruction Requirements Violate Insurers' First Amendment Rights.**

The right to maintain, use and disseminate information obtained lawfully is protected

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<sup>27</sup> The term “group purchaser” is defined to mean “a person or organization that purchases health care services on behalf of an identified group of persons, regardless of whether the cost of coverage or services is paid for by the purchaser or by the persons receiving coverage or services,” and expressly includes “the medical component of automobile insurance coverage.” Minn. Stat. § 62J.03(6).

<sup>28</sup> Compliance with this and other provisions of Minnesota's Health Care Administrative Simplification Act is enforced through the threat of “civil money penalt[ies].” Minn. Stat. § 62J.536(2)(h).

under the First Amendment. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011). To survive First Amendment scrutiny, a movant seeking a protective order must show a need for the order, as supported by a proper finding of good cause, and the order must burden First Amendment rights no more than necessary to protect the interest asserted. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). A protective order cannot restrict the use of information obtainable outside of the discovery process, *see id.* at 34, as such restrictions on outside information amount to an unconstitutional prior restraint on speech. *See Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983).

The Protective Order entered by Respondent fails on all counts: there is no need for the Order because Plaintiff's asserted privacy interest already is protected by existing state and federal law; Plaintiff failed to make the requisite factual showing to support a finding of good cause; and the Protective Order unnecessarily intrudes upon State Farm's right to retain and engage in limited use and disclosure of Plaintiff's medical records, as authorized (and circumscribed) by law. It was therefore clear error to refuse to modify the Protective Order. Further, the Circuit Court erred in dismissing affidavit testimony submitted by State Farm concerning the effects of the order, particularly without holding an evidentiary hearing to assess live evidence on these points. A writ of prohibition should issue for this reason, as well.

**1. There Is No Need For The Protective Order Because Plaintiff's Asserted Privacy Interest Is More Than Adequately Protected By Existing Safeguards Provided By Federal And State Law.**

As this Court recognized in *Bedell I*, State and federal regulations and statutes already circumscribe insurer use of nonpublic personal medical information and provide protection to Plaintiff's asserted privacy interest. West Virginia insurance regulations provide that, unless an exemption applies, an insurer "shall not disclose 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.” W. Va. C.S.R. § 114-57-15.1. Additionally, the federal Gramm-Leach-Bliley Act, codified at 15 U.S.C. § 6801, *et seq.*, protects against the disclosure of nonpublic personal information. And West Virginia law ensures compliance with this important federal legislation. *See* W. Va. Code § 33-6F-1(a) (“No person shall disclose any nonpublic personal information contrary to the provisions of Title V of the Gramm-Leach-Bliley Act, Pub. L. 106-102 (1999).”). State Farm fully complies with these applicable federal and state regulations,<sup>29</sup> as well as its own internal requirements for confidentiality. *See* State Farm Code of Conduct 2008, attached as Ex. D to State Farm’s Resp. & Joinder to Nationwide’s Supplemental Mem. of Law, App. at 252-60.

Given the protections already existing for Plaintiff’s asserted medical privacy interest, there is no risk that State Farm would publicly disseminate Plaintiff’s private health information. *See Warren v. Rodriguez-Hernandez*, No. 5:10CV25, 2010 WL 3668063, \*5 (N.D. W. Va. Sept. 15, 2010) (declining to enter order prohibiting dissemination of plaintiffs’ medical records because there was no showing that existing protections were insufficient to safeguard plaintiffs’ privacy interests).<sup>30</sup> Moreover, State Farm seeks to make authorized use of medical records and information that present no risk of embarrassment or humiliation to Plaintiff and thus implicate

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<sup>29</sup> It is important to recognize that the policy applicable to this case is expressed through Title V of the Gramm-Leach-Bliley Act, Pub. L. 106-102 (1999), which specifically tasks the “State insurance authorities,” 15 U.S.C. § 6805(a), with the responsibility of promulgating regulations “to insure the security and confidentiality of customer records and information.” 15 U.S.C. 6801(b)(1). In furtherance of Gramm-Leach-Bliley, the West Virginia Insurance Commissioner promulgated regulations containing strict requirements that protect a policyholder’s personal health information against improper use and dissemination to third parties, but expressly authorizing the use of nonpublic personal health information for specified insurance functions. W. Va. C.S.R. § 114-57-15.2 (2011). While these regulations are applicable here, “HIPAA does not apply to automobile insurance, which is at issue in this case.” *Warren v. Rodriguez-Hernandez*, Civ. A. No. 5:10CV25, 2010 WL 3668063, at \*5 (N.D.W. Va. Sept. 15, 2010).

<sup>30</sup> Indeed, legal scholars have criticized abstract invocations of amorphous privacy rights and questioned whether they should be judicially enforceable. *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Penn. L. Rev. 477, 477 (2006) (“Privacy is far too vague a concept to guide adjudication and lawmaking, as abstract incantations of the importance of ‘privacy’ do not fare well when pitted against more concretely state countervailing interests.”).

no privacy interest. For example, the use of medical information for public safety, industry research, and other purposes authorized by state law does not implicate any privacy interest or medical privilege so long as the information has been stripped of any identifying information so that it cannot be connected to a specific individual. *See Seattle Times*, 467 U.S. at 35.<sup>31</sup>

**2. Even Assuming That Plaintiff's Privacy Interest Warranted Further Protection, Plaintiff Failed To Make The Requisite "Good Cause" Showing To Justify This Protective Order.**

The Circuit Court's refusal to reconsider, vacate or stay enforcement of its medical Protective Order was clearly erroneous because West Virginia Rules permit the entry of a protective order only upon a demonstration of good cause. *See W. Va. R. Civ. P. 26(c)* (allowing a protective order upon a "good cause" showing that a protective order is "require[d] to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"). The First Amendment demands a rigorous good cause showing. Conclusory or stereotypical assertions are insufficient; a party seeking a protective order must demonstrate good cause by a particular and specific demonstration of fact. Thus, a party who fails to offer specific evidence of a "clearly defined and serious injury" has not shown good cause under *W. Va. R. Civ. P. 26(c)*.<sup>32</sup>

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<sup>31</sup> In addition, generic medical information that does not rise to the level of information "about our intimate selves," *Byron, Harless, Schaffer, Reid & Assocs., Inc. v. State ex rel. Schellenberg*, 360 So.2d 83, 92 (Fla. App. 1978), or does not reveal a "personal matter," *Whalen v. Roe*, 429 U.S. 589, 599 (1977), is not a proper subject of a protective order. General descriptions of an injury that do not reveal medical records or communications between a patient and a physician are considered non-confidential and are not a proper subject of a protective order. *See Restatement of Torts, Second § 652D cmt. f* ("[T]hose who are the victims of ... accidents" are considered "involuntary public figures" about whom the public has a legitimate interest in being informed). Such persons lose their reasonable expectation of privacy with respect to reports on those events, including material details thereof. *See Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 488 (Cal. 1998) ("Automobile accidents are by their nature of interest to that great portion of the public that travels frequently by automobile.). Nor can Plaintiff claim to have an expectation of privacy for medical matters that will be the subject of testimony at trial. *See Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 207 (3d Cir. 1991).

<sup>32</sup> As the U.S. Supreme Court has emphasized, where a protective order limits the use and dissemination of information, the "good cause" standard requires consideration of the nature and magnitude of both the interests asserted in support of the protective order and the First Amendment rights implicated by the order, as well as

Furthermore, the good cause showing that plaintiff needed to make here must be measured against the evidence before the court below of the adverse impacts imposed by the protective order upon State Farm, insurance regulators, and the public at large. Before the court was a substantial body of evidence presented by State Farm, through affidavits showing the substantial problems presented to State Farm, insurance regulators and the public. *See App.* at 242-51, 281-82. Respondent ignored this evidence entirely -- which it was not permitted to do in the absence of holding a hearing where live testimony would have been provided so that evidence and the credibility of the witnesses could have been assessed on the merits.<sup>33</sup>

Here, Plaintiff cited no specific injuries that will—or are reasonably likely to—result from State Farm’s use and retention of his medical records as authorized by existing law and regulations. Plaintiff’s entire argument that “good cause” exists to support the Protective Order here is his conclusory statement that his medical records are “inherently private,” Pl.’s Mot. for Protective Order, App. at 31; Pl.’s Reply to Nationwide’s Resp. to Plaintiff’s Mot. for Protective Order, App. at 70, coupled with his subjective belief that his medical records would be “kept strictly confidential between himself and his [medical] professionals,” Plaintiff’s Mot. for Protective Order, App. at 34. This falls far short of the “clearly defined and serious injury” required to support a proper “good cause” finding. Moreover, Plaintiff’s subjective belief that

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whether the protective order will actually afford the protection it purports to provide. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02 (1981) (“[A protective] order limiting [First Amendment rights] should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.”); *id.* at 102 (criticizing the lower court for failing to engage in “careful weighing of [the] competing factors”). “[S]uch a weighing—identifying the potential abuses being addressed—should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.” *Bernard*, 452 U.S. at 102.

<sup>33</sup> *Cf. Banner Life Ins. Co. v. Mark Wallace Dixon Irrevocable Trust*, 206 P.3d 481, 491-92 (Idaho 2009); *Trujillo v. Indus. Comm’n*, 735 P.2d 211, 214 (Colo. App. 1987) (“An assessment of an affiant’s credibility can only be made through consideration of his demeanor while testifying, the reasonableness of his testimony, and the strength of his memory.”).

his medical records would be “kept strictly confidential between himself and his [medical] professionals” is unreasonable given that he expressly consented to State Farm’s obtaining of his medical records and information. *See* Policy, Insured’s Duties, Section 6(a)(3), App. at 331 (policyholder, when making a claim, must provide State Farm with “written authorization . . . to obtain” not only “medical records” but also “any other information we deem necessary to substantiate the claim”). By filing a claim with State Farm, Plaintiff expressly waived his right to confidentiality as to any medical record related to his claim of injury.

In any event, this is not a dispute about *widespread public dissemination* of Plaintiff’s personal information. Under governing law, State Farm cannot disclose nonpublic personal health information except in authorized circumstances. *See* W. Va. C.S.R. § 114-57-15.2. There is no basis to conclude that State Farm’s *retention and limited use* of medical information in order to fulfill its authorized insurance functions will cause “annoyance, embarrassment, oppression, undue burden or expense.” W. Va. R.C.P. 26(c). *See also Nat’l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 762-63 (2011). It therefore is not surprising that the Protective Order itself contains no express finding of good cause and in fact never uses the phrase “good cause.” *See generally* Protective Order, App. at 1-5. Given the trial court’s failure to properly assess “good cause” after full briefing and evidentiary submissions, a writ of prohibition should issue with respect to the December 7, 2012 and January 13, 2012 Orders.

### **3. The Protective Order Intrudes Upon State Farm’s First Amendment Rights.**

State Farm's retention and use of data both internally and in communicating with state and federal governmental and quasi-governmental authorities, as well as other organizations and entities is protected speech under the First Amendment.<sup>34</sup> Respondent’s prohibition on all use of

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<sup>34</sup> In *Sorrell*, the United States Supreme Court recognized that “[f]acts . . . are the beginning point for much of

and dissemination of such information by State Farm by requiring it to destroy its records and data is a content-based prior restraint on the “dissemination of information,” *see Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011), that (1) does not serve “a compelling governmental interest” and (2) is not “narrowly tailored” to serve the interest at issue. *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 615 (1982)). Accordingly, Respondent’s actions are not permissible under the First Amendment.

State Farm uses claims data, including medical information, in internal communications among its employees and in external communications with regulators and others. The ability to communicate claims data internally is crucial to State Farm in various business aspects, including the research and evaluation necessary to rate-setting, underwriting, and business and financial analysis and reporting, as well as to State Farm’s internal analysis and examination of its claims handling and litigation practices and outcomes. The ability to communicate claims data externally is crucial to accurate reporting of financial information to state regulators, presentation of market conduct and other information to state regulators. In addition, insurance company claims data, including medical information, also forms the basis of nationwide databases that generate research on vehicle safety design. The ability to communicate such

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the speech that is most essential to advance human knowledge and to conduct human affairs.” *Sorrell*, 131 S. Ct. at 2667. Thus, in *Sorrell*, the Court rejected the argument that the data at issue (prescriber information) was not speech at all, but “a mere commodity.” *Id.* The Court reaffirmed the basic principles that “[t]he First Amendment protects even dry information, devoid of advocacy, political relevance, or artistic expression,” *id.* at 2666-67 (citation omitted), and “[a]n individual’s right to speak is implicated when information he or she possesses is subjected to ‘restraints on the way in which the information might be used’ or disseminated.” *Id.* at 2665 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)); *see also Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (“If the acts of “disclosing” and “publishing” information do not constitute speech, it is hard to imagine what does fall within that category . . . .”) (citation omitted); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445-47 (2d Cir. 2001) (computer programs and code are speech under the First Amendment). Because of the paramount importance of facts to speech, not only the speech itself, but the collection and creation of data are protected under the First Amendment. *See Sorrell*, 131 S. Ct. at 2667.

information is also crucial to State Farm's participation in fraud-detection efforts by the insurance industry and state and federal governments.

By refusing to modify the Protective Order at issue, Respondent has sharply curtailed State Farm's ability to engage in uses of medical records explicitly recognized by regulation as protected insurance functions. W. Va. C.S.R. § 114-57-15.2. A writ of prohibition should issue for the independent reason that Respondent thus has intruded upon, severely, State Farm's First Amendment rights. *See Seattle Times*, 467 U.S. 20 (1984).

Respondent's intrusion upon State Farm's rights is particularly egregious in restricting State Farm's First Amendment rights with regard to information that is obtainable outside the discovery process. By virtue of Plaintiff's policy with State Farm, State Farm is contractually entitled to obtain Plaintiff's medical records and information.<sup>35</sup> *See* Policy, Insured's Duties, Section 6(a)(3), App. at 331 (policyholder must permit State Farm to obtain "medical records" and "any other information we deem necessary to substantiate the claim").<sup>36</sup> Notably, Plaintiff

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<sup>35</sup> The adjustment of an insurance claim is an independent process governed by contract and pertinent state law. It has nothing to do with the court's process or any "pre-trial procedures." Indeed, State Farm adjusts hundreds of thousands of claims each year, only a small fraction of which result in litigation. Plaintiff's attempt to merge the claims adjustment process into his lawsuit ignores the fact that the medical information that is subject to the Protective Order is information that State Farm is contractually entitled to under the plain terms of the insurance policy under which Plaintiff is seeking medical payments and underinsured motorist coverage.

<sup>36</sup> Under West Virginia law (and the law of nearly every other jurisdiction), Plaintiff's refusal to provide State Farm with the required authorization constitutes a willful, material breach under the policy, which voids coverage. *See Stover v. Aetna Cas. & Sur. Co.*, 658 F. Supp. 156, 159 (S.D. W. Va. 1987) ("Courts have generally viewed compliance with insurance policy provisions as a condition precedent to recovery. Hence, the failure of an insured to cooperate with the insurer has been held to be a material breach of the contract and a defense to a suit on the policy." (citation omitted)); *Bowyer ex rel. Bowyer v. Thomas*, 188 W. Va. 297, 298, 423 S.E.2d 906, 907 (W. Va. 1992) (an insured who willfully fails to cooperate with an insurance company, preventing proper adjustment of a claim, forfeits coverage under the policy (syllabus points 1-4)). The trial court simply ignored the fact that Plaintiff was contractually obligated to provide State Farm with a medical authorization, treating the release of this information as solely a function of the discovery process. In so doing, the lower court made a crucial error, which, in turn, led it to ignore both State Farm's rights under the First Amendment and the inherent limitations of Rule 26(c).

Plaintiff might seek to distinguish *Seattle Times* and its progeny by arguing that many of the documents at issue here were not yet in State Farm's possession when the lawsuit was filed. This argument must be rejected, however, because Plaintiff cannot be permitted to benefit from his own willful breach of contract.

and State Farm did not agree to any privacy or confidentiality restrictions on State Farm's use and disclosure of his medical records over and above the protections already existing at law, or at odds with State Farm's other statutory and regulatory obligations.

The trial court also has ordered that the Protective Order continues to apply with respect to evidentiary depositions taken in advance of trial, even though Plaintiff – by conducting those depositions – effectively waives any objections to the admissibility of such records in a public proceeding. Respondent's order in this regard is clear error; in granting the writ, this Court should also consider the appropriate cutoff for any medical protective order, which necessarily must end (if not before) by the time a Plaintiff voluntarily puts his medical records into evidence in an evidentiary deposition.<sup>37</sup>

This Court has held that both civil court proceedings and civil court records are presumptively open to the public, subject to certain well-defined exceptions not relevant here. *State v. Garden State Newspapers, Inc.*, 205 W. Va. 611, 615-16, 618, 520 S.E.2d 186, 190-91, 193 (1999). This presumptive right of access is rooted in the common law and in W. Va. Const. art. III, § 17. *Garden State Newspapers*, 205 W. Va. at 617, 520 S.E.2d at 192 (quoting *Virmani v. Presbyterian Heath Servs. Corp.*, 515 S.E.2d 675, 693 (N.C. 1999)).<sup>38</sup> Further, unlike

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<sup>37</sup> As recognized by this Court in *Bedell I*, any privacy interest that an individual has in his medical records is eviscerated, such that a medical protective order concerning those records can no longer shield those records, once the records are introduced at trial. 697 S.E.2d at 740.

<sup>38</sup> See, e.g., *In re Copeland*, No. 09-13443, 2010 WL 4683941, at \*3 (Bankr. N.D. Okla. 2010) (denying a party's motion to seal documents containing "sensitive medical information, records, and reports" where the party entered the information into the record and thereby "voluntarily waived his privacy rights with respect to this information"); *White v. Worthington Indus., Inc. Long Term Disability Plan*, 266 F.R.D. 178, 196 (S.D. Ohio 2010) ("[M]any types of cases involve the public disclosure of medical conditions and medical records. That is typical in personal injury litigation, employment litigation, and for certain types of administrative review . . . . The plaintiff who seeks such redress ordinarily understands that in order to do so, he or she may be waiving the right to keep his or her medical history out of the public domain."); *Doe v. Meachum*, 126 F.R.D. 458, 458 (D. Conn. 1989) (plaintiff's privacy interest in shielding his infection with AIDS did not outweigh "the First Amendment right of the public and of the press to attend judicial proceedings").

depositions conducted for discovery purposes, this Court repeatedly has held that an evidentiary deposition is functionally equivalent to the trial itself. “An evidentiary deposition ‘is taken with the knowledge that it will be introduced as “evidence” at the hearing [or a trial].’” *State ex rel. Means v. King*, 205 W. Va. 708, 715, 520 S.E.2d 875, 882 (1999) (quoting *State ex rel. Hoover v. Smith*, 198 W. Va. 507, 513, 482 S.E.2d 124, 130 (1997)) (alteration in original); *see also Carper v. Watson*, 226 W. Va. 50, 60 n.5, 697 S.E.2d 86, 96 n.5 (2010).<sup>39</sup> In sum, an evidentiary deposition is taken by a party with the expectation—indeed, the *intent*—that it will be introduced into the public record. Upon taking the evidentiary deposition, the party waives any rights to object to its introduction at trial and voluntarily surrenders any reasonable expectation that the evidence contained therein (including relevant medical records and information) will remain private. Accordingly, just as a “compelling interest” is necessary to close the trial itself, so a compelling interest is required to seal this equally integral component of the trial proceedings. *Cf. Petition of U.S. for Perpetuation of Testimony of Thompson*, No. 95 C 2041, 1995 WL 599061, at \*1 (N.D. Ill. Oct. 5, 1995) (“[T]he presumption of a right of public access is even stronger for evidentiary materials than it is for discovery materials.”).

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<sup>39</sup> Indeed, parties who conduct evidentiary depositions waive the right to object to their opponents’ subsequent use of those depositions at trial. *See Dobkowski v. Lowe’s, Inc.*, 314 N.E.2d 623, 627 (Ill. Ct. App. 1974) (holding “that if a party who takes an evidence deposition declines to introduce it into evidence, the other party may do so”); *cf. Thomas v. Irvin*, 16 S.W. 1045, 1045 (Tenn. 1891) (holding, in the context of the state dead man’s statute, that where the defendant took the equivalent of an evidentiary deposition of the plaintiff but elected not to present the deposition at trial, the defendant’s objection to the plaintiff’s presentation of the deposition was “waived by the act of requiring the complainant to testify . . .”), *quoted in Burchett v. Stephens*, 794 S.W.2d 745, 750 (Tenn. Ct. App. 1990). Long-standing precedent in West Virginia also supports this proposition. *See Echols v. Staunton*, 3 W. Va. 574, 1869 WL 1954, at \*4 (1869) (opinion of Berkshire, J.) (“I think the court committed no error in allowing the deposition to be read, and that it is as competent for one party to read on his own behalf a deposition regularly taken and filed by the other party, as it would be to introduce a witness summoned on behalf of such other party.”).

Respondent has exceeded his authority by refusing to modify a Protective Order that intrudes upon State Farm's protected speech rights. The Court thus should grant the petition for writ of prohibition.

**D. The Protective Order Violates The Full Faith And Credit Clause And Due Process Clause By Creating Conflicts With State Farm's Legal Obligations Under Other State And Federal Laws**

The Protective Order and its destruction protocol raise further constitutional issues of full faith and credit and due process. By requiring that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," U.S. Const. art. IV, § 1, the Constitution establishes "barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); accord *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 & n.16 (1996). Under the Full Faith and Credit Clause, each state's power is "constrained by the need to respect the interests of other States." *BMW*, 517 U.S. at 571. This constraint is important here because insurance companies are subject to the laws of every state in which they do business. Moreover, each insurance company's home state has a special interest in regulating the company's business practices and financial affairs. Regulation of insurance companies generally entails periodic examinations of the companies' records. Effective regulation and examination depends on the companies' retention of their records. Thus, protective orders such as the one at issue here impair the substantial interest of an insurance company's home state in requiring insurance companies to retain records for specified periods of time, or (as in the case of Illinois) until permission is granted to dispose of them.

The denial of the motions to modify the Protective Order also raises substantial issues of due process and fundamental fairness that merit examination by this Court. It potentially places State Farm in the untenable position of being forced to choose between violating the order or

violating the insurance laws and regulations of other states, such as New York and Illinois. *See Credit Suisse v. U.S. Dist. Court*, 130 F.3d 1342, 1345 (9th Cir. 1997); *see also North Carolina v. Pearce*, 395 U.S. 711, 738-39 (1969) (Black, J., concurring in part and dissenting in part) (“[M]aking it impossible for persons to know which one of . . . two conflicting laws to follow . . . would . . . violate one of the first principles of due process.”), *superseded on other grounds by statute as stated in Alabama v. Smith*, 490 U.S. 794 (1989); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (due process prohibits imposing “arbitrary punishments”). This problem is greatly exacerbated by the fact that the Protective Order does not clearly delineate what “medical information” must be destroyed. *See Bedell II*, 2011 WL 1486100, at \*23-24 (Benjamin, J., dissenting).

In addition, State Farm has a fundamental property and liberty interest in its records and in keeping information contained therein. *Cf. Sovereign News Co. v. United States*, 690 F.2d 569, 577-78 (6th Cir. 1982). The Protective Order does not merely limit the ways in which State Farm may use medical records and information; rather, it requires their destruction, permanently depriving State Farm of them. Claims information, which Plaintiff is contractually obligated to provide to State Farm, is the lifeblood of the insurance business. Insurance companies maintain and use claims information in underwriting, setting rates, researching public safety, and making other business decisions. The arbitrary, unreasonable and permanent deprivation of property that will be effectuated by the Protective Order contravenes due process. *Cf. Spence v. Zimmerman*, 873 F.2d 256, 258, 260 (11th Cir. 1989); *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Moore v. City of E. Cleveland*, 431 U.S. 494, 513-14 (1977) (Stevens, J., concurring).

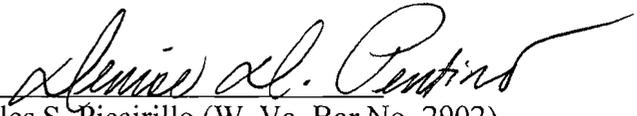
The Court should grant the writ to address the fundamental issues of full faith and credit and due process raised by the Circuit Court's denial of State Farm's motions to stay, modify or vacate the Protective Order.

### CONCLUSION

This petition presents a recurring issue of extraordinary importance to the property and casualty insurance industry, state insurance regulators, and consumers in West Virginia and elsewhere in the country. State Farm respectfully submits that this Court should grant a writ of prohibition to correct the manifest errors in the circuit court's December 7, 2012 and January 13, 2012 Orders. The court below should not have denied State Farm's motions to stay, vacate or modify the Protective Order because it cannot survive scrutiny unless it is amended to provide that nothing in the Order shall prohibit, restrict, or require an authorization for the retention, use, or disclosure of nonpublic personal and medical information and records as authorized or as reasonably required by federal or state law or regulation, or court order or rule (including preservation of evidence relevant to litigation under court rules such as *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004)). For all of the reasons stated, State Farm respectfully submits that the writ should be granted.

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 to the Circuit Court of Harrison County, West Virginia.

**STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY**

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**VERIFICATION**

I, Denise D. Pentino, counsel for the Petitioner, State Farm Mutual Automobile Insurance Company, hereby certify that the facts and allegations contained the **Writ of Prohibition** and **Appendix** are true and correct to the best of my belief and knowledge

3-6-12  
DATE

  
Denise D. Pentino

**CERTIFICATE OF SERVICE**

I, Denise D. Pentino, 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** and **Appendix** upon the following individuals, via regular U.S. mail, postage prepaid, on this the 6<sup>th</sup> day of March, 2012:

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