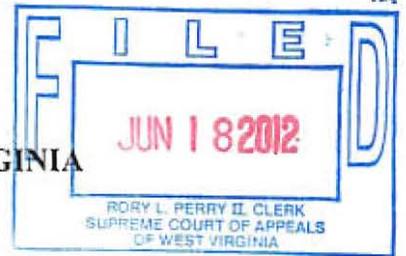


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 12-0210



NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant Below, Petitioner

v.

CARMELLA J. FARIS, and ROBERT FARIS,

Plaintiffs Below, Respondents

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From the Circuit Court of  
Harrison County, West Virginia  
Civil Action No. 10-C-123-1

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**AMICUS CURIAE BRIEF OF THE AMERICAN TORT REFORM  
ASSOCIATION IN SUPPORT OF DEFENDANT BELOW, PETITIONER**

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## **STATEMENT OF THE QUESTIONS PRESENTED**

*Amicus curiae* filed this brief to address whether the Circuit Court exceeded its judicial authority by adopting Medical Protective Orders (MPOs) that:

(1) impose restrictions contrary to governing law and regulations thereby usurping West Virginia legislature’s policy-making role and the insurance commissioner’s expertise, and exposing insurers to liability, fines, or other sanctions when complying with the law;

(2) prohibit insurers from assessing, using, and retaining “medical records and medical information” to perform vital business and insurance functions, including federal and state regulatory obligations; and

(3) were issued without a showing of clearly and defined serious injury to the Plaintiffs and undervalues the public, regulatory, and private insurer interests at stake, such as in policing insurance fraud.

### **IDENTITY OF *AMICUS CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE**

Founded in 1986, the American Tort Reform Association (“ATRA”) is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.<sup>1</sup>

As an association that includes businesses and associations of all sizes and their insurers, ATRA has a substantial interest in ensuring that regulated parties operate with a clear

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<sup>1</sup> Pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, ATRA states that counsel for a party did not author this *amicus* brief in whole or in part, nor did such counsel or a party make a monetary contribution specifically intended to fund the preparation or submission of the brief. No person, other than the *amicus curiae*, its members, or its counsel, made such a monetary contribution toward the brief.

understanding of their obligations and are not placed at risk of violating judicial mandates that conflict with statutory and regulatory requirements.

ATRA has filed a motion concurrently with this *amicus* brief requesting leave to file.

### **STATEMENT OF THE FACTS**

Both of the subject civil actions involved personal injury claims stemming from automobile accidents that occurred in West Virginia.<sup>2</sup> Plaintiffs sought entry of substantively identical Medical Protective Orders (MPOs) against their insurers, Nationwide Mutual Insurance Company (“Nationwide”) and State Farm Mutual Automobile Insurance Company (“State Farm”). Among their provisions, the MPOs state:

[U]nder no circumstances shall the medical records and medical information, or any copies or summaries thereof, be kept [by the insurers] longer than the provisions of W. Va. C.S.R. § 114-15-4.2(b) require, with the retention period beginning to run at the conclusion of this case, including any possible appeal period. The retention period shall continue until the lesser of “the current calendar year plus five (5) calendar years,” or “from the closing date of the period of review for the most recent examination by the commissioner,” or “a period otherwise specified by statute as the examination cycle for the insurer.” W. Va. C.S.R. § 114-15-4.2(b).

At the conclusion of the applicable period, the insurers’ defense counsel must certify that the Plaintiffs’ medical records and information were destroyed or returned to the Plaintiffs. The Harrison County Circuit Court entered the MPOs and rejected subsequent motions by the insurers to modify or eliminate the Orders.

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<sup>2</sup> The Court has accepted for review identical issues in *State Ex Rel. State Farm Mutual Automobile Insurance Company v. The Honorable John Lewis Marks, Jr.*, No. 12-0304. A motion for consolidation of the two cases is pending before the Court. For this reason, ATRA has filed its *amicus* brief, which addresses both cases, in each docket.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

These cases raise a troubling type of “regulation through litigation”: state court protective orders that impose obligations on litigants and their insurers in areas tightly regulated by state and federal governments. As the use of MPOs becomes routine, these orders threaten to create significant confusion for regulated parties, unravel the ability of regulators to properly monitor the insurance industry and investigate fraud, and increase the cost of insurance for the public. In addition, this piecemeal regulation-by-protective order places companies at risk of liability and civil penalties as they attempt to fulfill competing requirements.

Specifically at issue here is the Circuit Court’s issuance of MPOs that impose document destruction requirements that conflict with statutory recordkeeping and reporting requirements governing insurers and interfere with legitimate business practices, including fraud-prevention activities, explicitly authorized by state and federal law.

In earlier litigation, this Court found that the validity of MPOs that may conflict with statutory reporting and document retention obligations was not ripe for consideration. *See State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 719 S.E.2d 722, 734 (W. Va. 2011) (“*Bedell II*”). The Court should consider that issue here and find that MPOs are unnecessary, disruptive, and burdensome given existing privacy and insurance regulations.

In addition, this Court should clarify the level of evidence needed to show “good cause” warranting an MPO. The Court has recognized that MPOs are impermissible in absence of a showing beyond “vague fears” or demonstrating that existing laws and regulations are insufficient to protect against disclosure of personally identifiable medical records. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 697 S.E.2d 730, 740 (W. Va. 2010) (“*Bedell I*”). In a subsequent ruling, however, the Court denied a writ of prohibition against entry of a nearly

identical MPO supported only by generic and speculative privacy concerns. *See Bedell II*, 719 S.E.2d at 733. Particularly given existing state and federal privacy safeguards, close state oversight of the insurance industry, and the need for unaltered claim files to identify questionable claims and potential fraud, this Court should reaffirm that West Virginia courts may not issue MPOs requiring destruction of medical records or other medical information, or prohibiting insurers from using medical records for legitimate business purposes authorized by state law, in absence of good cause shown through a “particular and specific demonstration of fact.” *See* 697 S.E.2d at 740; *see also* 719 S.E.2d at 731.

Those seeking MPOs can meet this standard through evidence indicating: (1) the insurer has failed to comply with its obligation under West Virginia law to prevent the unauthorized disclosure of confidential medical records; (2) a reasonable basis for believing that the insurer intends to disseminate “nonpublic personal health information” without the policyholder’s consent in the future; (3) the insurer has inadequate internal privacy safeguards; (4) existing regulations governing the confidentiality of a claimant’s medical records are insufficient to protect the claimant’s information. *Id.* at 739. Requiring movants to meet such rigorous criteria would significantly reduce the risk of insurers facing conflicting legal obligations and limit the potential disruption to an insurer’s business practices, including fraud-monitoring obligations.

## ARGUMENT

### **I. A THIRD LAYER OF REGULATION IS UNWARRANTED AND RESULTS IN BURDENSOME AND CONFLICTING REGULATORY OBLIGATIONS**

The Circuit Court, at Plaintiffs’ request, issued MPOs that regulate areas that are subject to extensive rules: the privacy of personally identifiable information, mandatory reporting to state and federal governments, and record-keeping by insurers. In so doing, the trial court imposed an additional layer of regulation on businesses that is wholly unnecessary to the

protection of the Plaintiffs' interests. The MPOs are burdensome and place tightly-regulated parties at a risk of violating federal and state laws that govern these areas.

**A. The First Layer: Federal Regulation**

Over the past several decades, the federal government has enacted a plethora of rules and regulations to protect confidential or sensitive records of individuals from dissemination. For instance, in the 1970s, Congress enacted laws governing the privacy of consumer credit reports,<sup>3</sup> information maintained by federal agencies,<sup>4</sup> educational records,<sup>5</sup> and financial information.<sup>6</sup> More laws followed in the 1980s and 1990s, including law prohibiting the dissemination of video rental and similar records,<sup>7</sup> motor vehicle records,<sup>8</sup> telephone usage,<sup>9</sup> and internet usage of children.<sup>10</sup>

Among these areas, Congress carefully considered the privacy of medical information. Congress enacted the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1636 (1996), which prohibits disclosure of confidential health

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<sup>3</sup> Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified at 15 U.S.C. §§ 1681 to 1681x).

<sup>4</sup> Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified at 5 U.S.C. § 552a).

<sup>5</sup> Family Educational Rights and Privacy Act, Pub. L. No. 93-380, tit. V, § 513(a), 88 Stat. 571 (1974) (codified at 20 U.S.C. § 1232g).

<sup>6</sup> Right to Financial Privacy Act, Pub. L. No. 95-630, tit. XI, 92 Stat. 3697 (1978) (codified at 12 U.S.C. §§ 3401 to 3422).

<sup>7</sup> Video Privacy Protection Act, Pub. L. No. 100-618, § 2(a)(2), 102 Stat. 3195 (1988) (codified at 18 U.S.C. § 2710).

<sup>8</sup> Driver's Privacy Protection Act (1994), Pub. L. No. 103-322, tit. XXX, § 300002(a), 108 Stat. 2099 (codified as amended at 18 U.S.C. §§ 2721 to 2725).

<sup>9</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, tit. VII, § 702, 110 Stat. 148 (codified at 47 U.S.C. § 222).

<sup>10</sup> Children's Online Privacy Protection Act, Pub. L. No. 105-277, div. C, tit. XIII, § 1302, 112 Stat. 2681-728 (1998) (codified at 15 U.S.C. §§ 6501 to 6506).

information.<sup>11</sup> Because Congress decided that supplemental or other incidental benefits should not be regulated in the same manner as comprehensive medical plans, HIPAA established several exclusions from the Act's requirements. Congress specifically listed the types of arrangements that do not provide comprehensive medical coverage. These "excepted benefit" plans include automobile liability insurance. *See* 42 U.S.C. § 300gg-91(c)(1); 45 C.F.R. § 160.103.

Automobile insurers are exempt from HIPAA, but subject to other federal privacy protections. While automobile insurers are not health plans, they fall within the broad definition of a financial institution, 15 U.S.C. § 6809(3), and therefore must comply with the privacy protections of Title V of the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, §§ 501 to 510, 113 Stat. 1338, 1436-45 (1999) ("Gramm-Leach-Bliley") (codified at 15 U.S.C. §§ 6801 to 6809). Gramm-Leach-Bliley requires financial services institutions to establish privacy policies and deliver notices to their customers informing them of how the company uses and shares nonpublic personal information. *See* 15 U.S.C. § 6802(a). The law prohibits financial institutions from disclosing to a nonaffiliated third party any nonpublic personal information unless permitted by its policy. With respect to insurers, Gramm-Leach-Bliley delegates to state insurance commissioners the authority to enforce safeguards to: "(1) to insure the security and confidentiality of customer records and information; (2) to protect against any anticipated threats or hazards to the security or integrity of such records; and (3) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer." 15 U.S.C. §§ 1601(b), 1605(a)(6). The West Virginia Legislature has expressly incorporated the protections of Gramm-Leach-Bliley into state law.

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<sup>11</sup> Balanced Budget Act, Pub. L. No. 105-33, tit. IV, § 4001, 111 Stat. 286 (1997) (codified at 42 U.S.C. § 1395w-22) also establish safeguards for the privacy of individually identifiable patient information maintained by Medicare+Choice organizations).

*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).”).

Congress and the West Virginia Legislature, by virtue of W. Va. Code § 33-6F-1(a), recognized that there are circumstances under which insurers must have flexibility to manage policyholder records as needed for their operations or where disclosure of records is in the public interest. For example, Gramm-Leach-Bliley explicitly provides that it does not prohibit the disclosure of nonpublic personal information “to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability.” *Id.* § 6802(e)(3)(B). Gramm-Leach-Bliley also recognizes that insurers must have the ability to release information when required for compliance with other federal, state, and local laws and regulations, government investigations, and in litigation. *See id.* § 6802(e)(8). Finally, legislators understood that insurers must have the flexibility to disclose a policyholder’s information, “as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer,” or in connection with “[a]ccount administration, reporting, investigating, or preventing fraud or material misrepresentation, processing premium payments, processing insurance claims, administering insurance benefits (including utilization review activities), participating in research projects, or as otherwise required or specifically permitted by Federal or State law.” *Id.* §§ 6802(e)(1), 6809(7)(C).

**B. The Second Layer: State Insurance Regulation**

Gramm-Leach-Bliley does not supersede state privacy laws that offer greater protection than the federal law, *id.* § 6807. Indeed, the West Virginia Legislature has established a comprehensive set of laws governing insurers that operate in the state. *See* W. Va. Code §§ 33-1-1 to 33-48-12. Pursuant to this authority, state insurance regulations already prohibit insurers

from disclosing the nonpublic personal health information of their policyholders without authorization. *See* W. Va. Code R. § 114-57-15.1.

West Virginia law, like Gramm-Leach-Bliley, explicitly permits insurers to disclose nonpublic personal health information, without consent, for certain legitimate purposes. *See* W. Va. Code R. § 114-57-15.2. Among these functions are claims administration, claims adjustment, loss control, ratemaking, quality improvement, auditing, reporting, and database security. *See id.* Perhaps the most important of these lawful uses of personally identifiable health information is “detection, investigation or reporting of actual or potential fraud, misrepresentation or criminal activity.” *Id.* This provision enables insurers to comply with their obligation to report suspected fraud to the state insurance commissioner. *See* W. Va. Code § 33-41-5(a). The Insurance Commissioner has recognized that that use of a policyholder’s health information for each of these purposes is “necessary for appropriate performance of insurance functions and are fair and reasonable to the interests of consumers.” W. Va. Code R. § 114-57-15.2. The MPOs at issue, however, broadly prohibit insurers from disclosing the claimant’s health information “to any other person or entity” and effectively nullifies the legitimate and necessary purposes for which insurers may disclose such information under West Virginia’s insurance regulations.

In addition to setting reasonable safeguards for protecting the privacy of health information, state insurance commissions set minimum document retention requirements to protect consumers. As the MPOs at issue recognize, West Virginia requires retention of claim files, including medical records, for no less than five to six years, W. Va. Code R. §§ 114-15-4.2(b), 114-15-4.4(a). Insurers may be subject to the laws of other jurisdictions, which require retention of records for substantially longer periods. *See, e.g.*, 215 Ill. Comp. Stat. 5/133(2)

(requiring retention of records until insurer is granted authority by regulators to dispose of files). These regulations provide *minimum* time periods for *retention* of claim records, not *maximum* periods before requiring *destruction* of documents, as mandated by the MPOs that are the subject of the request for a Writ of Prohibition. Such state statutory document retention requirements ensure that regulators are able to fulfill their obligations both to monitor insurance industry practices and investigate potential fraud. *See* W. Va. Code § 33-41-1(b) (finding “the business of insurance involves many transactions of numerous types that have potential for fraud and other illegal activities” and that the West Virginia Insurance Fraud Prevention Act is intended to provide the insurance commission with the tools to “investigate and help prosecute insurance fraud and other crimes related to the business of insurance more effectively”). The MPOs directly conflict with, and effectively supersede, the reasoned public policy judgments of Congress, the West Virginia Legislature, sister state legislatures, and professional insurance regulators.

**C. The Protective Order Creates a New, Unnecessary and Conflicting Third Layer of Privacy Regulation**

The MPOs in these cases, and the practice of some courts that enter similar orders, create a new third layer of regulation. The MPOs disregard the careful balancing of privacy concerns and business practices struck by Congress, state legislatures, and insurance commissions.<sup>12</sup> MPOs, such as those at issue here, involve a single judge in an individual case overreaching into this already extensive and complex environment of privacy protections and insurance regulation. Not only is this layer wholly unnecessary given federal and state regulation of healthcare privacy

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<sup>12</sup> The MPOs also fail to recognize that when an individual files an insurance claim seeking payment for a personal injury that person loses some expectation of privacy. The claimant must reasonably expect, under the terms of the insurance policy, to submit medical records to the insurer to (Footnote continued on next page)

and insurance practices, it creates confusion for businesses as to their regulatory obligations and places them at risk of violating conflicting requirements.

Moreover, provisions in protective orders that require destruction of medical information contained in claim files after litigation, or broadly preclude disclosure of medical information, pose an obstacle to uncovering fraudulent insurance claims. The Insurance Information Institute estimates that fraud accounts for about ten percent of the property/casualty insurance industry's incurred losses and loss adjustment expenses, with healthcare and automobile insurance constituting two of the three areas most vulnerable to such conduct. *See* Ins. Info. Inst., Insurance Fraud (2012), at [http://www.iii.org/issues\\_updates/insurance-fraud.html](http://www.iii.org/issues_updates/insurance-fraud.html) (last visited May 31, 2012). Insurance fraud results in about \$30 billion in losses each year. *Id.* According to the National Insurance Crime Bureau's ("NICB") most recent analysis of questionable claims, claims raising suspicion due to potentially inflated damages are on this rise. *See* Nat'l Ins. Crime Bureau, 2009, 2010, 2011 Referral Reason Analysis (2012), at [https://www.nicb.org/File%20Library/Public%20Affairs/ForeCAST-2011-Referral-Reasons\\_FINAL.PDF](https://www.nicb.org/File%20Library/Public%20Affairs/ForeCAST-2011-Referral-Reasons_FINAL.PDF) (last visited May 31, 2012). Faked or exaggerated injuries increased as the reason for referral by sixteen and nineteen percent in 2010 and 2011, respectively, over the previous year. *See id.* at 3. Similarly, claims raising suspicious as related to prior injuries rose by nine and sixteen percent over this period. *See id.*

As regulations requiring the retention of insurance information demonstrate, maintaining a complete claim file is an important tool for identifying duplicative or questionable insurance claims. Medical information in a claim file, for example, can show that an individual is seeking

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substantiate the claim. If the claimant files a lawsuit that proceeds to trial, then his or her medical records are subject to the scrutiny of jurors in open court.

compensation for an injury for which he or she has already received compensation or a pre-existing health condition. Such information can also identify a pattern of questionable charges by a healthcare provider. The cost of fraudulent claims is unavoidably passed down to consumers in the form of higher rates for insurance premiums.

In addition, protective orders such as that issued by the Circuit Court, threaten to significantly increase compliance costs. Not only will insurers need to follow federal and state privacy and document retention requirements, they will need to closely track additional and potentially conflicting requirements applicable to particular policyholders stemming from protective orders imposed by courts in individual cases. Here, MPOs at issue require the insurers to either return to the plaintiffs' counsel or certify that they have destroyed not only medical records disclosed as a result of the litigation, but "*all . . . medical information or any copies of summaries thereof*" in the claim files. In *Bedell II*, this Court concluded that the two phrases "medical records" and "medical information" are used "interchangeably" and "reference the same material." 719 S.E.2d at 738. The Court's finding that the protective order in *Bedell II* required the insurer to scan its claims file and "in some instances it may be necessary to redact" identifying medical information, *see id.* at 740, may lead to confusion. If the MPOs in these cases, and similar protective orders issued by other courts, are broadly interpreted, then insurers will have a judicially-imposed obligation to scrub claim files for any material that could be considered "medical information," a far broader term than "medical records" disclosed during litigation. These additional compliance costs, along with the cost of more fraudulent claims, is likely to increase the price of insurance for consumers without any corresponding benefit.

## II. THE COURT SHOULD REAFFIRM THAT GOOD CAUSE REQUIRES A PLAINTIFF TO SHOW A SPECIFIC NEED FOR ENTRY OF AN MPO

In *Bedell I*, this Court squarely placed the “burden on the party seeking relief to show some plainly adequate reason therefor” and insisted on “a *particular and specific demonstration of fact*, as distinguished from stereotyped and conclusory statements, in order to establish good cause.” *Bedell I*, 697 S.E.2d at 739 (emphasis in original). It found that “Mrs. Blank merely alleges, in a conclusory manner, that the electronic storage of her records will allow State Farm to disseminate them to third-parties and ‘keep them indefinitely in a manner in which all State Farm employees could access them.’” *Id.* The Court observed that Mrs. Blank failed to present any evidence as to why the insurer’s policies, and the Insurance Commissioner’s regulations, were insufficient to protect the confidentiality of her medical records. *See id.* Nor did she show a “reasonable basis for believing that State Farm intends to disseminate her ‘nonpublic personal health information’ without her consent in the future.” *Id.* The Court concluded that “[i]n the absence of any factual support, the vague fears articulated by Mrs. Blank do not constitute the ‘particular and specific demonstration of fact’ that this Court requires from a party seeking a protective order.” *Id.* at 740.

Thus, in initially granting the writ of prohibition invalidating the protective order, the Court instructed that a plaintiff may demonstrate good cause by presenting evidence that, at minimum, indicates: (1) the insurer has failed to comply with its obligation under West Virginia law to prevent the unauthorized disclosure of confidential medical records; (2) there is a reasonable basis for believing that the insurer intends to disseminate the claimant’s “nonpublic personal health information” without consent in the future; (3) the insurer has inadequate internal privacy safeguards; or (4) existing regulations governing the confidentiality of a claimant’s medical records are insufficient to protect her information. *Id.* at 739.

The Court's decision following remand, however, could lead to confusion in the circuit courts in deciding whether the Plaintiff has shown good cause for an MPO. The revised MPO eliminated specific conflicts with the West Virginia insurance regulations with respect to electronic storage of information, but was otherwise "substantially the same as the previous order." *Bedell II*, 719 S.E.2d at 728. While the original MPO was silent on good cause, the revised MPO included findings that were no more than generic privacy concerns, such as:

[M]edical records are private in nature and are protected by the privilege between the treating physician or care provider and the patient. . . .

[M]edical records have the potential to contain facts that are embarrassing to the patient, and the law recognizes that the dissemination of medical records must be done with the patient's consent. . . .

[N]one of Mrs. Blank's medical records will become public unless she consents to their dissemination or until they are introduced at trial. . . .

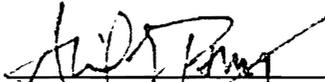
*Id.* at 733. The Court found that the circuit court's inclusion of such statements in the MPO demonstrated a "particular and specific demonstration of fact," as well as good cause, for issuance of the MPO. *Id.*

The inconsistency between *Bedell I* and *Bedell II* is likely to confuse circuit courts as to the level of evidence necessary to support entry of a protective order with respect to disclosure of medical information. This Court should clarify that, in accordance with the standards it provided in *Bedell I*, a plaintiff seeking a MPO may show good cause for a medical protective order that requires destruction of medical records following litigation only by substantiating specific privacy concerns and by demonstrating that protections already provided by state and federal law, as well as the insurer's internal safeguards, are insufficient to address those concerns.

**CONCLUSION**

For these reasons, *amici* respectfully request that the Court grant a writ of prohibition to the Circuit Court of Harrison County.

Respectfully submitted,



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Dated: June 18, 2012

**CERTIFICATE OF SERVICE**

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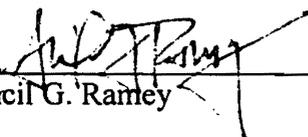
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