IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v. **Docket Number 12-0304**

HONORABLE JOHN LEWIS MARKS, JR., JUDGE OF THE CIRCUIT COURT OF HARRISON COUNTY, ET AL.,
Respondents,

From the Circuit Court of Harrison County, West Virginia
Civil Action No. 10-C-176-1

and

NATIONWIDE MUTUAL INSURANCE COMPANY,
Petitioner,

v. **Docket Number: 12-0210**

CARMELLA J. FARIS AND ROBERT FARIS,
Respondents.

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

BRIEF OF BRICKSTREET MUTUAL INSURANCE COMPANY AS AMICUS CURIAE SUPPORTING PETITIONERS

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I. INTEREST OF AMICUS CURIAE

Pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, Brickstreet Mutual Insurance Company (hereinafter "Brickstreet") respectfully submits this brief, as *amicus curiae*[1] in support of Petitioners.[2]

Petitioners are asking the Court to overturn a protective order, issued by the Circuit Court of Harrison County, regarding medical records. This protective order would prevent Petitioners, insurance companies, from disseminating medical information to third parties, even when required to do so by law. The protective order would also require Petitioners to destroy medical information in claims files, even when that information was not gained through the litigation, and even when retention of the information is required by law. The protective order will substantially impair any insurer's ability to comply with the legal requirements of West Virginia law, federal law, and the law of other states. Additionally, by impairing an insurer's ability to maintain proper claims files, the protective order will substantially impair any insurer's ability to perform vital and essential business functions including but not limited to rate-making, underwriting, fraud prevention, and payment of legitimate claims.

Brickstreet, as *amicus curiae*, has a strong interest in the outcome of this matter. Brickstreet provides broad form coverage which may cover employers sued for deliberate intent. If Brickstreet is subjected to the provisions of the protective order entered in this case in

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[1] Pursuant to Rule 30(e)(5) of the Rules of Appellate Procedure, no counsel retained by any party to this appeal participated in the drafting of this brief. Counsel for Brickstreet are the sole authors of this brief. No monetary contributions were made from parties or persons other than Brickstreet for the preparation of this brief. Additionally, counsel of record for all parties were notified of Brickstreet's intention to file an amicus curiae brief at least five days prior to the due date for the brief; Brickstreet filed its Notice in that regard on June 8, 2012. Brickstreet obtained consent from all involved parties to file this brief.

[2] Pursuant to the June 18, 2012 Order entered by this Honorable Court, the above-captioned matters were consolidated.

deliberate intent cases brought in the Circuit Courts of West Virginia, it will make it impossible to comply with federal and state law. It will also significantly affect Brickstreet's ability to fulfill one of its primary missions in West Virginia - to provide competitively priced workers' compensation coverage to the employers of the State of West Virginia. Brickstreet is the largest workers' compensation insurer in West Virginia. The majority of employers in West Virginia are Brickstreet insureds. West Virginia has a strong public policy interest in lowering workers' compensation insurance rates to attract new businesses and increase the profitability of existing businesses. Brickstreet shares the same interest.

II. SUMMARY OF ARGUMENT

Brickstreet's insureds sometimes become involved in deliberate intent litigation before the Circuit Courts of West Virginia. Through deliberate intent litigation, Brickstreet is likely to become subject to the protective order at issue in this litigation. This Amicus Brief will detail the considerable harm the protective order will do to Brickstreet and similarly situated insurers. This brief will first address statutes and regulations that Brickstreet will be unable to follow if subjected to the protective order, and then will address the business reasons the protective order will harm Brickstreet.

III. STATEMENT OF FACTS

Brickstreet is West Virginia's first, and largest, private workers' compensation insurance company. In this role, Brickstreet handles a substantial number of workers' compensation claims. The protective order at issue prohibits dissemination of medical records and information to third parties and also requires the destruction or return of medical records and information following the close of litigation. Although protective orders like the one at issue will not be issued in workers' compensation claims, they may be issued in deliberate intent cases. Although only a small percentage of workers' compensation claims also result in

deliberate intent cases, the ones that do often involve the most serious injuries and are often from industries with the highest accident rates.

As a workers' compensation insurer, Brickstreet uses a claim computer system to generate electronic data to categorize and manage claims. Supplemental Appendix,[3] Affidavit of Frederick D. Boothe, ¶ 4. When medical records are received, the information from those medical records is coded and stored in Brickstreet's claims and medical payment computer systems. Supplemental Appendix, ¶ 5. For example, if an employee of an insured gets a new diagnosis on a compensable injury, Brickstreet records diagnosis codes. If the employee receives treatment, certain treatment information is entered into a computer system. A wealth of other information gleaned from medical records is also recorded for various reasons depending on the type of information. The medical records and bills are also scanned and kept electronically. Supplemental Appendix, ¶ 6. This not only allows Brickstreet to process and pay the claims faster and more efficiently, but also allows Brickstreet to accurately monitor a huge number of claims and provide statistical information to the government and other entities with a legitimate interest in the information. For example, when Brickstreet receives a bill from a medical provider, Brickstreet can instantly check the diagnosis codes, the treatment information, and determine if the prices charged by the medical provider are fair and reasonable. Obtaining medical care at market prices helps Brickstreet provide its insureds with reasonable rates. Without access to historical data on similar injuries, Brickstreet could not perform these calculations. These electronic systems also afford greater privacy protection than a paper file,

[3] Pursuant to West Virginia Rule of Appellate procedure 30(c)(3), the material in the Supplemental Appendix is necessary to provide factual support for Brickstreet's position in this brief. The information is relevant and necessary to the disposition of this case, because no other party possesses knowledge specific to Brickstreet or specific to other workers' compensation insurers like the information presented in the affidavit.

since access can be restricted without physical barriers and lists of those who accessed the file can be compiled with the touch of a button.

Additionally, Brickstreet provides medical data from its records, medical diagnosis and treatment information, and medical data summaries to third-party industry groups. These groups are vital to Brickstreet's compliance with West Virginia Insurance Commissioner regulations and are vital to essential business functions of Brickstreet. Supplemental Appendix, ¶ 7. For example, Brickstreet provides medical information to a third-party industry group called the National Council on Compensation Insurance, Inc. Supplemental Appendix, ¶ 7. The National Council on Compensation Insurance, Inc. is the rate-making body for workers' compensation in approximately thirty-nine different states, including West Virginia. Supplemental Appendix, ¶ 8.

Brickstreet also provides medical information to the National Insurance Crime Bureau ("NICB"). The National Insurance Crime Bureau is a not-for-profit organization that maintains a database used to facilitate the detection, identification, and prosecution of insurance criminals. Supplemental Appendix, ¶ 9. The National Insurance Crime Bureau helps insurance companies identify and prosecute insurance fraud in many different forms. Supplemental Appendix, ¶ 11. Without the ability to provide medical data to third-parties obtained in claims where a protective order was entered, Brickstreet will be unable to provide the NICB with data in many of its most serious claims, and will be unable to participate meaningfully in industry-wide fraud prevention. Supplemental Appendix, ¶¶ 11-13.

Brickstreet also uses an electronic bill review payment system to ensure fast and accurate payment of medical bills submitted to it. Supplemental Appendix, ¶ 14. Brickstreet uses a third-party contractor called Procura Management, Inc. (hereinafter "Procura") to manage

its electronic payment system. Supplemental Appendix, ¶ 15. Procura reviews the bills to investigate any duplicate billing, overbilling, unbundling, or other unfair billing practices that might adversely affect Brickstreet and its insureds. Supplemental Appendix, ¶ 16. Brickstreet then pays the amount that Procura tells Brickstreet to pay medical providers. Supplemental Appendix, ¶ 16. Additionally, reinsurance is purchased by Brickstreet to reimburse Brickstreet for catastrophic events when employers' claims exceed a specific amount. Supplemental Appendix, ¶ 18. To purchase reinsurance and obtain the coverage, Brickstreet must provide medical information electronically to the third-party reinsurer. Supplemental Appendix, ¶ 19.

Brickstreet also uses past medical information for case management; disease management; quality assurance; quality improvement; performance evaluations; provider credentialing verification; utilization review; peer review activities; actuarial, scientific, medical or public policy research; grievance procedures; internal administration of compliance, managerial, and information systems; policyholder underwriting functions; auditing; reporting; administration of consumer disputes and inquiries; and external accreditation. Supplemental Appendix, ¶ 21. The United States Office of Medicare and Medicaid is requiring all insurance carriers to begin reporting medical data in 2013. Supplemental Appendix, ¶ 22. In addition to Brickstreet's many uses for data gleaned from medical records, the cost of stripping that data out of a claimant's file would be immense. The data would need to be manually purged from each file. Supplemental Appendix, ¶ 24.

If a protective order like the one at issue becomes standard in deliberate intent cases, Brickstreet will have significant difficulty operating its business systems. Many of the most complex and serious injuries will not provide information usable by Brickstreet, since that information will need to be destroyed and cannot be disseminated. Furthermore, Brickstreet will

be unable to comply with regulations in many of the states it which operates, and will not be able to comply with federal regulations.

IV. ARGUMENT

A. THE PROTECTIVE ORDER WOULD PREVENT BRICKSTREET FROM COMPLYING WITH STATE AND FEDERAL LAW

Although most of these issues may be capably addressed in Petitioners' briefs, Brickstreet wishes to briefly address issues specific to Brickstreet and other workers' compensation insurers and to highlight the substantial prejudice that the subject protective order will have on the workers' compensation insurance industry as a whole.

1. Brickstreet will be unable to comply with both the subject protective order and West Virginia Code of State Regulations § 114-15-4 and other similar state regulations.

Although this Court, through *Bedell II*, ruled that no protective order shall be issued that requires an insurance company to violate West Virginia Code of State Regulations § 114-15-4.2, the unique interaction of workers' compensation claims and deliberate intent claims means that any requirement to destroy medical information in a claims file could result in Brickstreet's violation of § 114-15-4.2, regardless of the time limit in the order. *Bedell II, State ex. rel. State Farm Mutual Automobile Insurance Co. v. Bedell*, 2011 WL 1486100 (April 1, 2011).

§ 114-15-4.2 requires an insurer to maintain a claims file for the lesser of 5 years, until inspected by the insurance commissioner or a period otherwise specified by statute. Based on that requirement, this Court held in *Bedell II* that a protective order which specifies that the medical information in the claims file be destroyed five years after the close of litigation would allow an insurance company to comply with § 114-15-4.2. *Id.* This Court was correct in regard

to automobile claims like the ones addressed in *Bedell II*, but such logic could be incorrect for a deliberate intent case. For an automobile liability insurer, where the claim and the civil lawsuit nearly always end on the same date, a provision requiring the destruction five years after the close of litigation would allow for compliance with § 114-15-4.2. However, for a workers' compensation insurer, because the workers' compensation claim and the deliberate intent claim can start and end on different dates, and the workers' compensation claim can be re-opened subject to certain conditions, a blanket five year provision could still result in destroying medical information before the need for the information has ceased. If Brickstreet is required to destroy medical records obtained during a deliberate intent case five years after the deliberate intent case has settled, the workers' compensation claim may still be ongoing, could be re-opened or may have closed more recently than five years prior. When the workers' compensation claim is not closed until after the deliberate intent case has resolved, the protective order will require destruction of the medical records, but the insurance commissioner's regulation requires that the file be maintained. [4]

Importantly, the five year time period listed in § 114-15-4.2 is a *minimum* period of time that an insurer may maintain a claims file, barring a prior review by the West Virginia Insurance Commissioner. By instituting five years as the *maximum* period this information may be kept, the protective order places all insurers in a extremely difficult situation - in the best case scenario, there will only be one day to destroy the information and comply with the protective order and § 114-15-4.2. Destroy the medical information one day early and the insurer has violated the insurance commissioner's regulation. Destroy the medical information one day late and the insurer has violated the protective order.

[4] This scenario is not present in automobile accident claims.

Additionally, Brickstreet does business outside of West Virginia. New York requires claim files be kept for six years or after the filing of a report on examination with the commissioner, whichever is longer. N.Y. Comp. Codes R. & Regs. tit. 11, § 243.2. As pointed out by State Farm (whose home state is Illinois) in the *Huggins* matter, Illinois requires indefinite retention of this information. Brickstreet also does business in Illinois. As Brickstreet expands into other states, this issue will become a more serious problem. Most of these regulations are subject to the discretion of each state's insurance commissioner and the deadlines can change at the commissioner's whim.

The protective order at issue in this case will place a substantial burden on workers' compensation insurers above and beyond that placed on other types of insurers, because of the interaction between workers' compensation claims and deliberate intent civil actions. For a no-fault system like workers' compensation insurance, medical data composes the majority of the claim file. The deadlines imposed by such a protective order are at odds with the public policy decisions of legislatures and insurance commissioners across the country, which prefer that claims files be maintained in their entirety. Should this Court affirm the subject protective order, it will set a dangerous precedent that will severely hinder Brickstreet's ability to comply with regulations requiring the maintenance of claims files.

2. Disallowing the sharing of medical records, medical information, and medical summaries from claims files will prevent Brickstreet from actively and accurately participating in rate making required by West Virginia law.

Brickstreet is required by West Virginia law to provide medical information to a third-party industry group called National Council on Compensation Insurance, Inc. (hereinafter "NCCI") which is the West Virginia Offices of Insurance Commissioner's designated rate-

making body. *See, e.g.,* W. Va. C.S.R. § 85-8-10; see also W. Va. Code § 23-2C-18 (vesting the insurance commissioner with the authority to choose a rate-making body). This is a vital part of the business of insurance, and is mandated by the Insurance Commissioner. *See, e.g.,* W. Va. C.S.R. § 85-8-10; W. Va. Code § 23-2C-18. Under code of state regulations 85-8-10.2, Brickstreet is required by law to "record and report to the designated rating organization its workers' compensation experience as set forth in the uniform statistical plan submitted by the designated rating organization...." W. Va. C.S.R. § 85-8-10.2. Brickstreet would not be able to comply with the regulations requiring Brickstreet to provide information to NCCI if Brickstreet cannot provide medical information to a third-party and must instead destroy that information within five years of the claim being closed pursuant to a protective order.[5]

Medical records, medical information, and medical summaries[6] are all used by Brickstreet for rate-making purposes. As this Court knows, insurance rates are not invented from thin air, they are heavily researched and carefully priced based on complex calculations involving numerous variables. Without the ability to retain medical information and provide it to third parties, Brickstreet's rate-making functions, a vital and substantial business task, will be severely hindered, and Brickstreet will not be able to comply with the Insurance Commissioner's legal requirements. Brickstreet will not be able to provide accurate and well-researched rates to its insureds, the employers of West Virginia.

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[5] Providing medical information for rate-making purposes is discussed further below because in addition to being mandated by West Virginia state law, it is also an essential business function of Brickstreet.

[6] The phrase "medical summaries" is used in the subject protective order. This language was originally used in the Orders in the Judge Bedell decisions cited heavily in Petitioner State Farm's brief. Although Brickstreet does not always utilize a "summary" in adjusting a claim, Brickstreet does enter significant amounts of data into electronic programs, such as ICD-9 diagnosis codes, biographical information about the claimant, and descriptions of the type of injury. It is unclear whether such electronically stored information would fall under the Court's definition of a "summary." However, if the Court does consider that information a summary that would need to be destroyed, it would induce substantial harm to Brickstreet's business practices.

If this Court does not overturn the subject protective order, and that order is entered in deliberate intent cases, Brickstreet will be unable to provide accurate rate-making information to NCCI regarding those claims. This will lead to biasing the rates of certain classes of insureds, especially since certain employers tend to have large numbers of deliberate intent claims. In addition to altering industry specific rates, incomplete information given to the NCCI will also result in inaccurate jurisdictional data for West Virginia, especially since many of the most serious workers' compensation claims also result in deliberate intent claims and therefore, could result in the elimination of medical documentation from the claim file.

Inaccurate workers' compensation rates will hurt every West Virginian. If certain industries have unpredictable workers' compensation rates, those industries, their employees, and their customers will suffer. In addition, Brickstreet will suffer the consequences of not complying with the Insurance Commissioner's regulations.

3. Brickstreet will be unable to comply with both the subject protective order and West Virginia Code § 33-41-5(a).

West Virginia Code § 33-41-5(a) states that a "person engaged in the business of insurance having knowledge or a reasonable belief that fraud or another crime related to the business of insurance is being, will be or has been committed shall provide to the commissioner the information required by, and in a manner prescribed by, the commissioner." In furtherance of this statute, the West Virginia Insurance Commissioner requires a semi-annual reporting of claims which requires Brickstreet to submit a large amount of medical information, including diagnosis codes and current procedural terminology codes. This semi-annual reporting is required by the Workers' Compensation Medical Management of Claims regulations. West Virginia Code of State Regulations § 85-20-8 *et. seq.*

§ 85-20-8 *et. seq.* requires Brickstreet report to the Insurance Commissioner each injured worker's diagnosed conditions, an outline of a proposed treatment program, and other information.[7] Assuming that the protective order would consider the Insurance Commissioner's office a third-party, this release of confidential medical information to the Insurance Commissioner would be prohibited by the subject protective order, but is required by law in the State of West Virginia and elsewhere.

Finally, as discussed in detail below, Brickstreet's fraud detection and investigation abilities depend almost entirely on electronic storage of medical records and on providing those records to third parties such as the National Insurance Crime Bureau and others. Not all of these insurance fraud entities are governmental, some are non-profits, and others are for-profit industry groups. Without the ability to disseminate confidential medical information to third parties, Brickstreet cannot comply with West Virginia Code § 33-41-5(a).

4. Brickstreet will be unable to comply with both the subject protective order and Medicare's Secondary Payer Statute.

Medicare's secondary payer statute requires the maintenance of electronic claims files containing medical records and information, requires submission of information by "liability insurance, no-fault insurance, and workers' compensation laws and plans" including "the identity of the claimant," and complete medical records and any other information "as the Secretary shall specify in order to enable the Secretary to make an appropriate determination concerning coordination of benefits, including any applicable recovery claim." 42 U.S.C.A. § 1395y, et. seq. This statute contains over twenty pages of various exceptions and provisions

[7] For example, § 85-20-8.3 requires the actual medical "chart notes" written by the doctor about the claimant be provided to the Insurance Commissioner. § 85-20-8.5 states that "by application for benefits, an injured worker irrevocably waives patient-physician confidentiality and agrees that physicians and health care providers may release and discuss the injured worker's medical history and medical reports pertaining to the compensable injury...." These are just a few of the requirements imposed by this section.

regarding precisely what medical treatments and payments are eligible for reimbursement and which are excluded. The Secretary requires the complete medical records of claimants to determine what treatment falls within the various exceptions and provisions of Medicare and which do not. *Id.*

Brickstreet cannot comply with 42 U.S.C.A. § 1395y, *et. seq.* if a protective order requires that Brickstreet not provide third parties with medical information, and Brickstreet certainly cannot comply if a protective order requires Brickstreet to destroy medical information in claims files after five years or some other arbitrary period. Medicare's civil penalty for non-compliance is one thousand dollars per day per claimant. *Id.* With the Patient Protection and Affordable Care Act's reliance on Medicare savings to provide funding for other programs, it is highly unlikely that Medicare will reduce or ignore the civil penalty for non-compliance because of the order of a West Virginia Circuit Court. Brickstreet will be placed in the untenable position of either violating the protective order or facing a potentially huge civil penalty from the federal government.

B. THE PROTECTIVE ORDER WOULD SUBSTANTIALLY ENCUMBER BRICKSTREET'S BASIC BUSINESS FUNCTIONS AS AN INSURANCE COMPANY

1. Disallowing the sharing of medical records, medical information, and medical summaries from claims files will prevent Brickstreet from actively and accurately participating in national fraud prevention databases.

Another use of medical information within the insurance industry is fraud prevention. As discussed in the statement of facts herein, the National Insurance Crime Bureau (hereinafter "NICB") is a not-for-profit organization that maintains a database used to detect insurance fraud in all its forms. Supplemental Appendix, ¶ 10. Although this is often as simple

as identifying an individual who files a workers' compensation claim for a back injury allegedly sustained at work the same day he files an insurance claim with an automobile insurer for a back injury allegedly sustained in a low speed accident, it can be far more complex as well. The stereotypical insurance fraud is actually only a small part of the NICB's mission. The NICB also helps target interstate insurance fraud rings and questionable practices like upcoding, modifier abuses, and template billing practices. Supplemental Appendix, ¶ 11. See, e.g., NICB 2011 annual report, available at https://www.nicb.org/about-nicb/annual_reports. The NICB's national database and the wealth of information contained therein allows the NICB to perform fraud detection activities using information unavailable to any insurance company acting alone. Although Brickstreet can investigate some of these practices on its own, the NICB's national database and unparalleled expertise in investigating these issues places the NICB on the cutting edge of insurance fraud detection. Although participation in the NICB's database is not mandatory, it is a essential tool in fulfilling Brickstreet's statutory duty under West Virginia Code § 33-41-5(a) to report suspected insurance fraud.

Workers' compensation's "no-fault" system makes it particularly susceptible to fraud. The NICB helps insurance companies prevent and prosecute fraud. These functions cannot be performed without sufficient information from the insurance companies, including electronically stored medical information. Without the ability to provide medical data to third parties gained in claims where a protective order was entered, Brickstreet will be unable to provide the NICB with data in many of its most serious claims, and will be unable to participate meaningfully in industry-wide fraud prevention. More prevalent insurance fraud will result in higher rates for Brickstreet insureds, and harm employers across West Virginia.

2. Disallowing the sharing of medical records, medical information, and medical summaries from claims files or requiring the destruction of older medical information in claims files will prevent Brickstreet from actively and accurately participating in loss control.

In addition to participating in national fraud prevention organizations like the NICB, Brickstreet also takes its own measures to ensure that Brickstreet is paying claims quickly and efficiently. Brickstreet's internal loss control systems will not be able to function in cases where Brickstreet cannot share medical records with third parties.

Brickstreet's electronic payment system ensures fast and accurate payment of medical bills submitted to Brickstreet.[8] Supplemental Appendix, ¶ 14. This system also allows for increased oversight, allowing Brickstreet to monitor for fraud or sloppy billing practices by medical providers. Brickstreet uses a third-party contractor called Procura to manage its electronic payment system. Supplemental Appendix, ¶15. Essentially, medical records arrive either electronically or are scanned in to an electronic format. Brickstreet submits this data to Procura. Procura reviews the bills to investigate any duplicate billing, overbilling, unbundling, or other unfair billing practices that might adversely affect Brickstreet and its insureds. Supplemental Appendix, ¶ 16. Brickstreet then pays the amount that Procura tells Brickstreet to pay its medical providers. Supplemental Appendix, ¶ 16. If Brickstreet cannot share medical records and information with a third-party, Brickstreet will be required to perform these functions in house, something Brickstreet does not presently do. Obviously, performing complex medical bill analysis in house rather than paying a nationally recognized third-party specialist will increase Brickstreet's costs immensely.

[8] As discussed above in the section on Medicare secondary payor provisions, an electronic payment system where medical records and information are shared electronically is required by the federal government.

Additionally, Brickstreet uses historical medical data from claims files in its own anti-fraud activities, pursuant to the mandates of West Virginia law discussed above. Brickstreet performs utilization review to determine who the top billers and top prescribers are in the medical community. Supplemental Appendix, ¶ 17. This allows Brickstreet to monitor its own files for doctors who over-prescribe pain medications, who overbill for routine procedures, or who charge for a doctor's time when the patient was only seen by nursing staff. This type of fraud is difficult to track if Brickstreet must delete medical information from files merely five years after the close of litigation, and cannot use it for any purpose other than the litigation. Supplemental Appendix, ¶ 17. Brickstreet needs the ability to maintain a full and complete claims file (including medical records) to investigate fraud and overbilling practices.

3. Disallowing the sharing of medical records, medical information, and medical summaries from claims files will prevent Brickstreet from obtaining reinsurance.

A key to Brickstreet's financial stability is obtaining reinsurance. Reinsurance is purchased by Brickstreet to reimburse Brickstreet in the event a certain employer's claims exceed the retention amount. Supplemental Appendix, ¶ 18. Due to the fact that workers' compensation policies usually have no policy limits, reinsurance is a vital tool for Brickstreet and other workers' compensation insurers. Perhaps more than any other factor discussed in this brief, this issue affects workers' compensation insurers far more than automobile or commercial general liability insurers, because of the lack of policy limits on workers' compensation policies. Brickstreet must be able to obtain reinsurance if Brickstreet wishes to have any semblance of financial stability.

Of course, reinsurance will be difficult if not impossible to obtain if Brickstreet cannot provide individual claims data to reinsurance companies. Supplemental Appendix, ¶ 19.

For example, if a reinsurer has agreed to reimburse Brickstreet for any expenses over one hundred thousand dollars per claim, every reinsurance policy will require Brickstreet to provide to the third-party reinsurer copies of the medical expenses expended in reaching the one hundred thousand dollar mark. The reinsurer has a right under their policy to make sure that the costs incurred in exhausting the first one hundred thousand dollars are related to the risk they are insuring for and are reasonable. Supplemental Appendix, ¶ 19. To do this, Brickstreet must provide medical information electronically to the third-party reinsurer. Supplemental Appendix, ¶ 19. Providing information to the reinsurer could be prohibited under the protective order this Court is reviewing. Consequently, obtaining reinsurance could become impossible for Brickstreet.

4. Mandatory destruction of medical records, medical information, and medical summaries from claims files will prevent Brickstreet from fulfilling its duties to its insureds' employees in Workers' Compensation claims.

When an automobile accident enters litigation, the insurance company knows that when the litigation settles, the claim is over. The subject matter of the litigation is the same as the subject matter of the claim. The same is not true for a workers' compensation claim that enters civil litigation under a deliberate intent theory. The employee can bring the deliberate intent claim first, and file the workers' compensation claim later, they can settle the deliberate intent claim while the workers' compensation claim is ongoing, the workers' compensation claim can continue for five years, or could be closed and reopened. This distinction is crucial for the West Virginia Supreme Court of Appeals to understand and consider.

If Brickstreet is forced to destroy medical information in a claim file five years after the deliberate intent claim resolves, what happens if the workers' compensation claim is

ongoing? What happens if the claimant wishes to re-open his workers' compensation claim? Destruction of the medical records in an ongoing workers' compensation claim would obviously hinder Brickstreet's goal of promptly and effectively processing and paying those claims. Some workers' compensation determinations happen several years after a claim is initially closed. For example, to be able to rate someone for permanent partial disability through an independent medical examination, a doctor must review all of the prior medical records and prior disability findings for a claimant. Some claimants working in safety sensitive industries slowly increase their permanent partial disability awards over the years as they become more and more disabled through workplace injuries. Without prior records to review, a doctor calculating a permanent partial disability award faces an impossible task. At a minimum, obtaining all of the claimant's medical records and documentation again would unnecessarily delay payment of the claim.

Destruction of medical records in ongoing workers' compensation claims also presents a strong possibility that medical bills properly incurred and submitted will not be paid. If the corresponding treatment records are destroyed pursuant to a protective order entered in a deliberate intent case, Brickstreet will be unable to confirm whether billed services are related to a compensable workplace incident, and therefore will be unable to confirm whether or not the billed services should be paid. The best case scenario in this situation is a delay in payment, and the worst case scenario is Brickstreet paying unrelated medical expenses or refusing to pay proper medical expenses. None of these results make sense for Brickstreet, the medical provider, the employer or the employee who is seeking treatment.[9]

Additionally, Brickstreet is not the only workers' compensation insurer operating in West Virginia. More carriers are writing workers' compensation policies for West Virginia

[9] This scenario may even discourage employees from filing valid deliberate intent claims, since doing so could result in complications to their workers' compensation claims.

each year. Without prior records showing previous permanent partial disability awards, Brickstreet could erroneously pay claimants for liabilities insured by other carriers. For example, an employee could be injured while working for another insurer's policyholder and receive a twenty percent permanent partial disability award. The employee could also bring a deliberate intent case, and obtain a protective order like the one at issue here. Under the subject protective order, the other insurer would be unable to provide any information to the NICB, or any other third-party. Five years later, the employee's medical information in his claim file with the other insurer is destroyed, per the protective order. If that same employee is later injured while working for a Brickstreet insured, and is awarded twenty three percent permanent partial disability, Brickstreet would be responsible for settling the entire twenty three percent, with no easy way to know that the employee was already compensated for twenty percent of his award and it should only be paying for three percent of the award. This scenario shows that even when the employee is not trying to defraud the workers' compensation system, a protective order like the one at issue will facilitate improper results and interfere with the current business systems used by the insurance industry.

5. Mandatory destruction of medical records, medical information, and medical summaries from claims files will prevent Brickstreet from performing numerous other basic functions of its business.

Brickstreet uses medical information in closed claims every single day for many different purposes. The aggregate data collected by Brickstreet about the markets that Brickstreet serves, about the adjusters Brickstreet employs, and about the health care providers in the state of West Virginia, is invaluable. Although this brief addresses many of the most obvious and glaring uses of this information, such as rate-making, fraud, reinsurance, loss control, and claims service, numerous other issues exist where Brickstreet makes use of past medical

information. These other areas, which are not discussed here in detail, but which should be considered by this Court, include case management;[10] disease management; quality assurance; quality improvement; performance evaluations;[11] provider credentialing verification; utilization review; peer review activities; actuarial, scientific, medical or public policy research; grievance procedures; internal administration of compliance, managerial, and information systems; policyholder service functions; auditing; reporting; administration of consumer disputes[12] and inquiries; and external accreditation. Supplemental Appendix, ¶ 21.

Brickstreet will not burden the Court with a complete, detailed recitation of how each of these numerous areas uses past medical information. Suffice it to say that without access to medical information from old claims, Brickstreet will necessarily have to change how it performs each and every one of these functions, and each and every one of these functions will not be performed as effectively by Brickstreet as they are today. This Court, by and through its history and the experience of the judges, is familiar with workers' compensation system in West Virginia and can easily recognize how Brickstreet might use historical claims information (necessarily including medical records and data) to effectively accomplish the listed functions. If protective orders like the one at issue become the norm in deliberate intent cases, Brickstreet

[10] Brickstreet, other workers' compensation insurers, and third-party workers' compensation administrators often employ nurse case managers to assist in managing an employee's medical care. Many employees who file workers' compensation claims do not have a family doctor or primary care physician, and see numerous specialists as a result of their workplace injury. Nurse case managers assist the specialists by providing past medical records, medical history, coordinating care between diverse specialists, and ensuring the employees attend their appointments.

[11] It will be exceedingly difficult for Brickstreet to evaluate whether or not their adjusters are adjusting claims fairly if historical medical data from similar claims is unavailable. Although writing performance evaluations for insurance adjusters may not be a compelling public interest, there is a compelling public interest in ensuring that adjusters are adjusting claims in good faith and in compliance with West Virginia's Unfair Trade Practices Act, West Virginia § Code 33-11-4. Evaluating adjuster conduct with an incomplete claims file is nearly impossible.

[12] Claimants who wish to file a complaint against Brickstreet with the West Virginia Insurance Commissioner will have difficulty establishing that Brickstreet has a general business practice of violating West Virginia's Unfair Trade Practices Act, West Virginia § Code 33-11-4, in the adjustment of deliberate intent claims, if the claims files are scrubbed of medical data, and Brickstreet cannot provide the complainant with any information from those files.

will be left to try to accomplish these functions without data from many of its most serious and expensive claims.

V. CONCLUSION

Every American citizen has a basic interest in the privacy of their medical records. Brickstreet takes that interest very seriously, and uses internal protections to accomplish that goal in addition to carefully complying with Insurance Commissioner regulations drafted to accomplish the goal of claimant privacy. Electronic storage of medical data, and providing that medical data to government entities and third parties that assist with billing, fraud detection, and other essential business functions do nothing to undermine a claimant's privacy.

The subject protective order entered by the Circuit Court of Harrison County in this case does little to protect the privacy of insurance claimant's medical records, which are already capably protected through West Virginia regulations and industry standards, but significantly affects the basic business functions and regulatory compliance of insurance companies. The protective order seeks to place an untenable burden on insurance companies who litigate claims. Indeed, in Plaintiff's Response to State Farm's Petition, Plaintiff-Respondent states that State Farm and Nationwide are appealing the protective order because they "have the economic resources to spend hundreds of thousands of dollars on an issue that has very little impact on a $20,000 UIM case." Respondent's brief, p. 8. This comment demonstrates the lack of analysis by Plaintiff-Respondent of the protective order's effects on the insurance business in West Virginia which Brickstreet has attempted to demonstrate in this brief. While from the Respondent's perspective, this may be merely a "$20,000 UIM case," to insurance companies, this is a multi-million dollar issue with repercussions across nearly every aspect of our business. From Brickstreet's perspective, this decision could eliminate nearly all

fraud prevention, rate-making, and regulatory compliance from our most costly and complex claims - deliberate intent cases. It would also make full regulatory compliance impossible for Brickstreet. For these reasons, the West Virginia Supreme Court should overturn the subject protective order, and require that future protective orders not ask insurance companies to violate any established law and not restrict insurance companies from using medical records for legitimate and accepted business purposes.

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IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
Petitioner,

v. **Docket Number 12-0304**

HONORABLE JOHN LEWIS MARKS, JR.,
JUDGE OF THE CIRCUIT COURT OF
HARRISON COUNTY, ET AL.,
Respondents,

From the Circuit Court of Harrison County, West Virginia
Civil Action No. 10-C-176-1

and

NATIONWIDE MUTUAL INSURANCE
COMPANY,
Petitioner,

v. **Docket Number: 12-0210**

Carmella J. Faris and Robert Faris,
Respondents.

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

CERTIFICATE OF SERVICE

I, Corey Palumbo, hereby certify that on the 3rd day of July, 2012, the foregoing **Brief of BrickStreet Mutual Insurance Company as Amicus Curiae Supporting Petitioners,** was served via U.S. mail, on the following:

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