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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Nos. 12-0304 and 12-0210

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v. No. 12-0304

THE HONORABLE JOHN LEWIS MARKS, JR.,
Judge of the Circuit Court of Harrison County, et al.,
Respondents.

AND

NATIONWIDE MUTUAL INSURANCE COMPANY,
Petitioner,

v. No. 12-0210

CARMELLA J. FARIS and ROBERT FARIS,
Respondents.

AMICUS CURIAE BRIEF OF WEST VIRGINIA INSURANCE COMMISSIONER IN SUPPORT OF THE PETITIONS OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND NATIONWIDE MUTUAL INSURANCE COMPANY FOR REVERSAL OF THE TRIAL COURT'S RULINGS

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II. STATEMENT OF *AMICUS CURIAE*

The "Insurance Commissioner of West Virginia" is the state agency charged by the West Virginia Legislature to regulate the insurance industry and its activities in West Virginia and to otherwise enforce the provisions of the state insurance code. *See* W. Va. Code § 33-2-3(a). The Insurance Commissioner's area of regulation includes, *inter alia*, the investigation, examination and oversight of the financial status of insurers and overall authority to review any phase of the operations of an insurer in this state (*see* W. Va. Code §§ 33-2-3a, 33-2-9); the licensing of insurers transacting insurance in West Virginia (*see* W. Va. Code § 33-3-1 *et seq.*); the approval of all forms used by an insurer in this state (*see* W. Va. Code § 33-6-9); the approval of rates charged by an insurer in this state (*see* W. Va. Code § 33-20-1 *et seq.*); the licensing of insurance producers doing business in this state (*see* W. Va. Code § 33-12-1 *et seq.*); and the investigation of insurance fraud and other crimes related to the business of insurance to assist in the detection and prosecution of such crimes (*see* W. Va. Code § 33-41-1 *et seq.*).[1] The Governor appoints the Insurance Commissioner by and with the advice and consent of the Senate. *See* W. Va. Code § 33-2-1.

The Insurance Commissioner submits this *amicus curiae* brief pursuant to West Virginia Rule of Appellate Procedure 30(a) for the purpose of emphasizing his statutorily mandated responsibilities, particularly with respect to the periodic examination of licensed insurers and his involvement in the investigation of insurance fraud. It is not the intention of the Insurance Commissioner to comment upon the facts of the underlying dispute or arguments of the parties. The Insurance Commissioner wishes to respectfully inform this Honorable Court of his concerns

[1] The McCarran-Ferguson Act of 1945, codified at 15 U.S.C. § 1011 et seq., allows states to regulate the insurance industry without interference from federal regulation unless federal law expressly provides otherwise. More specifically, 15 U.S.C. § 1012(b) states, in relevant part, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance[.]"

over the subject protective orders' encroachment onto the authority bestowed upon him by the West Virginia Legislature.

III. DISCUSSION

Upon information and belief, the instant appeals arise out of civil actions filed in the Circuit Court of Harrison County ("Circuit Court") as a result of injuries sustained in separate automobile accidents. In both of the personal injury actions, the Circuit Court entered protective orders that were essentially identical to each other (hereinafter collectively referred to as the "Protective Order"). Two insurance companies, State Farm Mutual Automobile Insurance Company and Nationwide Mutual Insurance Company (hereinafter collectively referred to as "Insurers"), having interests in the actions, objected to the entry of the Protective Order. The Protective Order required, among other things, that the Insurers return or destroy all of plaintiffs' medical records and medical information obtained by the Insurers in connection with the litigation upon the expiration of the document retention period required by an insurance rule provision, namely W. Va. C.S.R. § 114-15-4.2(b). The Protective Order further prohibited the disclosure of the subject medical records or information "to any person or entity" except for those involved in the litigation. Exceptions to this nondisclosure requirement were if the protected person consented to the information's release or if the Circuit Court so ordered after proper motion.

On January 13, 2012, the trial court entered a "combined order" in both matters affirming the Protective Order. The Insurers now seek this Court's review of the Protective Order and the Circuit Court's order of January 13, 2012. The instant matters were consolidated for consideration and decision by this Court on June 18, 2012. For the reasons set forth below, the

Insurance Commissioner joins the Insurers in asking this Court to prevent the Circuit Court's enforcement of the Protective Order.

The Circuit Court Has Generally Exceeded Its Authority To Judicially Operate Within The Confines Of Its Legitimate Authority And Entered The Realm Of Insurance Regulation Which Is Exclusively Within The Offices Of The Insurance Commissioner As Primary Regulator Within The State Legislatively Mandated Statutory Scheme

The Insurance Commissioner completely defers and would absolutely concur that the Circuit Court has legitimate constitutional authority within the confines of the West Virginia Constitution, statutes, rules and precedent of this Honorable Court to control conduct in regards to matters before the Circuit Court and among a host of many other responsibilities, especially in matters concerning discovery of litigation before it. *See* W.V.R.C.P. Rule 26. Nevertheless, the Insurance Commissioner has been charged with a statutory duty to regulate the industry of insurance among other matters. *See* W. Va. Code § 33-2-3. Further, there are a number of functions as mentioned above and herein that are essentially exclusive functions of the statutorily created state agency.[2] Consequently, while it may be difficult to precisely define the parameters of the conduct of both the Circuit Court and the Insurance Commissioner regarding the handling of each's respective affairs, it seems apparent that not only is the Circuit Court attempting to control the aspects of its judicial role and function with the Protective Order but is further encroaching and entering the realm of insurance regulation, which should respectfully be left in deference to the Insurance Commissioner. *See State ex rel. Citifinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008).

[2] *See, e.g.*, W. Va. Code § 33-2-21 (authority to regulate workers' compensation); W. Va. Code § 33-11-4a (authority to handle third party unfair claim settlement practice allegations through administrative process); W. Va. Code § 33-3-1 *et seq.* (licensing and taxation of insurers); W. Va. Code § 33-6-1 *et seq.* (approval or review of rate and forms required to be filed with the State); W. Va. Code § 33-12-1 *et seq.* and W. Va. Code § 33-12C-1 *et seq.* (licensure of producers and surplus lines brokers, respectively); and W. Va. Code § 33-2-9 and W. Va. Code § 33-2-3a (examination and investigation of insurers, respectively).

This Court determined in *Madden* that "the Legislature did not authorize the circuit courts to invade the jurisdiction of the Insurance Commissioner and conduct a reexamination of insurance rates previously approved by the Commissioner." *Id.*, 223 W.Va. at 238, 672 S.E.2d at 374. Further, the Court stated, "It stands to reason that if a circuit court is allowed to invade this administrative arena and reexamine the issue of whether a given insurance rate is reasonable or excessive, the judiciary will necessarily be substituting its determinations as to the permissible insurance rates for those previously determined by the Commissioner and supplanting its opinion in matters expressly delegated to the Commissioner's expertise and jurisdiction." *Id.*, 223 W.Va. at 237, 672 S.E.2d at 373. The Court additionally discussed,

> A further peril that cannot be overlooked is that judicial intervention in the rate making area would open the door to conflicting decisions amongst the various circuits regarding what constitutes an unreasonable or excessive charge for credit insurance. In this matter then, the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner is certain to be infringed if circuit courts or jurors are permitted to second guess the reasonableness of rates previously approved by the Commissioner.

Id.

The concerns present in the instant matter are analogous to those in *Madden*. Considering the Insurance Commissioner is charged with everyday regulation of a complex and evolving industry, this requires him and his staff to have a unique and expert skill set to perform necessary regulatory functions. While a circuit court must have broad discretion to control the parameters of its courtroom, ramifications can result in unanticipated ways when the actions the court orders stretch beyond the immediate litigation issues and far into the future. As a result, there can be inconsistent rulings causing adverse consequences to industry as well as resultant adverse consequences to the public or policyholders in many regards. Some of these ramifications will be discussed below.

A. The Circuit Court Exceeded Its Legitimate Authority When It Entered A Protective Order That Directly Infringed Upon The Insurance Commissioner's Privacy Rule

To carry out his regulatory duties, the Insurance Commissioner may review any phase of the operations of an insurer doing business in West Virginia. *See* W. Va. Code § 33-2-9(h). Moreover, the Insurance Commissioner is required to conduct an examination of each licensed insurance company operating in this state at least once every five years. *See* W. Va. Code § 33-2-9(c) and (d). Having access to accurate and complete insurance claim files is paramount to ensuring the orderly, fair and consistent application of laws enacted by the Legislature to protect the state's consumers of insurance products and services.

As this Court has observed, "With regard to the regulation of the insurance industry in West Virginia, the West Virginia Legislature in Chapter 33 of the West Virginia Code has established a comprehensive set of laws governing insurers who operate in the State." *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 226 W. Va. 138, 143, 697 S.E.2d 730, 735 (2010). The Court added, "To facilitate the enforcement of these statutes, the Legislature delegated rule-making authority to the Insurance Commissioner. [W. Va. Code] § 33-2-10." *Id.*, 226 W. Va. at 143-44, 697 S.E.2d at 735-36. In 2002, the Legislature enacted a bill authorizing 114 W. Va. C.S.R. 57, § 1 *et seq.*, a legislative rule promulgated by the Insurance Commissioner. The purpose behind this rule, which is often referred to as the "Privacy Rule," was to address how a licensed West Virginia insurer should treat nonpublic personal health and financial information in its possession. Crafted from a 2000 model regulation of the National Association of Insurance Commissioners ("NAIC"),[3] the Privacy Rule prohibits, among other things, an insurance company from disclosing a claimant's medical records without the claimant's authorization

[3] The NAIC principally patterned its model regulation upon the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.* The process upon which the NAIC constructs a model regulation is open to all interest groups; therefore, a model's provisions are thoroughly vetted prior to adoption.

except under certain delineated circumstances. An insurer's failure to maintain the privacy of health information in accordance with the Privacy Rule is an unfair trade practice. *See* W. Va. Code § 33-11-4(12).

More specifically, the Privacy Rule commands that 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. However, the Legislature also ratified specific exemptions to the authorization requirement:

> Nothing in this section shall prohibit, restrict or require an authorization for the disclosure of nonpublic personal health information by a licensee for the performance of the following insurance functions by or on behalf of the licensee: 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 and guaranty fund functions; reinsurance and excess loss insurance; risk management; case management; disease management; quality assurance; quality improvement; performance evaluation; 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; database security; administration of consumer disputes and inquiries; external accreditation standards; the replacement of a group benefit plan; activities in connection with a sale, merger, transfer or exchange of all or part of a business or operating unit; any activity that permits disclosure without authorization pursuant to the federal Health Insurance Portability and Accountability Act privacy rules promulgated by the U.S. Department of Health and Human Services; disclosure that is required, or is one of the lawful or appropriate methods, to enforce the licensee's rights or the rights of other persons engaged in carrying out a transaction or providing a product or service that a consumer requests or authorizes; and **any activity otherwise permitted by law**, required pursuant to governmental reporting authority, or to comply with legal process. Additional insurance functions may be added with the approval of the commissioner to the extent they are necessary for appropriate performance of insurance functions and are fair and reasonable to the interest of consumers.

W. Va. C.S.R. § 114-57-15.2 (emphasis added). The listed insurance functions of § 15.2 are an integral part of West Virginia's insurance system. As discussed below, careful consideration

was given by the Legislature and the Insurance Commissioner regarding the needs of an effective insurance system versus the concerns surrounding medical information confidentiality.

To further protect against unauthorized access to or use of records or information being held by an insurer that could result in substantial harm or inconvenience to a consumer, the Insurance Commissioner promulgated 114 W. Va. C.S.R. 62, § 1 *et seq*. According to this rule, an insurer must "implement a comprehensive written information security program that includes administrative, technical and physical safeguards for the protection of customer information." W. Va. C.S.R. § 114-62-3.1. A violation of this rule provision is cause for the Insurance Commissioner to revoke or suspend the insurer's license, or in the alternative assess a penalty. *See* W. Va. C.S.R. § 114-62-6.1. During a periodic examination of an insurer, the Insurance Commissioner must confirm that the insurer has such a security program in place and abides by the privacy laws of this state. *See* Market Regulation Handbook, Operations and Management Standards 11, 12 and 17, attached hereto as "Exhibit A."

Insurers being examined by the Insurance Commissioner are obligated to provide to the Insurance Commissioner "**free access** at all reasonable hours at its offices to **all** books, records, accounts, papers, documents and any or all computer or other recordings relating to the property, assets, business and affairs of the company being examined." W. Va. Code § 33-2-9(i)(2) (emphasis added); *see also* W. Va. C.S.R. § 114-15-4.1. Accordingly, the legal duty imposed upon an insurer to produce all claim records for inspection by the Insurance Commissioner during a regulatory examination falls squarely within the "any activity otherwise permitted by law" exception set forth in W. Va. C.S.R. § 114-57-15.2.[4]

[4] Likewise, the Privacy Rule's exception for the reporting of suspected fraud to the Insurance Commissioner is a mandatory requirement under the Insurance Fraud Prevention Act. The Protective Order's intrusion into the fraud reporting requirement is more fully fleshed out in part B of the Discussion section of this brief.

The Insurance Commissioner, in promulgating the Privacy Rule under the authority of W. Va. Code §§ 33-2-10[5] and 33-6F-1(b),[6] and the Legislature, in adopting the Privacy Rule by legislation, appropriately weighed medical record confidentiality against certain critical insurance functions and determined that insurers should be permitted to utilize and disclose nonpublic personal medical information for distinct purposes without the prerequisite of obtaining an authorization from the protected person. These insurance functions go to the heart of a properly operating insurance system. A comprehensive insurance scheme having appropriate safeguards and in which pertinent information reaches those that have an essential need for it benefits those that come in contact with the business of insurance, which obviously includes policyholders and claimants. The Circuit Court has, through its entry of the Protective Order, unseated the balancing of interests undertaken by the Insurance Commissioner, the NAIC and, most importantly, the West Virginia Legislature.

In reviewing policy considerations made within the context of a legislative rule, this Court has explained:

> Our job is not to weigh the wisdom of, nor to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by an agency in interpreting and applying a statute. Moreover, it is not necessary for us to find that the regulation is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in this Court.

West Virginia Health Care Cost Rev. Auth. v. Boone Meml. Hosp., 196 W.Va. 326, 339, 472 S.E.2d 411, 424 (1996). Additionally, this Court has found that West Virginia courts owe "substantial deference" to a valid legislative rule, which "can be ignored only if the agency has

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[5] W. Va. Code § 33-2-10(a) provides: "The commissioner is authorized to promulgate and adopt such rules and regulations relating to insurance as are necessary to discharge his duties and exercise his powers and to effectuate the provisions of this chapter and to protect and safeguard the interests of policyholders and the public of this State."

[6] W. Va. Code § 33-6F-1(b) states: "On or before the first day of July, two thousand one, the commissioner shall propose rules for legislative approval in accordance with article twenty, chapter twenty-nine-a of this code necessary to carry out the provisions of Title V of the Gramm-Leach-Bliley Act, Pub. L. 106-102 (1999) and this article."

exceeded its constitutional or statutory authority or is arbitrary or capricious." Syl. Pt. 4, *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995); *see also*, Syl. Pt. 5, *Smith v. W. Va. Human Rights Comm'n*, 216 W. Va. 2, 602 S.E.2d 445 (2004) ("A regulation that is proposed by an agency and approved by the Legislature is a 'legislative rule' as defined by the State Administrative Procedures Act, W. Va. Code § 29A-1-2(d), and such a legislative rule has the force and effect of law."); *Kincaid v. Mangum*, 189 W. Va. 404, 411-12, 432 S.E.2d 74, 81-82 (1993) ("[O]ur legislature does not simply review the rules recommended by the agencies, but, instead gives our rules the same effect as statutes."). Thus, the effect of a valid legislative rule is authoritative.

Put simply, the Protective Order plainly contradicts W. Va. C.S.R. § 114-57-15.2 considering it prohibits the Insurers from providing the plaintiffs' medical records to the Insurance Commissioner unless the plaintiffs consent or a court order is obtained. Moreover, the Insurers could find themselves in the unenviable position of having to either violate the Insurance Commissioner's examination statute (W. Va. Code § 33-2-9) or the Protective Order. The instant case is strikingly analogous to *Bedell*, *supra*, where this Court found that "[b]ecause [the legislative rule in question] 'has the force and effect of law,' the circuit court's protective order which would require [the insurer] to violate the rule is erroneous as a matter of law." 226 W. Va. at 145, 697 S.E.2d at 737 (citation omitted).

The Circuit Court's blanket non-disclosure mandate is particularly puzzling given that it comes soon after the trial court's acknowledgment of the Insurance Commissioner's record retention requirement set forth in W. Va. C.S.R. § 114-15-4.2(b), a requirement that is in obvious aid of the Insurance Commissioner's statutorily assigned duty to periodically conduct an examination of each licensed insurance company operating in West Virginia. *See* W. Va. Code §

33-2-9(c) and (d). A property and casualty insurer is expressly required to retain, *inter alia*, "medical records" in its claim files in order for the files to be "sufficiently clear and specific so that pertinent events and dates of these events can be reconstructed." W. Va. C.S.R. § 114-15-4.4. Importantly, any medical record produced to the Insurance Commissioner by an insurer as part of an examination is to be kept confidential. *See* W. Va. Code § 33-2-9(*l*)(4).[7]

At the very least, the non-disclosure provision of the Protective Order adds an impractical barrier to the open exchange of claim information from insurer to Insurance Commissioner, a barrier in which the Legislature thought unnecessary when it adopted the exceptions set forth in W. Va. C.S.R. § 114-57-15.2. As mentioned above, an insurer under a regulatory examination by the Insurance Commissioner must provide "free access . . . to all [of its] books, records, accounts, papers, documents . . .." W. Va. Code § 33-2-9(i)(2). The insurance claims review portion of an examination takes approximately two to three weeks to complete. If a protective order was in place like the ones in question and the Insurance Commissioner initiated an examination, it is highly unlikely the insurer could obtain the claimant's authorization or a court order for the release of medical records within the two to three week review period. Therefore, assuming the claimant's consent or a court order would ultimately be available for the release of the records, a delay during the examination would almost surely result causing additional expense and work time lost. Of course, if for whatever reason the claimant's authorization or court order could not be obtained, the protective order's nondisclosure provision would entirely supersede the exemption of W. Va. C.S.R. § 114-57-15.2.

[7] W. Va. Code § 33-2-9(*l*)(4) states, in part: "All working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the commissioner or any other person in the course of an examination, analysis or review made under this section must be given confidential treatment and are not subject to subpoena and may not be made public by the commissioner or any other person[.]"

Additionally and overlooked in regards to the Protective Order is that the Insurance Commissioner also has exclusive authority to investigate and determine third party unfair trade practice claim violations pursuant to W. Va. Code § 33-11-4a. While not as disconcerting as the need for the retention of the files for market conduct review, issues can arise in the context of singular claims that would require the dissemination of pertinent claim information to the Insurance Commissioner for determination of violations concerning the referenced authority.

For the foregoing grounds, the Insurance Commissioner respectfully requests this Honorable Court prevent the enforcement of the Protective Order by reiterating the "substantial deference" owed to a valid legislative rule.

B. The Protective Order Substantially Impedes The Statutorily Mandated Duty Of Insurers To Report Suspected Fraud

Of particular importance to the Insurance Commissioner is the exemption expressed in W. Va. C.S.R. § 114-57-15.2 pertaining to the "detection, investigation or reporting of actual or potential fraud, misrepresentation or criminal activity." Because insurance transactions are ripe with the potential for fraud and other illegal activities, the Legislature enacted the Insurance Fraud Prevention Act, codified at W. Va. Code § 33-41-1 *et seq.* A principle purpose of the Act is to utilize "the expertise of the commissioner to investigate and help prosecute insurance fraud and other crimes related to the business of insurance more effectively[.]" W. Va. Code § 33-41-1(b). To implement the objectives of the Act, the Legislature established the West Virginia Insurance Fraud Unit within the Insurance Commissioner's office.[8] *See* W. Va. Code § 33-41-8(a). With twenty-five allocated investigative positions, the Insurance Fraud Unit operates out of

[8] Separate from the Insurance Fraud Unit, the Insurance Commissioner may conduct investigations whenever he "has cause to believe that a violation of any provision of [Chapters 23 or 33] of this code has been or is being committed." W. Va. Code § 33-2-3a(a); *see also* W. Va. Code § 33-2-19(a) (providing that such investigations are "confidential by law and privileged, are not subject to the provisions of chapter twenty-nine-b of this code and are not open to public inspection")

field offices located in eight West Virginia cities. Among its responsibilities, the Insurance Fraud Unit evaluates "reports or complaints of alleged fraud related to the business of insurance activities from federal, state and local law-enforcement and regulatory agencies, persons engaged in the business of insurance and the general public to determine whether the reports require further investigation[.]" W. Va. Code § 33-41-8(b)(2).

Although the pervasiveness of insurance fraud is difficult to precisely measure, the associated costs imputed to the public are of no doubt substantial. The Insurance Information Institute estimates that fraud accounts for approximately ten percent (10%) of the property and casualty insurance industry's incurred losses and loss adjustment expenses, or around $30 billion annually. *See* Insurance Information Institute, Insurance Topics, Insurance Fraud, March 2012, *at* http://www.iii.org/issues_updates/insurance-fraud.html. Forty-two states and the District of Columbia have found it necessary to create a specific governmental agency to combat insurance fraud. *Id.* Referrals, cases opened, convictions and court-ordered restitution have been on the increase as reported by these agencies. *Id.*

West Virginia is by no means spared from such fraudulent activity or its resulting adverse effects. In 2010, the Fraud Unit received a total of eight hundred ninety referrals leading to forty-nine arrests and forty-five convictions on one hundred forty-five felony counts. *See* West Virginia Offices of the Insurance Commissioner, 2010 Annual Report, at 105-06, *available at* http://www.wvinsurance.gov/LinkClick.aspx?fileticket=JonxQH3o8hI%3d&tabid=207&mid=799. Such successful prosecutions could not occur without the cooperation and assistance of law enforcement agencies, the public and the insurance industry. The deterrent effect of publicized fraud prosecutions and convictions cannot be overstated. The Fraud Unit's investigation of

referred matters has unquestionably developed into a vital tool for combating insurance fraud in West Virginia.

The duty to report suspected fraud is not discretionary with respect to insurance companies. "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." W. Va. Code §33-41-5(a) (emphasis added); *see also* W. Va. C.S.R. § 114-71-3. "The word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation." Syl. Pt. 2, *Terry v. Sencindiver*, 153 W.Va. 651, 171 S.E.2d 480 (1969).

Medical records are particularly important in the detection of insurance fraud because they often contain crucial information such as when a claimant has presented with the same injuries after multiple staged accidents or when a medical provider is connected to a number of dubious claims involving similar scenarios.[9] Without such information to expose and verify a pattern of suspicious activity, certain criminal fraud cases may not be uncovered or prosecuted. So in addition to usurping the fraud reporting exception in W. Va. C.S.R. § 114-57-15.2, the Protective Order's non-disclosure and non-retention provisions potentially interfere with the reporting requirement of W. Va. Code § 33-41-5(a) which, in turn, could undermine the Fraud Unit's ability to detect and investigate fraudulent activity within the business of insurance occurring in West Virginia.

Although the likelihood of the plaintiffs in the instant matters perpetrating insurance fraud may be remote, the possibility of future plaintiffs committing undetected fraud rises with

[9] As with documents provided in connection with regulatory examinations of insurers, all documents obtained by the Insurance Fraud Unit during a fraud investigation are treated as confidential. *See* W. Va. Code § 33-41-7(a).

the entry of every protective order having overreaching language like the one in the cases *sub judice*. Therefore, this Court should set a clear precedent by prohibiting the enforcement of the Protective Order while advancing the policy goals originally set forth in the Insurance Fraud Prevention Act.

C. The Protective Order May Substantially Impede Operations Of Insurance Carriers Which May Result In Ultimate Harm To Policyholders In General

As mentioned earlier, unintended consequences can result when there is overlapping or concurrent jurisdiction in regards to matters that are within the expertise of a regulator. This is not to say that a circuit court cannot touch upon and issue rulings concerning specified insurance matters that clearly require the court's ruling and ultimate disposition. The Protective Order, however, greatly exceeds the needs of the Circuit Court to fashion a remedy that would provide fairness to all parties involved. The following instances only briefly touch upon concerns which this Honorable Court can ascertain and discern far reaching implications if misapplied.

1. Ratemaking

The Insurance Commissioner is charged with approving rates of insurance companies. *See* W. Va. Code § 33-20-1 *et seq*. There are specific statutory parameters that rates must not be "excessive, inadequate or unfairly discriminatory." W. Va. Code § 33-20-3(b). Loss payments, *i.e.* claims experience, must be reviewed and analyzed to ascertain appropriate loss ratios, operating ratios and ultimately rates that need to be charged to in fact make sure that rates do not become excessive or inadequate. Rates can be challenged pursuant to W. Va. Code § 33-20-5. Some rate challenges have gone back as much as fourteen years in seeking prior approval of the Insurance Commissioner. Accordingly, litigation may entail a challenge of loss experience and the need to charge specific rates to policyholders. Underlying data and information concerning

claims must be readily available in order to defend business decisions that companies make, to defend why it sought particular rates with the Insurance Commissioner and to defend challenges to loss ratios, look back on rates and other actuarially sound principles that were relied upon. To encroach upon these principles may indelibly cause a failure to provide justification for actions taken years earlier and either approved or denied by the Insurance Commissioner.

2. Reporting To Data Information Services

The insurance industry may report claims information to reporting and data accumulation services. Not only is this a valuable fraud tool, it also allows for the industry to in fact adjust claims. Under West Virginia law, proximate cause and injury must be proven. If reporting to data accumulation services is prohibited, insurance companies may be forced to pay for damages that were not the result of the insured/tortfeasor's negligence. These costs will ultimately be passed onto policyholders that then must bear the brunt of the court's failure to allow the industry to in fact operate in a needed fashion. Claims quite simply cannot be adjusted in a vacuum. The Court is well aware of the potentially thousands of reasons claims are litigated, settled or ultimately go to verdict. Some of the issues can involve prior injuries or exposure of injured parties in which responsibility for their injuries are the liability of other parties. This cost shifting may ultimately harm consumers and should not be allowed to occur if so prevented by the court's Protective Order.

3. Electronic Information Systems

We are obviously in the age of exponential technological advances regarding the handling of electronic documents. While all such ramifications cannot be fully examined within the content of this brief, the Court should consider issues such as the need for electronic holds on documents, spoliation of evidence, the ability to retrieve information, paperless environments,

cost savings of electronic mail and so on. As mentioned earlier herein, there are costs or potential cost ramifications associated with the requirements of the Protective Order. As the insurance industry attempts to reduce costs, avenues are explored to implement the same. The Insurance Commissioner however is charged and has authority to regulate these occurences. It is considered an unfair trade practice to violate the provisions of the Insurance Commissioner's Privacy Rule. *See* W. Va. Code § 33-11-4(12). The costs to operate and adjust claims is a component that is factored into a rate that is charged to the consumer. If costs associated with loss adjustment expenses increases, rates may necessarily need to be increased. The Insurance Commissioner has the authority, investigative wherewithal, examination resources, expertise and knowledge to investigate these matters. Such matters should not be taken up by the circuit courts of this state and is not a good use of judicial economy and resources. Further, the ramifications of such ordered action should be explored before requiring implementation.

4. Reinsurance Transactions

For a variety of reasons, insurance companies reinsure transactions or cede the liability as well as premium to reinsurance vehicles and/or companies.[10] The Supreme Court of Louisiana has succinctly enumerated the benefits of reinsurance:

> Some of the more important needs which reinsurance fulfills are: 1) to increase the ceding company's capacity, 2) to help stabilize the ceding company's operating results, 3) to attain a greater spread of risk, 4) to enable the ceding company to withdraw from a given class or line of business within a short period of time, 5) to permit the reduction of the primary carrier's required reserves, 6) to enable a small insurance company to write risks which would normally be beyond the carrier's capacity, and 7) to enable a number of insurers to spread the risk of a catastrophe such as Hurricane Camille over many companies throughout the world. *See*, generally, Thompson, [Reinsurance (4th ed. 1966)], pp. 9, 24-25; Reinarz, Robert, Property and Liability Reinsurance Management, pp. 14-15. In

[10] As this Court has noted, "Reinsurance is defined as 'insurance purchased by one underwriter from another, the latter wholly or partially indemnifying the former against the risks that it has assumed. The rights as between the underwriters are governed by the terms of the reinsurance contract.' Allan D. Windt, *Insurance Claims and Disputes* § 7.10 (2d ed. 1998)." *Higginbotham v. Clark*, 189 W. Va. 504, 510, 432 S.E.2d 774, 780 (1993).

> sum, it allows insurers to meet the public need and also allows the smaller insurer to compete, creating a marketplace.

Fontenot v. Marquette Cas. Co., 258 LA. 671, 682, 247 So.2d 572, 575-76 (1971).

Reinsurance transactions are subject to audit by the reinsurance company concerning liability and exposure to loss as well as to determine overall strength and ability of the company to handle and operate effectively on their behalf.[11] The reinsurer may ultimately bear the final risk in regards to a transaction of insurance or contractual duty to perform. These ceded transactions must have the ability to be audited, reviewed and discussed among insuring entities for a number of years. Consequently, failure to allow use of certain claim information may result in unanticipated harm if the ability to share information precludes a ceding of liability risk, causing the bearing entity to absorb catastrophic losses and thereby potentially destabilizing a market the size of West Virginia.

5. Insurance Holding Company Systems

Insurance holding company systems entail the affiliation of two or more entities, one of which is an insurer.[12] The Insurance Commissioner has authority to regulate and generally review transactions of an insurance holding company systems when the transactions touch upon the business of insurance. *See* W. Va. Code § 33-27-1 *et seq.*

How this may involve the instant situation is where an insurance company is owned by a parent holding company that is not an insurer. Consequently, a holding company may be regulated by another governmental entity such as the United States Department of Treasury where the parent holding company is a bank. In this regard, the insurance company may have to divulge and disclose details justifying its operational decisions to another entity of state or

[11] Reinsurance agreements must be approved by the Insurance Commissioner. *See* W. Va. Code § 33-4-15(f).
[12] Insurance companies, commercial banks, investment banks and securities firms were allowed to consolidate with the passage of the Gramm–Leach–Bliley Act, 15 U.S.C. § 6801 *et seq.*, in 1999.

federal government for an indeterminate period of time, especially where there could be a number of allegations posited against the entity from which it may need to defend its actions. The actuality of other unknown regulatory bodies that might audit decisions of insurance companies again begs the necessity to allow a regulator to handle matters outside of the courtroom itself to prevent unnecessary and unintended consequences.

IV. CONCLUSION

For the reasons detailed above, the Insurance Commissioner joins the Petitioners in respectfully requesting that this Honorable Court prevent the Circuit Court of Harrison County from enforcing the Protective Order.

Respectfully submitted,

MICHAEL D. RILEY,
INSURANCE COMMISSIONER

By Counsel

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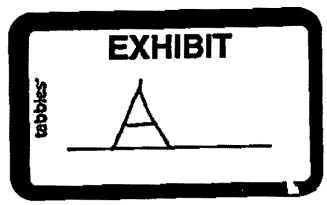
STANDARDS
OPERATIONS/MANAGEMENT

Standard 11
The regulated entity has developed and implemented written policies, standards and procedures for the management of insurance information.

Apply to: All regulated entities

Priority: Essential



Documents to be Reviewed

_____ Applicable statutes, rules and regulations

_____ Regulated entity procedure manual

_____ Regulated entity training manual

_____ Internal regulated entity claim audit procedures

_____ Regulated entity bulletins regarding insurance information

_____ Contractual arrangements between the carrier and a person other than the covered person

Others Reviewed

_____ _____

_____ _____

NAIC Model References

Health Information Privacy Model Act (#55), Section 5
Insurance Information and Privacy Protection Model Act (#670), Sections 4-9

Review Procedures and Criteria

Review regulated entity procedures, training manuals and claim bulletins to determine if regulated entity standards exist and whether standards comply with state law.

Review contractual arrangements between the regulated entity and other persons to determine if the contracts address privacy procedures and standards for the person with whom the regulated entity is contracting.

Review the regulated entity's methods for handling, disclosing, storing and disposing of insurance information. The examiners should determine whether there are procedures in place to ensure proper authorization is obtained prior to disclosure of insurance information.

Review the regulated entity's training manual to determine whether the regulated entity's employees are properly trained on the handling of insurance information.

Verify that the regulated entity provides a "Notice of Information Practices" to all applicants or policyholders or has procedures in place for the producer to deliver the notice. The examiner should determine whether the notice contains all provisions required by applicable state law.

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Verify that the regulated entity specifies those questions designed to obtain information solely for marketing or research purposes.

Verify that the regulated entity has implemented reasonable procedures to address investigative consumer reports and personal interviews.

Verify that the regulated entity has established procedures to address access to, correction, amendment or deletion of recorded personal information.

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STANDARDS
OPERATIONS/MANAGEMENT

Standard 12
The regulated entity has policies and procedures to protect the privacy of nonpublic personal information relating to its customers, former customers and consumers that are not customers.

Apply to: All regulated entities

Priority: Essential

Documents to be Reviewed

_____ Applicable statutes, rules and regulations

_____ Regulated entity privacy policies and procedures

_____ Other regulated entity manuals/instruction books

_____ Communication provided by the regulated entity to employees and producers subject to the regulated entity's privacy policies

_____ Prior to conducting an examination, the examiner should review the state's definition of "customer" and "consumer" to determine appropriate usage of the terms. The examiner should also review the various exceptions and exclusions contained in the state's privacy act/regulation.

Others Reviewed

_____ _____

_____ _____

NAIC Model References

Privacy of Consumer Financial and Health Information Model Regulation (#672)

Review Procedures and Criteria

Review the regulated entity's policies, practices and procedures regarding protection and disclosure of nonpublic personal information of customers, former customers and consumers who are not customers, to verify that they comply with applicable state laws regarding privacy.

Review employee procedures regarding the treatment of nonpublic personal information to verify that they comply with the regulated entity's privacy policies, practices and procedures and with applicable state laws regarding privacy.

As applicable, verify that the regulated entity/licensee has provided a copy of its privacy notice to its producers.

Determine that the regulated entity does not unfairly discriminate against customers and consumers who are not customers who (1) have opted out from the disclosure of nonpublic personal financial information to nonaffiliated third parties; and (2) have not authorized disclosure of nonpublic personal health information, if applicable.

Review all privacy-related consumer complaints and inquiries.

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STANDARDS
OPERATIONS/MANAGEMENT

Standard 17
Each licensee shall implement a comprehensive written information security program for the protection of nonpublic customer information.

Apply to: All regulated entities

Priority: Essential

Documents to be Reviewed:

_____ Applicable statutes, rules and regulations

_____ Regulated entity written materials describing its information security program

_____ Regulated entity policies, procedures and other materials it uses to implement its information security program

_____ Prior to conducting an examination, the examiner should review the state's definition of "customer" and "consumer" to determine appropriate usage of the terms. The examiner should also review the various exceptions and exclusions contained in the state's privacy act/regulation.

Others Reviewed

_____ _____

_____ _____

NAIC Model References

Standards for Safeguarding Customer Information Model Regulation (#673)

Review Procedures and Criteria

Review the regulated entity's written information security program to determine whether the security program includes administrative, technical and physical safeguards.

Determine whether, when developing safeguards, the regulated entity took into consideration the:
- Size and complexity of the regulated entity; and
- Nature and scope of regulated entity's activities.

In making the assessment above, consider factors such as: (1) the products and services offered by the regulated entity; (2) the methods of distribution for the products and services; (3) the types of information maintained by the regulated entity; (4) the size of the regulated entity (which may include the number of employees and the volume of business, etc.); (5) the marketing arrangements; and (6) the extent to which, or methods by which, the regulated entity communicates electronically with customers, producers and other third parties.

Evaluate whether the regulated entity's information security program is designed to:
- Ensure the security and confidentiality of customer information;
- Protect against any anticipated threats or hazards to the security or integrity of the information; and
- Protect against unauthorized access to or use of the information that could result in substantial harm or inconvenience to any customer.

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CERTIFICATE OF SERVICE

I, Andrew R. Pauley, counsel for Michael D. Riley, West Virginia Insurance Commissioner, do hereby certify that I have served a copy of the foregoing "*AMICUS CURIAE* BRIEF OF WEST VIRGINIA INSURANCE COMMISSIONER IN SUPPORT OF THE PETITIONS OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND NATIONWIDE MUTUAL INSURANCE COMPANY FOR REVERSAL OF THE TRIAL COURT'S RULINGS" upon the following by mailing a true and accurate copy of the same, by United States mail, postage prepaid, on this 3rd day of July, 2012, as follows:

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