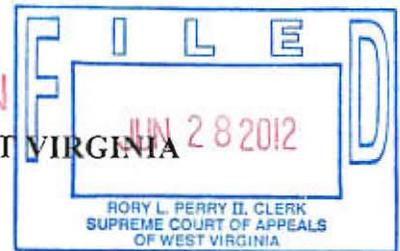


BRIEF FILED
WITH MOTION



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NOS. 12-0304 and 12-0210

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

Petitioner,

v.

Civil Action No. 10-C-176-1

MATTHEW HUGGINS, and
THE HONORABLE JOHN LEWIS MARKS, JR.

Respondents.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner

v.

Civil Action No. 10-C-123-1

CARMELLA J. FARIS, and ROBERT FARIS,

Respondents.

From the Circuit Court of
Harrison County, West Virginia

BRIEF OF *AMICI CURIAE* WEST VIRGINIA INSURANCE
FEDERATION, AMERICAN INSURANCE ASSOCIATION, AND THE
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN
SUPPORT OF WRIT OF PROHIBITION AND APPEAL

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INTRODUCTION

The West Virginia Insurance Federation, the American Insurance Association, and the National Association of Mutual Insurance Companies file this brief as *amici curiae* (“*Amici*”) because the principle underlying the issuance of Protective Orders in these consolidated cases would have significant, adverse implications for the insurance industry in this State.¹ Allowing Courts through individual protective orders to prevent the limited, required dissemination of certain claimants’ medical information to third parties would hamstring an insurer’s ability to operate efficiently, effectively and in full compliance with the law. The disclosure of specific claim information is necessary for obtaining reinsurance and setting rates. Significantly, a prohibition on the disclosure of specific claim information to the West Virginia Insurance Commissioner or the National Insurance Crime Bureau (NICB) severely hampers the ability to identify and reduce fraudulent claims, which can do nothing to enhance the affordability of critical property and casualty insurance coverages for the citizens of West Virginia.

Further, the entry of protective orders like the ones entered by the Circuit Court of Harrison County significantly and adversely impacts the insurance industry’s ability to comply with competing regulations concerning the retention of claim file documentation. Allowing individual courts to set the parameters of an insurer’s obligations with respect to retention of claim files, including medical information of claimants, means that a multi-state insurance company cannot rely on a single, uniform regulatory system for its

¹ Pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amici*, its members, or its counsel contributed monetarily to the preparation or submission of this brief. Jill Cranston Bentz serves as President of the West Virginia Insurance Federation. She also is a Partner with Dinsmore & Shohl, counsel to State Farm in this case. Ms. Bentz’ involvement in the preparation and filing of this brief has been limited exclusively to her role as President of the Federation, an amicus filing this brief.

document retention policies. The issuance of such directives by courts within this State subjects insurance companies to conflicting requirements and the impossible task of meeting all of this State's regulatory and judicially imposed obligations.

For these reasons, and those contained herein, the *Amici* respectfully request that this Court reverse the Circuit Court of Harrison County, West Virginia and invalidate the Protective Orders entered by it.

STATEMENT OF INTEREST

The West Virginia Insurance Federation is the state trade association for property and casualty insurance companies doing business in West Virginia. Its members insure approximately eight of every ten automobiles and homes in West Virginia. The Federation is widely-regarded as the voice of West Virginia's insurance industry and has served the property and casualty insurance industry for nearly thirty years. The Federation has a strong interest in promoting a healthy and competitive insurance market in this State to ensure that insurance is both available and affordable to West Virginia's insurance consumers.

The American Insurance Association (AIA) is a leading national trade association representing over 300 major property and casualty insurance companies that collectively underwrite more than \$100 billion in direct property and casualty premiums, including over \$367 million in premiums in this State. AIA members, ranging in size from small companies to the largest insurers with global operations, underwrite virtually all lines of property and casualty insurance. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state

levels and files *amicus curiae* briefs in significant cases before federal and state courts, including this Court.

The National Association of Mutual Insurance Companies (NAMIC) is a national insurance trade association whose members are property and casualty insurers. NAMIC is the largest national property/casualty insurance trade association in the United States. Its 1,400 member companies write all lines of property/casualty insurance business and include small, single-state, regional, and national insurance companies, accounting for 50 percent of the automobile and homeowners insurance market and 31 percent of the business insurance market. Since its inception in 1895, NAMIC has been advocating for a strong and vibrant insurance industry.

These three trade associations file this *amicus curiae* brief in support of the Petitioner, State Farm Mutual Automobile Insurance Company, to emphasize the far-reaching and significantly adverse impact the Protective Orders entered in these consolidated matters have on West Virginia's insurance marketplace, insurance consumers and the industry as a whole.

ARGUMENT

The Protective Orders entered by the Circuit Court of Harrison County, West Virginia in these cases impede insurers from performing vital functions necessary to efficiently and economically carry on the business of insurance and to comply with state statutory and regulatory requirements that uniquely apply to the state-regulated insurance industry. The Protective Orders of the type entered in these cases prevent insurers from compiling and/or providing complete information relative to their claims for various purposes, including rate setting, and assisting the West Virginia Insurance Commissioner

and the National Insurance Crime Bureau in identifying and reducing the number of fraud claims. Further, the effect of the Protective Orders in these cases is to allow individual circuit courts within this State to arbitrarily set their own guidelines for an insurance company's retention of documents within its claim files, subject only to this Court's directives in *State ex rel. State Farm Mutual Automobile Insurance Company v. Bedell*, 226 W. Va. 138, 697 S.E.2d 730 (2010). However, left unaddressed by this Court in *Bedell* were the compliance requirements insurance companies have with respect to other states. For these reasons, the *Amici* herein respectfully request that this Court reverse the Circuit Court of Harrison County and invalidate the Protective Orders.

A. Limited Reporting of Consumer Information is a Vital Function of the Insurance Industry

One of the primary functions of an insurance company is the adjustment or handling of claims. However, the business of insurance is necessarily much broader than simply handling a claim on an individual basis. Insurance companies rely on historical claim data to meet other obligations, including rate setting and underwriting, obtaining reinsurance, and detecting and preventing fraud, a fact that the Protective Orders in these cases appear to disregard.

By their terms, the Protective Orders entered by the Circuit Court of Harrison County prohibit disclosure of medical information to any entity other than four defined groups: defense counsel and office staff, the defendants, experts necessary to assist in the case, and the insurance company, thereby prohibiting disclosure of nonpublic personal health information to third parties, such as the West Virginia Insurance Commissioner, reinsurance companies, scientific and medical research facilities, and fraud-fighting organizations such as the National Insurance Crime Bureau. By doing so, the Protective

Orders expressly prohibit the use of medical information by the insurance company to perform necessary functions in the business of insurance, functions that have been specifically recognized and accepted as permissible by the West Virginia Insurance Commissioner.

In the regulations promulgated by the West Virginia Insurance Commissioner, there is an express prohibition on the disclosure of nonpublic personal health information about a consumer or customer, absent an authorization from that consumer or customer. W. Va. Code R. § 114-57-15.1.² Standing alone, this regulation made the entry of the Protective Orders in these cases unnecessary. However, the regulation also recognizes that there are other insurance functions where nonpublic personal health information is required. The West Virginia Insurance Commissioner recognizes and specifically exempts from the non-disclosure requirements the use of nonpublic personal health information by an insurance company for various non-claim functions, such as ratemaking and guaranty fund functions, reinsurance and excess loss insurance, scientific and medical research and fraud detection. W. Va. Code R. § 114-57-15.2.

An insurance company does not handle a claim within a vacuum. Relative to a specific claim, an insurance company relies on its experience and claim history to evaluate claim values. By prohibiting an insurance company from relying on this past claims information, which necessarily includes nonpublic personal health information of

² According to W. Va. Code St. R. 114-57-15, a licensee is prohibited from disclosing nonpublic personal health information about a consumer or customer unless a disclosure authorization is obtained from the consumer or customer. However, the law further states that authorization is not required by a licensee for the performance of a number of insurance functions including, but not limited to: claims administration; claims adjustment and management; detection, investigation or reporting of action or potential fraud, misrepresentation or criminal activity; underwriting; policy placement or issuance; loss control; rate making and guaranty fund functions; reinsurance and excess loss insurance; risk management; disease management; quality assurance; actuarial, scientific, medical or public policy research; grievance procedures and many other insurance functions.

other claimants, the insurance company is stripped of information it needs to set reserves on new claims. For the same reason, an insurance company is deprived of a source of valuable information when it performs its ratemaking function and in underwriting particular policies. Historical claim data serves as a valuable tool for insurers in identifying claim values and setting rates for insurance policies. While claim information, including nonpublic personal health information, used for setting reserves and ratemaking may be an internal function of the insurance company, the Protective Orders' time limitations on retention of information effectively eviscerates historical claim data.

Likewise, the Protective Orders entered in these cases prohibit disclosure of claim information, including nonpublic personal health information, to third parties who interact with an insurance company for various reasons. Reinsurance has been recognized by this Court as, "insurance purchased from one underwriter to another, the latter wholly or partially, indemnifying the former against the risks it has assumed." *Higginbotham v. Clark*, 189 W. Va. 504, 510, 432 S.E.2d 774, 780 (1993), citing Allan D. Windt, *Insurance Claims and Disputes* §7.10 (2nd. Ed. 1998). Just as an insurance company does with its insureds, a reinsurer underwrites risks through an evaluation of the history of its insured. This underwriting process includes a review of claims history and the auditing of claim files to review reserve and other claim information. To require that a claim file be dismantled after a certain period of time precludes an insurer from having a complete picture of its operations when obtaining that reinsurance.

Finally, the Protective Orders in these cases, by prohibiting any dissemination of nonpublic personal health information to third parties, impede an insurance company's

role in meeting its obligations to identify and deter fraudulent claims. The terms of the Protective Orders entered by the Circuit Court of Harrison County are in direct conflict with an insurance company's ability to report actual or suspected fraud, either to the West Virginia Insurance Commissioner or to the National Insurance Crime Bureau. Existing statutes and regulations do not require an insurer to seek authorization before information is disseminated when fraud is suspected. The Protective Orders, by their terms, prohibit any such disclosure absent that authorization.

To prevent and detect fraud, the West Virginia Legislature has established within the Office of the Insurance Commissioner, the West Virginia Fraud Unit. W. Va. Code § 33-41-8. Among other things, the Fraud Unit may investigate insurance fraud, inspect and copy insurers' records, and serve subpoenas to obtain information in an investigation or criminal matter. *Id.* To facilitate cooperation with the Insurance Commissioner, the Legislature has also stated that a person "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. The effect of the Protective Orders entered in these cases is to supersede these statutory requirements.

B. The Protective Order Conflicts with West Virginia's and Other State's Laws, Leading to Unworkable and Inefficient Operations as well as Significant Increased Costs.

The Protective Orders entered by the Circuit Court of Harrison County not only interfere and conflict with an insurance company's operations outside of claim handling, but also create a direct conflict between their terms and the obligations of insurers outside of West Virginia. While the Protective Orders purport to allow compliance with West

Virginia's document retention requirements, they fail to address the requirements of any other states and their regulatory schemes for document retention by insurance companies.

Document retention requirements have historically been reserved to insurance regulators and legislatures, not to individual circuit courts. To allow individual trial courts in a myriad of separate actions to dictate the terms for document retention would create varying and inconsistent obligations for insurance companies attempting to meet both the requirements of the various orders, as well as their reporting obligations to other state regulatory agencies.

The insurance industry is a heavily-regulated industry, not only in West Virginia but in all states and commonwealths across the country. Though the content of the states' regulations vary, nearly all jurisdictions – through a statute or regulation – have required insurers to maintain their records as to claims indefinitely or for various periods of time, ranging from one year to ten years,³ or longer in the case of reinsurance,⁴ or particular

³ See e.g., Ala. Code § 27-27-29 (2011); Alaska Stat. §§ 21.09.320, -.390 (2010); Ariz. Rev. Stat. Ann. § 20-157 (2011); Ark. Code Ann. § 23-61-204 (2010); Cal. Ins. Code § 10508.5 (2010); Colo. Rev. Stat. § 10-4-413 (2011); Conn. Gen. Stat. § 38a-57 (2011); Del. Code Ann. tit. 18 § 5305 (2011); D.C. Code § 31-5204 (2010); Fla. Stat. §§ 624.443, 628.271 (2010); Ga. Code Ann. § 33-14-13 (2011); Haw. Rev. Stat. § 431:3-305 (2010); Idaho Code Ann. § 41-2839 (2011); Ind. Code § 27-1-6-21 (2010); Iowa Admin. Code r. 191-15.13 (2011); 806 Ky. Admin. Regs. 2:070 (2011); La. Rev. Stat. Ann. § 22:68 (2011); Me. Rev. Stat. tit. 24-A, §§ 3408, 3410 (2010); Md. Code Regs. 31-04.16.05 (2011); Mich. Comp. Laws § 500.5256 (2011); Miss. Code Ann. § 83-2-25 (2010); Mont. Code Ann. § 33-3-401 (2010); Neb. Rev. Stat. § 44-5905 (2011); N.H. Rev. Stat. Ann. §§ 400-B-3 (2010); N.Y. Ins. Law § 325 (McKinney 2011); N.Y. Comp. Codes R. & Regs. tit. 11, § 243.2 (2011); N.C. Gen. Stat. §§ 58-2-185, 58-7-50 (2010); N.D. Admin. Code 45-05-04-04 (2011); 40 Pa. Cons. Stat. § 710-16 (2011); R.I. Gen. Laws § 27-1-1 (2009); S.C. Code Ann. §§ 38-13-120, -130 (2010); S.D. Codified Laws §§ 58-5-93, 58-3-7.4 (2010); Tex. Ins. Code Ann. § 803.005 (West 2009); Vt. Stat. Ann. tit. 8, § 3568 (2010); Wash. Rev. Code § 48.05.280 (2010); W. Va. Code R. § 114-15-4.2(b) (2011); Wis. Admin. Code Ins. § 6.80 (2011); Wyo. Stat. Ann. § 26-24-129 (2010).

⁴ See e.g., W. Va. Code § 33-38-5 (2011) (10 years).

lines of insurance.⁵ Indeed, several states' statutes do not state a particular requirement but instead allow removal only when approved by the State regulator.⁶

The decision whether to impose a time period and if so, the length of that time period, is based upon a variety of jurisdiction-specific concerns. The legislative bodies which imposed those requirements presumably had input from its respective insurance regulator and members of the particular jurisdiction's insurance industry. Legislators may have considered the interplay between retention of records and any statutes of limitations that may be applicable to causes of action involving the claims files. They may have considered other statutes or regulations applicable to retention of records generally. Similarly, they may have considered public policy in favor of or opposed to the retention of records generally.

Three points of concern to *Amici* should be clear from these varying statutes. First, *Amici's* insurer members already are subject to specific record *retention* policies in any state or commonwealth where these insurers do business. A mandatory *destruction* policy that does not take into account every jurisdiction in which each insurer does business has the clear potential to conflict with those existing retention policies.

Here, the Protective Orders are quite clearly drafted in an attempt to comply only with West Virginia law:

⁵ See e.g., Conn. Gen. Stat. § 38a-407 (2011) (10 years for title insurance); Haw. Rev. Stat. § 431:20-113 (2011) (10 years for title insurance); Mo. Rev. Stat. § 375.1120 (2010) (23 years for medical malpractice reinsurance); Neb. Rev. Stat. § 44-19, 100 (2011) (for title insurance, 15 years after issue or 10 years after account closed); N.H. Rev. Stat. Ann. §§ 416-A:6 (2011) (20 years for title insurance); N.M. Stat. Ann. § 59A-30-11 (2011) (15 years for title insurance); Wyo. Stat. Ann. § 26-23-308 (2010) (15 years for title insurance).

⁶ See e.g., N.M. Stat. Ann. § 59A-34-10 (2011); 215 Ill. Comp. Stat. 5/133 (2010); Or. Rev. Stat. Ann. § 732.245 (2010).

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

The circuit court failed to consider that insurance companies are subjected to other retention requirements, imposed by other jurisdictions in which they are domiciled.

Second, creating a patchwork of requirements in this manner is highly inefficient and can only increase insurers’ administrative costs. Each new protective order with its unique terms poses a new set of requirements that the insurer must follow as to the records generated from that single claim. Instead of general policies that encourage record retention for the purposes of conducting market conduct examinations, reporting fraud, and the like, insurers may now be subject to one order that applies to Claim X, another that applies to Claim Y, and a general policy of retention as to other claims.

This is unworkable, particularly given the various jurisdictions’ claims handling and reporting requirements and insurers’ long-established and extensive document retention and destruction policies developed to comply with federal and state laws. Insurers have developed extensive policies; employees have been trained; significant resources have been invested in designing and implementing document retention protocols; and technology systems have been programmed to comply with the reporting and retention requirements of the individual jurisdictions where each insurer does business. To permit an individual trial court judge to revise these requirements case-by-

case, thereby requiring a business to dismantle systems and procedures in place, would impose unnecessary costs that can do nothing to improve the affordability of insurance in this State.

Third, the Protective Orders entered in these cases, if affirmed, would invite other state's courts to issue similar orders against West Virginia insurers without regard to this State's requirements for insurers relating to the retention of this type of medical information, creating the same kinds of insurance marketplace disruptions in these other states. The individual retention requirements of the multitude of jurisdictions are the result of several competing considerations, none of which appear to have factored into the trial court's analysis in these cases. Trial courts should not undo, on a case-by-case basis, what the various legislative bodies put in place with the benefit of understanding all of the competing concerns.

To be clear, *Amici* favor the States' record retention requirements not because they enable *Amici's* members to keep or store information as to any specific claim or individual, but because they encourage *Amici's* members to comply with existing statutes and regulations, to conduct meaningful evaluations of their business and claims handling practices, and to report fraud. A mandatory destruction policy which conflicts with and supersedes existing statutes, in other words, is counterproductive.

CONCLUSION

In order to effectively and efficiently operate in West Virginia, historical claim data, which in some cases includes nonpublic personal health information, serves as an invaluable source of information for the insurance industry. Internally, such information is used for evaluating claims and setting appropriate reserves. Likewise, historical claim

data provides information to underwriters for purposes of rate setting in this State. The time limitation contained in these Protective Orders eliminate a large portion of that historical claim data, even though it is used internally for these functions.

Aside from those internal, non-claim handling functions, insurers need the ability to share certain claim information, including nonpublic personal health information, with third parties. When underwriting is performed in obtaining reinsurance, insurance companies are required to share claim information with that reinsurer so the risks of that insurance company can be properly underwritten. Further, nonpublic personal health information can be utilized and shared with research facilities for the advancement of medical and scientific research, a valuable function specifically recognized by the West Virginia Insurance Commissioner. Finally, the disclosure of nonpublic personal health information to the West Virginia Insurance Commissioner and the National Insurance Crime Bureau allows for the effective identification and deterrence of fraudulent claims, an application of such data that impacts, not just insurers, but insurance consumers and the insurance marketplace.

Allowing individual trial courts to unilaterally and arbitrarily set differing parameters for an insurance company's obligations with respect to document retention and dissemination to a limited number of third parties would fail to take account of the needs of the insurance industry and insurance marketplace in the appropriate use of nonpublic personal health information. Rather, these obligations can and must be governed by the insurance regulatory framework within each state, to which such authority has been delegated by state legislatures. *Amici* respectfully request that this

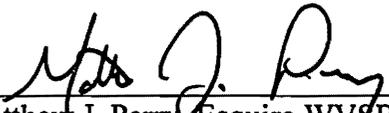
Court reverse the Circuit Court of Harrison County, West Virginia and invalidate the Protective Orders entered by it.

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CERTIFICATE OF SERVICE

The undersigned counsel for *Amici Curiae*, The West Virginia Insurance Federation, American Insurance Association, and the National Association of Mutual Insurance Companies, hereby certify that I served a true copy of the foregoing **Motion of the West Virginia Insurance Federation, American Insurance Association, and The National Association of Mutual Insurance Companies for Leave to File Brief as *Amici Curiae* in Support of Writ of Prohibition and Appeal and Brief of *Amici Curiae* West Virginia Insurance Federation, American Insurance Association, and The National Association of Mutual Insurance Companies in Support of Writ of Prohibition and Appeal** upon the following individuals, by placing the same in the U.S. Mail, First Class, postage prepaid, on this the 28th day of June, 2012:

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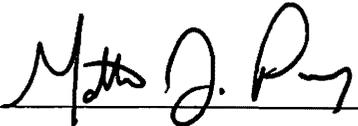
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