

Nos. 12-0304 and No. 12-0210



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

No. 12-0304

STATE EX REL. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v.

THE HONORABLE JOHN LEWIS MARKS, JR.
Judge of the Circuit Court of Harrison County, and **MATTHEW HUGGINS,**
Respondents.

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

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**No. 12-0210**

**NATIONWIDE MUTUAL INSURANCE COMPANY,**  
*Appellant,*

v.

**CARMELLA J. FARIS and ROBERT FARIS,**  
*Appellee*

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

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**CONSOLIDATED RESPONSE OF PLAINTIFFS BELOW TO STATE FARM'S  
REQUEST FOR WRIT OF PROHIBITION AND NATIONWIDE'S APPEAL**

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**No. 12-0304**

**STATE EX REL. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,**  
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From the Circuit Court of Harrison County, West Virginia  
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No. 12-0210

NATIONWIDE MUTUAL INSURANCE COMPANY,
Appellant,

v.

CARMELLA J. FARIS and ROBERT FARIS,
Appellee

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

**RESPONSE OF PLAINTIFFS BELOW TO STATE FARM'S REQUEST
FOR WRIT OF PROHIBITION AND NATIONWIDE'S APPEAL**

"That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition

of new rights, and the common law, in its' eternal youth, grows to meet the new demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. Then the "right to life" served only to protect the subject from battery in its' various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, -- the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession -- intangible, as well as tangible."

These words were written more than 100 years ago by Justice Louis D Brandeis in December 1890. They could not be more applicable today then they were in 1890. In fact, they are most likely more applicable in view of the technological advances that have caused great inroads to our personal privacy in this 21st Century.¹

An individual's personal identifiable health information, i.e. medical records are some of the most private documents many individuals will ever have. One's medical records contain very private and confidential information not only about one's health, but also about their social, marital and sexual activities. It often discusses one's disease processes such as terminal illnesses, venereal diseases, chronic problems and mental health issues like depression and uncontrollable anger outbursts. Such personal identifiable health information, i.e. medical records, may also comment

¹ Google's payment of 22.5 million dollars to settle breach of privacy claim, Resp. App. "Ex. 1, p. 1" and Facebook's settlement of similar charges for invasion of privacy; Resp. App. "Ex. 2, p. 3"; Respondent's Appendix is filed pursuant to Rule 16(e) of the West Virginia Rules of Appellate Procedure in response to State Farm's Petition for extraordinary relief and will be referenced hereafter as "Resp. App. Ex. __, p. __"; "Jt. App. Vol__ - App__" refers to the Parties Joint Appendix filed in the Faris appeal which was later consolidated with the Petition for Writ of Prohibition filed by State Farm in Huggins.

on spousal abuse, difficult children and identifies all medications being taken or which have been taken by the patient, all as part of a complete medical history necessary to competently treat a person's injury or illness. It even sometimes includes one's religious beliefs. Such documents must be protected by the common law as diligently as the law will allow. Even in 1890, Justice Brandeis foresaw that technology would advance in ways that would require an individual's privacy to be jealously protected. He spoke of "instantaneous photographs" and, "mechanical devices [that] threatened to make good the prediction that ' what is whispered in the closet shall be proclaimed from the housetops.' "

Now in the 21st Century, almost any governmental entity, or business, including big insurance companies, and even savvy individuals, can maintain millions of pages of scanned documents that are easily searchable to find the smallest detail about a person. Such is the norm not the exception. Added to that is the potential that with one click of a mouse stored documents can be transmitted throughout the World, perhaps carried around the world on a small laptop or now an I-Phone. Computer programs are now readily available to anyone which will analyze and glean from these mass amounts of information subtle trends and other personal proclivities from such documents including one's computer search trail, shopping habits, and yes, their medical records. An individual's privacy has become very vulnerable and subject to easy exploitation. As Justice Brandeis further recognized, the common-law enables judges to afford the requisite protection of one's privacy interest without the interposition of the legislature. That's what this case is about – one's personal privacy and not allowing it to be taken, or without such person's voluntary consent, merely because they must file a claim to protect their person or property due to a wrong thrust upon them through no fault of their own.

This High Court has already ruled in two separate Opinions that certain protections are warranted to protect an individual's confidentiality of their personal identifiable health information (PIHI), but big insurance has refused to accept those rulings, and instead, has spent millions of dollars in an attempt to bludgeon, both innocent victims, and this Court and other Courts, into giving them what they want when there is no basis to grant such relief and such relief flies in the face of common sense, and tramples on an individual's right to privacy and one's right "to be let alone."²

As Justice Brandeis proclaimed, it is the individual who must be protected and "the unwarranted invasion of individual privacy, which is reprehended, and to be, so far as possible, prevented." Such protection of individual privacy is a farce when multi-national insurance companies like State Farm and Nationwide can make available to any of its' thousands of employees with access to the Company's computer system, a claimant or litigant's confidential medical records that were obtained from that person just so he or she could file a claim or file a civil action.³

Unless this Court should decide to disregard *res judicata* and *stare decisis* principles,⁴ which it should not, this Court has already finally decided several issues that have been again raised

² This case as well as the numerous other actions and motions brought mainly by State Farm and Nationwide, have been a *pro bono* effort by the undersigned counsel as usually medical confidentiality is a collateral issue to the substance of the case.

³ The widespread access by insurance company employees, and thus unnecessary publication, of a person's medical records and medical information within these big insurance companies internal domain will be discussed further herein; State Farm has approximately 68,000 employees; see <http://www.statefarm.com/aboutus/company/company.asp?WT.svl=124>; and Nationwide approximately 36,000; see <http://www.nationwide.com/newsroom/facts-and-figures.jsp>

⁴ This Court has issued varying opinions regarding the effect of *stare decisis*, but even considering those variations, it would be highly suspect to overrule a 2011 decision without discovery about State Farm's and Nationwide's protection of a persons medical records, or more importantly, the lack of such protection; both entities refused to provide discovery on these issues; to overrule recent cases on such non-existent record would be a severe blow to the doctrine of *stare decisis*; compare Banker v. Banker, 196 W.Va. 535, 474 S.E. 2d 465 (W.Va. 1996) with Griffith v ConAgra Brands, Inc., ___ W.Va. ___, 728 S.E. 2d 74 (W.Va. 2012).

in this Consolidated Appeal and which issues have been litigated throughout various Courts since this Court's recent ruling on April 1, 2011 in State ex. rel. State Farm v. Bedell, 228 W.Va. 252, 719 S.E.2d 722, cert denied, 132 S.Ct. 776, 181 L.Ed.2d 487, (2011) [hereinafter referred to as "Bedell III"]. "An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of *stare decisis*, which is to promote certainty, stability, and uniformity in the law." Dailey v. Bd. Review WV Bureau Employment, 214 W.Va. 419, 431, 589 S.E. 2d 797, 809, (W.Va. 2003), [Davis, dissenting]; surely, this Court's, April 2011 Opinion in Bedell II, supra, meets such criteria entitling those holdings to deference under the doctrine of *stare decisis*. Moreover, State Farm having been a Party to both Bedell appellate cases, is bound by the doctrine of *res judicata* and cannot be allowed to relitigate the same issues again and again, not only in this Court, but in other Courts⁵ just because State Farm does not receive a favorable ruling.

FACTS

This case involves two automobile collisions with the Huggins crash occurring on June 6, 2008, and the Faris crash occurring on May 2, 2008, where both Plaintiffs were rear-ended by distracted drivers through no fault of their own.

In the Huggins case, State Farm was the underinsured motorist carrier for the Plaintiff Matthew Huggins and was a named Defendant in the case for declaratory relief and for claims of failing to pay certain medical payment coverages in a timely manner. In the Faris case, Mrs. Faris

⁵ The Federal District Court recently ruled against State Farm and Nationwide on almost every issue which is again being raised in this Consolidated Appeal. Small v Ramsey, 208 F.R.D. 264 (N.D. W.Va. 2012), affirmed; see Resp. App. "Ex. 3, p. 5."

resolved her claim with the Defendant Harding and Nationwide which was Defendant Harding's insurance carrier, and Nationwide was not a named Defendant in that case.

In Faris, Nationwide insured the Defendant driver, Linda Lee Harding, under a Nationwide Mutual Insurance Company automobile liability policy No. 92-47-N-973596 issued in the State of West Virginia. In Huggins, Nationwide Property and Casualty Insurance Company likewise insured the Defendants Woodward Video LLC and its' employees, Randall Shuman and Bryan Woodward, under automobile liability policy No. 92-BA-517-178-3001-W, also issued in this State.⁶ State Farm, on the other hand, insured the Plaintiff Huggins for \$25,000 of Underinsured Motorists benefit pursuant to a State Farm Mutual Automobile Insurance Company automobile liability policy No. 301 0872-E07-48D likewise issued in the State of West Virginia.⁷

Subsequent to the mediation in Huggins, State Farm filed for a Writ of Prohibition and Nationwide filed a direct appeal in Faris. Both appellate actions have been consolidated before this High Court. This is the third time that this Court has addressed issues regarding confidentiality of personal identifiable health information, i.e. medical records . The issue has also been considered

⁶ Nationwide settled the case on behalf of its' insureds at mediation by paying the policy limits; Nationwide received and reviewed Plaintiff's medical records and had Plaintiff examined by a physician which Nationwide selected, all pursuant to the Trial Court's Protective Order; State Farm refused to participate in the mediation asserting it could not evaluate Plaintiff's claim unless the Protective Order entered by the Trial Court was vacated or modified as State Farm desired.

⁷ It is significant that all the automobile liability policies involved in this Consolidated Appeal were subject to the statutory provision that "No policy delivered or issued for delivery in West Virginia and covering a subject of insurance resident, located, or to be performed in West Virginia, shall contain any condition, stipulation or agreement requiring such policy to be construed according to the laws of any other state or country.... Any such condition, stipulation or agreement shall be void...." W.Va. Code §33-6-14 (1957); State Farm's argument that it must comply with Illinois law and thus no protective order can be issued by West Virginia courts is directly contrary to this statutory provision; perhaps Illinois is violating the full faith and credit clause for not complying with West Virginia law which is paramount in these cases as the liability policies were delivered in West Virginia for insured risks located in West Virginia; another State's insurance law could not control such matters and State Farm's argument in this regard is frivolous and a waste of this Court's resources and time.

by numerous Circuit Courts in this State and by both Federal District Courts for West Virginia and all of the Courts considering the issue have granted protective orders to protect the confidentiality of a person's personal identifiable health information i.e. medical records.⁸ Neither State Farm nor Nationwide have provided this Court a single case which adopts their extreme position.⁹ There is a reason State Farm and Nationwide have lost every case: No court can accept that a citizen must relinquish their personal privacy forever to make an insurance claim or file a civil action. Such is overreaching at its worst.

ARGUMENT:

I. Individuals Have a Constitutional Right to Protect Their Privacy from the Intrusive Use of Their Personal Identifiable Health Information Contained in Medical Records

- a) **The United States and West Virginia State Constitutions protect the privacy interest of individuals by limiting the retention, use and dissemination of personal identifiable health information produced as part of an insurance claim or for litigation**
- b) **The public policy of the United States and the State of West Virginia requires that an individual's personal identifiable health information as contained in their medical records is confidential and entitled to protection similar to that required by the Health Insurance Portability and Accountability Act of 1996**

It has generally been accepted that the United States Constitution provides protection for the unwarranted intrusion into an individual's personal matters. This includes the unwarranted publication or dissemination of an individual's personal identifiable health information. Whalen v.

⁸ The United States Supreme Court denied *certiorari* in Bedell II having been asked to grant *certiorari* by State Farm; State Farm no doubt has used its economic superiority to overwhelm and bludgeon many plaintiffs into agreeing with its' position on the medical confidentiality issue; most plaintiffs don't understand why an insurance company would want to keep their medical records indefinitely and none want their personal medical records used for any other purpose without their consent.

⁹ A single case involving these issues was dismissed on 12(b)(6) grounds and will be discussed infra.

Roe, 429 U.S. 589, 598-99, (1977) [an individual has a “zone of privacy” which includes an “individual interest in avoiding disclosure of personal matters....”], see also, E.I. du Pont de Nemours v. Finklea, 442 F. Supp 821 (S.D.W.Va. 1977) holding that “While it is recognized that there is no general constitutional right to privacy, ‘(v)arious guarantees create zones of privacy.’” (citation omitted). We believe that the information sought in this litigation is protected. Whether this protection falls within any or all of the guarantees of the First, Fourth, or Fifth Amendments, or rests on the penumbras of the Bill of Rights, is not therefore important.” Accord, Brende v Hara, 113 Hawaii 424, 153 P.3d 1109 (2007) [“health information [produced in discovery] is ‘highly personal and intimate’ information that is protected by the informational prong of” the Hawaii Constitution].

Justice Stevens in Whalen acknowledged the “threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.” Id. at 605. He went on to state that the “right to collect and use such data for public purposes is typically accompanied by concomitant statutory or regulatory duty to avoid unwanted disclosures.” Id. Justice Stevens recognized that the duty to maintain confidentiality had its’ roots in the Constitution under a right to privacy but then held for the majority that New York’s statutory scheme requiring the production of drug prescription information was constitutional because of the “proper concern with, and protection of, the individuals interest in privacy.” Id. The Supreme Court in Whalen upheld the New York public health statute at issue because it found sufficient protections to safeguard an individual’s medical privacy while recognizing the necessity of the reporting law. The Whalen Court noted that only forty-one (41) people would have access to the prescription drug information being collected, that the computer where the prescription drug information data would be stored was “off-line” and thus, not accessible to others through computer connections or by

hackers, and that the statute expressly prohibited any disclosure or dissemination of the collected information and provided a criminal penalty including imprisonment for violation. Importantly, the Court also noted that all of the data would be destroyed, including that on the computer database, after a five-year period. Whalen at 593–95. These safeguards were paramount to the Courts’ constitutional review in determining that in balancing the need of the State for the drug information i.e. to investigate and prosecute drug crimes, that the statute on its face did not present a likely invasion of personal privacy protected by the Constitution, sufficient to declare the statute unconstitutional. However, if the statute’s stringent protections had been absent, a different decision may have resulted. Mr. Huggins and Mrs. Faris want the same type of stringent protections for their personal identifiable health information when compelled to produce it for an insurance claim or litigation.¹⁰

Insurance claimants and litigants in this State are likewise entitled to protect their personal privacy in such information. It is conceded that an opposing party and his or her liability insurer have a need for relevant medical information to adjust claims, or to defend themselves in litigation, even though the insurance carrier may not be a named party. However, State Farm and Nationwide’s desire to retain such personal identifiable health information indefinitely, and to use it for whatever purposes they deem necessary, all without the knowledge or consent of the individual involved, clearly violates the holding in Whalen and this Court’s holdings regarding personal privacy. No

¹⁰ The State action in Whalen was the statute requiring furnishing of prescription drug information to the New York state agency; here it is the Trial Court’s in our State requiring production of personal identifiable health information in a legal proceeding; the State action regarding pre-suit production of such personal identifiable health information would be the WV Insurance Commission approving licensed insurance carriers to require production of such information for claims evaluation without providing constitutionally required safeguards for such information in the Privacy rule [§ 114-57-15.2] if that Rule is interpreted as the current Insurance Commissioner’s Amicus Brief suggests; such actions become actions of the State in both instances as the State has the ultimate control over what is required to be produced and how it is protected or not protected.

balancing is necessary regarding the insurance carrier's request to keep indefinitely such private information and to use it as desired, because such a request is violative of personal privacy regardless of any safeguards provided by State Farm or Nationwide and which neither this Court, nor the Respondents, have any idea the parameters of such safeguards, as both Nationwide and State Farm refused to permit discovery on this issue and also have not provided any details to the Court in there Petition or Brief in this Consolidate Appeal.

This Court has found a right of privacy for individuals in various circumstances, including the installation of a listening device without a person's knowledge, random drug testing, eavesdropping, polygraph testing and personal privacy relating to the termination of employment. Roach v. Harper, 143 W.Va. 869, 105 SE.2d 564, (W.Va. 1958); see also, Baughman v. Wal-Mart Stores, Inc., 215 W.Va. 45, 592 S.E.2d 824 (W.Va. 2003) [private employers requirement of a urine sample for pre-employment drug test invades one's personal privacy]; State v. Mullens, 221 W.Va. 70, 650 S.E. 2d 169, (W.Va. 2007) [surreptitious use of recording device without consent by law enforcement in a suspect's home is an invasion of privacy]; Cordle v. Gen. Hugh Mercer Corp., 174 W.Va. 321, 325 S. E 2d 111 (W.Va. 1984) [terminating employee for failure to take polygraph test is an invasion of employee's privacy]; Golden v. Board of Education of Harrison County, 169 W.Va. 63, 285 S. E 2d 665 (W.Va.1981) [termination of county teacher based upon misdemeanor conviction for shoplifting would constitute an invasion of a teacher's privacy as it has no rational nexus to employment].

This Court has also held that the public policy of this State considers a person's medical records "to be very private or, perhaps, embarrassing." Even when a person is required to file a civil action, such medical records should "remain private" and such claimant "should be able to maintain

the confidentiality of that information. “A person should not be deterred from filing a civil suit that places at issue a medical condition for fear that unrelated private or embarrassing medical information may be disclosed.” Keplinger v. Virginia Electric & Power Co., 208 W.Va. 11, 23, 537 S.E.2d 632, 644 (W.Va. 2000).¹¹ Likewise, this Court has held that a patient’s expectation of privacy coupled with the physician-patient relationship, were sufficient protectable interests to condemn the *ex parte* communication by an employer with an employee’s physician, **even if the employer’s motive was to uncover potential fraud.** Morris v. Consolidation Coal Co., 191 W. Va. 426, at 433, 446 S.E.2d 648, at 655 (W.Va. 1994). This Court also has held that “[information is entrusted to the doctor in the expectation of confidentiality and the doctor has a fiduciary obligation in that regard.” This Court specifically held that a physician had a fiduciary relationship with his or her patient and that a patient would have a cause of action for any breach of this fiduciary duty by the physician or anyone who induced the physician to breach this solemn duty. In State ex rel. Kitzmiller v. Henning, 190 W.Va. 142, 437 S.E.2d 452, (W.Va. 1993), this Court again addressed the confidential nature of medical records and the physician-patient relationship when it held that in litigation *ex parte* communications were prohibited by the Rules of Civil Procedure. Id. 190 W.Va. at 144. These holdings support the Trial Court’s issuance of protective orders in the cases below and also any trial court’s protection of an individual’s personal identifiable health information.

The law in this State clearly recognizes the confidentiality of the physician-patient relationship which would be meaningless if the results of such confidential relationship—the medical

¹¹ Keplinger held that past medical records were irrelevant to litigation involving injuries “related to the condition placed at issue” and therefore were generally not discoverable at all; in the cases at Bar, the Plaintiffs did not seek to withhold any medical records or information but only sought protection of unconsented use and unlimited retention, which is a very reasonable request for protecting such personal confidential information.

records embodying those discussions –were not accorded the same confidentiality and protection in claims and litigation. Any other interpretation would render Morris, Kitzmiller and Keplinger without any force or effect and violate the United States and West Virginia Constitutions protection for personal privacy. Should this Court not agree, it may be opening the door for many less private, but important personal interests, to be collected and used without Constitutional protection. There being no more private and personal information than one’s personal identifiable health information, **if such is not constitutionally protected then most probably no personal information would be protected.**

Surely, all of this Court’s precedents are not to be cast aside merely because Nationwide and State Farm desire to serve their private business interests by keeping massive data banks of claimants’ personal and private medical records for their own unfettered use. State Farm and Nationwide’s unsupported claims that their business model cannot function without such unrestricted access to these private documents is absurd, and clearly rebutted as discussed further in this Brief. However it makes no difference whether these insurance carriers’ business model is affected or not. One does not relinquish personal privacy protected by the State and Federal Constitutions as well as the common law, merely because an insurance carrier’s business model would be more efficient if there were no such protections. Such assertions and justifications are just not cognizable, or worthy of any consideration, when balancing such important personal rights protected by the Constitution and the well developed common law.

However, Respondents have provided to this Court in the Appendix [Resp. App. “**Ex. 4, p.7**” - Nationwide Orders) & “**Ex. 5, p. 73**” State Farm Orders) examples of protective orders providing the same protections approved by this Court in Bedell II involving both Nationwide and State Farm.

Both State Farm and Nationwide have each been conducting business for almost 20 years while at least purportedly complying with such agreements and Orders. If such dire effects to their business models occurred due to such agreements and Orders then how did they conduct business? Either State Farm and Nationwide have been able to comply with the restrictions and have misrepresented to this Court by their claims of calamity resulting therefrom, or they have failed to abide by their promises and the Orders of the Circuit Court's of this State. If State Farm and Nationwide did not comply with their agreements and the Orders of the Courts, then such conduct surely undermines our principles of justice. As Judge Knapp noted in Finklea, supra, "We think that surely one must assume that litigants will obey court orders. Once we assume otherwise, then our system of jurisprudence is in serious trouble." (citing Whalen, supra, 429 US pp. 601-602). Hopefully, that is not what State Farm or Nationwide have done for the last 20 years regarding their obligations to comply with the Protective Orders of our Courts.

This Court at oral argument should inquire of both State Farm and Nationwide whether each has followed in all respects their prior agreements and the Protective Orders entered by the Circuit Courts of this State, including the requirement of non-dissemination without consent or notice, and the complete destruction of all medical records and information, including computer data, as directed in those Orders.

Both State Farm and Nationwide seek equity in this matter and it is axiomatic that to seek equity one must have "clean hands." Province v. Province, 196 W.Va. 473, 473 S.E.2d 894 (W.Va. 1996) [a] party who seeks equity must come with clean hands. 'Equity never helps those who engage in fraudulent transactions, but leaves them where it finds them'].

So how these two insurance carriers complied with those agreements and Circuit Court

Protective Orders, or disregarded them, should be important to this Court's inquiry and decision for two reasons: First, if State Farm or Nationwide disregarded their agreements and the Protective Orders in any regard, either or both have unclean hands and any equity should be denied them on that basis; second, if they have been following those agreements and Orders for 20 years, then both should explain how that could be done without the dire results that each has posited to this Court about the devastation and business disruption such protections would create. **Such responses are important regardless of the answers.**

II. This Court Has Previously Held in Bedell I and Bedell II That an Individual Is Entitled to a Medical Protective Order To Maintain the Confidentiality of Such Private and Personal Information and Such Holdings Are *Res Judicata* and Entitled to *Stare Decisis*

- a) **This Court ruled that personal identifiable health information required to be produced in litigation is presumptively private and satisfies the "good cause" requirement of Rule 26(c) of the West Virginia Rules of Civil Procedure**

This Court held in Bedell I that good cause for a protective order had not been demonstrated. In arriving at that holding, this Court primarily relied on State Farm's representation that the Insurance Commissioner's Regulations prohibited the dissemination of personal medical records and information without the person's consent. This representation by State Farm was inaccurate as regarding State Farm's true intent to retain and use a litigant's personal identifiable health information received in claims and litigation. This is discussed in more detail in Section V of this Response. Another reason for this Court's holding in Bedell I was that Mrs. Blank had not provided any evidence to support her right to a protective order. Bedell I at 739. This reason was

subsequently rejected by this Court in Bedell II when this Court affirmed the finding of good cause as found by the Trial Court which finding was based on the same facts as in Bedell I. What was not addressed by this Court in both Bedell I and Bedell II was State Farm's refusal to provide discovery about what, if any, privacy safeguards it employed to protect an individuals personal identifiable health information and what these insurance carriers have been doing with such information they have collected.¹² State Farm and Nationwide have resisted discovery about their methods and procedures to maintain the confidentiality of claimants personal medical records in every Court that this issue has been considered. The information that this Court believed to be important has never been obtained due to State Farm and Nationwide's obstruction. Accordingly, the Trial Court's considering of the Protective Order issue have rejected any reliance of *ex parte* self-serving affidavits by these two insurance companies which "parade the horrible's" as to what may happen if a protective order is granted. Such statements and affidavits are nothing more than hyperbole and poppycock and were rejected by every Trial Court considering the same, including the Trial Court in Bedell II , by the Federal Court in Small v Ramsey, supra at 268 and the Trial Court in this case which determined that the Affidavits were of no consequence to the decision to issue a protective order or disregarded them as being *ex parte* and not subject to cross-examination or after probing

¹² Neither State Farm nor Nationwide has provided any verified information as to how many times they have used a claimants or litigants personal identifiable health information for other purposes than the claim or case for which such information was provided, or how many times such information has been shared with trade groups like ISO or NICB or other insurance carriers, without the knowledge or consent of the individual whose personal identifiable health information is being given to strangers; the Plaintiffs below sought this information to provide to the Trial Court, and if necessary to this Court, but when the insurance carriers refused the issue was not ruled upon as the Trial Court granted the protections sought by the Plaintiffs in the Protective Orders; however if such conduct is important to any of the issues in this Consolidated Appeal, which it is, this Court should remand for development of such discovery rather than rule on significant issues in the dark; see Discovery Requests to Nationwide and State Farm and their Motions to Quash [Resp. App. "Ex. 6, p. 164 & Ex. 7, p. 201", & See Jt. App. Vol I- App. 21-89 & 103-122]

discovery. However, State Farm and Nationwide's conduct in failing to permit discovery precludes this Court from learning the extent of these insurance companies' disregard for the privacy of personal medical records and the unbridled widespread access to such confidential and private information by almost every employee in their Companies and perhaps routine dissemination to strangers without consent or knowledge of the individual whose confidential records are at issue. Interestingly, both State Farm and Nationwide resisted Plaintiff's discovery in Small arguing that such inquiry may disclose "proprietary" information. Small at 268. Apparently State Farm and Nationwide desire to protect themselves from any discovery information claimed to be proprietary but an individual must surrender all of their privacy even to limit the use and retention of personal identifiable health information they are forced to produce in claims or litigation. No doubt State Farm and Nationwide would seek a protective order for their proprietary information if such discovery goes forward, but such a double standard reeks of hypocrisy and just plain insensitivity to personal privacy issues.

Perhaps State Farm resisted discovery as its excessive dissemination was disclosed during the 2008 deposition of Thomas Fitzsimmons, a State Farm claims representative, wherein he acknowledged that any State Farm employee with access to State Farm's claims computer system could review any claimant's medical records at any time for any claim in the State Farm system.¹³

¹³ 1 A. Yes. I understand. And to the best of my
2 knowledge, they're only uploaded here and kept.
3 Q. Okay. On the claims computer?
4 A. Yes. Uh-huh.
5 Q. Okay. And just help me out here, the claims
6 computer -- if I've got a claim number and I'm a State Farm
7 claims agent in California, I could call up this
8 Murray/Rogers claim file, can't I?
9 A. Yes.
10 Q. Okay. And once I've got a claim number and I have

See Resp. App. “**Ex. 8, p. 244.**” Such revelation is sufficient to demonstrate good cause any time PIHI is sought to be produced.¹⁴ What audacity State Farm’s executives must have to resist all discovery about State Farm’s “proprietary” information, while simultaneously asserting that individuals are not even entitled to a protective order after producing PIHI.

This Court should clearly state in any opinion in this case that personal identifiable health information i.e. medical records and information, are inherently private and personal, and as such, are protected by the Constitution of the United States and the West Virginia Constitution as well as the common law, which is sufficient without more to be entitled to protection under Rule 26(c) by the issuance of a protective order as done in Bedell II and the civil actions in this Consolidated Appeal. The Federal Courts have adopted this position relying on the inherent private nature of medical records, and the Federal public policy as established by HIPAA, or both. Small v Ramsey, 280 F.R.D. 264, 268-71 (N.D. W.Va. 2012); Fields v. West Virginia State Police, 264 F.R.D. 260, 262(S.D. W.Va.2010); Law v. Zuckerman, 307 F.Supp.2d 705, 711 (D.Md. 2004) A Helping Hand, LLC v. Baltimore Co., Maryland, 295 F.Supp.2d 585, 592 (D.Md. 2003);

- b) This Court ruled that a trial court may limit the time during which a party, including the party’s insurance carrier, may retain such medical records before returning or destroying all of such medical records and any summaries of such medical information**

In Bedell I this Court held in Syllabus pt. 7 that “A court may not issue a protective order directing an insurance company to return or destroy a claimant’s medical records prior to the time

11 a password, I have access to all the claim files?
12 A. Yes.

¹⁴ State Farm has 68,000 employees and Nationwide has 36,000 employees.

period set forth by the Insurance Commissioner of West Virginia in §§114-15-4.2 (b) and §114-15-4.4 (a) of the West Virginia Code of State Rules for the retention of records.” This was an extension of the usual requirement that such protected materials be returned or destroyed at the final conclusion of the litigation. Its purpose was to allow retention of such documents for examination by the Commissioner.

This principle of law has already been established and it is clear that any issue raised by State Farm or Nationwide that they be permitted to retain a claimant’s medical records indefinitely is without merit as this Court’s prior holding is *res judicata*, as to State Farm and *stare decisis* as to Nationwide. The Trial Court in Bedell I and II, had followed prior protective orders protecting personal identifiable health information i.e. medical records and information granted during the prior 20 years wherein State Farm and Nationwide and other insurance carriers evidently complied with the Court’s direction to return or destroy all medical records at the end of the litigation in exchange for having access to most historical medical records without having to prove relevancy of a claimant’s historical medical records which was ultimately required by Keplinger v. Virginia Elec. and Power Co., 208 W.Va.11, 537 S.E.2d 632 (W. Va. 2000). See Resp. App. “Ex. 4 & 5, pp.” These Protective Orders and the agreed pre-suit Medical Confidentiality Agreements, had been utilized for almost 20 years in numerous cases in the Harrison County Circuit Court and in other Circuit Courts without the sky falling provides a strong inference that the sky won’t fall as predicted by State Farm and Nationwide if this Court again upholds an individuals right to protect his or her privacy in their personal identifiable health information i.e. medical records and information¹⁵ The

¹⁵ Many other insurance companies including Westfield, Anthem, Allstate, Progressive, USAA and others have been bound by such Protective Orders over the last 20 years and a sampling of those Protective Orders have been provided in the Appendix. (Resp. App. “Ex. 9, p. 255)

Protective Orders entered by the Circuit Courts and provided herein also complied with the judicial exception to the Federal HIPAA statute.¹⁶

This Court by its holdings in Bedell I and II, has already decided that a trial court can limit the time for retention of such confidential documents. This is the law of this State and has been since Bedell I. This Court reaffirmed that holding when it did not address the issue when raised again in Bedell II. This holding has been relied upon by many other Courts, including the Federal Court in Small v Ramsey, supra, at 272 and it should not be revisited again because the same parties are dissatisfied with the result.

III. The West Virginia Insurance Commission's Regulation "Privacy of Consumer Financial and Health Information" (§114-57-1 et. seq.) If Interpreted as Suggested by State Farm, Nationwide and in the West Virginia Insurance Commissioner's Amicus Brief Is Unconstitutional and Unlawful As Such Interpretation Would Violate an Individual's Right to Informational Privacy Protection and Because the Regulation Exceeds the Scope and Purpose of the Enabling Statute Which Purpose Was to Protect Individual Privacy Not Erode It

¹⁶ Under HIPAA's Disclosures for Judicial and Administrative Proceedings, disclosure of a person's medical records by a covered entity is not permitted without the entry of a "qualified protective order." 45 C.F.R. 5 164.512(e); A "qualified protective order" under HIPAA means an order that: "(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding." 45 C.F.R. § 164.512(e)(1)(v); Thus, HIPAA while not applying directly to liability insurance carriers, like State Farm and Nationwide, does apply indirectly, for any medical records sought by such entities from a HIPAA covered entity such as a hospital, physician or other healthcare provider; this Court recognized such in Bedell II at pg. 742 and **State Farm admitted such at oral argument before this Court; Id.** moreover, HIPAA clearly establishes the federal public policy to protect the privacy of an individual's personal identifiable health information which was adopted in Executive Order 13181 [See Resp. App. "Ex. 10, p. 323"] requiring that all federal law enforcement agencies not use or obtain in "civil, administrative or criminal investigations" unrelated to health oversight investigations under HIPAA, any personal health information of individuals unless there is an independent determination that the need for such personal health information "clearly" outweighs any interference with the "potential for injury to the patient, to the physician-patient relationship, and to the treatment services" ; such is exactly what the Protective Order in this case provided to Mr. Huggins and Mrs. Faris.

- a) **In Adopting the Legislative Rule on Privacy the Legislature Could Not Have Intended to Reduce or Eliminate the Constitutional and Common Law Privacy Protections Afforded Personal Identifiable Health Information as Asserted by the Appellants and In the West Virginia Insurance Commissioner’s Amicus Brief**
- i) **The Appellants’ and Commissioner’s Position Would Render Subsection 15.2 of the West Virginia Privacy Rule Invalid as Contrary to the Enabling Legislation and the Gramm-Leach-Bliley Act**

Certain significant issues have been raised in this Consolidated Appeal by the Amicus Brief of the West Virginia Insurance Commissioner.¹⁷ However, that Amicus Brief, although forceful in tone, is superficial and without substance to be persuasive.

The current Commissioner¹⁸ would have this Court hold that the Privacy rule (§114-57-1 *et. seq.*) doesn’t protect the privacy of “consumers” and “customers”¹⁹ personal identifiable health

¹⁷ This Court must recognize that the Amicus Brief of the West Virginia Insurance Commissioner is only the opinion of the current Commissioner and is entitled to no special weight; see *Small v Ramsey*, *infra*, at 278; the interpretation of the Privacy rule (114-57-1) is a determination to be made by the Court based on scope of the Regulation, its promulgation, the enabling statute’s mission and the intent of the Legislature in approving this legislative rule if done so properly, all of which is superimposed with any Constitutional or common law implications; in this instance, if this Court were to agree with the interpretation of the current Commissioner then this Court must determine whether the promulgation of this legislative rule violates the Federal and West Virginia constitutional protections regarding any unreasonable invasion of privacy as well as whether the intent was to modify the common law; of course, if this Court does not accept the current Commissioner’s opinion as expressed in his Amicus Brief, then such Constitutional and common law/statutory confrontations will be avoided.

¹⁸ Unfortunately, many insurance commissioner’s are closely aligned with the insurance industry and give greater consideration to insurance companies views then protection of the public; our last Commissioner who served for over a decade, upon leaving her position, almost immediately began lobbying for the insurance industry as did the general counsel; see, <http://www.ethics.wv.gov/SiteCollectionDocuments/Lobby/empycur.pdf> often this Court is the only available avenue to protect ordinary citizens who have no lobbyists to speak on their behalf.

¹⁹ It should be clearly understood that nothing in the Commissioner’s Amicus Brief applies to third party litigants who are forced to file suit against a tort feaser who may has liability insurance. Such parties are neither “customers” or “consumers” under the definition of §114-57-2.6 or 2.9. The Commissioner’s Amicus Brief can only be referring to those individuals who would come within that status of customer or consumer and no Regulation can convert an innocent victim who is injured by a drunk driver through no fault of their own to a consumer or customer of an insurance company. This must be made clear in any opinion this Court renders in this case, and this argument by the Insurance Commissioner relates only to first party insureds who make claims with their own insurance company and then there must be an interpretation of the insurance agreement and these Regulations as tempered by

information, but rather, eliminates the protections of the United States and West Virginia Constitutions, and the common law protections, both of which were in place at the time of the Rule's adoption. Such an interpretation would be an oxymoron, i.e. that a privacy rule reduces the degree of privacy protection instead of enhancing it. The Commissioner does not have the power to abrogate privacy protections, nor did the Legislature by legislative rule, assuming that the Legislature understood the Privacy rule would strip individuals of all privacy protections already guaranteed by the State and Federal Constitutions and the common law as suggested in the Commissioner's Amicus Brief. However, the Legislature could not have intended such an interpretation as is now being proposed by the current Commissioner's Amicus Brief as will be explained in this Response.

According to the Insurance Commissioner's Amicus Brief, all of the enumerated insurance functions to the Privacy rule set forth in §§ 15.2, which are numerous [over 30 with others to be added "with the approval of the Commissioner" not the Legislature], do not restrict in any manner, the use, dissemination or retention, of an individual's personal identifiable health information. If this interpretation is accepted by this Court, then there are no privacy protections for personal identifiable health information as §§15.2 would allow an insurance carrier to use PIHI in any manner for any purpose as every insurance function is listed in §§15.2. Moreover, the insurance functions listed in §§15.2 are non-specific without any restraints on how such PIHI could be utilized including dissemination to strangers without any consent or notice to the individual. In essence any privacy protection which was supposed to be provided by the Privacy rule is eliminated and this includes the Constitutional and common law protections. This cannot be correct, and if this is how the Commissioner interprets the Privacy rule and this Court cannot construe it in a manner to protect

the constitutional mandates to protect privacy and the common law.

such PIHI then it must be found to be unconstitutional. However, the Respondents don't believe such a constitutional confrontation is necessary.

The Commissioner's statements in his Amicus Brief are ill conceived, overreaching and in contravention of the enabling legislation rendering them arbitrary and capricious. No legislator would have agreed to permit private insurance companies, like State Farm and Nationwide, to demand, receive and then store indefinitely on computer databases personal identifiable health information, and thereafter, use it in any manner for whatever purpose the insurance carrier decided was necessary to fulfill the vague enumerated insurance functions set forth in §§15.2.

There is no criteria in the Privacy rule regarding what an insurance carrier can and cannot do with regard to use or dissemination of such PIHI. Are we to believe the Privacy rule means that insurance companies can do whatever they want with these personal health records if they label such action with the terminology as used in the Rule like "claims administration" or "claims adjustment and management" or "policy placement or issuance" or "loss control" or "risk management" or "quality improvement" or "policyholder service functions" or "reporting" or "external accreditation standards" or "activities in connection with a sale, merger, transfer or exchange of all or part of a business or operating unit"? What do these insurance functions entail? How will the individual whose privacy was supposed to be protected by the Privacy rule ever have the opportunity to challenge such decisions as to what is required of such insurance functions. They will mean whatever the insurance carrier decides they mean as they are vague and incapable of any precise understanding of how protected health information would be protected and this violates an individual's Constitutional protections and his common law protections and is beyond the scope of the enabling legislation which demanded protection of privacy not elimination of it.

The Commissioner has failed to reconcile all of the provisions of the Privacy rule in formulating his position in his Amicus Brief as the Rule itself preserves all “existing state law related to medical records [and] health insurance information privacy.” §114-57-19. There is an express directive that “existing state law” is not “supercede[d]” or “preempt[ed]”. Id. How is Subsection 19 to be interpreted by this Court? Obviously, this Court’s trilogy of cases starting with Kitzmilller and the Federal and State constitutional protections were recognized under the Privacy rules as still being applicable and providing protection for both claimant’s and litigant’s health information. This is also consistent with the GLB Act [Gramm-Leach-Bliley Act] and West Virginia’s enabling mandate to implement the GLB Act. To adopt the Commissioner’s view that “insurers should be permitted to utilize and disclose nonpublic personal medical information for distinct purposes without the prerequisite of obtaining authorization from the protected person” and presumably without notice to such person, would be incongruous with the GLB Act, the enabling Legislation, and existing protections provided by the Constitutions and the common law. Importantly, it would also be inconsistent with the Privacy rule itself.

The Commissioner also asserts that his staff will not be permitted to view medical records during an examination or audit of an insurance company. WVIC Amicus p. 7-8. There is nothing in the Protective Order that precludes this, but on the contrary, the Protective Order recognizes that retention by the insurance carrier encompasses “the period of review for the most recent examination by the Commissioner.” Thus, the Protective Order clearly recognizes the Insurance Commissioners’ ability to review medical records as part of an official audit for examination of the insurance carriers’ books and records. However, should this Court believe it necessary to make such authority more clear, then more specific language can be placed in the Protective Order recognizing the

Commissioner's authority to inspect medical records during such audits. The Commissioner's Brief appears to create obstacles when none exist. However, Respondents disagree with the Commissioner's position that investigation of potential fraud permits the Commissioner to receive personal identifiable health information from an insurance carrier even though the Commissioner has no authority under the statute [§33-41-1 *et. seq.*] to do so directly for investigations initiated by the Commissioner. Such would be an obtuse construction of the Fraud Investigation statute and the Privacy rule when considered in *pari materia*. Perhaps the Commissioner believes that his investigatory powers, even though specifically subscribed and limited, enable him to obtain that which neither the FBI, the West Virginia State police or any other law enforcement authority is permitted to obtain without judicial process or the consent of the owner of such protected healthcare records; Small v Ramsey at 277. This Court should not accept such an unsupported assertion which is directly contrary to the fraud statute. There is no reason why the Commissioner needs actual copies of a persons medical records to determine whether to begin an investigation regarding fraudulent activity. As stated in other parts of this Brief such a request is overreaching and violates constitutional and common law protections.

Both the Congress and the West Virginia Legislature are presumed to have been aware of the Constitutional protections accorded personal identifiable health information. Whalen, supra; Kitzmilller, supra; Morris, supra; and Keplinger, supra. All of these cases were decided prior to March 2002 when the Privacy rule was approved by the Legislature in an Omnibus Bill. Thus, the adoption of the Legislative Privacy rule, to be interpreted as the Commissioner asserts in his Amicus Brief, would mean the Legislature intended to eliminate such Constitutional protections and common law protections. However, that would ignore the preservation of such privacy laws as stated in §§19

[§114-57-19]. Just as in the Whalen case, where the United States Supreme Court scrutinized the New York statute that permitted government employees to receive and review personal identifiable health information in an effort to combat drug abuse, that Court was very careful to understand the exact parameters of who within the New York State Health Department would have access to such confidential information, the protections to restrict access, and the ultimate destruction of such data after a limited period of time.²⁰ Understanding that all these privacy protections were in place, the United States Supreme Court refused to strike down the statute as being violative of the informational privacy prong of the United States Constitution. However, the Supreme Court cautioned that had these very detailed and stringent security measures not been in place, that a different conclusion may have resulted. Whalen at 605-06.

Also, this Court should not assume that the Legislature intended such privacy protections to disappear as suggested by the Commissioner, especially when the enabling legislation is scrutinized. The analysis regarding why the West Virginia Privacy rule exceeding the scope of its enabling legislation, if interpreted as the Commissioner suggests, is multi faceted.

First, the West Virginia enabling legislation, W. Va. Code §33-6F-1(a) (2001), is titled, Privacy: rules, and it simply states that “No person shall disclose any nonpublic personal information contrary to the provisions of Title V of the Graham–Leach–Bliley Act” [GLB--15 USC 6801]. Subsection (b) of Article 6F, then directs that the Insurance Commissioner promulgate rules to “carry out the provisions of Title V [Privacy] of the Gramm-Leach-Bliley Act”. On its face this enabling

²⁰ The New York statute prohibited public disclosure of the PHI with criminal penalties for doing so, required a separate “off line” computer system from the main system to store the data which computer system was only accessible to 41 employees of Dept. of Health, kept the data in a secure locked facility and destroyed the data after 5 years of retention; Whalen at 593-94.

legislation would seem to demonstrate the clear legislative intent to expand the privacy protections for nonpublic personal information rather than curtailing or eliminating privacy protections as is asserted in the Commissioner's Amicus Brief. Wouldn't the title "Privacy" clearly indicate such intent?

The second inquiry of the analysis is to determine the intent of the West Virginia Legislature when the Legislature directed the Insurance Commissioner "to carry out" the provisions of the GLB Act. It is essential to review that Act's provisions regarding any references to personal identifiable health information. A fair reading of the GLB Act quickly informs one that the GLB Act primarily deals with consumer financial privacy, and rules restricting the exchange of personal financial information between and among banks, insurance companies and financial institutions. "It is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." 15 USC §6801(a). The GLB Act also provides for notice to customer's of a financial institution's privacy policies [15 USC §6802 & §6803], and the right of the customer to "opt-out"²¹ [15 USC §6802(b)], and to not permit his or her personal financial information to be shared as the bank or insurance company desires. The GLB Act obviously was intended to grant individuals greater control over the dissemination of their personal financial information when dealing with banks, insurance companies and other financial entities.

²¹ "A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless--
(A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 6804 of this title, that such information may be disclosed to such third party;
(B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and
(C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option."

The word “health” or “health records” or “medical information” **does not appear a single time in the Privacy section [15 USC §6801 *et. seq.*] of the GLB.** The only reference to personal health information is found in the Chapter relating to Insurance, Operation of State Law [15 USC §6701] where in subsections (d)(2)(B) & (d)(2)(B)(vii) of 15 USC §6701, subsection (d)(2)(B) reads as follows:

Certain State Laws Preserved.— Notwithstanding subparagraph (A)²², a State may impose any of the following restrictions, or restrictions that are substantially the same as but no more burdensome or restrictive than those in each of the following clauses:

- (vii) “Restrictions prohibiting the use of health information obtained from the insurance records of a customer for any purpose, other than for its activities as a licensed agent or broker, without the express consent of the customer.” (d)(2)(B)(vii).

Although written somewhat confusingly, this essentially means that States can restrict and prohibit the “use of health information obtained from the insurance records of a customer for any purpose” unless expressly consented to by the individual. The Protective Orders in this case and which have been entered for the last 20 years do not restrict an insurance company from using personal identifiable health information for purposes of the “activities” i.e. the claim of case at issue, or for internal purposes i.e. audit, during the time such information is retained by the insurance company. However, it is the intent of such protective orders to restrict the unnecessary dissemination internally within an insurance company i.e. not being accessible to 68,000 employees with no

²² Subsection (2)(A) “Insurance sales- In general”, states: “In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.”

safeguards, or the dissemination to strangers i.e. ISO or NICB or other insurance companies or other persons. If the West Virginia Privacy rule is interpreted any differently then it is contrary to the mandate of the West Virginia Legislature to “carry out” the privacy provisions of the GLB Act. The GLB Act is focused on financial transactions not health care records or personal identifiable health information. To believe otherwise is to shut one’s eyes to the daylight and then proclaim it is nighttime! Nowhere in the text of the GLB Act does it indicate a purpose to reduce or eliminate the privacy protections traditionally accorded personal identifiable health information as provided by the Constitutions and the common law, or which one would expect such privacy to be expanded by an Act designed to protect privacy not curtail it.²³ Such an interpretation would also be contrary to a fair reading of the Privacy rule as it can be reconciled by interpreting §§15.2 as permitting use of PIHI for certain internal insurance functions²⁴ as long as there are adequate safeguards and protections from excessive dissemination internally and no such dissemination to strangers and return or destruction after the 5 year time period established in Bedell I and II.

So how did the West Virginia Privacy rule come to include the elimination of privacy protections for personal identifiable health information if this Court accepts the argument of the Commissioner as to the interpretation of §§15.2? No doubt, the insurance industry saw an opportunity to erode or even eliminate the traditional protections for such confidential information

²³ One only has to review the Federal Trade Commission website to understand the GLB Act is to restrict dissemination of personal financial information without a consumer’s consent and not expand such unconsented use and dissemination; the same would be true for personal identifiable health information if the GLB Act even covers PIHI; see FTC Privacy and Security <http://business.ftc.gov/privacy-and-security>; and FTC Gramm-Leach-Bliley Act <http://business.ftc.gov/privacy-and-security/gramm-leach-bliley-act>.

²⁴ Such insurance functions must also be more clearly defined as well as the limitations of the use of such PIHI when engaging in such insurance functions; under no circumstances can such use mean excessive dissemination or dissemination to strangers without consent and indefinite retention.

by adding a provision which clearly conflicts with other provisions of the Privacy rule i.e. preservation of existing privacy protections [§114-57-19], and the West Virginia enabling statute, §64-7-2(b) requirement of compliance with the GLB Act when the GLB Act does not even mention health care records in its privacy section!

This Court should reject the interpretation of the Insurance Commissioner in his Amicus Brief as it is not supported by the text of the Privacy rule itself, and the enabling legislation granting the Commissioner authority to promulgate privacy rules consistent with the intent of the GLB Act. The Commissioner's interpretation would also violate established constitutional principles and the common-law protections accorded to personal identifiable health information's zone of privacy, protected under the informational prong of the right to privacy. However, this Court does not have to reach such constitutional issues to reject the Commissioner's interpretation of §15.2 of the Privacy rule but only interpret it in a manner consistent with such constitutional protections as well as the intent of the Privacy rule itself.

b) The West Virginia Insurance Commission's Regulation "Privacy of Consumer Financial and Health Information" (§114-57-1 *et. seq.*) Is Unconstitutional Because It Was Passed in an Omnibus Bill Thus Violating the One Object Rule of Article VI, Section 30, of the West Virginia Constitution.

The Insurance Commission's "Privacy of Consumer Financial and Health Information" Regulations were subject to the requirements of Legislature's rule making process under the Administrative Procedures Act. This required compliance with Article VI, Section 30, of the West Virginia Constitution as interpreted by this Court in Kincaid v Magnum, 189 W.Va. 404, 432 S.E.2d 74 (W.Va. 1981)]. The Privacy regulations were promulgated and passed on March 9, 2002, to be

effective on passage. Resp. App. “**Ex.11, p. 326.**” However, the Legislature failed to comply with the requirements of the "one object rule" and rather adopted various legislative rules by a non-specific, omnibus bill which did not contain the Rules themselves and were grouped with other unrelated legislative rules for the Tax Commission, the Insurance Commission and the Lottery Commission. Thus, the standard of review of the Insurance Commission's Regulations currently identified as §114-57-1 *et. seq.* requires this Court to apply the "special or careful scrutiny test" to determine the validity of these Rules as they relate to the issues in this Consolidated Appeal. *Id.*; accord, Swiger v UGI/AmeriGas, Inc, 216 W.Va. 756, 613 S.E.2d 904 (W.Va. 2005).

This Court established in the Kincaid and Swiger cases, a procedure by which to analyze whether a legislative rule promulgated by an agency violates the West Virginia Constitution in its promulgation and adoption. See also, Chico Dairy Co. v. WV Human Rights Comm'n., 181 W.Va. 238, 382 S.E.2d 75 (W.Va. 1989); In Chico Dairy, this Court determined that any legislative rule must be promulgated through the proper legislative rule making procedure, i.e. recommended to be approved by the Rule Making Review Committee and subsequently approved by the full Legislature. If the agency rule failed in either of these two steps, then it was invalid and could not be applied in any manner. Further, this Court established in Kincaid that if the agency rule was properly recommended by the Legislative Rule Making Committee to the Legislature, it must be determined whether the rule was approved by the Legislature in an omnibus bill which deprives the entire Legislature of the text of the rules being adopted as the proposed legislative rule, thus violating the "one object rule" of W.Va. Const., Article VI, Section 30. This Court found that the purpose of the "one object rule" as it applies to agency legislative regulations required careful and extensive review by the entire Legislature "in a manner properly respectful of the separation of powers" because of the voluminous

body of administrative law which is "often formulated without adequate public participation and collected and preserved for public knowledge and use in an unacceptable and essentially inaccessible fashion." Chico Dairy, 382 S.E.2d, at pg. 80, fn.5, citing W.Va. Code § 29A-1-1 (1982). The Privacy rules at issue in this Consolidated appeal were passed in an omnibus bill being Senate Bill No. 397. See Resp. App. "Ex. 11, p.326."

The Insurance Commission in its Amicus Brief articulates the exact reason why this Court has held, as an unconstitutional usurpation of executive prerogative and hence a violation of the separation of powers, the control of agency rules by a few Legislators. This is exactly the type of unconstitutional conduct condemned in the Kincaid case, and which was so eloquently explained in that case as why such conduct would violate the separation of powers doctrine as well as our West Virginia Constitution's procedure for legislative enactments. The purpose of the one object doctrine is so the entire Legislature will have full knowledge of the Bill and its effect, so that the enacted legislation represents the will of all of the citizens in this State through our representative form of government. The passage of privacy legislation which, according to the current Commissioner, eliminates certain constitutional and common law privacy protections which creates an ineluctable inference that the full Legislature was unaware of the effect of these Privacy rules as interpreted by the current Commissioner. Accordingly, without these constitutional principles being upheld, the power of a few in the Legislature would usurp that of the Executive Branch and its appointed agency directors. If agency rules were promulgated by the executive agency only there would be no issue as such rules would not have the full force of law as do legislative rules approved by the full Legislature. This is exactly why the procedure is important so that one may be confident that the entire Legislature considered and passed upon such rules that have the force of law if consistent with the enabling statute.

It seems rather apparent that Senate Bill No. 397 did not advise Members of the Legislature as to the effect of the Insurance Commission's Privacy regulations, if this Court would construe them as requested by the Commissioner in his Amicus Brief. Senate Bill No. 397, and as amended in West Virginia Code §64-7-2(b), approved numerous of regulations for various State agencies including the Tax Department, the Insurance Commission, and the Lottery Commission regarding many different subjects. Tucked away amongst this Omnibus Bill was a single phrase stating as follows: "authorizing insurance Commissioner to promulgate legislative rules relating to privacy of consumer financial and health information." Nothing in this Senate Bill 397 would alert any Legislator that the Insurance Commission's regulations were not going to protect the privacy of a consumer or individual's personal financial and health information, but rather, would reduce and eliminate the constitutional and common law protections then existing. It is safe to assume that had the full Legislature been aware of the Insurance Commission's position, as now articulated in its Amicus Brief, the authority to adopt these Legislative rules would have been more vigorously debated and perhaps rejected. This is exactly why this Court has held that such omnibus legislation must be carefully scrutinized.

Special scrutiny is similar to that required when a fundamental, constitutional right or suspect class is the subject of a legislative or administrative enactment. See generally, Whitener v. W.Va. Board of Embalmers, 169 W.Va. 513, 288 S.E.2d 543 (W.Va. 1982). Once a regulation is subject to special scrutiny, it requires more than a rational relationship to a specified, legitimate State goal. In essence, under a special scrutiny analysis, the subsection 15.2 of the Privacy rule [§114-57-15.2] is entitled to no deference and, in fact, the Regulation itself must be clear and unambiguous as to its purpose and must be consistent with the enabling legislation, W.Va. Code §33-6F-1(a): "Privacy; rules."

If the exemption contained in §§15.2 is not clear as to its intent and application, or is contrary to the enabling Legislation, then it is invalid. Under the facts of this case, application of the exemption as requested by the current Insurance Commissioner would be contrary to its enabling legislation. Also, the interpretation urged by the Commissioner is not consistent with the Rules themselves when considered in totality. This Court need not apply the nine factors set forth in West Virginia Healthcare Costs Review Authority v. Boone Memorial Hospital, 196 W.Va. 326, 472 S.E.2d 411 (W.Va. 1996), as the effect of the regulation having been considered and passed by the West Virginia Legislature in an omnibus bill triggers special scrutiny. Ordinarily, a regulation, if its intent is clear and it is not contrary to the enabling legislation, would be upheld and given the force of law. Boone, at 421. However, this Court, in Boone, held that when specific procedural or substantive infirmities are brought to the Court's attention, then the deference provided to a validly enacted legislative rule is no longer applicable. Such is the case here. However, even had the provisions of §§15.2 been validly enacted, it still could not pass muster as it is inconsistent with the enabling legislation, the GLB Act and the existing Constitutional and common law protections afforded to personal health information as preserved in §§ 19 of the Privacy rule. Thus, this Court should find subsection 15.2 of the Privacy rules to be invalid.

IV. State Farm and Nationwide's "Flim Flamming" of the Court

In Bedell I this Court unfortunately accepted State Farm's assertion in its' Petition that there was no need for the Trial Court to enter a protective order because State Farm complied with the West Virginia State Insurance Commissioner's Regulations, and the Gramm-Leach-Bliley Act, both of which adequately protected the confidentiality of Mrs. Blank's [Plaintiff in Bedell I] confidential

medical records from unauthorized use or dissemination. State Farm asserted in its' Petition in Bedell

I filed on March 8, 2010, as follows:

“State Farm follows consistent, reliable claim-handling procedures that comply with the privacy rules established after careful consideration of all relevant interests by state and federal lawmakers. Both state and federal law comprehensively regulate the protection of an individual’s privacy in the conduct of the insurance business. For example, the federal Gramm-Leach-Bliley Act, codified at 15 U.S.C. § 6801, *et seq.*, requires state regulatory authorities, *inter alia*, “(1) to ensure the security and confidentiality of customer records and information; (2) to protect against any anticipated threats or hazards to the security or integrity of such records; and (3) to protect against unauthorized access to or use of records or information that could result in substantial harm or inconvenience to a customer.” West Virginia has implemented these requirements through adoption of the model National Association of Insurance Commissioners privacy rules. See 114 CSR 57-§

Notwithstanding these protections under existing law, and the obvious need for State Farm to obtain plaintiff’s medical records in order to properly evaluate a claim, Plaintiff has refused to provide her medical records unless and until State Farm executes a medical confidentiality Order. While no such Order is necessary, State Farm is willing to enter into an Order, consistent with existing laws and regulations which is not unduly restrictive, to protect the confidentiality of the records.” Pet. at pp. 2-3.

Clearly, State Farm’s representation lead this Court to believe that there were adequate protections in place to preserve the confidentiality of a claimant’s personal identifiable health information contained in his or her medical records without the need of a protective order.²⁵ This Court discussed in great length in Bedell I the protections granted by the West Virginia Insurance Commission Regulation §114-57-15 (2002) and the Gramm Leach Bliley Act, 15 USC §6801 (2009). This Court, in relying on State Farm’s representations in its’ Petition commented in Bedell I as follows:

“State Farm asserts that it complies with all of the Insurance Commissioner’s requirements for maintaining electronic files, and that storing records electronically

²⁵ The Federal statute quoted by State Farm in Bedell I does not even use the word “health” or “medical records” or any other reference to PIHI in the text.

permits it to quickly comply with any record requests. To further protect the confidentiality of an insured's medical records, the Insurance Commissioner has promulgated a legislative rule, W.Va. C.S.R. §114-57-15 (2002), based on the model privacy rules of the National Association of Insurance Commissioners, which are patterned after the federal Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 (2009), *et seq.* **Among other things, this rule prohibits insurers from disclosing “nonpublic personal health information” without authorization by the individual.** W.Va. C.S.R. § 114-57-15.1. Thus, insurers operating in West Virginia are required to prevent the unauthorized disclosure of confidential medical records contained in claim files, whether those files are stored electronically or in paper format.” *Id.* at 226 W.Va. 146, 697 S.E.2d 738.

“Here, none of Mrs. Blank's medical records will become public unless she consents to their dissemination or until they are introduced at trial. Whether the records will be made public by virtue of being introduced at trial, or whether they can be sealed at that time, is an entirely separate issue not addressed by the circuit court's protective order in this case.” *Id.* at 148, 740 (emphasis added)

Understandably, this Court was persuaded by State Farm's assertions in Bedell I that a claimant's medical records would be protected from unauthorized disclosure without the consent of such individual as well as State Farm's representation that it did not desire to retain such PIHI permanently.²⁶ However, State Farm never intended to comply with such assertions made in Bedell I as is obvious from the plethora of constant litigation it has generated since the holdings in Bedell I and Bedell II. State Farm was not candid with this Court as to its intentions regarding State Farm's future use of a claimant's confidential medical records. However the Respondent, Mrs. Blank, did call to this Court's attention in Bedell I that the West Virginia Insurance Commissioner's Regulation did

²⁶ The WV Insurance Commissioner at the time, Jane Cline, by her then General Counsel, Mary Jane Pickens, filed an Amicus Brief in the Bedell II case on November 5, 2010 which made no argument that §114-57-15.2 permits insurance companies to disregard privacy protections of personal identifiable health information when performing certain insurance functions; that Amicus Brief did not even mention the Privacy rule at all!! It only argued that the Protective Order approved in Bedell II may impede fraud investigations; such is strange indeed and one can only infer that it was not mentioned because of State Farm's decision to assert that the Privacy rule [§114-57-15.1] did provide all the lawful protections necessary to protect an individual's privacy in their PIHI.

not provide the protections as claimed by State Farm and that a protective order was still necessary. The Respondent, Mrs. Blank, noted State Farm's misrepresentation in Bedell I by highlighting State Farm's argument that State Farm could not disseminate PIHI without the consent of the individual.

"State Farm respectfully submits that medical protective Orders such as the one at issue here are unnecessary given the multitude of protections already in place to ensure the confidentiality of medical records held by regulated entities such as insurers. West Virginia has adopted the model National Association of Insurance Commissioners privacy rules. See 114 CSR §57-15.1.6 These state regulations also impose standards, patterned after the Gramm-Leach-Bliley Act, 15 USC §6801, et seq., to ensure the security and confidentiality of records and other information. In addition to these rules, State Farm fully complies with all applicable privacy requirements of state and federal law. fn. 6 This rule states 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." [State Farm's Petition, §3(b) p. 18]

Mrs. Blank countered by highlighting to this Court that:

"State Farm asserts to this Court 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."

However State Farm failed to read the Regulation further in 957-15.2 where it states:

"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"

[Supplemental Response by Respondent to State Farm's Petition for Writ of Prohibition, p. 6, filed 4/12/10] Bedell I.

Some of this confusion was resolved in Bedell II but not completely as while this Court acknowledged that State Farm did not dispute that good cause existed for a protective order to ensure

the confidentiality of personal medical records,²⁷ this Court again reiterated from Bedell I that WVIC Regulation 114 CSR §57-15.1 was “patterned after federal statutes, [to] provides privacy protections ‘to prevent the unauthorized disclosure of confidential medical records contained in claim files.’ “ Bedell II at 742. However, State Farm now disputes its prior representations to the Trial Court and this Court as is evident from its Petition in this Consolidated Appeal where State Farm now argues that the same Insurance Regulation “authorizes” the use and disclosure of confidential medical records as State Farm sees fit including dissemination to strangers like the NICB and unnecessary dissemination internally to most of its 68,000 employees.

“A Protective Order is not needed to protect Plaintiffs medical records from public dissemination by State Farm. West Virginia insurance regulations generally prohibit insurers from “disclos[ing] nonpublic personal health information about a consumer or customer unless an authorization is obtained from the consumer or customer.” W.Va. C.S.R. § 114-57-15.1. However, this same regulation expressly authorizes insurers to use and disclose nonpublic personal health information-without authorization from the consumer-for the performance of specified “insurance functions.” W.Va. C.S.R. § 114-57-15.2.” [Consolidated Appeal Petition p. 15.]²⁸

Both State Farm and Nationwide have played a shell game with regard to representations in different Courts about what they will do with an individual’s PIHI. State Farm on many occasions has represented to this Court including State Farm’s admission in Bedell I that State Farm “does not

²⁷ “Indeed, the Parties to this proceeding do not dispute that a protective order is appropriate under the facts and circumstances of this case to safeguard Mr. and Mrs. Blank's privacy interests in their medical records.”; the Trial Court had also confirmed State Farm’s agreement that good cause existed for a protective order recognizing that an individual’s personal medical records are inherently confidential when it stated as quoted in Bedell II: “Finally, the Defendants [State Farm and Ms. Luby], both in oral argument before the Supreme Court and in their proposed “Protective Order,” have stated that the Plaintiffs are entitled to a reasonable protective order.” Bedell II at 733; **how many times is State Farm entitled to flip flop on representations made to Courts in this State before *res judicata* or collateral estoppel applies?**

²⁸ Of course the insurance carrier in most cases is not a party and protection for PIHI is needed not just to protect unconsented disclosure or use by insurance carriers, but also by other parties including the insured and his or her counsel.

provide any nonpublic medical information to the NICB without the patient's consent."

State Farm made this admission no doubt because this Court was adamant during oral argument in Bedell I that an individual's personal medical information obtained during a claim or litigation should not be provided to trade organizations like the NICB or ISO. Bedell I at p. 739 f.n. 5. Accordingly, both State Farm and Nationwide waited until they were before a Federal Court to change their stripes like a chameleon and assert that insurance carriers were entitled to transmit confidential medical information to the NICB or ISO any time they believed it warranted and without the consent or knowledge of the claimant or litigant whose medical records are being disseminated. Small v Ramsey, 280 F.R.D. 264, 269-70 & 274-75 (N.D. W.Va. 2012).²⁹ The Federal Court completely rejected both State Farm and Nationwide's request in this regard so the flim flam did not work as intended by these insurance companies. Fraud will not be impeded by protecting the privacy of a person's PIHI. There can still be full and complete investigations of suspicious claims at the time they occur and even thereafter as long as necessary. As for the maintenance of PIHI in claims files, the time period allowed by this Court in Bedell I and II is in practicality longer than 5 or 6 years as that time does not start until the conclusion of the claim or civil action. Moreover these documents don't just disappear as they are still maintained by hospitals, health insurance companies, government payors like Medicare and Medicaid and can be obtained if needed, but of course only through legal process, not just by calling the NICB's cohort the liability insurance carrier.³⁰ If fraud is suspected before that

²⁹ The Magistrate Judge's Order was affirmed by the District Judge by Order entered April 17, 2012; See Resp. App. "Ex. 3"

³⁰ Neither this Court nor Respondents have any idea what protections and safeguards the NICB has regarding confidential PIHI nor is it important; perhaps we should fingerprint and take DNA samples of everyone in the United States and provide it to the NICB on the outside chance they may be able to solve a crime once in awhile; also the NICB's assertions of how valuable its information was in helping to solve several high profile crimes, World Trade Center and the Oklahoma Bombing is greatly overstated and had nothing to do with medical records

likely 8 or 9 year period then a hold order can be obtained or even *ex parte* subpoena by a grand jury. However no matter how many “possibilities” the NICB raises there is no bases to allow indefinite retention and unbridled dissemination to strangers like the NICB. The NICB is only trying to justify its existence and receipt of money from the insurance industry. The NICB is not the private corporate police that most large companies wish they could have and the insurance industry does in the NICB as it is still a trade organization with no restraints of HIPAA or the Federal Privacy Act or our West Virginia Privacy rule. We have all heard the old tune of “just trust me” well we don’t.

V. The Perceived Harms Asserted by State Farm, Nationwide, and the *Amicus Curiae* Participants Are Speculative, and Are Also Trumped by the Constitutional Privacy Protections and the Public Policy of the United States and State of West Virginia

- a) **Any potential harms asserted by State Farm or Nationwide claimed to result from the entry of a protective order consistent with Bedell I and II are either speculative or insufficient to deny the Respondents, or any claimants, their constitutional right of privacy or their common law protection afforded by the public policy of the United States and of the State of West Virginia, to protection of such personal identifiable health information**
- b) **Both State Farm and Nationwide have waived any consideration of their assertions of impending “doom” resulting from entry of protective orders consistent with Bedell I and II by refusing to permit discovery regarding what if any safeguards each employs to protect the confidentiality of a person’s personal identifiable health information once received during a claim or during litigation**

Good Cause:

State Farm and Nationwide make wild unsupported claims of what will happen if protective orders granting confidentiality are entered by trial courts if approved by this Court. They also assert that good cause has not been demonstrated in this case for the issuance of a protective order. This

but rather had to do with collection of vehicle registrations; hyperbole abounds in the NICB’s Amicus Brief.

Court has already established in Bedell II and the Keplinger cases that medical records are inherently private and worthy of protection when required to be provided in litigation. Every other Court that has considered this issue has likewise granted protective orders for confidential medical records and the Constitution and public policy requires such protection. Whalen, supra; Morris v Consolidated Coal, supra; and State ex rel Kitzmiller v Henning, supra; see also, Brende v Hara, supra; Small v Ramsey, supra; Fields v West Virginia State Police, supra; Law v Zuckerman, supra; and A Helping Hand LLC v Baltimore Co. Maryland, supra.; see also various Protective Orders Resp. App. "Ex. 6 & 7" All of the cited cases establish the principle that PIHI are entitled to constitutional protection, and there is a strong public policy in protecting against the unauthorized use or dissemination of private medical records.

Neither State Farm nor Nationwide have provided any case decided on the merits that supports their view. The only case cited by the Appellants is Warren v Rodriguez – Hernandez, 2010 WL 3668063 (N.D. W.Va. 2010), which was decided under Rule 12(b)(6) and the parameters of Rule 65 for preliminary injunction. That case was decided before this Court's decision in Bedell II and it also involves State Farm's "flim flaming" the Trial judge with misinformation. In the Warren case, State Farm made key misrepresentations. First, that it would not share confidential information with outside third parties. Warren at pp. 4 & 6. This Court is well aware that State Farm intends to share confidential medical information with the NICB, the ISO or any other person or entity that it deems appropriate, all without the consent or knowledge of the party who's medical records are being disseminated. Small v Ramsey at 269-70. Second, State Farm represented to the District Court that West Virginia law, and State Farm's internal practices, were adequate to protect a person's privacy. Unfortunately, the District Court in Warren accepted these representations, as did this Court in Bedell

I, as to the adequacy of the Insurance Commissions Regulation §114-57-15.1, which State Farm and the Commissioner now asserts permits such unbridled use and dissemination of confidential medical information. This is exactly why the Colorado Appellate Court in A.T. v State Farm Ins. Co., 989 P.2d 219 (Colo. App. 1999) held that a protective order must be entered to prevent unauthorized dissemination or use of confidential medical information.³¹ This is also the same reason why the Hawaii Supreme Court held in Brende that the Hawaii State Constitution as well as HIPAA, protects the confidentiality of litigants medical records and information and required that disclosure be limited only to those persons involved in the litigation necessary to assist in the case and that such medical records and information be destroyed at the conclusion of the case. This is exactly what the judicial provisions of HIPAA requires under 45 C.F.R. 5 164.51 2(e)(1)(v) and which the Hawaii Supreme Court held created a floor of protection which must be followed by the States.

A protective order is proper any time confidential medical records are being provided in litigation, without any additional showing of good cause, and in this case the entry of the Protective Order was based on good cause which was further supported by Plaintiffs Matt Huggins' and Carmela Faris's Affidavits filed with the Trial Court. See Resp. App. "Ex. 12, p.329."

The Protective Order Does Not Violate West Virginia Law:

This Court decided in Bedell II that a protective order is proper if it permits retention of medical records and information for the examination time period set forth in WVIC Regulation §114-15-4.2(b) and 4.4(a). This is 5 or 6 years **after** the conclusion of the litigation. Accordingly, the

³¹ In A.T. v State Farm had used a chiropractor's medical records submitted as part of her own claim which indicate that she had been treated for depression to cross-examine her when she appeared as an expert treating physician in another case involving a State Farm insured.

Protective Order in this case and in Faris complied with that direction from this Court and therefore are valid. Also, there is no need for any greater retention period as neither State Farm or Nationwide have provided any specific justification and by denying all discovery have waived any such assertion. They are merely making an unsupported argument as was found by the Federal Court in Small v Ramsey at 273. In the Small case, State Farm contended that it should be permitted to retain medical records “for a lifetime.” Id at 274. This was rejected by the Federal Court which ordered that the Small’s medical records would be returned or destroyed within the time period set forth in Bedell II with a Certification regarding the same. Id at 286.

Also, State Farm and Nationwide’s reliance on the Insurance Regulations for claiming a violation of law is misplaced. First, those Regulations do not affect a third-party litigant who has no relationship with the defendant’s insurance carrier. WVIC Reg. §114-57-2.6 & 2.9. Mr. Huggins was not a customer or consumer of Nationwide. Likewise, Mrs. Faris was not an insured of Nationwide and therefore was not a customer or consumer of Nationwide. Therefore, the Regulations are totally inapplicable in both instances.

With regard to Mr. Huggins’s status as a first party insured of State Farm as it relates to underinsured motorist coverage, the Regulations would apply, but not in the manner suggested by State Farm. §§15.1 and 15.2 cannot be interpreted to permit State Farm to use and disseminate Mr. Huggins’s PIHI to whomever it may desire. The Regulation was designed to protect the personal privacy of insurance consumers and customers and not to supplant the common law as developed by this Court’s decisions, nor could the Regulations deny a person their constitutional protection to informational privacy as set forth in Whalen, and this Court’s privacy cases. However as set forth previously in this Response, this Court need not declare the Regulations unconstitutional to reject

State Farm and Nationwide's position as to the effect of the Regulations. This Court should avoid a constitutional issue if the Regulations can be interpreted in a manner not to create such constitutional issue. The Regulations may be interpreted in a manner consistent with the guarantee of constitutional privacy protections and compliance with the public policy as expressed in HIPAA and West Virginia case law.

Moreover, an insurance carrier does not need to retain medical records and medical information indefinitely or to be able to disseminate such information at its own will and pleasure in order to fight fraud. There is nothing that prevents an insurance carrier from notifying the Insurance Commissioner's Office or any prosecuting attorney, law enforcement authority or anyone else if fraud is suspected. Nothing prevents such disclosure, and if the law enforcement authorities believe there is merit to such disclosure, they have all of the tools available to obtain such medical records and medical information. It is important to note that the West Virginia Insurance Commission does not have subpoena power to obtain medical records and medical information in its own right. Thus, the Commissioner cannot obtain indirectly that which it was not given the power to obtain directly. In other words, it would be incongruous to interpret the Regulation §15.2 to permit the Insurance Commissioner to require the indefinite retention of a claimant's medical records merely so that the Insurance Commissioner could have them provided to the Commissioner, in violation of the statute. Then however, such unsubstantiated claims are insufficient to deprive an individual of this important right of privacy, protected by both the Constitution and the common law. More importantly, our Legislature bound the Commissioner and his or her employees to total confidentiality more restrictive than the Protective Order in this case. Pursuant to West Virginia Code §33-41-7 (2004), this section regarding "Confidentiality" restricts all information obtained by the Commissioner in an investigation

of alleged fraud as “confidential by law and privilege” and not subject to the Freedom of Information Act, subpoena, or discovery, nor is it admissible as evidence in any private civil action. Further, neither the Commissioner “nor any person who receives documents, materials or other information while acting under the authority of the Commissioner may be permitted or required to testify in any private civil action concerning any confidential documents, materials or information” except as ordered by a court of competent jurisdiction. If the Commissioner shares any such information obtained in a fraud investigation, it may only be shared with other law enforcement agencies or insurance regulatory bodies “provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material, or other information.”

Clearly, the Legislature by not granting the Insurance Commissioner subpoena authority and also by restricting the use of such information obtained by the Commissioner demonstrates the Legislature’s intent to maintain the confidentiality of all information, including medical records. Nothing in the statute authorizes the Commissioner to share any information regarding suspected fraud with any private insurance company, or any trade group like the NICB or the ISO. Accordingly, the Commissioner could not require that medical records be retained by an insurance carrier merely to be available to the Insurance Commissioner, when the Commissioner has no such authority in the first instance. Likewise, the confidentiality provisions of the statute prohibit the sharing of any such information, including medical records, with any private insurer. A private insurer stands in no different position than an ordinary citizen who provides information of a potential crime to governmental authorities like the Insurance Commissioner or any law enforcement agency.

Accordingly, State Farm and Nationwide’s argument based upon its fraud reporting responsibilities is without merit as the protective order read issue does not prevent such reporting, but

only protects the privacy of all individuals. A very small percentage of which are engaged in potential fraud.

The Separation of Powers Doctrine Requires that a Court Protect its Own Processes:

Clearly under the Separation of Powers Doctrine a trial court must fashion a protective order regarding discovery it has ordered produced under its coercive contempt power. If a court can order medical information produced, it has to have the power to protect such confidential information as to use and dissemination or it does not have to allow State Farm or Nationwide or any other person or entity to receive it. What the court has the power to order produced it has to have the power to protect.

Also a court must base its granting or denial of a protective order upon the facts at hand and cannot be bound by any regulations or directives of the Executive Branch of the Office of the Insurance Commissioner, or any other Insurance Regulations, even if approved by the Legislature, which attempt to limit or otherwise control the application of the Rules of Civil Procedure. Such cannot supercede this Court's own Rules governing trial courts as the judiciary is a co-equal branch of government which determines the application of its own Rules. Louk v Cormier, 218 W.Va. 81, 622 S.E.2d 788 (W.Va. 2005) ["Amendment to Medical Professional Liability Act (MPLA), imposing non-discretionary duty upon trial court to accept non-unanimous verdict in medical malpractice action, violated constitutional separation of powers"]; Morris v Crown Equipment Corp., 219 W.Va. 347, 633 S.E.2d 292 (W.Va. 2006) ["This Court has made clear that "[t]he legislative, executive, and judicial powers ... are each in its own sphere of duty, independent of and exclusive of the other; so that, whenever a subject is committed to the discretion of the [judicial], legislative or executive department, the lawful exercise of that discretion cannot be controlled by the [others]."Danielley v. City of

Princeton, 113 W.Va. 252, 255, 167 S.E. 620, 622 (W.Va. 1933). [Promulgation of rules governing litigation in the Courts of this State rests exclusively with this Court.”]

When a protective order should be granted, and under what circumstances is the sole prerogative of the Court, not the Insurance Commissioner, regardless of the Constitutional and public policy protections involved in this issue, but of course such Constitutional and public policy protections inform the trial court and guide its determination.

However, a trial court should attempt to reconcile any such legislative rules with Rule 26 when issuing a protective order. This was done by the Trial Court in these cases when it waited until this Court’s holding in Bedell II before issuing a Protective Order and also modified the Protective Order to permit further modification should

“...during the period of possession of the protected medical records and information, and before destruction or return is required by this Protective Order, should any person believe they are required to produce such protected information to a person or entity by operation of law, then application to permit such disclosure may be made by motion to the Court for such disclosure or by an agreed order. Also, the protected person may grant consent for such disclosure should he or she so desire.” **Jt.App. Vol. II-App. 1**

Other concessions were offered to State Farm and Nationwide but both refused to accept reasonable restraints on the use, retention and dissemination of personal protected health information and the Trial Court was well within its discretion to provide such privacy protection as required by Rule 26, the Constitution and the case law.

The Protective Order Does Not Conflict with Any Other State or Federal Laws:

State Farm and Nationwide, again without any support, attempt to convince this Court that a valid protective order issued under Rule 26(c) somehow violates a host of non- applicable federal or

forwarding jurisdiction statutes. Some of the amorphous claims include:

1. That the Protective Order violates the Zubalake³² case, which it does not because that case has absolutely nothing to do with the issuance of a protective order protecting personal identifiable health information being produced as part of a claim or litigation. Neither State Farm nor Nationwide provide any case supporting this off-the-wall position. However, this issue was considered and ruled upon by the Federal District Court in Small v Ramsey. Id. at 270. In Small, the Federal District Court in rejecting the same arguments as made in this Consolidated Appeal did not find any merit to the speculative claim that either State Farm or Nationwide sometime in the future might be the subject of a hold order as contemplated by Zubalake. Under such a theory, no record received by an insurance carrier during a claim or in litigation would never be subject to return or destruction based on the possibility that it might be subject to a hold order sometime in the future. All of the Courts addressing such assertion very practically ruled that if such a hold order is issued prior to the time for return or destruction then an appropriate request may be made to the Court issuing the protective order or the Court issuing the hold order, but such possibility is mere speculation.

2. The Federal Court, in the Small v Ramsey case at 276-77 also ruled that the requirements of Medicare, Medicaid, or SCHIP do not prohibit the entry of a valid protective order regarding the return or destruction of a litigants confidential medical records produced in discovery. The Federal District Court held that such assertions were speculative and that the entry of a Protective Order in the Small case in no way impeded the reporting obligations of State Farm or Nationwide under the Medicare program. Neither Mrs. Faris or Mr. Huggins, are recipients of any Federal or State medical payment plan, and therefore, this issue is not in controversy in this Consolidated Appeal.

³² Zubulake v. USB Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y. 2004)

Neither State Farm nor Nationwide have provided to this Court a single case that holds to the contrary. One can only infer that no Court is willing to accept such far-reaching speculation as justification to prevent valid protective orders from being entered to guard the significant privacy interests in one's personal medical information. Obviously, the Hawaii Supreme Court had no hesitation in mandating the use of protective orders to protect such privacy interests when it reversed a Trial Court for failing to enter a broad protective order involving State Farm in Brende. Id at 1112. This Court should hold that this argument regarding the need to retain PIHI forever because of governmental repayment statutes is without merit because any party to litigation receiving any such State or Federal medical payments will be known to the opposing party and his or her liability insurance carrier well before the conclusion of the litigation, and definitely well before the expiration of the 5 or 6 year additional time period for retention permitted by Bedell I and II.

3. The next obtuse argument made by State Farm and Nationwide is that the Trial Court's Protective Order violated the Full Faith and Credit clause of the United States Constitution. Under this theory proposed by State Farm and Nationwide this Court would have to yield to any other State's laws regarding retention of insurance documents even if our Constitution, the United States Constitution and our common law require that such documents be protected from unauthorized dissemination and indefinite retention. Such is not the law and that is why no case has been cited by these insurance carriers to support this fantastical proposition. Moreover, West Virginia Code §33-6-14 mandates that any policy delivered in the State of West Virginia, contain no provision that requires such policy be construed according to the laws of any other State or Country. Such is a clear expression of West Virginia's intent that insurance policies delivered to West Virginia residents be construed by the laws of this State and not the laws of any other state. The Federal District Court in

the Small case rejected this same argument, as well as the claim that State Farm had to comply with the Illinois Department of Insurance requirement to maintain all records, including medical records, indefinitely. Thus, this argument must also fail. Small v Ramsey at 273, 278-80.

4. State Farm and Nationwide also assert a First Amendment right to receive and maintain protected personal healthcare records. Somehow these insurance carriers equate permission by the Court to permit receipt of such confidential information with a free-speech right to maintain and disclose such information after receipt through the discretion of the trial court. No case cited by State Farm or Nationwide supports this theory. Neither State Farm or Nationwide are even entitled to a copy of a litigants confidential medical records, as in most instances, they are not parties to the litigation and receive such information only because they insure one of the parties.³³ Merely because a trial court in its discretion includes the liability insurance carrier as one of the recipients of protected information pursuant to a protective order does not grant First Amendment rights to such information. Without the Courts compelling such information to be produced, the liability carrier would not be entitled to it. Such does not bootstrap the received information by cloaking it with First Amendment protection. This issue was specifically raised by State Farm in a Petition for Writ of Certiorari to the United States Supreme Court in the Bedell II case, but the Supreme Court did not find such purported constitutional issue to be worthy of granting review. This argument is also without merit.

5. State Farm and Nationwide's arguments that a protective order will impede detection of fraud, a compelling government interest, are not based on any relevant law or other authority and have been addressed previously in this Response.

³³ Respondents don't argue that to properly evaluate a claim or defend its interests in litigation against its insureds that liability carriers should be precluded from receiving medical records; on the other hand such receipt of confidential information does not make it the property of the insurance carriers to do with it want they want.

Insurance Carrier's Due Process:

Interestingly, insurance carriers, most notably Nationwide, assert that their due process rights have been violated by the Trial Court's Protective Order, when required to return or destroy any medical records provided to such insurance carrier during the claim process prior to litigation being commenced. This is curious that the insurance carriers claim lack of due process when they were present and able to vigorously contest the Court's Protective Order before it was entered, yet these same insurance carriers desire to disseminate and utilize the Plaintiffs' confidential medical records for an indefinite time period many years after receiving them without their knowledge or consent. It appears that the denial of due process is to the Plaintiffs who were required to provide their confidential medical records in order to recover damages caused through no fault of their own and who now may have been subject to unauthorized use and dissemination.

There was no violation of the insurance carriers due process right to be heard as they were ably represented by many attorneys in numerous hearings. As for the Court's Protective Order, including pre-suit medical records, such is not improper as it was an exercise of this Court's equity powers as it concerned relevant matters related to the case before the Trial Court and in which the Plaintiffs asserted such medical records were obtained without their being informed that State Farm and Nationwide intended to retain such documents indefinitely and to disseminate them as they saw fit. Such admitted intentions by State Farm and Nationwide provided a sufficient basis upon which the Court could exercise its equity jurisdiction in granting protection for medical records and information provided by Mr. Huggins and Mrs. Faris immediately before suit was filed. Such conduct by Nationwide and State Farm may be a violation of the Privacy rule.

Nationwide primarily argues that requiring return or destruction of medical records provided

pre-suit is a retroactive application. This is incorrect. There is nothing retroactive about the Trial Court's Protective Order as it did not seek to have Nationwide or State Farm punished for something it did before the Order was entered. However, there is nothing that precludes the Trial Court, in the exercise of its equity powers to require destruction or return of such PHI in the possession of these insurance carriers merely because they came into possession at different times. There is a distinct difference between an order requiring the removal of similar confidential documents maintained on the same computer system, regardless of when they were placed on such database, as compared to punishing conduct that has already occurred before the order was even entered. There has been no attempt by the Trial Court to punish either insurance carrier for receiving medical records pre-suit, or any other such conduct, and punishment would only occur if either State Farm or Nationwide refused to follow the Trial Court's Protective Order after it was entered. The Trial Court's Order, including as it relates to confidential medical records received pre-suit is valid. If this Court is unsure of the basis for the Trial Court's Order then this issue should be remanded for further evidentiary proceedings as neither Nationwide or State Farm asked for specific findings of fact and conclusions of law on this particular issue. State ex rel. Brison v Kaufman, 213 W.Va 624, 584 S.E.2d 480 (2003).

Inability to Maintain an Electronic Claim File:

These Insurance carriers also claim that the Protective Orders in this case will prevent them from maintaining an electronic claim file and will cause financial burden which requires allowing these insurance carriers to indefinitely maintain scanned copies of Mr. Huggins and Mrs. Faris' confidential medical records on the databases. Such assertion is without any support in the Record and is pure speculation. As the Federal District Court held in Small v Ramsey at 281, "What the insurers

IT departments have created they can modify.” The District Court went on to state that the confidential medical records should “not go beyond those select few persons within the insurance companies (State Farm and Nationwide) who are involved in the evaluation and resolution of the Small claims.” Surely, this Court should not accept the unsubstantiated “Chicken Little” assertions by these sophisticated insurance carriers that they cannot program their computer systems in a manner that will segregate confidential medical records and allow them to be purged [written over] within the time frames set forth in the Court’s Protective Order. To assert otherwise is absurd. We can put a man on the moon and a rover on Mars, but we can’t reprogram State Farm and Nationwide’s computer systems. Moreover, both State Farm and Nationwide have waived this claim by refusing to allow discovery with regard to these assertions which is one of the reasons why the Trial Court entered the Protective Orders in this case. One cannot refuse to permit verification of such far fetched assertions, but then ask this Court to accept those assertions as fact.

HIPAA Does Impact the Issues in This Consolidated Appeal:

HIPAA does provide significant guidance to the matters before this Court. While HIPAA excludes liability insurance carriers from all of the requirements of the Act, it’s judicial proceedings provisions and its security safeguards set a floor for what this Court should require in protecting a person’s constitutional right to informational privacy. Whalen, supra; Brende, supra. at 1114 [holding that HIPAA “establishes national privacy standards and fair information practices regarding health information” and the regulation is a “federal floor of privacy protections that does not disturb more protective rules were practices.”]

HIPAA is a notable and significant expression of the United States’ public policy determination

for the need to protect a person's medical records and emanates from Congress's enactment of that law. HIPAA codified privacy protections for medical records and information, and criminalized the unauthorized disclosure of protected health information. 42 U.S.C §I 320d-6 (1996) An entire body of research and Federal Regulations exist to implement the privacy protections of HIPAA.³⁴ The U.S. Department of Health and Human Services [HHS] has an entire division to enforce HIPAA privacy requirements regarding people's medical records. The HHS, through its Office of Civil Rights, requires both Physical Safeguards and Technical Safeguards regarding the protection of medical records including healthcare providers, i.e. hospitals and physicians, who must maintain a person's medical records to deliver health care services. The HIPAA required safeguards as set forth in the Code of Federal Regulations [45 C.F.R. §164.310-312] include:

Physical Safeguards

- **Facility Access and Control.** A covered entity must limit physical access to its facilities while ensuring that authorized access is allowed.
- **Workstation and Device Security.** A covered entity must implement policies and procedures to specify proper use of and access to workstations and electronic media. A covered entity also must have in place policies and procedures regarding the transfer, removal, disposal, and re-use of electronic media, to ensure appropriate protection of electronic protected health information (e-PHI).

Technical Safeguards

³⁴ See generally, "Health Information Privacy" (<http://www.hhs.gov/ocr/privacy/>); "Unsure how to handle HIPAA?" (HIPAA.org); "Report to Congress, Health Information Technology: Early Efforts Initiated but Comprehensive Privacy Approach Needed for National Strategy", Jan. 2007 <http://www.gao.gov/new.items/d07238.pdf>

- **Access Control.** A covered entity must implement technical policies and procedures that allow only authorized persons to access electronic protected health information (e-PHI).
- **Audit Controls.** A covered entity must implement hardware, software, and/or procedural mechanisms to record and examine access and other activity in information systems that contain or use e-PHI.
- **Integrity Controls.** A covered entity must implement policies and procedures to ensure that e-PHI is not improperly altered or destroyed. Electronic measures must be put in place to confirm that e-PHI has not been improperly altered or destroyed.
- **Transmission Security.**³⁵ A covered entity must implement technical security measures that guard against unauthorized access to e-PHI that is being transmitted over an electronic network." (footnotes omitted)³⁶

HIPAA's stated purpose is to protect patients' privacy rights and prevent unauthorized disclosure of medical records." The Summary, by the HHS Office of Civil Rights, referenced in Footnote 34 herein, is an excellent expression of the public policy privacy considerations incorporated in HIPAA which are at issue in this case.

Additionally, HIPAA sets forth certain requirements to protect medical records requested for use in judicial proceedings including limitation of use to the instant proceeding, and return or

³⁵ "Summary of the HIPAA Security Rule", HHS website:
[<http://www.hhs.gov/ocr/privacy/hipaa/understanding/srsummary.html>]

³⁶ Although requested, neither State Farm nor Nationwide have ever revealed if they maintain such safeguards for claimants or litigants medical records they receive and scan into its Companywide databases accessible to almost all of its personnel; See excerpts from the deposition of Thomas Fitzsimmons, a State Farm claims representative at fn 13 supra.

destruction of the medical records, both of which the Trial Court in this case provided. HIPAA's required Qualified Protective Order [QPO] is defined as "**an order that: (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and (B) Requires the return to the covered entity or destruction of the protected health information (including any copies made) at the end of the litigation or proceeding.**" 45 C.F.R. 5 164.51 2(e)(1)(v).

Under HIPAA's Disclosures for Judicial and Administrative Proceedings, disclosure of a person's medical records by a covered entity is not permitted without the entry of a "qualified protective order." 45 C.F.R. 5 164.512(e). Any hospital or healthcare provider is a "covered entity" and bound by HIPAA. However, a liability insurance carrier is not a "covered entity" but if State Farm or Nationwide or its hired counsel seeks medical records from a covered healthcare provider it must provide the protections of HIPAA or the Court issuing the legal process commanding the "covered entity" to produce this protected health information must assure that the HIPAA protections of 45 C.F.R. 5 164.51 2(e)(1)(v) are met. Fields v. West Virginia State Police, 264 F.R.D. 260, 262(S.D. W.Va.2010); Law v. Zuckerman, 307 F.Supp.2d 705, 711 (D.Md. 2004) A Helping Hand, LLC v. Baltimore Co., Maryland, 295 F.Supp.2d 585, 592 (D.Md. 2003);

HIPAA is the federal floor for medical privacy and this Court in considering the Protective Orders in these Consolidated Appeals should apply that federal floor, which includes, use only for the specific proceeding and return or destruction at the conclusion of such proceeding.

VI. None of the Remaining Errors Asserted by Either State Farm or Nationwide or the Amicus Curiae are Meritorious and Can be Summarily Dismissed, either as Being Irrelevant or as Having Been Previously Decided by this Court or Other Courts Regarding the Same Parties

The remaining assertions of the Appellants and the *Amicus Curiae* are either without merit or regurgitations of the arguments previously made by the Appellants. The arguments essentially assert that the insurance industry must be able to retain a claimant or litigants medical records indefinitely and also be able to disseminate them among and between themselves and other strangers so that their business model will be efficient and so that they can fight fraud. These arguments are self-serving, and unsupported by any law or case, and also repugnant to the privacy interests of both our Federal and State Constitutions and the way American citizens desire to conduct their personal lives with as much privacy as is reasonable in a complex society. Neither the Appellants nor any of the *Amicus Curiae* participants have provided any substantive evidence sufficient for this Court, or any Court, to compromise an individual's privacy of the most confidential information possessed by many individuals. Even the State would have to demonstrate a compelling interest in order to accomplish what the insurance industry considers routine. The warnings of Justice Brandeis in his article "The Right to Privacy" and Justice Brennan in the Whalen case predicted that society would be faced with entities like mega-corporations and their well-funded trade groups who do their bidding, who would attempt to deprive individuals of their personal right to privacy if the Courts did not intervene. If money was the only consideration as to whether an individual's privacy was respected or disregarded by the insurance industry, then Matt Huggins and Carmela Faris should lose this case. However, in Courts of law, money is not the decider, rather the Constitution, the common law and reasonableness are the final arbiters of what is right and what is wrong. Thank goodness.

The Respondents concede that if the only goal is to achieve the greatest efficiency for the insurance industry, then it is much more efficient to have no safeguards protecting personal privacy

or any requirements to use such personal identifiable health information for limited purposes. The same is true in many arenas, including criminal justice. The FBI and law enforcement generally would be much more efficient if they could dispense with the warrant requirement and probable cause, but such would be extremely costly to our privacy, and our way of life. Even conceding such, neither the Appellants nor the Amicus Curiae have precisely quantified how such free reign over private health information, required to be produced by law or court order, would translate into the benefits claimed by these Parties. No other Court considering this issue has accepted this rhetoric and hyperbole in deciding the serious issues of personal privacy protection presented by this issue. Neither should this Court.

This Court rejected many of the same arguments Bedell I and II, including the requirements of return of such confidential health information or certification of destruction, and the restriction of unnecessarily publishing medical records or summaries thereof received in litigation. There are understandable concerns by litigants and their counsel regarding the difficulty and sometimes cumbersomeness of complying with the safeguards contained in the protective orders, but such considerations are evident anytime a protective order is entered, including when proprietary business records are produced, including claims manuals, personnel files, or any other of the myriad types of confidential discovery produced in claims or civil actions. This Court cannot create one rule dispensing with privacy protections for individual's medical records and still maintain such protections for proprietary or confidential business records as they are not on the same Constitutional level, but assuming they are on the same level, this Court must balance the need for such privacy protections with the minor difficulties that may be encountered in order to comply with those safeguards. One really can't imagine that this Court, or any Court would condone the permanent retention and exchange

with strangers of medical records or medical summaries in civil cases merely to benefit the efficiency of the insurance industry. Likewise, neither should a party as well as his or her insurance carrier be permitted to use such confidential documents for any other purpose, or retain them forever.

What ever minor difficulties are presented to the Bar will be resolved as these protections become more widespread and parties become adjusted to protecting such personal records. It has worked without major difficulties for 20 years in the 15th Judicial Circuit and surrounding Circuits and in Federal courts. It will also be workable elsewhere with a little effort. Nothing in the Protective Orders at issue in this case deny any party or their insurance carrier access to needed medical information, to evaluate or defend a claim. It only protects the privacy of that information, which it should.

VI. CONCLUSION

The Respondents in this case request the following relief from this Court:

1. That this Court affirm the Trial Court's Protective Orders issued in these consolidated cases which protect the personal privacy interests of Matt Huggins and Carmela Faris in their personal identifiable health information contained in their medical records;
2. That this Court reaffirm its holdings in Bedell I and II, which include recognizing the presumption of "good cause" regarding protection of a party's personal privacy by safeguarding the use and dissemination of medical records and the information contained therein;
3. That this Court interpret West Virginia's privacy rule to do exactly what its title indicates, which is to protect the privacy of personal identifiable health information of consumers and customers as those terms are defined in the Rule by recognizing the preservation of all existing State

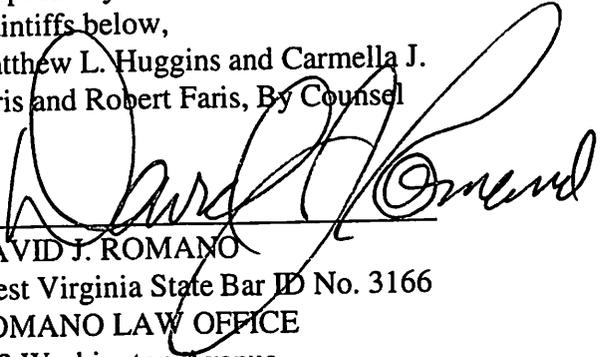
law relating to medical records, and health insurance information privacy as set forth §114-57-19 including this Court's recognition of the inherent privacy in the physician-patient relationship and the communications generated by that relationship and recorded in such medical records;

4. That this Court find that §114-57-15.2 of the Privacy rule exceeds the scope of the rules enabling legislation and the mandate that any Regulations "carry out" the provisions of the Graham- Leach- Bliley Act;

5. That this Court find that §114-57-1 *et seq.* of the Privacy rule was passed in an Omnibus Bill in violation of the one object rule and is therefore void;

6. Finally, as a last resort, that should this Court determine that the Privacy rule §114-57-15.2 exempts various insurance practices from statutory and common law privacy protections and safeguards, then in that event, that this Court find such provision [§§15.2] to be unconstitutional as a violation of the informational privacy prong of the United States and West Virginia Constitutions, and as being unconstitutionally vague and overly broad, and a violation of the common law of the State.

Respectfully submitted
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CERTIFICATE OF SERVICE

I, David J. Romano, do hereby certify that on the 31st day of August, 2012, I served the foregoing "CONSOLIDATED RESPONSE OF PLAINTIFFS BELOW TO STATE FARM'S REQUEST FOR WRIT OF PROHIBITION AND NATIONWIDE'S APPEAL" and "RESPONDENTS' APPENDIX" upon the below listed counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, in envelopes addressed to them at their office addresses:

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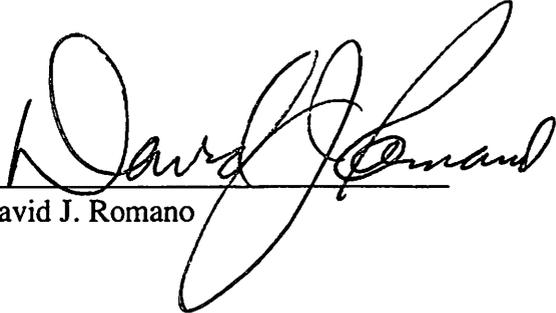
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