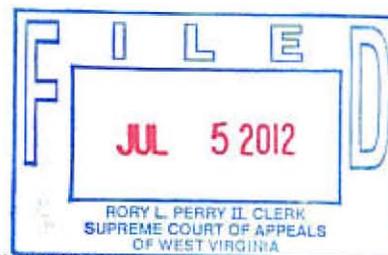


Nos. 12-0304 and No. 12-0210



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0304

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

Petitioner,

v.

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

Respondents.

No. 12-0210

NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

v.

CARMELLA J. FARIS and ROBERT FARIS,

Respondent

**BRIEF OF PETITIONER
NATIONWIDE MUTUAL INSURANCE COMPANY**

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INTRODUCTION

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in entering the Protective Order when Plaintiffs failed to demonstrate “good cause” as required under Rule 26(c) of the West Virginia Rules of Civil Procedure.
2. The Circuit Court erred in finding the Protective Order to be reasonable as it prohibits the dissemination of information in contravention of provisions of the State’s Privacy Rule, specifically 114 CSR Series 62, which permits insurers to engage unlimited reporting and/or dissemination of certain non-public personal information to fraud-fighting agencies and for other legitimate business uses without the necessity of prior permission.
3. The Circuit Court erred when it overruled any objection that the terms included within the Protective Order violated mandatory Medicare reporting laws.
4. The Circuit Court erred when it determined that HIPAA applies to insurance claims.
5. The Circuit Court erred in finding the Protective Order to be reasonable because it requires Nationwide to return/destroy documents at any given time – not just the period prescribed by West Virginia law – which would have the effect of forcing Nationwide to choose between either violating the requirements of other states and/or federal courts or being in contempt of the Circuit Court’s Order which is unconstitutional under the Full Faith and Credit Clause.
6. The Circuit Court erred when it concluded that the Protective Order’s return/destruction protocol was not in contravention of the litigation-minded preservation doctrine regarding business records as established in the case of *Zubulake v. UBS Warburg LLC*,

229 F.R.D. 422 (S.D.N.Y. 2004), in essence again forcing Nationwide to either comply with the Protective Order or to violate its obligations in other states.

7. The Circuit Court erred when it concluded that the Protective Order did not violate Nationwide's First Amendment right to free speech.

8. The Circuit Court erred when it ruled that the terms of the Protective Order were to be retroactively applied.

9. The Circuit Court erred by entering the Protective Order which has the effect of regulating the insurance industry thereby usurping the authority vested solely with the West Virginia Insurance Commissioner in violation of the doctrine of separation of powers.

10. The Circuit Court erred in finding the Protective Order to be reasonable when it would subject Nationwide to unduly burdensome financial obligations if Nationwide is required to develop a document retention protocol on a claim-by-claim basis.

11. The Circuit Court erred in finding the Protective Order reasonable because its provisions would have the effect of preventing Nationwide from utilizing an electronic claim system because the claim file would ultimately have to be altered in order to achieve compliance with the Protective Order's document destruction protocol which would violate insurance regulations requiring claim files to remain unaltered for an extended period of time due to potentially applicable statutes of limitation and tolling periods.

12. The Circuit Court erred when it declined Nationwide's request that it provide a more detailed definition of "medical records," in order to clearly define what records would be subject to the Circuit Court's Protective Order.

13. The Circuit Court erred when it rejected Nationwide's proposed definition of "medical records."

14. The Circuit Court erred when it concluded that the terms of the Protective Order did not contravene federal law.

15. The Circuit Court erred when it relied upon the “law of the case” doctrine to conclude that Nationwide had waived any objections to the provisions of the Protective Order by not raising certain factual and legal issues until after the Circuit Court had entered the Protective Order.

16. The Circuit Court erred by finding that the Protective Order did not deprive Nationwide of its the right to due process.

II. STATEMENT OF THE CASE

On May 2, 2008, Nationwide’s insured, Linda Lee Harding, was involved in a minor automobile accident with Plaintiff Carmella Faris. Pursuant to its contractual and statutory duties as the insurer of Ms. Harding, Nationwide began an investigation of Ms. Faris’ claims. As part of that investigation, on May 9, 2009 and, again, on June 21, 2009, Ms. Faris voluntarily signed medical authorizations allowing Nationwide to obtain her medical records and bills (collectively “medical records”) relating to her bodily injury claims. (See Mot. to Vacate Paragraph 3 of the Med. Prot. Order, Ex. A, Vol. II – App. 255-258.) Nationwide utilized the authorizations to obtain medical records from health care providers in West Virginia and Florida. Pursuant to Nationwide’s business practice, as the medical records were received, they were scanned into Nationwide’s electronic claim file. Thereafter, on December 23, 2009, Ms. Faris, through counsel, revoked the authorizations. (*Id.* at Ex. B, Vol. II – App. 259-260.)

On July 12, 2011, more than three years after Nationwide first received the authorizations to obtain Ms. Faris’ medical records, the circuit court entered a “Protective Order Granting Plaintiff’s Protection For Their Confidential Medical Records and Medical Information.”

("Protective Order"). The Protective Order, *inter alia*, imposes: (1) obligations and restrictions on Nationwide's use of Ms. Faris' medical records and medical information obtained during the course of litigation; (2) requires that Nationwide destroy and/or return Ms. Faris' medical records and medical information after a certain time period; and (3) retroactively imposes the terms and conditions of the Protective Order to medical records and medical information obtained by Nationwide prior to litigation and pursuant to Ms. Faris' signed authorizations. *See Prot. Order*, Vol. II – App. 1-4.

Nationwide, on multiple occasions,¹ objected to the terms of the Protective Order on constitutional, public policy, statutory, and regulatory grounds. Over these objections, however, on January 13, 2012, the Circuit Court entered a "Combined Order Affirming Medical Protective Orders Entered In These Civil Actions" ("Combined Order") wherein it affirmed the entry of Protective Orders and further found finding that, pursuant to the "law of the case" doctrine, Nationwide had waived any legal and factual issue not raised prior to the entry of the Protective Order.² *See Combined Order*, Vol. II – App. 273-274. It is the Protective Orders affirmed in the Circuit Court's Combined Order which Nationwide now appeals.

¹ See generally, Resp. of Nationwide Mut. Ins. Co. to Pls.' Mot. for Prot. Order (Jan. 6, 2011), Vol. I – App. 154-170; Supp. Memo of Law Concerning Med. Prot. Order (Jul. 18, 2011), Vol. II – App. 6-40; Mot. to Stay Enforcement of July 12, 2011 Med. Prot. Order (Aug. 19, 2011), Vol. II, App. 62-64; Hearing Trans re: Mot. for Stay of Enforcement (Sept. 16, 2011), Vol. II – App. 125-197; Mot. to Vacate Paragraph 3 of Med. Prot. Order (Oct. 25, 2011), Vol. II – App. 261-267.

² The Combined Order also affirmed the entry of an identical medical protective order in a separate action, *Huggins v. Woodward Video, et al.*, Civil Action No. 10-C-176, in which claims for bodily injury arising from an automobile accident were also asserted against insureds of Nationwide, Woodward Video, LLC and Thomas Shuman. During the course of its investigation of the claims against its insured and during the course of litigation, Nationwide encountered the same issues relating to its use of plaintiff's medical records obtained prior to and in the course of litigation. As such, on February 13, 2012, Nationwide filed a single Notice of Appeal in both this case and *Huggins* regarding the entry of the Combined Order affirming the entry of the respective medical protective orders in both. Thereafter, this Court granted Nationwide's appeal in Faris, but not Huggins.

However, prior to granting Nationwide's appeal in this case, this Court, in response to a Petition for a Writ of Prohibition filed by State Farm Mutual Automobile Insurance Company ("State Farm"),

III. SUMMARY OF ARGUMENT

The Protective Order entered by the Circuit Court is unconstitutional and contravenes the law and regulations of not only West Virginia but those of other states and jurisdictions as well. As such, the Protective Order is clearly erroneous and must be overturned.

This Court has previously addressed the issue of an insurer's access, use and retention of medical records and information. *See State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 226 W. Va. 138, 697 S.E.2d 730 (2010) ("*Bedell I*"); *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 2011 W. Va. LEXIS 16 (W. Va., Apr. 1, 2011) ("*Bedell II*"). However, important questions, which were either not before the Court in *Bedell I* and *Bedell II*, or which have since arisen, still remain and must be resolved. The magnitude of these remaining questions is evidenced by the Protective Order entered by the trial court below. The Protective Order is not only unnecessary, it is unconstitutional and simply not workable.

The plaintiffs' asserted privacy interests are already protected by state and federal laws, which generally prohibit the disclosure of nonpublic medical information, without the claimant's consent *except for* legitimate insurance purposes. Thus, because adequate protections are already in place, the Protective Order *only serves* to frustrate legitimate insurance purposes.

Further, even if Plaintiffs could establish good cause for a medical protective order in light of existing state and federal regulations, the terms of the Protective Order entered by the trial court are so overbroad that they impermissibly cross multiple constitutional boundaries and cannot be allowed to stand. For example, by restricting Nationwide's use of medical records and

issued a show cause order in *Huggins*. On June 18, 2012, pursuant to State Farm's and Nationwide's joint motion, this Court consolidated the two appeals on the grounds that they presented the same issues for this Court's consideration. **Thus, while only the Protective Order entered in *Faris* is specifically addressed herein, Nationwides's arguments apply equally to the order entered in *Huggins*.**

medical information and by requiring Nationwide to destroy such medical records and medical information, the Protective Order conflicts with Nationwide's obligations under not only the laws and regulations of West Virginia but also its obligations under federal law and the laws and regulations of other States in which it conducts business. Thus, as recognized by Justice Benjamin in his dissent *Bedell I*, the Protective Order places Nationwide in the untenable position of being "between a rock and a hard place" by forcing it to choose between violating the Protective Order or violating a state or federal regulation. Because either choice exposes Nationwide to potentially substantial penalties and fines, the Protective Order violates Nationwide's right to due process.

Moreover, because the Protective Order constitutes a content-based prior restraint on speech which is *not necessitated* by a *compelling government interest*, it violates Nationwide's First Amendment right to free speech. Not only is the Protective Order not necessitated by a compelling government interest, by prohibiting Nationwide from using medical records and medical information for any non-litigation purpose, it actually serves to *defeat* the government's compelling interest in preventing fraud.

In addition to the multiple constitutional implications of the Protective Order, it is simply not workable. Allowing this Protective Order to stand will necessarily invite similar protective orders to be entered in other trial courts resulting in Nationwide being subject to complying with protective orders as varied as the numerous circuit courts of this state could devise. And, instead of having a uniform, workable and regulatory-compliant claim handling procedures, Nationwide would be forced tailor its claim handling procedures on a claim-by-claim basis based upon multiple judicially-constructed privacy requirements. Even if this was doable, it would not only be cost-prohibitive, it would effectively prevent Nationwide from meeting its contractual and statutory obligations to claimants and insureds. Thus, the Protective Order, while serving no

legitimate purpose, would make it virtually impossible for Nationwide to conduct business in West Virginia.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure. The case involves issues of first impression, issues of fundamental public importance, and constitutional questions regarding the validity of a court ruling. Accordingly, it is appropriate for a Rule 20 argument.

V. ARGUMENT

A. THE PROTECTIVE ORDER IS NOT NECESSARY

1. The Protective Order Is Not Necessary Because Plaintiffs' Privacy Interests Are Already Protected By State And Federal Law

No one disputes that Plaintiffs' medical records contain confidential information or that the Plaintiffs have a privacy interest in maintaining the confidentiality of such records. What is disputed, however, is the necessity of the Protective Order to protect those interests. Plaintiffs' asserted privacy interests are already more than adequately protected by state and federal regulations and statutes.³ *See generally, Bedell I*, 226 W. Va. 138, 697 S.E.2d 739.

Specifically, regulations promulgated by the West Virginia Insurance Commissioner protect Plaintiffs' asserted privacy interests by prohibiting insurers from disclosing nonpublic personal health information about a consumer or customer absent an authorization from that consumer or customer unless doing so serves a legitimate insurance function. *W. Va. Code R. § 114-57-15.1*. The federal Gramm-Leach-Bliley Act likewise protects against the disclosure of nonpublic health information, 15 U.S.C. §6801, *et seq.* To ensure compliance with the Gramm-

³ Moreover, Nationwide imposes additional confidential requirements upon its employees who access medical records in the course and scope of adjusting claims.

Leach-Bliley Act , West Virginia enacted *W. Va. Code* § 33-6F-1(a) which provides that, “[n]o person shall disclose any nonpublic personal information contrary to the provisions of Title V of the Gramm-Leach-Bliley Act, Pub. L. 106-102 (1999).” Additionally, West Virginia insurance regulations require insurers to implement a comprehensive security program that provides “administrative, technical and physical safeguards for the protection of consumer information including nonpublic medical information.” *W. Va. Code R.* § 114-62-3.1.

Nationwide fully complies with these state and federal regulations. As such, Plaintiffs’ privacy interests are more than sufficiently protected making the Protective Order completely unnecessary and unwarranted. *See e.g., Warren v. Rodriguez-Hernandez*, Civil Action No. 5:10CV25, 2010 U.S. Dist. LEXIS 96121 (N.D. W.Va. 2010) (refusing to enter an order prohibiting an insurance company from disseminating plaintiffs’ medical records because plaintiffs failed to show that “existing protections [were] insufficient to secure their privacy interests, . . .”).

Moreover, the fact that the state and federal regulations permit Nationwide to use Plaintiffs’ medical records and information when doing so satisfies a legitimate insurance function, does not invade Plaintiffs’ privacy interests and, therefore, does not warrant the entry of a protective order. As the United States Supreme Court recognized in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the use of medical information for purposes authorized by state law does not implicate any privacy interest as long as any identifying information has been redacted. *See also, Whalen v. Roe*, 429 U.S. 589 (1977) (non-identifying medical information not proper subject of a protective order); *Byron, Harless, Schaffer, Reid & Assoc., Inc. v. State ex rel. Schellenberg*, 360 So.2d 83 (Fla. App. 1978) (generic medical information not proper subject of a protective order). Moreover, as recognized by this Court, the use of medical information, even when identifying information has not been redacted, does not improperly invade an individual’s

privacy interest if the use satisfies a compelling need. *See Child Prot. Group v. Cline*, 177 W.Va. 29, 350 S.E.2d 541 (1986) (medical records of school bus driver whose statements and actions in front of children during bus run raised serious concerns for children's safety were subject to limited disclosure to association of parents of children who rode driver's bus, although records were clearly personal and disclosure constituted invasion of privacy, where parents had compelling interest in driver's mental condition).

2. Plaintiffs Have Failed To Demonstrate The Requisite “Good Cause” Necessary To Satisfy The Mandates of Rule 26(c)

Rule 26 (c) of the *West Virginia Rules of Civil Procedure* allows for the entry of a protective order only in those instances where the moving party has demonstrated “good cause” that the protective order is “require[d] to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” “Good cause” can only be established in those instances where a party can offer specific evidence that, without the benefit of a protective order, he or she will suffer a “clearly defined and serious injury.” *W. Va. R. Civ. P. 26(c)*.

Here, Plaintiffs have offered no evidence that they would suffer a “clearly defined or serious injury” absent the entry of a protective order. Instead, they relied solely on the assertion that their medical records are “inherently private” and that their belief that their medical records would be kept “strictly confidential between [themselves] and their [medical] professionals. *See Pls’ Motion for Protective Order*, Vol. I – App. 134-139; *Pls’ Reply to Nationwide’s Response to Pls’ Motion for Protective Order*, Vol. I – App. 172-174. This does not rise to the level of good cause required for the issuance of a medical protective order when there are measures, i.e., state and federal regulations and statutes, already in place to provide adequate protection against the public disclosure of Plaintiffs’ medical records. Plaintiffs’ failure to show “good cause” is

supported by the fact that the Protective Order makes no express finding of good cause. *See generally, Protective Order*, Vol. II – App. 1-4.

Moreover, Plaintiffs’ alleged belief that their medical records would be “kept strictly confidential between [Ms. Faris] and her [medical] providers is not reasonable in light of the fact that Ms. Faris, on two separate occasions, signed authorizations allowing Nationwide to obtain her medical records and information. It is further unreasonable in light of the fact that Plaintiffs knew, or should have known, that their medical records would become a matter of public record once introduced into evidence at trial. *See e.g., Bedell I*, 226 W. Va. 139, 697 S.E.2d at 740.

Regardless, however, Nationwide is not seeking to (and could not pursuant to existing state and federal law) publicly disseminate Plaintiffs’ medical records or information. Nationwide is only seeking to be permitted to do what the law allows it to do -- to retain Plaintiffs’ medical records for the sole purpose of using to satisfying legitimate and vital insurance functions.

B. THE PROTECTIVE ORDER VIOLATES STATE LAW

This Court has long held, and recently affirmed, that any court order that is in contravention of West Virginia law is void and of no consequence. *See e.g., Wilson v. WVU Sch. of Med.*, No. 11-0600, 2011 W. Va. LEXIS 545 (West Virginia Supreme Court, October 21, 2011) (memorandum decision); *W. Va. Code §29-6A-7(b)*. This Court has further held that “[a] regulation that is proposed by an agency and approved by the Legislature is a ‘legislative rule’ as defined by the State Administrative Act, *W. Va. Code §29A-1-2(d)* [1982], and such a legislative rule has the force and effect of law.” Syl. Pt. 5, *Bedell I*, 226 W. Va. 138, 697 S.E.2d 739 (2010); Syl. Pt. 5, *Smith v. W. Va. Human Rights Comm’n*, 216 W. Va. 2, 602 S.E.2d 445 (2004). As set forth below, the Protective Order violates regulations promulgated by the West Virginia Insurance Commissioner. Consequently, it must be vacated.

1. The Protective Order Violates West Virginia’s Privacy Rule, 114 C.S.R. 62-15.

West Virginia’s Privacy Rule *expressly authorizes* Nationwide to disclose nonpublic personal medical information, without prior authorization or restraint, if doing so serves a legitimate insurance function. 114 CSR 16-15.1 and 15.2.⁴ In direct conflict, however, the Protective Order *expressly prohibits* Nationwide from disclosing nonpublic medical information for *any* purpose not related to the litigation *unless* it first receives authorization from the trial court or the consent of the Plaintiffs. *See Prot. Order*, Vol. II – App. 3.

2. The Protective Order Violates West Virginia’s Anti-Fraud Regulations

Recognizing that the business of insurance has the great potential for fraud, the Legislature delegated to the Insurance Commissioner, pursuant to West Virginia Code § 33-41-1(b), the imperative duty of investigating and prosecuting instances of insurance-related fraudulent activity occurring within the boundaries of the State of West Virginia. To that end, the West Virginia Insurance Commissioner, *inter alia*, enacted W. Va. C.S.R. 114-57-15.2 which permits the disclosure of information in the “detection, investigation or reporting of actual or potential fraud.”

⁴ Specifically, West Virginia’s State Privacy Rule, 114 CSR 62, patterned after the Gramm-Leach Bliley Act, 15 USC §6801, et seq., expressly authorizes insurers to disseminate nonpublic personal information, including medical records, to fraud-fighting agencies and for other legitimate insurance functions as follows:

“Nothing in this section *shall prohibit, restrict or require an authorization for the disclosure of nonpublic personal health information* by a licensee for the performance of the following insurance functions by or on behalf of the licensee: claims administration; claims adjustment and management; detection, investigation or reporting of actual or potential fraud, misrepresentation or criminal activity; underwriting; policy placement or issuance; loss control; ratemaking and guaranty fund functions; reinsurance and excess loss insurance; . . .”

115 CSR 62-15.2 (*emphasis added*).

To assist the Insurance Commissioner in combating the harsh costs and realities associated with the perpetration of insurance fraud, the Legislature also enacted *W. Va. Code* § 33-41-5, which *mandates* that any “person engaged in the business of insurance having knowledge or a reasonable belief that fraud or another crime related to the business of insurance is being, will be or has been committed” must furnish such information to the Insurance Commissioner. *See also, W. Va. Code* § 33-41-8 (establishing an Insurance Fraud Unit as a subcomponent of the Offices of the Insurance Commissioner to detect, investigate, and prosecute instances of fraud within the State’s insurance industry on a full-time basis).

However, by expressly prohibiting Nationwide from transmitting medical records or medical information to any third-party for non-litigation purposes, the Protective Order prevents Nationwide from fulfilling its obligations under West Virginia’s anti-fraud regulations.⁵ The Protective Order’s requirement that medical records and medical information be returned or destroyed at the expiration of the minimum record retention time required under *W. Va. §§*114-15-4.2(b), 114-15-4.4(a), likewise “ties the hands” of Nationwide in its fraud-fighting efforts.

To stress the importance of record retention in the investigation and prosecution of insurance fraud, the West Virginia Insurance Commissioner issued Informational Letter 172 which provides:

Record retention is also an important tool in detecting fraudulent insurance claims. Insurance fraud is a serious and growing problem which has been conservatively estimated as accounting for ten percent (10%) of the cost of insurance premiums. *Consistent maintenance of essential claim records by insurers is crucial to a comprehensive investigation of potentially fraudulent claims.* Additionally, use of such claim information is necessary to protect the citizens of West Virginia from insurance fraud.

⁵ Nationwide is not suggesting that Plaintiffs have committed or are suspected of committing insurance fraud.

(*emphasis added*). See also, Justice Ketchum's dissent in *Bedell II*, 2011 W. Va. LEXIS 16 (W. Va., Apr. 1, 2011) ("the insurance industry should be allowed to hold down costs by maintaining data banks of medical records to identify malingers and cheaters and double-dippers").

Thus, because the Protective Order prevents Nationwide from satisfying its obligations under West Virginia's anti-fraud regulations and defeats the State's compelling and over-riding interest in preventing fraud, it must be vacated.

3. The Protective Order Violates the Doctrine of Separation of Powers, W.Va. Const., Art. V, §1.

Under the doctrine of separation of powers, W. Va. Const., art. V, § 1,⁶ "courts have no authority -- *by mandamus, prohibition, contempt or otherwise* -- to interfere with the proceedings of either house of the Legislature." Syl. Pt. 3, *State ex rel. Holmes v. Clawges*, 2010 W. Va. LEXIS 116 (2010) (*emphasis added*); see also, *Clough v. Curtis*, 134 U.S. 361, 371 (1890) ("[o]ne branch of the government ... cannot encroach on the domain of another . . ."); *State ex rel. County Court of Marion Co. v. Demus*, 148 W. Va. 398, 135 S.E.2d 352 (1964) (courts of this state are forbidden to "exercise legislative authority of any kind").

As delegated by the Legislature pursuant to *W. Va. Code* § 33-41-1(b), the authority to regulate the insurance industry rests solely with the Offices of the Insurance Commissioner. The Insurance Commissioner, who is appointed by the Governor with the advice and consent of the Senate, is charged with the duty to enforce the insurance laws of this State as well as the duty to promulgate rules as necessary to properly govern and regulate the conduct of insurers authorized to transact in this State. *W. Va. Code* § 33-2-1, *et seq.*

⁶ This Court has consistently maintained that "[t]he legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected." Syl. Pt. 1, *State ex rel. Miller v. Buchanan*, 24 W. Va. 362, 1884 W. Va. LEXIS 66 (1884); *Danielley v. City of Princeton*, 113 W. Va. 252, 255, 167 S.E. 620, 622 (1933) ("whenever a subject is committed to the discretion of the legislative or executive department, the lawful exercise of that discretion cannot be controlled by the judiciary").

The Protective Order places restrictions on the manner Nationwide maintains its claim files and how its uses claim information. The result of these restrictions is the de facto regulation of West Virginia's insurance industry. Because the power to regulate the insurance industry in West Virginia rests solely with the West Virginia Insurance Commissioner, the trial court's Protective Order impermissibly encroaches upon the authority of the Insurance Commissioner in violation of the separation of powers doctrine and must be stricken.

C. THE PROTECTIVE ORDER CONFLICTS WITH FEDERAL LAW

1. The Protective Order Conflicts with Nationwide's Obligations in Federal Jurisdictions.

Because Nationwide transacts business throughout the United States, it necessarily becomes involved in litigation throughout the United States. Under what is commonly referred to as the "*Zubulake* doctrine," once Nationwide reasonably anticipates litigation, it has a duty to preserve documents and, if necessary, to suspend routine document retention/destruction protocols. *Zubulake v. USB Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2004).

The return/destroy protocol of the Protective Order, however, prevents Nationwide from fulfilling this duty and must, therefore, be vacated. To do otherwise would unnecessarily and improperly expose Nationwide to harsh penalties including, but not limited to, discovery sanctions, and to claims for spoliation of evidence and obstruction of justice.

2. The Protective Order Conflicts with Nationwide's Duties under Federal Medicare Regulations.

Section 111 of The Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA") requires mandatory reporting under group health, liability (including self-insurance), no-fault insurers, and workers' compensation insurers/plans. Under Section 111, insurers, such as Nationwide, must report to the Secretary of Health and Human Services certain claim information made in regard to Medicare beneficiaries. Specifically, Section 111 imposes

mandatory obligations on responsible reporting entities to report any payments made to Medicare beneficiaries. This reporting is required so that Medicare can recover the amount of money paid by it for medical services from the beneficiary, his or her counsel, the insurer, and other individuals and entities if the beneficiary subsequently obtains a settlement or judgment. In order to comply with Section 111's conditional payment recovery process, Nationwide must be allowed to report medical information and to maintain supporting medical records for well over the retention time period contemplated by the provisions of the Protective Order.

3. The Protective Order Violates the Full Faith and Credit Clause of the United States Constitution

Article IV, Section 1 of the United States Constitution, provides that “[f]ull faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state.” U.S. Const. art. IV, § 1. In other words, the Full Faith and Credit Clause “requires a court in one forum to respect the judgments of courts in another forum, and to accord such judgments the same force and effect of law as if they were actually issued in the forum state.” *Hannah v. GMC*, 969 F. Supp. 554, 556 (D. Ariz. 1996). By requiring “Full Faith and Credit [to] be given in each State to the public Acts, Records, and judicial Proceedings of every other State,” the United States Constitution establishes “barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.” *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); accord *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 n.16 (1996). Under the Full Faith and Credit Clause, each state’s power is “constrained by the need to respect the interests of other States.” *BMW*, 517 U.S. at 571.

This “need to respect the interests of other States” is especially critical when a court issues an order that affects how an insurance company maintains or uses its claim records

because insurance companies are subject to the laws of each state in which it conducts business and each state has a particularly unique interest when it comes to regulating the insurance industry within its boundaries. To that end, each state has document retention and reporting regulations in place which allow the insurance regulators of that state to periodically examine an insurance company's business records and claims files in order to ensure compliance. The Protective Order here does not allow for the requirements of or respect the interests of other States and thus runs afoul of the Full Faith and Credit Clause and must be vacated.

D. THE PROTECTIVE ORDER VIOLATES NATIONWIDE'S FIRST AMENDMENT RIGHTS

Rule 26(c) of the *West Virginia Rules of Civil Procedure* provides that, for good cause shown, a court may make any order, which justice so requires, "that [] discovery may be had only on specified terms and conditions." W. Va. R. Civ. P. 26(c)(2). The provisions of Rule 26 (c), however, must be tempered in light of the Free Speech Clause of the First Amendment to the United States Constitution which provides that "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const., Amend. I. When reading the aforementioned provisions in concert with one another, it becomes abundantly clear that the Circuit Court far exceeded the authority conferred upon it under Rule 26(c) when it entered the medical protective order as enforcement of the order's provisions will necessarily result in the violation of Nationwide's right to free speech as guaranteed by the First Amendment.

On its face, the Protective Order constitutes a content-based prior restraint on speech. Content-based regulations are presumptively invalid and must be struck down on First Amendment grounds unless they are "necessitated by a compelling governmental interest, and [are] narrowly tailored to serve that interest." *Capital Cities Media Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)); see

also, *Sorrell*, 131 S. Ct. at 2667 (quoting *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992)). Specifically, because enforcement of the Protective Order’s overly-broad language and vaguely phrased mandates will necessarily result in an improper infringement of Nationwide’s First Amendment rights to utilize information obtained outside the boundaries of the discovery process in an effort to combat insurance fraud—a governmental interest of the utmost degree, the Protective Order must be vacated.

1. The Protective Order Impedes, Rather than Furthers, the Compelling Government Interest of Combating Insurance Fraud.

As set forth above, content-based prior restraints on speech must be “necessitated by a compelling governmental interest, and [must be] narrowly tailored to serve that interest.” *Capital Cities Media Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Simply put, prior restraints on speech need “to **further a state interest of the highest order.**” *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (*emphasis added*).

In *United States v. Bailey*, the United States Attorney for the Western District of Virginia caused to be issued, pursuant to 18 U.S.C. § 3486, four subpoenas *duces tecum* for relevant medical records in connection with allegations of federal health care violations. *United States v. Bailey*, 228 F.3d 341, 343-4 (4th Cir. 2000). A doctor upon whom the subpoenas were served filed a motion to quash arguing, in part, that the production of the requested medical records would violate his patients’ privacy rights. *Id.* at 344. Conversely, the U.S. Attorney argued that its investigation of health care offenses, as well as the public’s strong interest in effective law enforcement, outweighed the doctor’s patients’ privacy rights in their medical records. *Id.* at 351. The Fourth Circuit Court agreed the government’s compelling interest in identifying illegal activity as substantially outweighs a patient’s interest in his/her medical records. *Id.*

Likewise, in the case *sub judice*, Nationwide and the public have a compelling interest to identify and halt fraudulent activity in the field of insurance. To accomplish this goal, Nationwide must be allowed to retain medical records. And, should Nationwide identify or reasonably suspect fraudulent activity, it must be allowed to report the activity and produce supporting medical information as it is mandated to do to the West Virginia Insurance Commissioner. W. Va. Code § 33-41-5(a); NAIC Model Laws, Regulations, and Guidelines 680-1, § 6(A). Specifically, W. Va. Code § 33-41-5(a) provides that “[a] person engaged in the business of insurance having knowledge or a reasonable belief that fraud or another crime related to the business of insurance is being, will be or has been committed **shall provide to the commissioner the information required by, and in a manner prescribed by, the commissioner.**”⁷ It is because of these mandatory reporting requirements that West Virginia’s insurance fraud unit has been able to confirm and prosecute fraud cases, which has had the effect of creating significant savings to consumers. Thus, Nationwide’s and the State’s compelling interest in preventing fraud far outweigh the interest the asserted privacy interests of the Plaintiffs.

When considered in light of the aforementioned policies and purposes, it is evident that the Protective Order does not serve a compelling government interest. To the contrary, it actually frustrates the government’s efforts to combat insurance fraud and regulate insurers by imposing overly-broad, arbitrary, and contradictory non-disclosure and destruction requirements. The Protective Order’s plain language explicitly forbids Nationwide from reporting instances of suspected insurance fraud to state and federal officials, despite being required to pursuant to state regulations. Moreover, the Protective Order is in direct contravention to the reporting

⁷ Nationwide would also have the option of instead referring the claim to the National Insurance Crime Bureau (“NICB”).

requirements set forth in W. Va. Code § 33-41-5(a), which has the potential to undermine the insurance fraud unit's ability to detect fraudulent activity in West Virginia. The more fraudulent activity that goes undetected equates to more money lost by the innocent West Virginia consumers. The Protective Order's mandatory destruction requirement precludes law enforcement or others from having access to older files should they become relevant to a given investigation. In addition, as set forth herein, compliance with the overly-broad destruction and reporting requirements of the Protective Order would result in Nationwide's defiance of Congress' mandate to report payments made to Medicare beneficiaries to the government pursuant to Section 111 of the MMSEA. For instance, the conditional payment recovery process requires insurers to report medical information and maintain records for well over the time period allowed by the Protective Order. Thus, in prohibiting reporting and requiring destruction of records prior to the end of the potential collection process, the Protective Order jeopardizes the federal government's interest in obtaining information necessary to pursue reimbursement of Medicare funds. Consequently, the enforcement of the Protective Order will necessarily result in the improper infringement of Nationwide's First Amendment rights to utilize claim information in order to promote a compelling government interest and must be vacated.⁸

⁸ This improper infringement is especially egregious when applied to Nationwide's First Amendment rights to use claim information obtained outside the boundaries of discovery. Nationwide is statutorily bound to investigate claims asserted against its insureds. As part of that investigation, Nationwide necessarily must collect and review a claimant's medical records in order to properly evaluate the merit and value of the claimant's claim. In the case *sub judice*, as part of its normal business practice and prior to litigation being filed, Nationwide collected Plaintiffs' medical records pursuant to separate authorizations signed by Ms. Faris. The authorizations signed by Ms. Faris did not subject Nationwide to any restrictions regarding the use of the medical records and medical information obtained over and above those restrictions set forth in the laws and regulations to which Nationwide is subject.

Equally egregious is the infringement of Nationwide's First Amendment rights to use information to which Plaintiffs have *waived* any expectation of privacy. Specifically, the terms of the Protective Order extend to medical records and medical information put into evidence by Plaintiffs during evidentiary depositions taken in advance of trial. An evidentiary deposition is "taken with the knowledge that it will be introduced as 'evidence' at the hearing [or at trial]." *State ex rel. Means v. King*, 205 W.Va. 708, 520

2. **The Protective Order Is Not Narrowly Tailored as Required by the Free Speech Clause of the First Amendment to the United States Constitution.**

Overly-broad confidentiality designations are adverse to the policies and purposes underlying the First Amendment. *See e.g., ACLU of Mass. V. Sebelius*, 2011 U.S. Dist. LEXIS 115783, 2-3 (D. Mass. 2011) (citing *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 780 (1st Cir. 1988)). As such, the United States Supreme Court has explicitly held that protective orders can only be entered to *prevent a party from disseminating information obtained solely through the litigation discovery process*. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (as quoted in *West Penn Allegheny Health System, Inc. v. UPMC*, 2011 U.S. Dist. LEXIS 149143 (N.D. Pa. 2011)) (emphasis added). The Court shed further light on this issue by holding that a protective order does not offend the First Amendment if it is entered after a showing of good cause and only in regard to the information gained solely “by virtue of the trial court’s discovery processes.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (emphasis added). Simply put, if a party has no other claim to the information and would not have received it but for the civil discovery process, then the protective order would be permissible. *Id.* at 37. **However, a party is permitted “to disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court’s processes.”** *Id.* at 34 (emphasis added); *See also, Small v. Ramsey*, 2012 U.S. Dist. LEXIS 29035, 62-3 (N.D.W. Va. 2012).

In *Butterworth v. Smith*, *supra*, a reporter obtained information relevant to alleged improprieties committed by the state attorney’s office and sheriff’s department. 494 U.S. 624,

S.E.2d 875, 882 (1999).(citations omitted). And, as previously recognized by this Court, once medical records and medical information are introduced at trial, they become matter of public record and no can no longer be shielded by a medical protective order. *Bedell I*, 697 S.E.2d at 740.

626. A special prosecutor appointed to investigate the allegations called the reporter to testify before a special grand jury. *Id.* At the time he testified, the reporter was cautioned by the special prosecutor not to reveal his testimony in any manner because such a dissemination of his testimony could result in a criminal prosecution for violation of a Florida statute which prohibited a grand jury witness from testifying regarding his participation in the process. *Id.*

After the grand jury terminated its investigation, the reporter wanted to publish a story about the subject matter of the investigation, including the content of his testimony. *Id.* at 628. Hence, he sought from the United States District Court for the Middle District of Florida a declaration that the Florida statute was an unconstitutional abridgment of speech under the First Amendment. *Id.* The District Court granted summary judgment to the State, concluding that Florida was permitted to determine whether a total ban on the disclosure of witness testimony was necessary to the proper functioning of its grand jury system. *Id.* The District Court came to its decision by reasoning that the situation presented an “exceptional case where a severe infringement on rights under the First Amendment [was] permissible.” *Id.* The United States Court of Appeals for the Eleventh Circuit reversed the District Court’s decision, however, acknowledging that the Florida statute was unconstitutional to the extent it prohibited a person from speaking about his own testimony after the grand jury had ceased. *Id.* 628-9.

Upholding the Eleventh Circuit’s decision, the United States Supreme Court struck down the Florida statute as being unconstitutional. In so doing the Court specifically held that the reporter had a First Amendment right to divulge information which he had testified to during a grand jury proceeding because he did not actually obtain the information as a result of the grand jury proceeding; rather, it had been information he had possessed all along. *Id.* at 632.

Moreover, in *Sorell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2665 (2011), the U.S. Supreme Court recently struck down a statute which “prohibit[ed] a speaker from conveying information

that the speaker already possesse[d].” In arriving at its decision, the Court noted that physical possession of the information is not necessary for dissemination to be permissible. *See generally, Sorrell*, 131 S. Ct. at 2665.

Protective orders similar to the one entered by the trial court below, which attempt to restrict the use and dissemination of materials and information collected outside the discovery process, have been struck down as being unconstitutional. *See e.g., Anderson v. Cryovac, Inc.*, 805 F.2d 1, 14 (1st Cir, 1986) (First Circuit Court specifically held that a protective order cannot be interpreted to preclude the distribution of information obtained from sources outside of the litigation discovery process); *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 944-5 (2d. Cir. 1983) (Rule 26(c) cannot be manipulated in such a manner so that protective orders are utilized to regulate the use of information obtained outside of the discovery process); *Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1006-7 (3d. Cir. 1976) (Third Circuit vacated a protective order because, *inter alia*, the protective order prohibited the disclosure of information obtained from sources other than the court’s processes); *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (finding a protective order invalid because it prohibited the disclosure of information that was obtained outside of the confines of the litigation discovery process); *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1080-81 (9th Cir. 1988) (vacating a protective order which regulated documents obtained by counsel during a prior, unaffiliated litigation); *In re Rafferty*, 864 F.2d 151, 155 (D.C. Cir. 1988) (writ of mandamus vacating a protective order was issued because the protective order proscribed disclosure of materials not obtained through the discovery process, and as such, constituted a prior restraint on speech which “exceeded [the court’s] delegated powers, which were limited to supervising the discovery process.”). Likewise, the Protective Order entered by the trial court below must also be struck down as being unconstitutional on its face and in its application.

E. THE PROTECTIVE ORDER VIOLATES NATIONWIDE'S RIGHT TO DUE PROCESS

The West Virginia Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without *due process* of law" *W. Va. Const. Art. III, § 10. (emphasis added)*. Here, the medical protective order violates Nationwide's right to due process because it imposes obligations upon Nationwide that, if followed, will cause Nationwide to be in violation of West Virginia Insurance Regulations as well as the regulations of other states and jurisdictions and, consequently, to be exposed to potentially substantial fines and penalties. The retroactive application of the Protective Order further violates Due Process by penalizing Nationwide for acts that were permitted when performed. Accordingly, because the Protective Order deprives Nationwide of its right to Due Process, it must be vacated.

1. The Protective Order Conflicts with Nationwide's Obligations in West Virginia Insurance and in Other States and Jurisdictions Exposing Nationwide to Sanctions and Penalties in Violation of its Right to Due Process

As set forth herein, the Protective Order conflicts with Nationwide's obligations under state and federal regulations. By forcing Nationwide to choose between violating the Protective Order violating other state and/or federal regulations, the medical protective order exposes Nationwide to potential sanctions and penalties regardless of the choice it makes. To knowingly subject Nationwide to such sanctions and penalties constitutes arbitrary punishment in violation of Nationwide's right to due process. *See e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (due process prohibits imposing "arbitrary punishments").

2. The Retroactive Application of the Protective Order Violates Nationwide's Right to Due Process

This Court has repeatedly held that "legislation cannot be made retroactive 'when the effect will be to impair the obligation of contracts or to disturb vested rights'" *Findley v. State*

Farm Mut. Auto. Ins. Co., 213 W. Va. 80, 93, 576 S.E.2d 807, 820 (2002) quoting *Lester v. State Comp. Comm'r*, 123 W. Va. 516, 521, 16 S.E.2d 920, 924 (1941), overruled on other grounds by *Sizemore v. State Workmen's Comp. Comm'r*, 159 W. Va. 100, 219 S.E.2d 912 (1975). Nevertheless, the Protective Order mandates that its provisions be retroactively applied to documents received by Nationwide prior to the commencement of litigation.

Nationwide, following its routine business practice when investigating a claim, first obtained medical records pursuant to authorizations signed by Mrs. Faris prior to litigation and therefore, obviously, prior to entry of the medical protective order. When Nationwide received Mrs. Faris' medical records pursuant to her signed authorizations, it, again, following its routine business practice in storing claim information electronically, scanned the records into its electronic claim file. Nationwide also transmitted the claim data to third-parties. These actions were not prohibited at the time and were, in fact, required in order for Nationwide to be in compliance with insurance regulations. *See e.g.*, 114 CSR §15-4.7(b)(permits insurers to utilize electronic claim files so long as the system is designed for "maintenance of records in a computer-based format . . . archival in nature, *so as to preclude alteration of the record after the initial transfer to computer format.*") (*emphasis added*). Thus, because Nationwide was not on notice that it could not utilize its electronic claim file or that, if it did, it might subsequently be called upon to alter its claim records, which it is expressly prohibited to do pursuant to 114 CSR §15-4.7(b), to now subject it to the retroactive application of the Protective Order would deprive Nationwide of its due process rights. *See e.g.*, *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 856 (1990)("The United States Constitution itself . . . proscribes all retroactive application of punitive laws, and prohibits (or requires compensation for) all retroactive law that destroy vested rights."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 294, 208 (1988)("[r]etroactivity is generally disfavored in the law"); *Landgraf v. Usi Film Prods.*, 511

U.S. 244, 264 (1994)(same); *Claridge Apartments Co. v. Comm'r.*, 323 U.S. 141, 164 (1944)(“[r]etroactivity, even where permissible, is not favored, except upon the clearest mandate. It is the normal and usual function of legislation to discriminate between closed transactions and future ones or others pending but not completed.”).

This Court has also addressed the issue of retroactive application in the context of statutory amendments and has likewise recognized that the presumption that a statute is intended to operate prospectively and not retrospectively. *See e.g., Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002); *Kosegi v. Pugliese*, 185 W.Va. 384, 407 S.E.2d 388 (1991). In *Kosegi, supra*, when considering an amendment of a workers’ compensation statute, this Court held that “[w]orkmen’s compensation statutes, or amendments of such statutes, which affect merely the procedure may be construed to have a retroactive operation; but any statute or amendment which affects the substantial rights or obligations of the parties to the contract arising from the employment relationship or which impairs the obligation of such a contract cannot be construed retroactively.” *Id.* at 387, 407 S.E.2d at 392. This Court further apprised: “the fundamental principle controlling such a statute’s application is “whether the individual has changed his position in reliance upon existing law or whether the retroactive act defeats the reasonable expectations of the parties it affects.” *Id.*

Thereafter, in *Findley, supra*, this Court addressed the validity of the retrospective application of an amendment to W.Va. Code § 33-6-30. There, this Court explained:

When determining whether a statute or statutory amendment should be applied retroactively, we are guided by the Legislature's own pronouncement that the following rule[] shall be observed in the construction of statutes, unless a different intent on the part of the Legislature be apparent from the context: A statute is presumed to be prospective in its operation unless expressly made retrospective[.]

W. Va. Code § 2-2-10(bb) (1998) (Repl. Vol. 2002). Applying this provision, we have understood it to mean that "the presumption is that a

statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect.' Thus, "the general rule is that statutes are construed to operate in the future only and are not given retroactive effect unless the legislature clearly expresses its intention to make them retroactive."

Id. at 92, 576 S.E.2d at 819, citing *Loveless v. State Workmen's Comp. Comm'r.*, 155 W. Va. 264, 266, 184 S.E.2d 127, 129 (*internal citations omitted*).

That caveat, however, does not apply to the case at hand; the Protective Order is in clear contravention of the general preclusion of retrospective application. Moreover, as this Court made abundantly clear in *Findley, supra*, where "a new provision would, if applied in a pending case, attach a new legal consequence to a completed event, then it will not be applied in that case unless the Legislature has made clear its intention that it shall apply." *Id.*, 576 S.E.2d at 820.

Specifically, this Court stated:

[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application.

Id.

Given the aforementioned prohibition, the retroactive application of the Protective Order in regard to documents received by Nationwide prior to the Order's entry must be vacated. Nationwide clearly had the right to scan the medical records it received prior to litigation into its electronic claim file that, by statute, cannot now be altered. To now subject Nationwide to penalties for doing so clearly deprives Nationwide of its right to due process. Further, the fact that the medical protective order is a judicial order, and not a statute enacted by the Legislature, is of no consequence and should not prevent its retroactive application from being struck down as unconstitutional. As the United States Supreme Court has recognized, the Due

Process Clause of the Fourteenth Amendment is similar to the Ex Post Facto Clause, (Art. I, § 9), in ensuring that fair warning is given where certain conduct will give rise to penalties.⁹ *See e.g., Marks v. United States*, 430 U.S. 188, 191-192 (1977)("[Judicial] enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness"); *Bouie v. Columbia*, 378 U.S. 347 (1964). Thus, "[if] a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. *Id. at 353-354.*¹⁰ *See also, Lanzetta v. New Jersey* 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."); *In re Baert*, 205 Cal. App.3d 514, 518-523 (Cal. 1988) (finding that retroactive application of an unforeseeable judicial expansion of law failed to provide "fair warning" as required by the Due Process Clause).

⁹ "The Ex Post Facto Clause is a limitation upon the powers of the legislature, and does not of its own force apply to the Judicial Branch of government. But the principle on which the Clause is based -- the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. 188, 191-192 (1977).

¹⁰ The facts of *Bouie v. Columbia*, *supra*, illustrate the operation of the due process clause to prevent the same type of mischief as the ex post facto clause when it results from judicial rather than legislative change in the law. In *Bouie*, black defendants were convicted under South Carolina's criminal trespass statute when they refused to leave a segregated lunch counter after being asked to do so. On its face, the statute defined as a misdemeanor "[every] entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry . . ." (*id.*, at p. 349) and no state appellate court had ever interpreted its scope other than consistent with the plain import of its terms. *Id. at pp. 355-359* Nevertheless, the South Carolina Supreme Court affirmed the convictions by "[construing] the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of after receiving notice to leave." *Id. at p. 350 (footnote omitted.)* Finding this interpretation at variance with the statutory language and unsupported by any prior state court decisions, the United States Supreme Court reversed the convictions as violative of due process. The retroactive application of an unforeseeable judicial expansion of the law failed to provide "the fair warning to which the Constitution entitles [one]." *Id. at p. 354.*

In the instant case, there certainly was no “fair warning” that Nationwide would be required to alter its claim records in order to return and/or destroy medical records *received prior to litigation* or be subjected to penalties for violating the mandates of the medical protective order. *Connolly v. Gen. Constr. Co.*, 269 U.S. 385, 394 (1926) (the key to the concept of “fair warning” under the Due Process Clause is whether a party was on clear notice that its conduct was prohibited). Accordingly, the retroactive application of the Protective Order violates Nationwide’s right to due process because it subjects Nationwide to penalties – either for being in violation of the Protective Order if it fails to destroy the medical records it obtained prior to litigation or for being in violation of insurance regulations if it complies with the Protective Order alter its claim file in order to return/destroy such records.

F. THE PROTECTIVE ORDER EFFECTIVELY PROHIBITS NATIONWIDE FROM MAINTAINING AN ELECTRONIC CLAIM FILE

The practical effect of the Protective Order currently under consideration is to prohibit the use of electronic claim files. Moreover, to the extent the proposed Order contemplates deletion or alteration of claim files, such mandates violate Insurance Commissioner regulations. The West Virginia Insurance Commissioner permits insurers to utilize electronic claim files so long as the system is designed for “maintenance of record in a computer-based format . . . archival in nature, *so as to preclude alteration of the record after the initial transfer to computer format.*” 114 CSR §15-4.7(b) (*emphasis added*). To the extent the Protective Order requires alteration or destruction of the record after transfer to computer format, it is violative of this regulation.

The Insurance Commissioner designed regulations to balance the need to protect private information while conducting business in a secure and cost-efficient manner. Nationwide’s claim system is in accord with this balance. As such, because the Protective Order calls for the

return or destruction of medical records, it has the practical effect of depriving Nationwide of the use of its electronic claim file and imposes an affirmative obligation to alter or destroy a claim file.

1. The Terms of the Proposed Order are Financially Burdensome to Nationwide.

The propriety of electronic claim files was ratified in *Bedell I* when this Court found no good cause was demonstrated as to why electronic storage of information should be prohibited. This was reinforced when Justice Davis found that the lack of good cause ruling in *Bedell I* was limited to the issue of electronic storage. “Our commentary regarding the need for good cause pertained to only that portion of the protective order that was addressed in our prior opinion, *i.e.*, the prohibition of electronic storage of medical records by State Farm.” *Id.* at 13 (footnote omitted).

The effect of the Protective Order, however, precludes Nationwide from utilizing its electronic claim file. While the Protective Order has stricken the express prohibition on electronic storage per *Bedell*, it implicitly reaches the same result and therefore must be vacated.

The current configuration of Nationwide’s claim system makes sound business sense to preserve complete business records without undue alteration. Nationwide should not therefore be required to attempt to devise a manner of claim file deletion.

2. A Balancing of the Interests Upholds Electronic Storage Without Return or Destruction Required.

Even assuming any protective order is necessary, it is incumbent upon this Court to take into consideration the burdens – financial and otherwise – imposed upon Nationwide by the unduly burdensome terms of the Protective Order entered by the trial court below. The overall utility of the Protective Order, with such terms, extends far beyond a true attempt to protect the privacy of medical records already protected is nil. However, the burdens imposed upon

Nationwide are astronomical. A weighing of the interests and an analysis of the true intent behind the Protective Order is therefore appropriate.

This analysis is similar to that adopted by the West Virginia Supreme Court in *State ex rel. State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992), wherein the Court considered the scope of discovery requests to an insurer. The *Stephens* Court instructed trial courts to weigh the question of relevancy against other factors, including, but not limited to, whether the requested information is unduly burdensome; whether its probative value is substantially outweighed by the danger of unfair prejudice; the risk of confusion of the issues or misleading the jury; by considerations of undue delay; waste of time, or needless presentation of cumulative evidence; or whether the breadth of the information sought would result in the production of materials so cumulative as to be inadmissible at trial.

Utilizing a similar balancing test, this Court should weigh the intent of any medical Protective Order against:

1. whether the relief sought and the terms imposed are unduly burdensome;
2. whether the Order's value is substantially outweighed by the danger of unfair prejudice to the insurer and its ability to do business in West Virginia;
3. the risk of confusion of the issues or conflicting with existing privacy laws;
4. whether the Order causes undue delay in the adjustment of the claim;
5. whether the Order is cumulative of other protections; and
6. the breadth of the Order.

Under this analysis, it is clear the Protective Order goes far beyond its stated purpose of protecting medical records, is needlessly cumulative, conflicts with existing laws and carries untold expense and burden to Nationwide which is required to obtain the medical records to meet

its contractual and statutory obligations to claimants and insureds. Moreover, Nationwide is prohibited by its regulator from altering its records. In short, the Protective Order does nothing more than stop the timely adjustment of claims and creates such significant costs that it is nearly impossible to do business in West Virginia.

G. HIPAA DOES NOT APPLY TO INSURANCE CLAIMS

The Medical Protective Order is premised upon a finding that HIPAA “*requires the entry of protective orders* to protect litigants whose medical records will be disclosed during the course of legal proceedings.” *Bedell II*, at 34 (emphasis added); *see also Bedell II*, dissent at 2 (“The majority opinion partly relies on the privacy interest created by the federal Health Information and Accountability Act of 1996 (HIPAA) and court cases interpreting this act.”).

The Medical Protective Order also requires the return/destruction of medical records upon the expiration of the calendar year in which the case is ultimately resolved, plus five additional calendar years. This return/destruction protocol is also premised upon HIPAA law. HIPAA, however, is inapplicable under the circumstances surrounding this claim. HIPAA applies to “health plans;” automobile liability insurance does not constitute a “health plan.” Federal regulations specifically exclude liability insurance from the definition of a “health plan.” *See* 42 USC §300gg-91(c)(1). “Excepted benefits” specifically excluded from the definition of a “health plan” include: (A) Coverage only for accident; or disability income insurance, or any combination thereof; (B) Coverage issued as a supplement to liability insurance; (C) ***Liability insurance, including general liability insurance and automobile liability insurance;*** . . . [and] (E) Automobile medical payment insurance.” (*emphasis added*). *See also*, 45 CFR §160.103; Executive Order 13181, signed Dec. 20, 2000.

Further, the United States District Court for the Northern District of West Virginia considered this issue in an analogous situation and likewise reached the conclusion that “HIPAA

does not apply to automobile insurance, which is at issue in this case. Because automobile insurance is a benefit excepted from the scope of the statute, the plaintiffs' argument that HIPAA applies to the present action is misplaced and must be rejected." *Warren v. Rodriguez-Hernandez*, No. 5:10cv25, 2010 WL 3668063, at *5 (N.D.W. Va. Sept. 15, 2010) Stamp, J.) (*internal citation omitted*). As it is clear that HIPAA has no application in the present action, to the extent the Medical Protective Order is premised upon this inapplicable body of law or which includes a HIPAA return/destruction protocol it constitutes clear error and must be vacated.

H. THE "LAW OF THE CASE" DOCTRINE IS NOT APPLICABLE

In the Combined Order, the trial court improperly relies upon the "law of the case" doctrine to reject Nationwide's factual and legal arguments it contends Nationwide failed to raise prior to the entry of the Protective Order. *See Combined Order*, Vol. II – App. 272-273. Even if Nationwide did fail to raise certain factual or legal arguments – a failure which Nationwide does not concede and specifically denies – the trial court's reliance on the "law of the case" doctrine directly contravenes established West Virginia law.

The "law of the case" doctrine, which has long been recognized in West Virginia, is a rule implemented for carrying out public policy purposes. Case law shows that "the doctrine is a salutary rule of policy and practice, grounded in important considerations related to stability in the decision making process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy." *State ex rel. Frazier & Oxley v. Cummings*, 214 W. Va. 802, 808, 591 S.E.2d 728, 734 (2004) (citing with approval *United States v. Rivera-Martinez*, 931 F.2d 148, 151 (1st Cir. 1991)). In meeting these policy concerns, the "law of the case" doctrine simply directs that where this Court has made a final determination on an issue, that same issue cannot later be overturned in subsequent stages of the same case.

Further, this Court has specifically rejected the proposition that the doctrine can be applied to a ruling of a trial court. *See e.g., State ex rel. Crafton v. Burnside*, 207 W.Va. 74, 528 S.E.2d 768 (2000)(holding that it was appropriate for trial courts to revisit issues in order “to correct errors they perceive before judgment is entered and while the adverse affects can be mitigated or abrogated.”) In fact, the only time a ruling of a trial court can become the “law of the case” is when the trial court enters a final order and this Court refuses to hear an appeal on that issue. *See e.g., State ex rel. TermNet Merchant Services, Inc. v. Jordan*, 217 W. Va. 696, 619 S.E.2d. 2009 (2005)(“[w]hen this Court refused to hear Petitioner's appeal of that judgment, it became the law of the case.”).

Therefore, since this Court has not yet made a final determination as to any issue raised by Nationwide herein and below, the “law of the case” doctrine is not applicable. Further, the fact that this Court has previously addressed issues surrounding medical protective orders in *Bedell I and Bedell II* likewise is of no consequence for purposes of the “law of the case” doctrine. A ruling from one case cannot, by definition, become the “law of the case” in another. The principles of collateral estoppel and *res judicata* are likewise unavailing. First, as acknowledged in *Bedell II*, this Court did not reach certain issues regarding the propriety of medical protective orders because such issues were not properly before it. *See e.g., Moore v. Sun Lumber Co.*, 166 W.Va. 735, 276 S.E.2d 797 (1981) (“Collateral estoppels” prevents relitigation of issues actually decided in a prior case). Second, *res judicata* only applies where, *inter alia*, the claims at issue are between the same parties. *Id.* As neither Nationwide nor the Plaintiffs were parties in *Bedell I or Bedell II*, *res judicata* is not applicable.

I. “MEDICAL RECORDS” MUST BE MORE CLEARLY DEFINED

While this Court concluded in *Bedell II* that the terms “medical records” and “medical information” were synonymous, it did not clearly define what actually qualifies as a “medical

record.”¹¹ As such, in the instant case, Nationwide, proposed that the trial court, if it was inclined to enter a medical protective order, then the following definition of medical records should be used so that could be clarity as to what documents would be subject to the return/destroy protocol and well as what information can be related to third-parties for non-litigation purposes without running afoul of the medical protective order.¹²

Any document or combination of documents that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

See Supp. Memo. of Law Concerning Med. Prot. Order, Vol. II – App. 19.

This definition is wholly consistent with the State Privacy Rule definition of “health information” which is defined as:

Any information or data except age or gender, whether oral or recorded in any form or medium, created by or derived from a health care provider or the consumer that relates to:

- a. The past, present or future physical, mental or behavioral health or condition of an individual;
- b. The provision of health care to an individual;
- or c. Payment for the provision of health care to an individual.

114 CSR §57-2.15.¹³

¹¹ Nationwide does not contest that the terms are synonymous. Further, the use of the terms synonymously implies that this Court limited its ruling in *State Farm II* to actual documents generated by health care providers therefore allowing the reporting of injury information – not medical records – to anti-fraud databases. The Plaintiffs below do not contest this point. *See* Pls.’ Reply to Nationwide’s Resp. to Pls.’ Mot. for Prot. Order, Vol. I – App. 176-177. (“[T]he proposed Protective Order does not prevent transmission of factual ‘injury’ information regarding the Plaintiffs’ claims or injuries.”). However, the medical protective order entered by the trial court below simply provides that that its terms “shall apply to Plaintiffs’ medical records and medical information” and does not make any distinction regarding what information, if any, relating to the Plaintiffs’ claims or injuries can be reported to third-parties such as anti-fraud databases without violating the medical protective order. *See Prot. Order, Vol. II – App. 1.*

¹² By proffering a definition of medical records, Nationwide did not and does not waive any argument relating to the terms and conditions of the medical protective order.

¹³ Nationwide’s proposed definition is also consistent with other federal and state definitions of “medical record.” *See e.g.*, 42 CFR §110.3(p) wherein the U.S. Department of Health and Human Services defines medical records as “documentation associated with primary care, hospital in-patient and

The broader definition of “medical records” and/or “medical information” included in the medical protective order in the case *sub judice* invades protected work product and/or attorney-client privileged information. As part of its routine business practice, Nationwide claim adjusters provide summaries of claimants’ alleged damages, which necessarily include, at a minimum, a description of the type of injuries allegedly suffered by the claimant. The summaries go into the electronic claim file and are the work product of the claim adjusters and, at times, also include privileged communications with in-house and/or outside counsel. These summaries, including any summaries relating to Ms. Faris’ claim, are solely the province of Nationwide and should not be subject to the return/destruction provision of the medical protective order.

The trial court included this broader definition of “medical records” despite this Court’s holding in *Bedell II* that a medical protective order “does not require the destruction of either claim files or attorney-client correspondence to comply with the order’s mandate. . . . No mention is made of claims files; business records; documents prepared in anticipation of litigation, including, but not limited to depositions and interrogatories; or attorney-client communications.” *Bedell II*, 2011 W. Va. LEXIS 16 (W. Va., Apr. 1, 2011). This Court further held that, “. . . because we conclude that the reach of the circuit court’s second protective order is not so extensive so as to infringe upon the ability of the defendants to retain documents they have generated from the discovered material that has been disclosed to them by Mrs. Blank *unless* such documents constitute ‘medical records, and medical information or any copies or summaries thereof,’ we deny the request writ of prohibition on this ground.” *Id.* (*emphasis in original*). Thus, the only documents that should be subjected to the terms of the medical

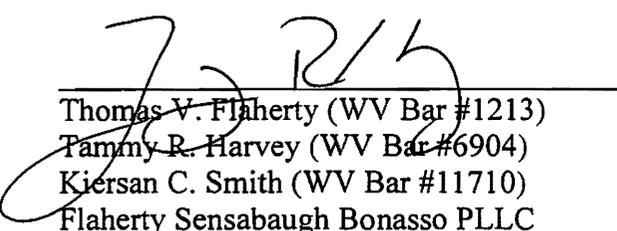
out-patient care, specialty consultations and diagnostic testing and results.” Likewise, the West Virginia Insurance Commissioner defines “medical record” with respect to regulation of health maintenance organizations as “the record in which clinical information relating to the provision of physical, social and mental health services is recorded and stored.” 114 CSR §53-2.11.

protective order are the actual medical records produced by Ms. Faris, and not information or commentary generated by Nationwide and now included in its claim file. Otherwise, Nationwide will have to remove or destroy its internal log entries which, even if possible, would cause Nationwide to be in violation of a multitude of insurance regulations which prohibit the alteration of claim files.

VI. CONCLUSION

The Protective Order is unnecessary to protect the Plaintiffs' asserted privacy interests in their nonpublic personal health information as those interests are already adequately protected by existing laws and regulations. Even if Plaintiffs' could satisfy the "good cause" requirement for the entry of any medical protective order, the terms of Protective Order entered by the trial court are overly broad, unduly burdensome and constitutionally impermissible. The practical implications of the Protective Order, if it is allowed to stand, will be devastating to Nationwide's ability to conduct business in West Virginia and to the State's ability to effectively and efficiently regulate the insurance industry within its borders. Thus, Nationwide respectfully requests that this Court reverse the Circuit Court and vacate the Protective Order entered by it.

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CERTIFICATE OF SERVICE

I, Tammy R. Harvey, counsel for Nationwide Mutual Insurance Company, do hereby certify that I have served the foregoing *Brief of Petitioner Nationwide Mutual Insurance Company* upon counsel of record this 5th day of July, 2012 by depositing true copies in the United States mail, postage prepaid, addressed as follows:

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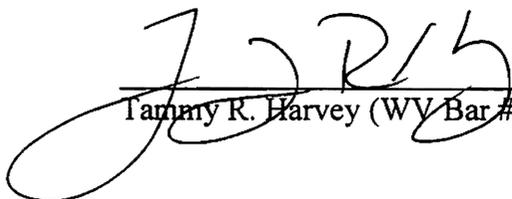
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