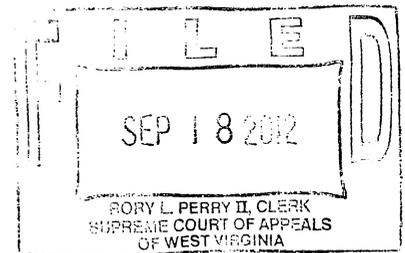


Nos. 12-0304 and No. 12-0210



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

**PETITIONER NATIONWIDE MUTUAL INSURANCE COMPANY'S REPLY TO THE
CONSOLIDATED RESPONSE OF PLAINTIFFS BELOW TO STATE FARM'S WRIT
OF PROHIBITION AND
NATIONWIDE'S APPEAL**

FLAHERTY SENSABAUGH BONASSO, PLLC
Thomas V. Flaherty (WV Bar No. 1213)
Tammy R. Harvey (WV Bar No. 6904)
Kiersan C. Smith (WV Bar #11710)
200 Capitol Street
Charleston, WV 25338
(304) 345-0200
tharvey@fsblaw.com
Nationwide Mutual Insurance Co.

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INTRODUCTION¹

Respondents spent the majority of their brief addressing why this Honorable Court should not allow Petitioners State Farm Mutual Automobile Insurance Company (“State Farm”) and Nationwide Mutual Insurance Company (“Nationwide”) unfettered access to a claimant’s medical records and information. Respondents repeatedly asserted throughout their entire brief that Petitioners were requesting this Court to permit them to retain such information “indefinitely” and for “use for whatever purpose deemed necessary.” Such propositions, however, constitute a **gross mischaracterization** of Petitioners’ request. Specifically, Nationwide is only seeking permission to do what the law already allows for it to do—to retain claimants’ medical records and information for the sole purpose of use in the satisfaction of legitimate and vital insurance functions.

STATEMENT OF THE CASE

Nationwide delineated the facts and procedural history germane to this Appeal in its initial *Brief of Petitioner Nationwide Mutual Insurance Company*, which was filed with the Court on or about July 5, 2012. For convenience and efficiency purposes, Nationwide’s rendition of the facts and procedural history as recounted in its *Brief of Petitioner Nationwide Mutual Insurance Company* is hereby incorporated by reference as if set forth fully herein.

ARGUMENT

At the outset it is important to note that Nationwide agrees with Respondents’ contention that every American citizen has a basic interest in the privacy of his medical records. In fact,

¹ Respondents spend a majority of their brief addressing the contentions and arguments contained within the submissions of State Farm and the West Virginia Insurance Commissioner. Nationwide’s Reply is limited, however, to addressing only those contentions of Respondents which are specifically applicable to Nationwide’s Appeal. To the extent that Respondents’ arguments directed to State Farm’s Writ of Prohibition and/or the West Virginia Insurance Commissioner’s Amicus brief are applicable to Nationwide’s Appeal, Nationwide will respond to such arguments accordingly.

Nationwide takes that interest seriously—employing both internal protections, as well as complying with all State/Federal rules and regulations which have been implemented to further accomplish this end. As previously recognized by the West Virginia Supreme Court, an insurance company’s compliance with existing West Virginia, Federal, and industry regulations ensures that the privacy of an insurance claimant’s medical records are already capably protected. *See generally State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 226 W. Va. 138 (2010) (“*Bedell I*”). Such State, Federal, and industry laws generally prohibit the disclosure of nonpublic medical information without the claimant’s consent *except when it comes to disclosure for legitimate insurance purposes*. Accordingly, the applicable rules and regulations at issue in this case permit insurers to disclose a claimant’s nonpublic medical information without consent only when it is in furtherance of legitimate insurance functions. As this type of disclosure is permitted by law, the Protective Orders at issue in this Appeal² afford little

² On July 12, 2011, the Circuit Court of Harrison County 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 Respondent/Plaintiff below Carmella 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.

On multiple occasions, Nationwide objected to the terms of the Protective Order on constitutional, public policy, statutory, and regulatory grounds. Nevertheless, on January 13, 2012, the Circuit Court entered a “Combined Order Affirming Medical Protective Orders Entered In These Civil Actions” (“Combined Order”). *See Combined Order*, Vol. II – App. 273-274. 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. Nationwide, likewise, objected to the terms of the Protective Order entered in *Huggins* on constitutional, public policy, statutory, and regulatory grounds.

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 *Faris* and in response to a Petition for a Writ of Prohibition filed by State Farm, this Court issued a show cause order in *Huggins*. On June 18, 2012, pursuant to State Farm’s and Nationwide’s joint motion, this Court consolidated *Faris and Huggins* on the grounds that they presented the same issues for this Court’s consideration.

additional protections to the privacy already afforded to a claimant’s medical records. And, because the protections already implemented appropriately restrict the use of a claimant’s nonpublic medical information, the only purpose the terms and provisions of the instant Protective Orders *serve is to frustrate legitimate insurance purposes contrary to established law and public policy.*

Furthermore, the terms of the Protective Orders are so over-broadly that they infringe upon multiple of Nationwide’s constitutional rights—for instance, forcing Nationwide to “pick its poison” is a violation of its right to due process since it is forced to choose between violating the Protective Orders or violating applicable State and/or Federal regulations. In addition, as the terms of the Protective Orders result in the creation of a prior content-based restraint on speech which is not justified by a compelling government interest, they infringe upon Nationwide’s First Amendment Right of Free speech.³ Lastly, entry of these types of orders would place a substantial burden on Nationwide as compliance with multiple orders with multiple return and/or destroy deadlines would be financially prohibitive. Consequently, as set forth more fully in Nationwide’s opening brief, and in the multiple Amicus briefs, the Protective Orders at issue are not only unnecessary, they are unconstitutional and simply not workable.

I. **NEITHER THE DOCTRINES OF RES JUDICATA OR STARE DECISIS OPERATE TO BAR THE ISSUES PRESENTED FOR REVIEW IN STATE FARM’S WRIT OF PROHIBITION OR NATIONWIDE’S APPEAL.**

As Nationwide readily admitted in its initial *Brief of Petitioner Nationwide Mutual Insurance Company*, this Court has previously addressed certain issues surrounding an insurer’s

Respondents Ms. Faris and Matthew Huggins are represented by attorney David J. Romano and the Romano Law Office. On August 31, counsel for Ms. Faris and the Huggins filed a joint response to Nationwide’s Appeal and the Show Cause Order issued pursuant to State Farm’s Writ of Prohibition. Thus, unless indicated otherwise, the use of the term “Protective Orders” herein refers to both the Protective Order entered in *Faris* and the Protective Order entered in *Huggins* and use of the term “Respondents” refers to both Ms. Faris and Mr. Huggins.

³ Not only are the overly-broad terms of the Protective Orders not justified by a compelling government interest, they actually severely hamper the government’s compelling interest in the detection and prevention of fraud.

access to, use of, 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, as also set forth in Nationwide’s initial brief, important questions still remain — either because they were not before this Court in *Bedell I* and/or *Bedell II* or have arisen since — which must be resolved in order to provide clear guidance to insurance companies doing business in West Virginia as to their respective duties regarding an insured’s and/or claimant’s nonpublic medical information.

Nevertheless, in their brief, Respondents maintain that the

principle of law [regarding the time period after which stored medical information must be returned or destroyed] 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.

Respondents’ Br. 18.

In addition to grossly misrepresenting the relief requested by Nationwide, the above proposition also represents a flawed application of the long-revered legal principles of *res judicata* and *stare decisis*. Contrary to the Respondents’ assertion, the doctrine of *res judicata* does not apply to bar the arguments set forth in State Farm’s Writ of Prohibition and, as such, cannot constitute *stare decisis* as to the arguments contained within Nationwide’s Appeal.

A. *The doctrine of res judicata does not operate to bar the arguments set forth in State Farm’s Writ of Prohibition because the three (3) elements necessary to establish claim preclusion as to the issues surrounding an insurer’s access to, use of, and retention of a claimant’s medical records and information.*

Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three (3) elements must be satisfied.

First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, **the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.**

Lloyd's, Inc. v. Lloyd, 225 W. Va. 377, 384 (2010) (emphasis added). As discussed above, although 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*")), important questions still remain. And, since issues still remain regarding the terms and effect of the Protective Orders, they are not identical to those which were presented or could have been presented in either *Bedell I* or *Bedell II*. Accordingly, the doctrine of *res judicata* does not apply in this instance to bar the arguments set forth in State Farm's *Writ of Prohibition. Lloyd's Inc., supra*.

B. *The principle of stare decisis is not applicable to bar any of the issues relating to the access, use, and retention of medical records and information set forth in Nationwide's Appellate Brief.*

"*Stare decisis* is the policy of the court to stand by precedent." *Mayhew v. Mayhew*, 205 W. Va. 490, 499 (1999) ("*Mayhew II*") (citing *Banker v. Banker*, 196 W. Va. 535, 546 n. 13 (1996)). Because the arguments, contentions, and issues regarding the access, use, and retention of medical records and information embodied in Nationwide's Appeal brief were not fully addressed by this Court in either *Bedell I* or *Bedell II*, this Court's review is not precluded pursuant to the theory of *stare decisis*.

Even if this Court would conclude that the issues presented in this Appeal are subject to the principles of *stare decisis*, it should nevertheless entertain Nationwide's Appeal because departure from the precedent set forth in *Bedell I* and *II* is warranted. "As a practical matter, a

precedent-creating opinion that contains no extrinsic analysis of an important issue is more vulnerable to being overruled[.]” *Id.* (citing *State v. Guthrie*, 194 W. Va. 657, 679 n. 28 (1995).) As cited by the *Mayhew II* Court, in *Moragne v. States Marine Lines, Inc.*, the United States Supreme Court set forth three factors which should be weighed prior to rejecting a longstanding rule:

(1) the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; (2) the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and (3) the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Id. at n. 21 (citing 398 U.S. 375, 403 (1970)).

In *Mayhew II*, this Court noted that the initial *Mayhew I* decision did not provide a logical analysis of its decision to adopt, as well as its formulation of, a dual burden of persuasion standard. *Id.* It further noted that the three *Moragne* factors were met because of the lack of clear guidance in *Mayhew I* on the dual persuasion standard as well as the questions which arose due to such. *Id.* This Court further noted that the *Mayhew I* rule of law had not been longstanding or oft cited. *Id.* Accordingly,

[r]emaining true to an ‘intrinsically sounder’ doctrine . . . better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; [particularly since] the latter course would simply compound the recent error . . . In such a situation ‘special justification’ exists to depart from the recently decided case.

Id. (citing *Adarand Constr., Inc. v. Pena*, 515 U.S. 200 (1995)). Consequently, this Court “simply [could] not find any persuasive reasoning to continue with the precedent established in its *Mayhew I* decision. *Id.*”

Similarly, in the instant Appeal, should this Court conclude that the doctrine of *stare decisis* is applicable—which Nationwide denies—then this Court should nevertheless conclude

that “special justification” exists to depart from the precedent established in *Bedell I* and *II* regarding an insurer’s access to, use of, and retention of a claimant’s medical information as such precedent is inconsistent with a substantial amount of pre-existing law. So long as significant and relevant issues regarding the *Bedell* decisions exist, and continue to arise, further re-litigation will necessarily ensure. In order to prevent this endless cycle, Nationwide respectfully requests that this Court conclude that to the extent that the principle of *stare decisis* is applicable, deviation therefrom is nevertheless warranted under the circumstances so that this Court can: (1) provide precise guidance to Nationwide, and to all insurers doing business in West Virginia, regarding an insurer’s access to, use of, and retention of a claimant’s medical records and information which is obtained by an insurer either in or outside the litigation process, and, by doing so, (2) eliminate the need of any future litigation regarding the terms and scope of medical protective orders as they pertain to insurers; and, therefore, (3) maintain the public’s faith in the judiciary of this State as a source of impersonal and reasoned judgments.

II. THE PROTECTIVE ORDER IS NOT NECESSARY BECAUSE RESPONDENTS’ PRIVACY INTERESTS ARE ALREADY ADEQUATELY PROTECTED BY STATE AND FEDERAL LAW, AS WELL AS INDUSTRY STANDARDS.

No one disputes that Respondents’ medical records contain confidential information or that the Respondents 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. Respondents’ asserted privacy interests are already more than adequately protected by state and federal regulations and statutes. *See generally, Bedell I*, 226 W. Va. 138, 697 S.E.2d 739. To this end, Respondents challenge the actual level of protection afforded by the aforementioned rules, regulations, and standards as well as Nationwide’s compliance with them.

Regulations promulgated by the West Virginia Insurance Commissioner protect a claimant's 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 Act⁴ likewise protects against the disclosure of nonpublic health information, 15 U.S.C. §6801, *et seq.* To ensure compliance with the Gramm-Leach-Bliley Act, West Virginia further 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).”⁵ 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.*

In an effort to undermine the privacy protections already in place and adhered to by Nationwide regarding the medical information it receives from claimants, Respondents cite to the case of *Whalen v. Roe*, 429 U.S. 589 (1977). However, the *Whalen* opinion actually **supports** Nationwide's position that sufficient protections to safeguard a claimant's medical information are already in place. In *Whalen*, the United States Supreme Court overturned a

⁴ The Gramm-Leach-Bliley Act essentially stands for the proposition that an affirmative obligation exists requiring the respect and protection of the confidentiality of consumers' nonpublic personal information to protect against unauthorized use that could result in harm to the consumer.

⁵ Notably, the Gramm-Leach-Bliley Act deals predominantly with the disclosure of nonpublic personal **financial** information. Respondents assert, however, that certain provisions of the Gramm-Leach-Bliley Act purport to allow states to 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. **That is just the case presented in the instant situation.** The West Virginia Insurance Commission has already promulgated regulations, which were passed by the Legislature, dealing with access to, use of, and retention of a claimant's medical information. Accordingly, any further action on behalf of the Judiciary was not contemplated to restrict or limit those provisions already implemented by the Legislature.

judgment from the United States District Court for the Southern District of New York finding the New York State Controlled Substances Act of 1972, N.Y. Pub. Health Law § 3300 et seq. (1976),—which required that records of all prescriptions for controlled substances with a potential for abuse be kept in a centralized filing system, was unconstitutional. Although the Court recognized that there was a constitutionally protected zone of privacy that included the interest in avoiding disclosure of personal matters, it held that the law itself provided for adequate security protection from such disclosure because limited access to the lists and had “built-in protection” from such disclosures. In further support of its decision to reverse the District Court’s judgment in favor of the law, the Court noted that the Act was the product of an orderly and rational legislative decision.

As in *Whalen*, there are already protections in place which adequately ensure the privacy of a claimant’s medical information.⁶ As such, Respondents’ privacy interests are already more than sufficiently secured by existing protections, thus making the Protective Order completely unnecessary and unwarranted as applied to insurance companies. *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, as recognized in *Whalen*, claimants’ privacy interests are not automatically threatened based upon the mere fact that State and Federal regulations permit insurers to use their medical records and information to satisfy legitimate insurance functions. *See e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)(the use of medical information **for purposes**

⁶ *See e.g., W.Va. Code R. §114-57-15.1; 15 U.S.C. §6801, et seq.; W.Va. Code §33-6F-1(a); W.Va. Code R. §114-62-3.1*

authorized by state law does not implicate any privacy interest as long as any identifying information has been redacted). *Whalen v. Roe*, 429 U.S. 589 (1977) (non-identifying medical information not proper subject of a protective order). In fact, this Court has gone even further and held that the use of medical information even when identifying information has not been redacted is not an improper invasion of 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).

Further, contrary to Respondents' outrageous mischaracterizations, Nationwide is not seeking to (and could not according to existing state and federal law) publicly disseminate Respondents' medical records or information for any reason it deems fit. In Section IV of their "Response of Plaintiffs Below to State Farm's Request for Writ of Prohibition and Nationwide's Appeal," Respondents make the appalling allegation that Nationwide has engaged in the "flim flaming" of this Court with regard to the representations it has allegedly made to various courts regarding its use of an individual's medical information. Respondents' Br. 33, 37-8. That being said, Respondents can point to no specific instances where Nationwide has done so particularly in light of the fact that Nationwide was NOT a party in either the *Bedell I* or *Bedell II* decisions. Furthermore, Respondents cannot seriously contend that Nationwide has engaged in the "flim flaming" of this Court where Nationwide is only seeking permission to do what the law legitimately allows for it to do—retain medical information to carry out legitimate and vital insurance functions. Accordingly, regardless of whether there is a Protective Order in place that pertains to insurers, the Respondents' medical information would still remain confidential through the protections and security controls afforded it by State and Federal laws, and by industry standards and regulations. As such, this Court striking down the Protective Orders

would not result in the wide spread dissemination of private medical information as Respondents would lead this Court to believe.

III. ENTRY OF THE PROTECTIVE ORDER WILL EFFECTIVELY RESULT IN VIOLATIONS OF STATE LAW.

As set forth in Nationwide’s initial brief, 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, because the Protective Orders, to the extent they pertain to insurers, violate regulations promulgated by the West Virginia Insurance Commissioner and approved by the Legislature, they are in direct contravention of West Virginia law and must be vacated.

A. Enforcement of the terms of the Protective Order will result in violations of the record retention mandates set forth in Section 114-15-4.2 of the West Virginia Code of State Rules.

Respondents are correct in their assertion that, in *Bedell I*, this Court held 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 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.” Syl. Pt. 7. However, §114-15-4.2 only sets forth the **minimum amount** of time that an insurer must maintain records, not the **maximum amount** of time that it may do so.⁷

Nevertheless, based on the mandates of § 114-15-4.2 of the West Virginia Code of State Rules, this Court held in *Bedell II* that a protective order providing for the destruction of medical information in a claim file five (5) years after the close of litigation would suffice to allow an insurance company to comply with the Insurance Commissioner’s mandates. However, while medical protective order with a maximum blanket destruction period of five (5) years might be sufficient to allow Nationwide to satisfy the requirements of §114-15-42, it would not be sufficient to allow Nationwide to satisfy all of its duties and obligations in not only West Virginia, but in other states and jurisdictions as well.⁸

B. Enforcement of the terms of the Protective Order will result in violations of West Virginia’s Privacy Rule, which is set forth in Section 114-62-15 of the West Virginia Code of State Rules.

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 15.2.⁹ In direct contravention, however, the

⁷ Section 114-15-4.2 of the West Virginia Code of State Rules requires an insurer to maintain a claim file for the lesser of five (5) years, until the claim file is inspected by the insurance commissioner, or another period specified by statute.

⁸ For example, the destruction of medical information in a claim file five (5) years after the close of litigation—or any other arbitrarily set period of time—would effectively interfere with Nationwide’s ability to comply with, *inter alia*, West Virginia’s anti-fraud regulations and the Federally-mandated *Zubulake* doctrine.

⁹ 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; . . .”

terms of the Protective Order *expressly prohibit* 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 Respondents. *See Prot. Order*, Vol. II – App. 3. In an effort to undermine the force and effect of the State Privacy Rule, Respondents argue that then Insurance Commissioner Jane Cline’s interpretation of her own regulation is unconstitutional and unlawful as violating an individual’s right to informational privacy protection. *Respondents’ Br.* 19.

As delegated by the Legislature under *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.* As such, any attempt by the judiciary to control aspects of the state insurance industry, in the place and stead of the Insurance Commissioner who has developed on expertise on such matters, would constitute an encroachment on the authority of the Insurance Commissioner in violation of the doctrine of the separation of powers. *See State ex rel. Citifinancial, Inc. v. Madden*, 223 W. Va. 229, 672 S.E.2d 365 (2008).

Under the doctrine of separation of powers, W. Va. Const., art. V, § 1,¹⁰ “courts have no authority -- *by mandamus, prohibition, contempt or otherwise* -- to interfere with the

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

¹⁰ 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”).

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”).

Accordingly, while a circuit court must have considerable discretion in the control of activities occurring within its walls, the Protective Orders here far exceed those boundaries by placing restrictions on the manner in which Nationwide maintains and uses its claim information. These restrictions necessarily amount to the *de facto* regulation of West Virginia’s insurance industry. Consequently, because the power to regulate West Virginia’s insurance industry rests solely with the West Virginia Insurance Commissioner, the circuit court’s Protective Orders impermissibly encroach upon the authority of the Insurance Commissioner in violation of the separation of powers doctrine.

C. Enforcement of the terms of the Protective Order will result in violations of West Virginia’s Anti-Fraud Regulations.

Respondents argue that an insurance carrier does not need to retain medical records or information “indefinitely” or to disseminate such information at “its own will and pleasure” in order to fight fraud. *Respondents’ Br.* 43. Respondents’ argument, however, conveniently overlooks the fact that nowhere in its initial brief does Nationwide ever argue that it be allowed to maintain a claimant’s medical information indefinitely or that it be allowed to disseminate such information however it pleases. Instead, Nationwide argued, as it argues now, that it should be allowed to access, use, and retain a claimant’s medical information in accordance with State or Federal laws and in accordance with industry standards, regulations, and rules.

Further, while Respondents grossly exaggerate Nationwide's argument in connection with how and for how long it may use a claimant's medical information, they grossly "under-exaggerate" the severity of the impact insurance fraud has on all West Virginia citizens and the necessity of insurers, like Nationwide, of being able to adequately detect and defend against such fraud.

Unlike the Respondents, however, the Legislature does recognize that the business of insurance has the great potential for fraud and further recognizes the vitality of the insurance industry's role in combating such fraud. As evidence thereof, the Legislature promulgated *W. Va. Code* §33-41-1(b) delegating to the Insurance Commissioner the imperative duty of investigating and prosecuting instances of insurance-related fraudulent activity occurring within the boundaries of the State of West Virginia. To fulfill that duty, the West Virginia Insurance Commissioner, *inter alia*, enacted *W. Va. C.S.R.* 114-57-15.2, requiring insurers to disclose private medical records and information if to do so would result in the "detection, investigation or reporting of actual or potential fraud."

The Legislature, to further enable the Insurance Commissioner to fulfill its duty to detect and prevent fraud, enacted Section 33-41-5(a) of the West Virginia Code, which mandates as follow:

a person engaged in the business of insurance having knowledge or a reasonable belief that fraud or another crime related to the business of insurance is being, will be or has been committed ***shall provide*** to the commissioner the information required by, and in a manner prescribed by the commissioner.

W. Va. Code § 33-41-5(a) (*emphasis added*). *See also, W. Va. 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, despite these legislative mandates and despite the reality of insurance fraud, by expressly prohibiting Nationwide from transmitting medical records and medical information to any third-party for non-litigation purposes and by requiring that medical records and 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), the Protective Orders “tie the hands” of Nationwide in its fraud-fighting efforts.¹¹ As such, the Protective Orders must be vacated.

IV. ENTRY OF THE PROTECTIVE ORDERS WILL EFFECTIVELY RESULT IN VIOLATIONS OF FEDERAL LAW.

A. The Terms of the Protective Orders Conflict with Nationwide’s Obligations in Federal Jurisdictions.

Because Nationwide, as most insurers, transacts business throughout the United States, it necessarily becomes involved in litigation throughout the United States, including federal jurisdictions where, under the *Zubulake* doctrine, it is required to preserve all of its documents, including medical records in a claim file, once it reasonably anticipates litigation.¹² *Zubulake v. USB Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2004). Thus, contrary to Respondents’ contention, the entry of the Protective Orders would cause Nationwide to violate the *Zubulake* doctrine if it were required to preserve documents in a claim file, including medical information, out of a reasonable anticipation of litigation while simultaneously being required to dispose of the same pursuant to the terms of a protective order.

Accordingly, if the Protective Orders are left to stand, Nationwide will be forced to either: (1) disobey its *Zubulake* obligations, thereby exposing itself to penalties in the form of discovery sanctions and to a multitude of civil and potentially criminal claims, including claims

¹¹ Nationwide is not suggesting that Respondents have committed or are suspected of committing insurance fraud.

¹² 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).

for the spoliation of evidence and obstruction of justice; or (2) disobey its obligations under the Protective Orders, thereby exposing itself to penalties in the form of contempt of court sanctions and to a mutilate of potential claims, including claims for “bad faith.” Being placed in this untenable position would be a clear and unconstitutional violation of Nationwide’s right to due process.¹³

B. The Terms of the Protective Order Conflict with Nationwide’s Duties under Federal Medicare Regulations.

Under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (“MMSEA”), **insurers 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 to assist in recovery of 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, 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 Orders.

However, instead of explaining how the Protective Orders do not conflict with Nationwide’s duties under MMSEA, Respondents again make the incredulous allegation that Nationwide is requesting that it be permitted to retain Respondents’ personal medical health information forever which, as explained time and time again, this is not the relief requested by Nationwide. *Respondents’ Br.* 48. Rather, despite Respondents’ attempted scare tactics in implying that, without the Protective Orders, Nationwide and other insurers would publicly disseminate a claimant’s personal medical information whenever and for whatever reason they

¹³ For a more in-depth discussion of the Protective Orders’ effect on Nationwide’s due process rights, please see Section IV(E), *infra*.

wish, Nationwide is merely asking this Court to allow it to do what the Legislature has already said it can do and that is to engage in legitimate insurance functions already contemplated by the applicable state, federal, and industry standards and laws.

C. The Terms of the Protective Order Violate the Full Faith and Credit Clause of the United States Constitution.

In response to Nationwide's argument that the Protective Orders violate the Full Faith and Credit Clause of the United States Constitution, Respondents once again overinflate Nationwide's argument by implying that Nationwide is essentially requesting that this Court yield to the laws of any other state regarding the retention or destruction of medical records and information contained in a claim file at the expense of the protection afforded to such medical records and information under West Virginia law and under the United States Constitution. Respondents' Br. 48. Respondents' argument is without merit.

Specifically, it has been consistently held that the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, "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). 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. Because the Protective Orders here do not allow for these requirements or respect the interests of other States, they run afoul of the Full Faith and Credit Clause and must be vacated. Thus, Nationwide is only requesting that this Court respect, not yield to, the laws of other states.

Further, allowing these Protective Orders to stand will necessarily invite similar protective orders to be entered in other trial courts both in and outside of West Virginia, which would result in Nationwide, and all insurers, being subjected to multiple protective orders with terms as varied as there are courts in this Country. As a result, instead of having a uniform, workable and regulatory-compliant claim handling procedures, Nationwide would be forced to 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 and defeat the public policy of West Virginia to provide a clear legal guide to its citizens and to those companies that conduct business within its borders as to how to "plan their affairs with assurance against toward surprise." *Mayhew II, supra; see also, Davis v. Sheppe*, 187 W. Va. 194, 417 S.E.2d 113 (1992) (this Court will consider public policy when construing the actions of the trial courts of the State of West Virginia).

D. The Terms of the Protective Order Constitute an Infringement of Nationwide's First Amendment Rights.

Multiple courts have held that 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). 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).¹⁴

In response to Nationwide’s argument that the provisions of the Protective Orders result in an infringement of Nationwide’s right to Free Speech under the First Amendment, Respondents maintain that insurance companies are mistakenly equating a court’s permission for their receipt of confidential materials with a free speech right to maintain and disclose such information after receipt of information only obtained through court process. *Respondents’ Br.* 49. Such a response is flawed, however, when insurers, like Nationwide in *Faris*, initially received the subject medical information ***outside the confines of*** the judicial process.

¹⁴ 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.”).

Furthermore, on their face, the Protective Orders constitute 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)). Therefore, because enforcement of the Protective Orders’ 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, the Protective Orders must be vacated.

E. The Terms of the Protective Order Violate Nationwide’s Right to Due Process.

As set forth in Nationwide’s initial brief, the retroactive effect of the Protective Orders violate Nationwide’s right to due process. See e.g., *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 93, 576 S.E.2d 807, 820 (2002) (“legislation cannot be made retroactive ‘when the effect will be to impair the obligation of contracts or to disturb vested rights’”) 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). In response, the Respondents incredulously maintain that Nationwide’s due process rights are not violated by the entry of these Protective Orders as there is “nothing retroactive about their effect.” *Respondents’ Br.* 51.¹⁵ That being said, the “Combined Order,” which affirmed the provisions of the Protective Order, provided as follows:

¹⁵ In response to the Due Process argument made in Nationwide’s initial brief, Respondents yet again assert that Nationwide desires to retain all claimants’ medical information indefinitely and to disseminate it in any manner that it deems fit. *Respondents’ Br.* 50. And yet again, this is an inaccurate restatement of Nationwide’s requested relief

The Court further finds that extending the medical Protective Order to protect medical records and medical information that may have been exchanged before the Protective Order was entered is appropriate even if such information was part of the claims process . . .

See Combined Order, Vol. II-App. 274.

Accordingly, Respondents' contention that the Protective Orders' terms are not given retroactive effect is preposterous, however, as Nationwide, following its routine business practice when investigating a claim, first obtained medical records pursuant to authorizations¹⁶ 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, if it did, it might subsequently be called upon to alter its claim records, which it is expressly prohibited from doing pursuant to 114 CSR §15-4.7(b), or that it could not disseminate medical information to third parties without the express consent of the claimant or the trial court, to now

as Nationwide only seeks to retain and disseminate such information pursuant to its statutory duty of carrying out legitimate business functions.

¹⁶ During the course of its investigation of the claims against its insured and during the course of litigation in the companion case—*Huggins v. Woodward Video, et al.*, Civil Action No. 10-C-176, Nationwide encountered the same issues relating to its use of plaintiff's medical records obtained prior to and in the course of litigation through voluntarily executed record authorizations.

subject Nationwide, without fair warning, to the retroactive application of the Protective Order and, therefore, expose Nationwide to penalties for violations thereof 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.”);¹⁷ *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).

F. The Terms of the Protective Order Effectively Prohibit Nationwide from Maintaining an Electronic Claim File.

Respondents dispute Nationwide’s argument that entry of the Protective Orders would effectively prevent it from maintaining an electronic claim file or that such would cause extreme financial burden worthy of allowing it to indefinitely maintain scanned copies of the information. *Respondents’ Br.* 51. In support thereof, Respondents glibly argue that what an insurance company’s IT department can do, it can undo. *Respondents’ Br.* 51-2. What Respondents fail to recognize, however, is that Nationwide has and does not argue that it is impossible from an “IT standpoint” to fashion an electronic claim-handling system which would allow for the removal or alteration of medical information once it has been electronically entered in a claim file. Rather, it is Nationwide’s argument that because it is *expressly precluded* from altering an electronic claim file or from even utilizing an electronic claim file which is designed to allow for such alteration, in order to be in compliance with both the Protective Orders and with insurance

¹⁷ *See also, 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.”).

regulations, it cannot utilize electronic claim files. See 114 CSR §15-4.7(b) (an insurer may utilize an electronic claim file 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*)).

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. As set forth above, the effect of the Protective Orders, however, precludes Nationwide from utilizing its electronic claim file as it would require violation of the Insurance Commissioner’s regulations precluding the alteration of claim files. Moreover, the current configuration of Nationwide’s electronic claim system makes sound business sense to preserve complete business records without alteration. Accordingly, even assuming that any protective order is necessary—which Nationwide adamantly denies that it is—it would be incumbent upon this Court to take into consideration the burdens – financial and otherwise – which would be imposed upon Nationwide and the insurance industry as a whole by the unduly burdensome terms of the Protective Orders when so considering, it is clear that the overall utility of the Protective Orders, when applied to insurance companies, with such terms that extend far beyond a true attempt to protect the privacy of medical records already protected, is nil. However, the burdens imposed upon Nationwide, and other insurers, are astronomical.

G. HIPAA does not apply to insurance claims.

Despite its recognition that HIPAA excludes liability insurance carriers from all of the requirements of the Act, Respondents argue that HIPAA’s judicial proceedings provisions and security safeguards set a floor for what this Court should require in protecting a person’s

constitutional right to informational privacy. *Respondents' Br.* 52. This argument is without merit.

The plain language of HIPAA is clear: 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*).

V. THE GENERAL DISMISSAL OF NATIONWIDE’S ARGUMENTS SET FORTH IN SECTION VI OF RESPONDENTS’ BRIEF DOES NOT CONSTITUTE A SUFFICIENT RESPONSE TO EACH ASSIGNMENT OF ERROR ALLEGEDLY REFERENCED THEREIN FOR THE PURPOSES OF RULE 10 OF THE WEST VIRGINIA REVISED RULES OF APPELLATE PROCEDURE.

According to Section VI of the Respondents’ brief, “the remaining assertions of the Appellants and the *Amicus Curiae* are either without merit or regurgitations of the arguments

previously made by the Appellants.” *Respondents’ Br.* 56. However, the Respondents do not delineate which precise assignments of error they are addressing through this argument. Under West Virginia Revised Rule of Appellate Procedure 10, subpart (d):

Unless otherwise provided by the Court, the argument section of the respondent’s brief **must specifically** respond to each assignment of error, to the fullest extent possible. If the respondent’s brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner’s view of the issue.

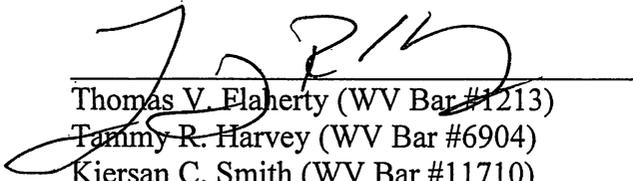
W. Va. R. App. Pro. 10(d). Consequently, Respondents’ blanket assertion that “none of the remaining errors” asserted by State Farm, Nationwide or the *Amicus Curiae* are “meritorious,” relevant, or they have been “previously decided by the Court or Other Courts regarding the same parties” (*Respondents’ Br.* 55) is not sufficient to “specifically respond” to each assignment of error alleged by Petitioners. (*See* W. Va. Rev. R. App. P. 10(d).) Accordingly, this Court should assume that Respondents agree with Petitioners’ views as to those assignments of error not specifically addressed by Respondents in their Consolidated Response.

VI. CONCLUSION

In summary, the Protective Orders at issue in this Consolidated Appeal are unnecessary to protect Respondents’ asserted privacy interests in their nonpublic personal health information as those interests are already adequately protected by existing laws and regulations. Furthermore, the terms of the Protective Orders entered by the trial court are overly broad, unduly burdensome, and constitutionally impermissible. The practical implications of the Protective Orders, if 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. Accordingly, Nationwide respectfully requests that this Court reverse the Circuit Court and vacate the Protective Orders entered by it.

**NATIONWIDE MUTUAL
INSURANCE COMPANY**
By Counsel



Thomas V. Flaherty (WV Bar #1213)
Tommy R. Harvey (WV Bar #6904)
Kiersan C. Smith (WV Bar #11710)
Flaherty Sensabaugh Bonasso PLLC
P. O. Box 3843
Charleston, WV 25338-3843
(304) 345-0200
tharvey@fsblaw.com

CERTIFICATE OF SERVICE

I, Tammy R. Harvey, counsel for Nationwide Mutual Insurance Company, do hereby certify that I have served the foregoing *Petitioner Nationwide Mutual Insurance Company's Reply to the Consolidated Response of Plaintiffs Below to State Farm's Writ of Prohibition and Nationwide's Appeal* upon counsel of record this 18th day of September, 2012 by depositing true copies in the United States mail, postage prepaid, addressed as follows:

David J. Romano, Esq.
Romano Law Office
363 Washington Avenue
Clarksburg, WV 26301
romanolaw@wvdsi.net

Matthew J. Perry, Esq.
Lamp O'Dell Bartrum Levy Trautwein & Perry
P. O. Box 2488
Huntington, WV 25725-2488
mjp@lampodell.com

April J. Wheeler, Esq.
Nationwide Trial Division
53 Fourteenth Street, Ste. 602
Wheeling, WV 26003
whelea5@nationwide.com

Denise D. Pentino, Esq.
Dinsmore & Shohl, LLP
2100 Market Street
Wheeling, WV 26003
denise.pentino@dinslaw.com

Charles S. Piccirillo, Esq.
Shaffer & Shaffer, PLLC
P. O. Box 38
Madison, WV 25310
cpiccirillo@shafferlaw.net

David E. Goddard, Esq.
Goddard Law
333 E. Main Street
Clarksburg, WV 26301
dave@goddardlawwv.com

Laura Foggan, Esq.
Wiley Rein, LLP
1776 K Street, NW
Washington, DC 20006
lfoggan@wileyrein.com

Allison S. McClure, Esq.
McNeer Highland McMunn & Varner
BB&T Bank Building
P. O. Drawer 2040
Clarksburg, WV 26302-2040
asmcclure@wvlawyers.com

M. Winiesdorffer-Schirripa, Esq.
Nationwide Trial Division
53 Fourteenth Street, Ste. 602
Wheeling, WV 26003
schirrm@nationwide.com



Tammy R. Harvey (WV Bar #6904)