

Nos. 12-0304 and 12-0210



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

No. 12-0304

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

Petitioner,

v.

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

Respondents.

No. 12-0210

NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

v.

CARMELLA J. FARIS and ROBERT FARIS,

Respondents.

REPLY BRIEF OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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Petitioner State Farm Mutual Automobile Insurance Company (“State Farm”) respectfully submits this reply brief, seeking issuance of a writ of prohibition to the Circuit Court of Harrison County.

ARGUMENT

I. INTRODUCTION.

In a brief filed twenty-five days late, Respondent Matthew Huggins accuses State Farm of “hypocrisy,” “insensitivity,” “hyperbole,” “poppycock,” “audacity,” “obtuse[ness],” “flim flamm[ing],” “not [being] candid,” “misrepresentation,” and “play[ing] a shell game.” Resp’t Br. 15, 16, 17, 24, 33, 35, 36, 37. Amicus Curiae National Insurance Crime Bureau, in turn, is “only trying to justify its existence and receipt of money from the insurance industry.” *Id.* 39. Even the Insurance Commissioner of West Virginia does not emerge unscathed; its amicus brief is “superficial,” “ill conceived,” and “without substance,” and the office of the Commissioner itself is often “closely aligned with the insurance industry.” *Id.* 20 & n.18, 22.

Nowhere in his submission, however, does Huggins explain why the Protective Order’s “return-or-destroy” provision and use restrictions are supported by good cause under Rule 26(c). In fact, he openly disavows any obligation to show good cause. In Huggins’s view, “[a] protective order is proper *any time* confidential medical records are being provided in litigation, *without any additional showing of good cause, ...*” *Id.* 41 (emphasis added). West Virginia law, however, demands that good cause be shown by “particular and specific facts” to support the restrictions of a protective order. *See State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell,*

228 W. Va. 252, 719 S.E.2d 722, 731 (2011) (“*Bedell II*”). And while Huggins may have a general interest in the privacy of his medical information, he has never shown that the added restrictions of the protective order he proposed are needed to supplement the existing law governing insurer handling of medical records. Instead, remarkably, he has opted to *challenge* West Virginia’s existing privacy regulations. Resp’t Br. 29-33.

Not only has Huggins refused to show—or even contend—that specific harm will result in the absence of the Protective Order’s onerous restrictions, he further asserts that the resulting burdens on the insurance system “are just not cognizable[] or worthy of any consideration.” Resp’t Br. 12. These burdens are profound, however, and the circuit court’s failure to account for them provides an independent basis for issuing the writ. To fulfill its duties, State Farm must access and analyze confidential information about insured claims, including information about Huggins’s medical condition to evaluate his claim. Cognizant of the need for oversight of insurers handling confidential personal information, the West Virginia Legislature has charged the West Virginia Insurance Commissioner with responsibility for regulating insurers in the State, consistent with applicable law. One specific area the Commissioner has addressed is the need to protect consumer and claimant interests in privacy while recognizing that, to process claims and for other important insurance functions, insurers must have access to and use confidential medical information. Using its expertise to balance the interests of claimants, consumers, insurers, and the public, the Commissioner has issued detailed regulations governing insurer retention and use of confidential medical information. *E.g.*, W. Va. C.S.R. §§ 114-57-15.1, -15.2.

Both Huggins and, implicitly, the court below have dismissed the importance of West Virginia’s detailed regulatory scheme governing insurer access to and use of confidential

medical information. In its place, they have sought to impose a new set of rules on State Farm's handling of Huggins's medical information through the application of a legally defective protective order. By improperly applying the Protective Order's terms to override the existing insurance regulatory system and dictate how and when State Farm can access and use Huggins's medical records, the court below erred substantially. If permitted to stand without amendment, either in this case or as potentially followed by other courts, the Protective Order will have serious adverse consequences for State Farm and, more broadly, for insurers and the citizens of West Virginia generally.

Huggins and the court below have disregarded the requirement that a party show good cause for restrictions in a protective order by demonstrating that specific harm will otherwise result. Under the West Virginia insurance regulations, insurers cannot disclose nonpublic personal health information about a claimant without the individual's authorization, unless a specific exemption for the performance of insurance functions applies. None of the exemptions under the West Virginia regulations allows for the sort of widespread dissemination of identifiable medical information that concerns Huggins. Indeed, Huggins does not argue otherwise, contending only that he might be harmed if State Farm *violated* West Virginia's regulations. Resp't Br. 22.

This Court has made clear that a protective order that conflicts with existing insurance regulations cannot stand. *State ex rel. State Farm Mut. Auto Ins. Co. v. Bedell*, 226 W. Va. 138, 145-46, 697 S.E.2d 730, 737-38 (2010). Yet this Protective Order is in conflict with the letter and spirit of West Virginia's insurance regulations. The restriction permitting use of Huggins's medical records only for this litigation squarely contradicts West Virginia law allowing use for specified insurance functions beyond a claim in litigation. For example, the Order impedes State

Farm's fraud-fighting efforts, which require analyzing patterns of medical treatment and expense across both fraudulent and non-fraudulent claims. The Order's return-or-destroy provision also affects State Farm's business operations by limiting the company's ability to make use of electronic databases and claim files containing medical information. These impediments, however, are wholly unnecessary to protect Huggins's interests. The Commissioner of Insurance has adopted privacy rules that permit an insurer to use claimant medical information for legitimate insurance functions, while at the same time requiring insurers to maintain the confidentiality of the claimant's nonpublic personal health information. Where the Legislature has delegated complex policymaking authority to an agency with special expertise and rule-making powers, there should be a strong presumption against imposing conditions on regulated businesses that contradict or undermine existing laws and regulations.

The court below did not amend the Protective Order to avoid burdens on State Farm and the insurance system generally. It could have alleviated these burdens by including a simple exception for uses authorized or required under state and federal law, but it refused State Farm's requests that it do so. *See App. at 150-51, 241.*

II. THE CIRCUIT COURT SHOULD HAVE VACATED THE PROTECTIVE ORDER FOR LACK OF SPECIFIC HARM.

By failing to require Huggins to show particularized harm, the circuit court substantially abused its discretion. It is well-established that a party seeking particular restrictions in a protective order must show a "clearly defined and serious injury" that would result without them. But the circuit court did not apply that legal standard, entering and later upholding the Protective Order without regard to the absence of any identifiable risk of harm and without adopting a proviso that would have avoided the unnecessary additional restrictions on State Farm.

A. Huggins Openly Fails To Rehabilitate the Lack of Specific Harm.

Huggins all but acknowledges that he cannot establish good cause with any particularity. Instead, he maintains, “[a] protective order is proper *any time* confidential medical records are being provided in litigation, *without any additional showing of good cause.*” Resp’t Br. 41 (emphasis added).

This is not the law. This Court has repeatedly held that the party seeking a protective order must establish good cause with “particular and specific facts.” *Bedell II*, 228 W. Va. 252, 719 S.E.2d at 731. “[S]tereotyped and conclusory statements” are not enough. *Id.* (quoting *State ex rel. Shroades v. Henry*, 187 W. Va. 723, 728, 421 S.E.2d 264, 269 (1992)). Nonetheless, Huggins offers only generalized conclusions, asserting that *all* medical records and information are “inherently private and personal” and that this generalized “penumbra” of privacy interests “is sufficient without more to” support a protective order in all circumstances. Resp’t Br. 8, 17; *see also, e.g., id.* 1-2 (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)), 3, 7, 12. But “[a] protective order will not be freely given simply because a party possesses a protected interest in the information sought to be discovered.” *Bedell II*, 228 W. Va. 252, 719 S.E.2d at 731. “Judges,” in fact, “must guard against any notion that the issuance of protective orders is routine, let alone automatic.” 8A Alan Wright, et al., *Federal Practice & Procedure*, § 2035 (3d ed. 2010) (citation omitted). An interest in avoiding disclosure of personal matters does not justify the exceptional remedy of a protective order that overturns West Virginia insurance regulations carefully crafted to balance privacy interests with the needs of West Virginia’s insurance system.¹

¹ Huggins persistently characterizes his generalized privacy interest as “constitutional,” but this talisman does not excuse him from showing good cause under Rule 26(c). *See, e.g.,* Resp’t Br.

B. Huggins Does Not Explain Why Existing Legal Protections Do Not Safeguard His Medical Records and Information.

Huggins takes issue with the existing legal protections governing insurer use of medical information, even going so far as to urge this Court to invalidate West Virginia’s privacy regulations wholesale. *See* Resp’t Br. 29-33. At no point, however, does he explain why these existing laws do not protect his medical records and information, except to assert that the laws are “vague”—they are not—and to speculate that insurers might violate them.

As noted, West Virginia law provides insurance claimants significant protection over their information. West Virginia law requires State Farm to “implement a comprehensive written information security program,” W. Va. C.S.R. § 114-62-3.1, and the default rule under West Virginia law is that insurers may not disclose a claimant’s nonpublic personal health information without the individual’s authorization, W. Va. C.S.R. § 114-57-15.1. Though there are exceptions to that rule, they allow only limited disclosures made to support insurance functions. The exceptions permit insurers to use nonpublic personal health information for specific insurance functions, such as: to administer claims; to investigate and prosecute fraud; to

7-8, 12, 17. The good-cause standard itself strikes a balance between parties’ competing informational interests by requiring the party seeking a protective order to show that his interests would be specifically harmed absent protection and that the harm to those interests outweighs the harms that such an order would impose on other parties. *See generally Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n.21 (1984) (interpreting corresponding Fed. R. Civ. P. 26(c) and remarking, “[a]lthough the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule”). Failure to apply the good-cause standard, in fact, implicates the constitutional rights of other interested parties, since “first amendment scrutiny of protective orders ‘must be made within the framework of Rule 26(c)’s requirement of good cause.” *Public Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 788 (1st Cir. 1988) (citation omitted); *see also Seattle Times Co.*, 467 U.S. at 37.

provide a basis for ratemaking; to pursue appropriate reinsurance; and for actuarial, scientific, medical, and public policy research. W. Va. C.S.R. § 114-57-15.2.²

In spite of the West Virginia privacy regulations governing State Farm, Huggins insists that his proposed Protective Order's use and retention restrictions are needed to rein in State Farm's "unfettered use" and "routine dissemination to strangers" of his medical information. *See* Resp't Br. 12, 16. In the same breath, however, he *concedes* that "§§ 15.1 and 15.2 [of the privacy regulations] cannot be interpreted to permit State Farm to use and disseminate [his personal identifiable health information] to whomever it may desire." *Id.* 42. And in this he is correct. Under existing law, State Farm may not lawfully engage in "unfettered use" of Huggins's medical information. Nor may it "routine[ly] disseminat[e]" that information. Rather, State Farm is bound to maintain the confidentiality of claimant medical information and may make limited disclosures only for specific insurance functions.³ Conspicuously, Huggins

² Huggins asserts in passing that the State's privacy regulations do not protect third-party claimants, although he concedes that his relationship with State Farm is covered by the regulations. Resp't Br. 42. State Farm nonetheless notes that the National Association of Insurance Commissioners ("NAIC")—whose Privacy of Consumer Financial and Health Information Model Regulation forms the basis for West Virginia's privacy regulations—openly contemplates protection for insured "consumers" and third-party "claimants" alike. *See, e.g.*, Testimony of Kathleen Sebelius, Chair of NAIC's Privacy Issues Working Group (Sept. 28, 2000) ("[A]ll individuals who use insurance products or services primarily for personal, family or household purposes—including claimants and beneficiaries—should receive the same privacy protections as traditional consumers who have direct relationships with licensees."), *available at* http://lobby.la.psu.edu/018_Personal_Medical_Privacy/Organizational_Statements/NAIC/NAIC_consumer_privacy_092800.doc; NAIC White Papers: NAIC Privacy of Consumer Financial and Health Information Model Regulation, Frequently Asked Questions, 2001 WL 34898563 (Jan. 2001) ("Insurers are required to get the consent of claimants prior to disclosing nonpublic personal health information to any other party (except when information is shared pursuant to one or more of the exceptions set out in the regulation).").

³ In this regard, Huggins attacks a straw man in his extended rebuttal of what he perceives to be the Insurance Commissioner's position that W. Va. C.S.R. § 114-57-15.2 "do[es] not restrict in any manner[] the use, dissemination or retention[] of an individual's personal identifiable health

points to no identifiable harm that will result from State Farm's compliance with these regulations or from State Farm's use or retention of medical information in furtherance of the insurance functions listed in W. Va. C.S.R. § 114-57-15.2. Instead, he complains that the regulatory exceptions are "vague" and that insurers allegedly can "do whatever they want with ... personal health records" by shoehorning unlawful activity into those exceptions. Resp't Br. 22.

This reasoning cannot sustain itself. To restate Huggins's argument, even though State Farm's use and retention of his medical information in accord with existing regulations causes no identifiable harm, the Protective Order is needed because State Farm might violate those existing laws. But the Court cannot simply assume that a party will disobey the law, *cf. E.I. du Pont de Nemours & Co. v. Finklea*, 442 F. Supp. 821, 825 (S.D. W. Va. 1977), particularly where, as here, no showing has been made of misuse of either the West Virginia privacy regulations or the similar regulatory schemes in numerous other states as vehicles for disseminating claimant information.⁴ On top of that, Huggins has not even backed up his perfunctory assertion that the regulatory exceptions are "vague" in the first place. "Condemned to the use of words, we can

information." Resp't Br. 21; *see generally id.* 20-29. State Farm has not advanced this position—which is manifestly at odds with the text of the regulation—and the Commissioner's amicus brief does not appear to make any such argument either. Indeed, it is precisely because W. Va. C.S.R. § 114-57-15 *does* restrict the disclosure of personal health information that the Protective Order's terms are not needed to protect Huggins from "annoyance, embarrassment, oppression, or undue burden or expense." W. Va. R. Civ. P. 26(c).

⁴ As noted *supra* note 2, the NAIC Privacy of Consumer Financial and Health Information Model Regulation is the basis for West Virginia's privacy regulation and the regulations of many other states. *See* Glennon J. Karr, Federation of Regulatory Counsel, Inc., *The Regulation of Health Information Privacy—HIPAA and Other Relevant Laws and Legal Actions—The Impact on Insurance Agents*, 14:2 FORC Journal (Summer 2003) ("The NAIC 'Privacy of Consumer Financial and Health Information Regulation' has been adopted by thirty-eight states in various forms.").

never expect mathematical certainty from our language” and “it is clear what the [privacy regulation] as a whole prohibits.” *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Not only do the terms of the privacy regulations set forth a default rule prohibiting unauthorized disclosure of medical information, *see* W. Va. C.S.R. §§ 114-57-1.2, -15.1, the regulations’ drafters have openly said as much. As the Chair of the National Association of Insurance Commissioners’ (“NAIC”) Privacy Issues Working Group explained, “[t]he regulation requires the consumer’s consent prior to any disclosure of protected health information ... , but provides numerous specific exceptions to the general rule to allow insurers to carry on their day-to-day business operations.” Testimony of Kathleen Sebelius, Chair of the NAIC Privacy Issues Working Group (Sept. 28, 2000) (hereinafter “Sebelius Testimony”), *supra* Note 2.

In short, Huggins has failed to show or even allege that the regulatory scheme in force in West Virginia does not protect his interest in the confidentiality of his medical records. As a review of the existing legal protections makes clear, the Protective Order is a solution to a problem that does not exist.⁵

III. THE CIRCUIT COURT SHOULD HAVE VACATED THE PROTECTIVE ORDER BECAUSE IT INTERFERES WITH STATE FARM’S RIGHTS AND OBLIGATIONS UNDER LAW AND WITH ITS BUSINESS NEEDS.

Another, independent reason for granting the writ is that the Protective Order unduly burdens State Farm and the insurance system generally. The Protective Order, particularly its “return or destroy” requirement and limitation on use of medical information to this litigation:

⁵ Huggins raises for the first time on appeal a concern that the Protective Order is needed to prevent State Farm employees themselves from accessing his medical information without authorization. Although Huggins did not raise this issue before the circuit court, State Farm notes that the company Code of Conduct provides that “[a]ccess and distribution of information must be limited to those who have a need to know.” App. at 256. In any event, the risk of internal dissemination is largely beside the point because the Protective Order itself makes no distinction between State Farm and any of its “agents and employees.” App. at 1.

(1) prohibits State Farm from performing insurance functions expressly authorized under West Virginia law; (2) impedes State Farm's compliance with regulatory obligations under West Virginia law; (3) conflicts with the laws of other states that govern State Farm's operations; (4) impairs State Farm's compliance with obligations under the federal Medicare program; (5) impedes State Farm's compliance with other court orders or rules, such as document preservation requirements; and (6) interferes with State Farm's need to retain medical information for its business operations. The Order effectively nullifies regulations issued both by the West Virginia Insurance Commissioner and by other state insurance agencies, and it second-guesses their expert judgment about the importance of claims information to the insurance system. Even if Huggins had shown a clearly defined potential injury, it would have been outweighed by the burdens on State Farm imposed by prohibiting use of medical records for insurance functions authorized and required by law.

In keeping with his refusal to identify any specific injury to support the Protective Order's retention and use restrictions, *see supra* Section II.A, Huggins likewise refuses to even acknowledge the numerous burdens that the Protective Order will impose on insurers. In his view, these burdens on insurers and the insurance system "are just not cognizable[] or worthy of any consideration." Resp't Br. 12. "[I]t makes no difference whether these insurance carriers' business model is affected or not," Huggins continues. *Id.* But these assertions are flatly contradicted by the good-cause standard, which requires courts to "balance the various interests of the parties ... in the design of the protective order." Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 Harv. L. Rev. 1085, 1087 (1981); *cf. State ex rel. Brooks v. Zakaib*, 216 W. Va. 600, 608, 609 S.E.2d 861, 869 (2004) (Starcher, J., concurring) ("[I]n deciding whether 'good cause' exists for a protective order concealing information under Rule

26(c), courts should balance the requesting party's need for the information against the possible injury accompanying the information's public dissemination." Yet again, Huggins abdicates his duty to justify the Protective Order's terms.

And the burdens, detailed in State Farm's petition, are weighty. Huggins offers little more than a conclusory citation to a magistrate judge's memorandum opinion, *Small v. Ramsey*, 280 F.R.D. 264 (N.D. W. Va. 2012), in response to concerns about the Order's conflicts with insurer obligations under the federal Medicare program. Resp't Br. 47. He also places great weight on the fact that he is not a beneficiary of government medical benefits. It is irrelevant, however, that Huggins is not himself a Medicare beneficiary. The effect of the Protective Order extends beyond this single claim because it dictates how State Farm can manage and use medical information, even for lawful purposes that pose no risk to confidentiality. Modern businesses use relational databases to house information relied upon by other systems for permitted functions, such as Medicare compliance. But the Order below so stifles the flow of information within State Farm that it could impair State Farm's business systems. *See* State Farm Pet. 23-26; *see also* Affidavit of Nestor Gutierrez, Oct. 17, 2011, at ¶ 8, attached as Ex. B to State Farm's Supplemental Mem. Concerning Medical Protective Orders, App. at 282. If this Court upholds the Protective Order, moreover, it may be urged upon other courts throughout this State and applied in cases that do involve Medicare beneficiaries. The Protective Order unnecessarily frustrates State Farm's and other West Virginia insurers' ability to comply with Medicare reporting obligations. If protective orders like this one are left in place, insurers would be left with the tremendous burden of seeking an exception for Medicare purposes on a case-by-case basis and developing a new system for managing the extensive medical information required for Medicare reporting.

Huggins likewise does not meaningfully address the Protective Order's conflict with other court orders or rules except to characterize State Farm's concerns as "speculative" and an "off-the-wall position." Resp't Br. 47. Huggins asserts that "[u]nder such a theory, no record received by an insurance carrier ... would []ever be subject to return or destruction" *Id.* This sweeping rebuttal ignores the routine requirements of litigation holds on document destruction given State Farm's litigation docket, and it pointedly fails to explain how Huggins would suffer "annoyance, embarrassment, oppression, or undue burden or expense" if State Farm maintains its claims information in compliance with West Virginia's privacy regulations.

Huggins also does not seriously contest that the Order conflicts with laws outside of West Virginia. *Id.* 48. Instead, Huggins suggests that weighing this burden would somehow subordinate West Virginia's sovereignty to that of other states, *id.* 6 n.7, 48-49. State Farm has not pointed to the conflicts with other states' laws to suggest that West Virginia law is preempted by, for example, Illinois's insurance regulations. But the conflicting directives undisputedly put State Farm "between a rock and a hard place," *Bedell II*, 228 W. Va. 252, 719 S.E.2d at 746 (Benjamin, J., dissenting), and this onerous consequence outweighs the unidentified harms allegedly guarded against by the Protective Order's use and retention restrictions.

Finally, Huggins disputes that the Protective Order conflicts with State Farm's fraud-fighting efforts. The use of medical claims information for fraud investigation and prosecution is one of the most important uses authorized by the Division of Insurance. *See* W. Va. C.S.R. § 114-57-15.2. In fact, recognizing the significance of combating insurance fraud, the West Virginia Legislature *mandates* that insurers report suspected fraudulent activity. *See* W. Va. Code § 33-41-5(a); W. Va. C.S.R. § 114-71-3.1 ("All persons identified in W. Va. Code § 33-41-5(a) shall report in writing all suspected fraudulent insurance acts to the Insurance Fraud Unit.").

Huggins asserts in conclusory fashion that “an insurance carrier does not need to retain medical information indefinitely or to be able to disseminate such information at its own will and pleasure in order to fight fraud.” Resp’t Br. 43. But this vastly mischaracterizes State Farm’s use of claims information, which does not involve the sort of public dissemination that protective orders typically target. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984) (“There is an opportunity, therefore, for litigants to obtain . . . information that . . . if *publicly released* could be damaging to reputation and privacy.”) (emphasis added). As discussed in State Farm’s petition, the Commissioner has emphasized that “[r]ecord retention is . . . an important tool in detecting fraudulent insurance claims” and that “[c]onsistent maintenance of essential claim records of insurers is crucial to a comprehensive investigation of potentially fraudulent claims.” App. at 340; *see also Bedell II*, 228 W. Va. 252, 719 S.E.2d at 744 (Ketchum, J., dissenting) (“[T]he insurance industry should be allowed to hold down costs by maintaining data banks of medical records to identify malingerers and cheaters and double-dippers.”). Furthermore, insurance fraud is not committed only by individual claimants, but often involves sophisticated criminal schemes made up of clinics and health care providers. *See, e.g., Affidavit of Goldie C. Rhodes*, July 26, 2011, at ¶ 4, attached as Ex. B to State Farm’s Resp. & Joinder to Nationwide’s Supplemental Mem. of Law, App. at 246. Fraud detection therefore requires analyzing and comparing hundreds and thousands of claims for patterns that may reveal fraud. Insurers must be able to retain and use non-fraudulent records as a standard against which to measure overcharges and abuses, and protective orders, like this one, that suppress critical pieces of information subvert that standard.

IV. THE PROTECTIVE ORDER RAISES SERIOUS CONSTITUTIONAL QUESTIONS.

Unless it is amended, the Protective Order also violates State Farm's constitutional rights. In particular, the Protective Order violates State Farm's First Amendment rights by imposing on State Farm restrictions above and beyond existing regulatory requirements governing insurer use of confidential information. The additional restrictions of the Protective Order are not "necessary or essential" to "an important or substantial governmental interest." *Seattle Times Co.*, 467 U.S. at 31 (citation omitted). Although the government has a legitimate interest in protecting Huggins's privacy, the Commissioner of Insurance has fully addressed that issue in regulating insurer handling of nonpublic medical information. Huggins even appears to embrace the Order's constitutional infirmities by disclaiming any obligation to establish good cause. *See supra* Section II.A; *see also Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986) ("[T]he first amendment test [is] the good cause inquiry found in Rule 26(c)."); *Seattle Times Co.*, 467 U.S. at 37. Moreover, by conflicting with existing laws in West Virginia and elsewhere, the Order raises constitutional concerns under the Full Faith and Credit Clause and the Due Process Clause.

Huggins contends that the Order does not violate the First Amendment because his medical information would be obtained through the discovery process. According to Huggins, "[s]uch does not bootstrap the received information by cloaking it with First Amendment protection." Resp't Br. 49. This narrow view of the First Amendment's protection does not, however, comport with the case law. Although the Supreme Court has explained that protective orders restricting the disclosure of information obtained independently warrant greater First Amendment scrutiny, it has never limited First Amendment scrutiny to those circumstances.

Indeed, as noted, the Supreme Court has suggested that a protective order entered without good cause, as here, may violate the First Amendment. *See Seattle Times Co.*, 467 U.S. at 37.

Huggins also asserts that State Farm is not “even entitled to a copy of a litigant[']s confidential medical records, as in most instances, [insurers] are not parties to the litigation and receive such information only because they insure one of the parties.” Resp’t Br. 49. Of course, State Farm is a party to this litigation. And more importantly, State Farm has a contractual right to Huggins’s medical information *outside* of the discovery process. Huggins’s Policy, which constitutes a contract between him and State Farm, requires that he “must ... provide written authorization for [State Farm] to obtain ... medical bills [and] medical records.” App. at 331. In addition, the Policy imposes a standard duty of cooperation, which includes a duty to “assist” State Farm in “securing and giving evidence.” App. at 330. For this reason also, the Protective Order’s “[r]estrict[i]ons on] the dissemination of ... information ... gained from ... sources” other than pretrial discovery raise serious questions under the First Amendment. *See Seattle Times Co.*, 467 U.S. at 37.

Moreover, Huggins’s position misapprehends the role of insurers in West Virginia’s tort compensation system. Automobile liability claims, especially in jurisdictions like West Virginia that mandate the purchase of automobile liability insurance, squarely implicate the interests and obligations of insurers. *See W. Va. Code* § 17D-4-2. Some percentage of automobile accidents will inevitably be litigated, and in each such case the interests of an insurer will be at stake. Insurers must investigate claims presented through litigation, just as they must investigate any other claim. They require access to the claimants’ nonpublic medical information. And they are subject to all the same legal rights and duties relating to claims-handling; the Commissioner’s regulations do not treat claims arising in litigation any differently from other claims.

As a result, to the extent it does not accommodate an insurer's interests, a protective order in litigation can interfere with the insurance system. By restricting the flow of a plaintiff-claimant's information to insurers, a protective order can create significant conflicts with an insurer's obligations under state and federal law and also seriously disrupt its business practices. This Protective Order does all of that.

V. **HUGGINS'S INVITATION TO INVALIDATE THE ENTIRE PRIVACY REGULATION IS DIVORCED FROM THIS CASE.**

For reasons known only to himself, Huggins also urges this Court to rewrite W. Va. C.S.R. § 114-57-15.2 by inserting a blanket prohibition on "excessive dissemination [of medical information] internally and ... to strangers" and requiring the return or destruction of all medical information within the five-year period "established" by *Bedell II*. Resp't Br. 22, 28. Failing that, Huggins invites the Court to void the privacy regulation in its entirety under W. Va. Const. art. IV, § 30. *Id.* 29-33, 59.

Putting to one side that Huggins lacks standing to challenge the constitutionality of the State's privacy regulations, *see generally Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94-95, 576 S.E.2d 807, 821-22 (2002), this Court cannot import Huggins's policy preferences into the West Virginia Privacy of Consumer Financial and Health Information Rule. As a starting point, the validity of West Virginia's privacy regulations is not at issue here. State Farm's position is that the circuit court wrongfully refused to vacate or modify the Protective Order, in large part because the West Virginia privacy regulations already protect Huggins's interest in the confidentiality of his medical information. Huggins has not contested State Farm's position beyond speculating that insurers might break the law. *See supra* Section II.B. In short, his new effort to redraft or strike down the regulations is untethered in every respect

from the question before this Court—whether the Protective Order entered in *Huggins v. Woodward Video LLC*, No. 10-c-176-1 (W. Va. Cir. Ct., Harrison Cnty. 2010), was supported by good cause under Rule 26(c).

Huggins’s arguments nonetheless illustrate a fundamental problem posed by protective orders like the ones at issue here. At the core of his theory, Huggins seeks to substitute judicial policy judgments made in litigation for the uniform standards and judgments of the Insurance Commissioner. The courts are plainly ill-equipped to make these types of policy determinations, whether by redrafting the privacy regulations wholesale or by entering *ad hoc* protective orders that chip away at those regulations on a case-by-case basis. In either circumstance, by undermining regulatory schemes based on nothing more than penumbras and other “stereotyped and conclusory statements,” *see Bedell II*, 228 W. Va. 252, 719 S.E.2d at 731, courts fail to defer properly “to the expertise presumed to be inherent in an administrative agency created to deal with such complex issues,” *see Modi v. W. Va. Bd. of Med.*, 195 W. Va. 230, 242, 465 S.E.2d 230, 243 (1995). With substantive expertise and day-to-day involvement in a particular industry, agencies are far better positioned than individual judges to weigh competing policies and make rules that will impact businesses and consumers throughout the State.

The federal magistrate judge’s treatment of this issue in *Small v. Ramsey*—on which Huggins and his supporting amicus rely heavily—highlights the danger of upsetting the balance achieved by agencies in this field.⁶ The court in *Small* acknowledged the extensive insurance

⁶ The district court denied without prejudice the insurers’ motion for reconsideration of its order overruling the objections to the magistrate judge’s order, so the ruling on which Huggins relies is subject to further reconsideration. *See Small v. Ramsey*, No. 1:10-cv-00121, Summary Order Following Hearing (June 13, 2012) (attached as Ex. A). In addition, courts in other jurisdictions have encountered the same issues raised here and have adopted protective orders specifically allowing insurers to use and retain claimants’ medical records and information in accordance

and privacy regulations in West Virginia and other states but summarily held them “not adequate” to protect a claimant’s generalized “right to privacy with respect to his or her medical records.” 280 F.R.D. at 275. And to the extent the protective order entered in *Small* conflicted with state law and hampered critical insurance functions like fighting fraud, the court stated that it would retain a sealed digital copy of the records and the insurers could either seek further modification of the protective order in the future or “with proper notice to [the claimant], ... request an order from th[e] Court for use of the records.” *Id.* at 277, 280. But it simply is not realistic to expect courts to be a repository for storing records for potential future use or to expect insurers like State Farm—which processes more than 30,000 claims per day—to revisit the courts on a claim-by-claim basis in perpetuity to “carry on their day-to-day business operations.” Sebelius Testimony, *supra*. Insurers need the flexibility to have each case processed through the same automated systems to enable timely and cost-effective handling of claims. The corresponding burden on the court system would be equally onerous and would, in practical terms, transform the courts into storehouses for medical information in a wide array of personal injury suits. In short, it is emphatically *not* the province of trial judges in individual cases to second-guess the careful regulatory balance struck between the interests of claimants, consumers, insurers, and the public.⁷ At the very least, good cause must be shown by “particular

with their regular business practices and in accordance with applicable laws, statutes, and regulations governing the retention and destruction of claim files. *See Confidentiality/Protective Order, Harvey v. State Farm Mut. Auto. Ins. Co.*, No. 11-cv-00467 (D. Colo. Mar. 15, 2012) (attached as Exhibit B).

⁷ As Commissioner Sebelius explained, “the privacy issue is very complex, with many competing interests and concerns across the spectrum of interested parties.” Sebelius Testimony, *supra*. For this reason, the drafters of the NAIC Model Privacy Rule “evaluat[ed] the many comment letters from consumers, industry and others” as part of the drafting process. *Id.*

and specific facts” to support terms in a protective order that deviate from the Insurance Commissioner’s comprehensive regulations. *See Bedell II*, 228 W. Va. 252, 719 S.E.2d at 731.

VI. THE CIRCUIT COURT ABUSED ITS DISCRETION BY BELATEDLY CITING THE “LAW OF THE CASE” DOCTRINE IN REFUSING TO VACATE THE PROTECTIVE ORDER.

Although Huggins has abandoned this theory on appeal, the circuit court’s January 13 order suggested that vacation of the Protective Order was precluded on law-of-the-case grounds. As invoked by the circuit court, the law-of-the-case rule may permit a trial court to decline to revisit its own previous decisions in certain circumstances. *See Wiley v. Proctor*, No. 5:10-cv-85, 2011 WL 3648087, at *4 (N.D. W. Va. Aug. 18, 2011). A trial court’s refusal to reconsider an interlocutory order on law-of-the-case grounds is reviewed for abuse of discretion. *Am. Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505, 516 (4th Cir. 2003); *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Librand, LLP*, 322 F.3d 147, 166-68 (2d Cir. 2003).⁸ The standard for issuing a writ of prohibition is at least the same as (and likely higher than) the standard for reversing the circuit court’s refusal to reconsider the Protective Order on law-of-the-case grounds. This Court, for example, has held that “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.” *Bedell II*, 228 W. Va. 252, 719 S.E.2d at 728. In the context of discovery rulings, as here, “[a] writ of prohibition is available [only] to correct a clear legal error resulting from a trial court’s substantial abuse of its discretion.” *Id.* at 729. Thus, if this Court agrees with State Farm that a writ of prohibition

⁸ Although this Court does not appear to have addressed the issue, it has suggested that a circuit court *always* has the authority to revisit nonfinal orders. *See Caldwell v. Caldwell*, 117 W. Va. 61, 64, 350 S.E.2d 688, 691 (1986).

should issue, the Court necessarily will have determined that the circuit court erred in refusing to reconsider the Protective Order on law-of-the-case grounds.⁹

CONCLUSION

For the foregoing reasons and the reasons stated in its petition, State Farm respectfully requests that this Court grant the writ of prohibition to the Circuit Court of Harrison County, West Virginia. This Court should hold invalid the requirements that State Farm use medical records solely for purposes of this litigation and return or destroy such records within six years after the conclusion of this litigation because these requirements are not supported by good cause and are at odds with W. Va. C.S.R. §§ 114-57-15.1, 15.2

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⁹ In addition, one month before the January 13 order, the circuit court entered two orders in *Huggins* resolving on the merits all of State Farm's requests for relief with respect to the Protective Order. It denied State Farm's motion for a stay in its December 6, 2011 order. App. at 7. And in a "catch-all" order the following day, the court expressly "denie[d] all motions of State Farm to stay enforcement or modify" the protective order. App. at 13. Hence, when the court purported to rule in January that State Farm's arguments were barred by the law-of-the-case rule, there was nothing left to decide.

STATE FARM CERTIFICATE OF SERVICE

I, Denise D. Pentino, counsel for the Petitioner, State Farm Mutual Automobile Insurance Company, hereby certify that I served a true copy of the foregoing Reply Brief upon the following individuals, via regular U.S. mail, postage prepaid, on this the 17th day of September, 2012:

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

TOBBY LYNN SMALL,

Plaintiff,

v.

// CIVIL ACTION NO. 1:10CV121
(Judge Keeley)

JAMES R. RAMSEY, et al.,

Defendants.

SUMMARY ORDER FOLLOWING HEARING

For the reasons stated on the record during the hearing held on June 12, 2012, the Court:

1. DENIES WITHOUT PREJUDICE the motions for reconsideration filed by the defendant State Farm Mutual Auto Ins. Co. and the intervenor Nationwide Ins. Co. of America (dkt. nos. 378, 379); and
2. DENIES AS MOOT the motion to strike filed by the defendants Jack B. Kelly Inc., Willie McNeal, and Amerigas Propane, Inc. (dkt. no. 388) pursuant to the parties' agreed resolution of this issue (dkt. no. 389).

It is so ORDERED.

The Court directs the Clerk to transmit copies of this Order to counsel of record.

DATED: June 13, 2012.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE

Exhibit B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 11-cv-00467-LTB-KLM

MATTHEW HARVEY,
Plaintiff

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. and, JOHN C. WALLACE,
Defendants

CONFIDENTIALITY/PROTECTIVE ORDER

THE COURT DOES HEREBY ORDER this Protective Order shall apply to plaintiff's medical records, employment records, and tax records that are private, confidential, and/or privileged, and that are disclosed by plaintiff to Mr. Wallace for purposes of this litigation.

IT IS FURTHER ORDERED THAT:

1. Any records voluntarily disclosed to Mr. Wallace's insurer before the commencement of this litigation are not subject to the terms of this stipulation.
2. Plaintiff's medical records, employment records, and tax records (the "Records") that are disclosed during this litigation and are the subject of this stipulation are to be labeled, marked, or designated with a "CONFIDENTIAL" stamp. The Records are to be used only in this litigation or related litigation, such as an appeal. Mr. Wallace, his defense counsel, and his insurer will not use the Records for any purpose not related to this litigation and will not disclose any of the Records to the public.
3. The Records may be utilized by Mr. Wallace, his defense, and his insurer to evaluate plaintiff's claims and to prepare a defense in this litigation. For these purposes, the

Records may be disclosed without plaintiff's prior authorization or approval to the following third parties:

- a. attorneys actively working on or supervising the work on this case, including their employees and associates;
- b. representatives of any insurer providing a defense in this litigation;
- c. any parties and their designated representatives;
- d. expert witnesses and consultants retained in connection with this litigation;
- e. the Court and its employees;
- f. stenographic reporters;
- g. deponents and witnesses; and
- h. other persons by written agreement of the parties.

4. Before disclosing the Records to any third party, a copy of this Protective Order shall be provided and the third party will agree in writing to destroy any of the Records received at the conclusion of litigation.

5. Absent any court order to the contrary, at the conclusion of this litigation, any copies of the Records shall be destroyed, except that defense counsel and Mr. Wallace's insurer may maintain records in accordance with their regular business practices for maintenance and destruction of files and records and in accordance with applicable laws, statutes, and regulations governing the maintenance and destruction of client files and insurance records. This Protective Order is not intended to impose on defense counsel and/or Mr. Wallace's insurer any obligation with respect to record keeping that is more burdensome than that imposed by currently existing, applicable laws, statutes, and regulations.

6. After this litigation is concluded, while the Records are maintained by defense counsel and Mr. Wallace's insurer, they shall not be disclosed to any third parties unless such disclosure is permitted by applicable laws, statutes, and regulations; plaintiff's written authorization; or court order.

7. In the event of an unintended, inadvertent, or accidental disclosure of any of the Records, the party that caused the unintended disclosure may cure the unintended disclosure by advising plaintiff's counsel in writing of the disclosure, requesting that any of the Records be returned, and destroying any such Records.

8. If it is determined that Mr. Wallace, his defense counsel, his insurer, and/or any person identified in paragraph 3, due to inadvertence or by accident, did not destroy the Records following the conclusion of this litigation and/or in accordance with applicable business practices, as required by this Protective Order, the party that failed to destroy any such Records may cure the unintended failure by advising plaintiff's counsel in writing of the failure and destroying any such Records.

Dated this 15th day of March, 2012.

BY THE COURT:


UNITED STATES MAGISTRATE JUDGE