

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

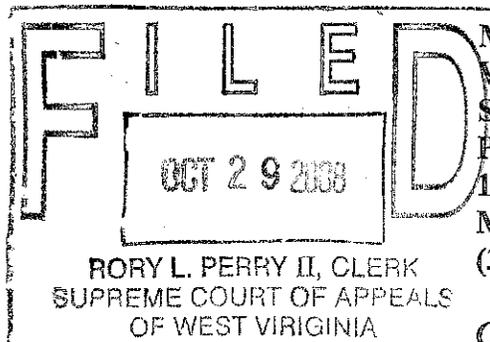
v.

THE HONORABLE JOHN LEWIS MARKS, JR.,
Judge of the Circuit Court of Harrison County,
West Virginia,

Respondent.

*From the Circuit Court of
Harrison Count, West Virginia
Civil Action No. 05-C-325-1*

PETITION FOR WRIT OF PROHIBITION



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I. ISSUE PRESENTED

This Petition arises from the October 9, 2008 Order Compelling Discovery from Defendant Nationwide Mutual Insurance Company of the Circuit Court of Harrison County which granted, in part, Plaintiffs' Motion to Compel Discovery, and ordered Nationwide Mutual Insurance Company ("Nationwide") to produce the identification and other specific information of any other "bad faith" claims, both statutory and common law, made against Nationwide within the prior ten years. Pursuant to the Order, Nationwide must produce such information as claimant or party names, addresses, and telephone numbers; attorney identification; the identify of the Nationwide claim representative whose conduct was at issue; a brief description of the allegations; production of any Insurance Commissioner complaint or court complaint; and the details of any settlement, resolution, verdict or judgment, and production of any document reflecting same, including confidential settlements or resolutions. (See Exhibit A, Circuit Court's October 9, 2008 Order, attached hereto, specifically paragraphs numbered 7 and 9.)

II. PROCEEDINGS AND RULINGS BELOW

The instant civil action is a first-party "bad faith" claim which arose following an August 19, 2004 automobile accident. Nationwide was named, among others, as a party-Defendant in this action filed in the Circuit Court of Harrison County ("the *George* action"). The *George* action asserted negligence claims against William Gail Gooden, Elizabeth Arnett, and Melissa Shanholtz arising out of the August 19, 2004 automobile accident. Claims as to the Gooden, Arnett, and Shanholtz defendants have been resolved. Unfair trade practice claims were asserted against West Virginia National Automobile

Insurance Company and Deneane Reneau, its Claim Representative. Claims as to National Automobile Insurance Company and Reneau have been resolved.

The *George* action further alleges that Nationwide intentionally, willfully, and maliciously failed to make a reasonable offer of underinsured motorist coverage in an amount not less than the liability limits as required by West Virginia Code § 33-6-31(b). In addition to alleging claims of fraudulent conduct related to Nationwide's offers of underinsured motorist coverage, the *George* action asserts claims for violations of the Unfair Claims Settlement Practices Act and seeks, among other damages, payment of underinsured motorist benefits of not less than \$100,000 per person and \$300,000 per accident, the liability limits of Nationwide's policy. Prior to the filing of the *George* action, Nationwide tendered its underinsured motorist limits of \$25,000 to the Plaintiffs.

On March 19, 2007, the Plaintiffs propounded Plaintiffs' First Combined Discovery Requests to Nationwide Mutual Insurance Company. (See **Exhibit B**, attached hereto.) Request number 8 sought:

Request No. 8: Has Defendant Nationwide at any time within the past 10 (ten) years, in the State of West Virginia, paid any money or granted any other thing of value in order to settle, resolve, or to satisfy any judgment, claim, or allegation, either directly or indirectly, which: (1) asserted first-party unfair insurance claims settlement practices; (2) asserted other insurance bad faith settlement conduct of any kind or nature; or (3) asserted violations of the West Virginia Unfair Trades (sic) Practices Act, W.Va. Code § 33-11-1, et seq., against Defendant Nationwide whether asserted by your insured or a third-party claimant? If the answer to this Request is in the affirmative, please provide the following information for each:

- (a) Name, address and telephone number of the claimant or claimants and their attorneys, if any;
- (b) Name, home and business addresses and telephone numbers of any of your agents, servants, or employees whose conduct was at issue in the claim, including the current employment status of such individual or individuals with you and such person's last known address and telephone number;

- (c) A brief description of the allegations against you, your agents, servants and employees;
- (d) If the dispute resulted in a written claim being made to you, the West Virginia Insurance Commissioner and/or a complaint filed with any court of law, PRODUCE a copy of each of the same; and,
- (e) The details of any settlement, resolution, verdict, judgment, or any other disposition or each such dispute, whether in writing or oral, and PRODUCE a copy of the same, if in writing. This request shall include any "confidential settlements" or "resolutions" for each such dispute.

(See **Exhibit B**, pages 7-8, emphasis in original.)

Request number 10 of the Plaintiffs' First Combined Discovery Requests to Nationwide Mutual Insurance Company sought:

Request No. 10: To the extent not PRODUCED pursuant to the immediately preceding two Requests above, please PRODUCE each and every document which sets forth the details of any claims made against you for insurance bad faith conduct and/or violations of the Unfair Trade Practices Act (W.Va. Code § 33-11-1, et seq.), and its attendant regulations (114 CSR 14, et seq.), OR any other claim relating, in any way, to Defendant Nationwide's bad faith conduct in the insurance industry, whether said documents are correspondence, grievances, complaints made to any Insurance Commissioner of any State or complaints filed with any court and regardless of whether more than one document is necessary to set forth all such claims made against this Defendant; and, in each instance, please PRODUCE any documents which reflect any resolution or settlement of each and every claim made, including documents which specify the amount of money paid to settle or resolve such claim, or which specifies other valuable consideration provided to resolve or settle such claim. This request shall include any "confidential settlements" or "resolutions" for each such claim, and, please PRODUCE any documents or other tangible item related to each such settlement or resolution. This request is limited to matters occurring or resolved within the last ten (10) years.

(See **Exhibit B**, pages 9-10, emphasis in original.)

On May 2, 2007, Nationwide filed Defendant Nationwide Mutual Insurance Company's Responses to Plaintiffs' First Combined Discovery Requests. (See **Exhibit C**, attached hereto.)¹ Nationwide responded to Request number 8 as follows:

¹ Nationwide obtained a two-week extension from the Plaintiffs to file discovery responses.

RESPONSE FOR SUBPART (a): OBJECTION. This Request is compound, overly broad, burdensome, oppressive, vague, ambiguous and is designed solely to harass or to cause undue litigation expense to Nationwide. Moreover, the scope of the Request is such that it is not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, this Request seeks information that is protected by the attorney-client privilege and the attorney work product, and also asks for documentation that may have been generated in anticipation of litigation and/or trial. This Request is also objectionable as it seeks information for periods of time unrelated to the instant claim. This Request as drafted seeks information that is not available to this Defendant, nor could such requested information be reasonably ascertained in the absence of a manual review of all Claim Files, which review would be unduly burdensome. In addition, to the extent that this Request seeks information concerning confidential settlements that are subject to confidentiality agreements, said Request is beyond the permissible scope of discovery as it is contrary to West Virginia public policy and invades the privacy rights of third parties who have not consented to the release of such information. Moreover, to the extent that any such settlements were achieved, any payments were made in compromise of disputed claims where liability was denied and not proven and, thus, such payments were not made for punitive damages. Moreover, to the extent that any verdicts exist with respect to a jury award of punitive damages, said verdicts are matters of public record and are equally accessible to the Plaintiffs.

Subject to the above objections and without waiving the same, and reserving the right to further assert the individual or cumulative objections, response is made only to the extent of such materials as are within Nationwide's immediate possession, custody or control and to the exclusion of such matters of public record which are equally accessible to the Plaintiffs. Defendants refer Plaintiffs to the Responses to the Request for Production stated below.

RESPONSE FOR SUBPART (b): OBJECTION. This Request is compound, overly broad, burdensome, oppressive, vague, ambiguous, and is designed solely to harass or to cause undue litigation expense to Nationwide. Moreover, the scope of the Request is such that it is not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, this Request seeks information that is protected by the attorney-client privilege and the attorney work product, and also asks for documentation that may have been generated in anticipation of litigation and/or trial. This Request is also objectionable as it seeks information for periods of time unrelated to the instant claim. The Request as drafted seeks information that is not available to this Defendant, nor could such requested information be reasonably ascertained in the absence of a manual review of all Claim Files, which review would be unduly burdensome. In addition, to the extent that this Request seeks information concerning confidential settlements that are subject to confidentiality agreements, said Request is beyond the permissible scope of discovery as it is contrary to West Virginia public policy and invades the privacy rights of third parties who have not consented to the release of such information. Moreover, to the extent that any such settlements were achieved, any payments were made in compromise of disputed claims where liability was denied and not proven and, thus, such payments were not made for punitive damages. Moreover to the extent that any verdicts

exist with respect to a jury award of punitive damages, said verdicts are matters of public record and are equally accessible to the Plaintiffs.

Subject to the above objections and without waiving the same, and reserving the right to further assert the individual or cumulative objections, response is made only to the extent of such materials as are within Nationwide's immediate possession, custody or control and to the exclusion of such matters of public record which are equally accessible to the Plaintiffs. Defendants refer Plaintiffs to the Responses to the Request for Production stated below.

RESPONSE FOR SUBPART (c): OBJECTION. This Request is compound, overly broad, burdensome, oppressive, vague, ambiguous, and is designed solely to harass or to cause undue litigation expense to Nationwide. Moreover, the scope of the Request is such that it is not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, this Request seeks information that is protected by the attorney-client privilege and the attorney work product, and also asks for documentation that may have been generated in anticipation of litigation and/or trial. This Request is also objectionable as it seeks information for periods of time unrelated to the instant claim. The Request as drafted seeks information that is not available to this Defendant, nor could such requested information be reasonably ascertained in the absence of a manual review of all Claim Files, which review would be unduly burdensome. In addition, to the extent that this Request seeks information concerning confidential settlements that are subject to confidentiality agreements, said Request is beyond the permissible scope of discovery as it is contrary to West Virginia public policy and invades the privacy rights of third parties who have not consented to the release of such information. Moreover, to the extent that any such settlements were achieved, any payments were made in compromise of disputed claims where liability was denied and not proven and, thus, such payments were not made for punitive damages. Moreover to the extent that any verdicts exist with respect to a jury award of punitive damages, said verdicts are matters of public record and are equally accessible to the Plaintiffs.

Subject to the above objections and without waiving the same, and reserving the right to further assert the individual or cumulative objections, response is made only to the extent of such materials as are within Nationwide's immediate possession, custody or control and to the exclusion of such matters of public record which are equally accessible to the Plaintiffs. Defendants refer Plaintiffs to the Responses to the Request for Production stated below.

RESPONSE TO REQUEST FOR PRODUCTION (d): OBJECTION. This request is compound, overly broad in time and scope, burdensome, oppressive, vague, ambiguous, and is designed solely to harass or to cause undue litigation expense to Nationwide. Moreover, the scope of the Request is such that it is not reasonably calculated to lead to the discovery of admissible evidence. This request is also objectionable as it seeks information for periods of time unrelated to the instant claim. This Request as drafted seeks information that is not available to Nationwide, nor may such requested information be reasonably ascertained in the absence of a manual review

of all Claim Files throughout West Virginia, such a review being unduly burdensome. To the extent that any complaints exist, said complaints are matters of public record and are equally accessible to the Plaintiffs.

Subject to and without waiving the above objections, and reserving the right to further assert the individual or cumulative objections, response is made only to the extent of such materials as are within Nationwide's immediate possession, custody or control. A list of civil actions, dating from 1997 to the present, attached hereto as Bates Numbers 599 through 643, and a list of West Virginia Department of Insurance complaints filed against Nationwide Mutual Insurance Company related to uninsured and underinsured motorist coverage for the allowable statutory period is attached hereto as Bates Numbers 718 through 735.

DISCLAIMER: These lists have been prepared by counsel employed by Nationwide to compile said lists for litigation purposes only. The above lists are historically incomplete, and are based upon the quality of judicial indexes, the availability of data, and the limited ability to identify litigation and complaints within the parameters provided, including but not limited to Plaintiffs' requested date requirements. The identification of individual Nationwide entities or lines of insurance is also inexact as much of the data is identified only as Nationwide, and judicial indexes often identify the entity or line of insurance by the misnomer of Nationwide Insurance and, more frequently, the litigation has been filed against either the wrong entity or an inaccurately identified company.

RESPONSE TO REQUEST FOR PRODUCTION (e): OBJECTION. This request is compound, overly broad in time and scope, burdensome, oppressive, vague, ambiguous, and is designed solely to harass or to cause undue litigation expense to Nationwide. Moreover, the scope of the Request is such that it is not reasonably calculated to lead to the discovery of admissible evidence. This Request is also objectionable as it seeks information for periods of time unrelated to the instant claim. The Request as drafted seeks information that is not available to Nationwide, nor may such requested information be reasonably ascertained in the absence of a manual review of all Claim Files throughout West Virginia, such a review being unduly burdensome. In addition, to the extent that this Request seeks information concerning confidential settlements that are subject to confidentiality agreements, said Request is beyond the permissible scope of discovery as it is contrary to West Virginia public policy and invades the privacy rights of third parties who have not consented to the release of such information. Furthermore, to the extent that any such settlements were achieved, any payments were made in compromise of disputed claims where liability was denied and not proven.

(See Exhibit C, pages 13-18.)

Nationwide responded to Request number 10 as follows:

RESPONSE: OBJECTION. This Request is compound, overly broad in time and scope, burdensome, oppressive, vague, and ambiguous and is designed solely to harass or to cause undue litigation expense to Nationwide. Moreover, the scope of this Request is such that it is not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, this Request seeks information that is protected by the attorney-client privilege and the attorney work product, and also asks for documentation that may have been generated in anticipation of litigation and/or trial. This Request is also objectionable as it seeks information for periods of time unrelated to the instant claim. This Request as drafted asks for information that is not available to Nationwide, nor could such requested information be reasonably ascertained in the absence of a manual review of all claims throughout the United States, which review would be unduly burdensome. In addition, to the extent that this Request seeks information concerning confidential settlements that are subject to confidentiality agreements, said Request is beyond the permissible scope of discovery as it is contrary to West Virginia public policy and invades the privacy rights of third parties who have not consented to the release of such information. Moreover, to the extent that any such settlements were achieved, any payments were made in compromise of disputed claims where liability was denied and not proven and, thus, such payments were not made for punitive damages. Moreover, to the extent that any verdicts exist with respect to a jury award of punitive damages, said verdicts are matters of public record and are equally accessible to the Plaintiff. In addition, to the extent that this Request seeks information concerning extra-territorial conduct, this Request is overbroad and is not reasonably calculated to lead to the discovery of admissible evidence. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 409 (2003) (finding that extraterritorial conduct is not relevant unless it is "substantially similar" to the complained of conduct).

Subject to the above objections and without waiving the same, and reserving the right to further assert the individual or cumulative objections, response is made only with respect to West Virginia civil actions, and only to the extent of such materials as are within its immediate possession, custody or control and to the exclusion of such materials which are matters of public record and are equally accessible to the Plaintiffs. A list of civil actions, dating from 1997 to the present, attached hereto as Bates Numbers 599 through 643, and a list of West Virginia Department of Insurance complaints filed against Nationwide Mutual Insurance Company related to uninsured and underinsured motorist coverage for the allowable statutory period is attached hereto as Bates Numbers 718 through 735.

DISCLAIMER: These lists have been prepared by counsel employed by Nationwide to compile said lists for litigation purposes only. The above lists are historically incomplete, and are based upon the quality of judicial indexes, the availability of data, and the limited ability to identify litigation and complaints within the parameters provided, including but not limited to Plaintiffs' requested date requirements. The identification of individual Nationwide entities or lines of insurance is also inexact as much of the data is identified only as Nationwide, and judicial indexes often identify the entity or line of insurance by the misnomer of Nationwide Insurance and, more frequently, the litigation has been filed against either the wrong entity or an inaccurately

identified company.

(See **Exhibit C**, pages 24-26.)

On June 11, 2007, the Plaintiffs filed a Motion to Compel Discovery From Defendant Nationwide Mutual Insurance Company and Request for Mandatory Attorneys' Fees and Costs. (See **Exhibit D**, attached hereto.) With regard to Nationwide's Responses to Request numbers 8 and 10, the Plaintiffs alleged that Nationwide provided boilerplate objections and an incomplete compilation of litigation claims and Insurance Commissioner grievance/complaints, but did not provide the information sought in Request number 8 subparts (a) – (e). (See **Exhibit D**, pages 16 and 23 of Exhibit 2.)

On June 18, 2007, Nationwide filed Nationwide Mutual Insurance Company's Response to Plaintiffs' Motion to Compel. (See **Exhibit E**, attached hereto.) Nationwide reiterated its previously stated objections and explained how the compilation list of litigation filed against Nationwide complied with the Plaintiffs' request. Nationwide also set forth its objections to the request for confidential settlements as the disclosure of same is against West Virginia public policy and the West Virginia Rules of Evidence and Civil Procedure. (See **Exhibit E**, pages 6-10.)

Judge Marks, by correspondence dated January 3, 2008, made final rulings pertaining to the Plaintiffs' Motion to Compel. (See **Exhibit F**, attached hereto.) In regard to Request number 8, Judge Marks granted the Plaintiffs' motion to compel and ordered that "Nationwide must completely respond to the interrogatory and requests (sic) for production, but the Court believes a protective order is necessary concerning the "confidential settlements." (See **Exhibit F**, page 2, paragraph 7.) Judge Marks also

granted the Plaintiffs' Motion to Compel in regard to Request number 10. (See **Exhibit F**, page 3, paragraph 9.) The January 3, 2008 correspondence/Order directed Plaintiffs' counsel to prepare an Order with language consistent with the rulings in the January 3, 2008 correspondence. Plaintiff provided a proposed order to which Nationwide objected. Nationwide then provided its own draft proposed order to the Court.

The Respondent entered the Order prepared by Nationwide's counsel on October 9, 2008. This Order mandates that Nationwide shall provide all of the information requested in Request numbers 8 and 10. It is from this Order that Nationwide submits this Petition for Writ of Prohibition. The Respondent ignored and undermined West Virginia's public policy and stated judicial role of encouraging settlements. The Respondent also failed to properly weigh a party's privacy interest in confidentiality against the public's right of access to court records.

III. ASSIGNMENTS OF ERROR

1. The Respondent exceeded his judicial authority in ordering production of confidential settlement agreements contrary to State public policy and legislative intent.
2. The Respondent exceeded his judicial authority in ordering production of confidential settlement agreements in violation of third parties' privacy interests.

IV. ARGUMENT

A. PROHIBITION IS THE ONLY REMEDY TO CORRECT A CLEAR LEGAL ERROR

Prohibition lies as a matter of right where a lower court, having proper jurisdiction over a matter, exceeds its legitimate powers. West Virginia Code § 53-1-1; see also *Handley v. Cook*, 162 W.Va. 629, 252 S.E.2d 147 (1979). Prohibition will issue where the trial court has no jurisdiction or, having such jurisdiction, exceeds its

legitimate powers. *State ex rel. Kees v. Sanders*, 192 W.Va. 602, 453 S.E.2d 436 (1994). A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of discretion in regard to discovery orders. *State ex rel. USF&G v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995); *State ex rel. State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992).

In the instant matter, the court below exceeded any legitimate power it may have by compelling production of confidential settlement agreements previously entered into by Nationwide with other parties. Production of confidential settlement agreements is contrary to State public policy and legislative intent. Additionally, the court below exceeded any legitimate power it may have by ignoring third party privacy interests in ordering production of confidential settlement agreements.

In determining whether to grant a rule to show cause in prohibition, this Court must consider the adequacy of other available remedies such as appeal and the overall economy of effort and money among the litigants, lawyers and courts. Syl. Pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979). Here, no other remedy is available. Immediate relief from this Court is necessary to protect information intended to be confidential by the contracting parties, and to prevent erosion of the State's policy encouraging settlements and the ensuing chilling effect on same should immediate relief not be granted.

B. CONFIDENTIAL SETTLEMENT AGREEMENTS ARE VALID AND ENFORCEABLE

Many courts have acknowledged a strong preference for the settlement of disputes

among parties, finding a strong public policy in favor of such agreements.² This preference has translated into a strong protection for the rights of parties in making settlement agreements. *Id.* “There is an obvious public policy favoring the amicable settlement of litigation, and agreements accomplishing this result will be disregarded only for the strongest of reasons.” *Cities Serv. Oil Co. v. Coleman Oil Co.*, 470 F.2d 925, 929 (1st Cir. 1972). Courts have ruled that parties to a settlement can bargain away the right to freely speak of a matter, even when that matter would otherwise be protected by the First Amendment to the United States Constitution.³ *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 981 P.2d 600, 603 (Colo. 1999); U.S. CONST. amend. I.

In *Pierce*, the court was presented with a breach of a settlement agreement that contained a confidentiality provision. The plaintiff, a former superintendent of the St. Vrain Valley School District, claimed that the school district breached an agreement keeping the circumstances of his resignation confidential. The school district argued that the settlement agreement was unenforceable because the confidentiality clause restricted their freedom of speech, in violation of the First Amendment. The court, finding that the parties “imposed their own restrictions on their ability to speak publicly,” held that the agreement was valid. 981 P.2d at 603. The court ruled that the First Amendment does not reach private arrangements; therefore, private parties can limit even those most sacrosanct rights guaranteed in the Constitution.⁴

There is a presumption that a court should enforce the settlement agreements

² Avedia H. Seferian, et al., *Secrecy Clauses in Sexual Molestation Settlements: Should Courts Agree to Seal Documents in Cases Involving the Catholic Church?*, 16 Geo. J. Legal Ethics 801, 809 (2003).

³ See fn.2, 16 Geo. J. Legal Ethics at 809-810.

⁴ The synopsis of the *Pierce* case was adapted from Avedia H. Seferian, et al., *Secrecy Clauses in Sexual Molestation Settlements: Should Courts Agree to Seal Documents in Cases Involving the Catholic Church?*, 16 Geo. J. Legal Ethics 801, 809 (2003).

reached by parties.⁵ West Virginia likewise favors and encourages the resolution of lawsuits by settlement. *DeVane v. Kennedy*, 205 W.Va. 519, 519 S.E.2d 622 (1999); *State ex rel. Ward v. Hill*, 200 W.Va. 270, 489 S.E.2d 24 (1997); *Accord v. Chrysler Corp.*, 184 W.Va. 149, 399 S.E.2d 860 (1990); *Board of Educ. of Monongalia v. Starcher*, 176 W.Va. 388, 343 S.E.2d 673 (1986); *Snyder v. Hicks*, 170 W.Va. 281, 294 S.E.2d 83 (1982); *Sanders v. Roselawn Memorial Gardens, Inc.*, 152 W.Va. 91, 159 S.E.2d 784 (1968). Further, a court's role "in reviewing a settlement is not to just substitute its own judgment for that of the parties to a decree but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy." *United States v. Hooker Chem. & Plastics Corp.*, 607 F.Supp. 1052, 1057 (W.D.N.Y. 1985).

The vast majority of cases and jurisdictions respect the right of parties to contract in settlement as they please.⁶ Most terms of a settlement agreement will be dealt with in much the same manner as a traditional contract.⁷ Parties have the right to contract as they wish, and most courts will not seek to impose their own judgment for those of the parties. *Id.* Courts will, however, refuse to enforce agreements that violate public policy. *Id.*

C. THE DISCLOSURE OF CONFIDENTIAL SETTLEMENT AGREEMENTS IN AN UNRELATED SUIT IS PROHIBITED

⁵ See fn.2, 16 Geo. J. Legal Ethics at 810; see also Carrie Menkel-Meadow, *Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (in Some Case)*, 83 Geo. L.J. 2663, 2664-65 ("[S]ettlement has become the 'norm' for our system."); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 99 U. Ill. L. Rev. 457, 502 ("There is no doubt that American judges, particularly federal judges, increasingly view settlement promotion as an important objective."); *Davis v. Flatiron Materials Co.*, 511 P.2d 28, 32 (Colo. 1973); *Lomas & Nettleton Co. v. Tiger Enters. Inc.*, 585 P.2d 949 (Idaho 1978); *Smith v. Munro*, 365 A.2d 259 (Vt. 1976); *Nelson v. Johnson*, 599 N.W.2d 246 (N.D. 1999); *Haderlie v. Sondgeroth*, 866 P.2d 703 (Wyo. 1993); *Hentschel v. Smith*, 153 N.W.2d 199 (Minn. 1967); *McManus v. Howard*, 569 So.2d 1213 (Miss. 1990); *McCoy Farms, Inc. v. J & M McKee*, 563 S.W.2d 409 (Ark. 1978); *Bennett v. Deaton*, 68 P.2d 895 (Idaho 1937); *Rosenthal v. J. Leo Kolb, Inc.*, 97 A.2d 925 (D.C. 1953).

⁶ See fn. 5, *supra*.

⁷ See fn.2, 16 Geo. J. Legal Ethics at 810.

Whether confidential settlement agreements are barred from disclosure in another suit has never been squarely addressed by the Supreme Court of Appeals of West Virginia.⁸ However, other jurisdictions which have faced this issue have upheld the sanctity of confidential agreements. In *Hasbrouck v. BankAmerica Housing Services*, 187 F.R.D. 453 (N.D.N.Y. 1999), the District Court prohibited disclosure of a confidential settlement agreement. Plaintiff Hasbrouck filed an employment discrimination suit and sought an order protecting from discovery the terms of a settlement agreement between she and non-party Trustco Bank. Defendant BankAmerica opposed the motion. Hasbrouck and Trustco Bank entered into a Settlement Agreement

⁸ The Circuit Court of Ohio County has held in favor of upholding the validity of confidential settlement agreements on two separate occasions in the cases of *Grandstaff v. Allstate Insurance Company, et al.*, Civil Action No. 98-C-356, and *Holland v. Allstate*, Civil Action No. 94-C-33. (The *Holland* Order was not entered because the case resolved before it was entered.) In an Order entered September 27, 2000, the Ohio County Circuit Court held in *Grandstaff*:

In connection with concerns raised by counsel for Allstate with respect to general business practice witness testimony involving cases that have been settled in which Allstate has secured confidential settlement agreements, the Court held that individuals may be permitted to testify about the facts of the bad faith litigation. They can further testify that they filed a lawsuit to prosecute their bad faith claims and they can further testify that the lawsuit was resolved. **However, the parties will not be permitted to testify as to the events that transpired in connection with the prosecution of the bad faith lawsuit.**

(A copy of said Order is attached hereto as **Exhibit G**, emphasis added.) Thus, a West Virginia Circuit Court has recognized that confidential settlement agreements are valid and enforceable and that parties should not be permitted to attempt to solicit the breach of such agreements.

The U.S. District Court for the Northern District of West Virginia ruled in *Forshey v. Allstate Insurance Company*, Case No. 5:98-CV-85, that the use of confidentiality agreements violated public policy. In his affirmation of United States Magistrate Core's proposed ruling, District Judge Stamp applied a "clearly erroneous" standard to the Magistrate's ruling. Because the issue is unresolved by the West Virginia Supreme Court, Judge Stamp held that he could not find that the Magistrate's ruling was clearly erroneous. In the subsequent case of *Lynch v. Allstate Insurance Company*, filed in the United States District Court for the Northern District of West Virginia, Case No. 3:98-CV-27, District Judge W. Craig Broadwater held at a hearing held October 12, 2000 that *Forshey* is not precedent. (A copy of the relevant portions of the transcript is attached hereto as **Exhibit H**.)

Thus, there are conflicting rulings in West Virginia at the trial court level as to the admissibility of confidential settlement agreements and a definitive ruling from this Court is needed to resolve this issue.

settling all disputes arising out of Hasbrouck's employment and termination of employment with Trustco Bank. The Agreement entered into between the parties provided for strict confidentiality and set forth payment to be made by Trustco Bank to Hasbrouck in consideration for the release and non-disclosure agreement. Subsequent to the settlement, BankAmerica served Trustco Bank with a subpoena requiring production of the Agreement and Hasbrouck's personnel file. Hasbrouck objected to production of the Agreement. During deposition, Hasbrouck objected to questions regarding the settlement agreement with Trustco and refused to answer same pending the court's ruling.

The District Court held that Trustco Bank relied on the Agreement, and the benefit of its bargain, to maintain the secrecy of its confidential information. *Id.* at 458. The Court rules that "[t]he rights of the parties as contracted between them deserve the protection of the court." *Id.* The District Court further stated that Trustco Bank's privacy interest in the information was to be given additional weight because it was not a party to the action in which the agreement was sought to be disclosed. *Id.* Hasbrouck likewise had an interest in maintaining the confidentiality of the information as required by the Agreement so that she would not be in breach and subject to further liability to Trustco Bank. *Id.* The District Court further found:

Moreover, protecting the confidentiality of the settlement agreement promotes the important public policy of encouraging settlements.... Settlement of civil disputes is in the public interest because it avoids the significant cost of trial.... In addition to conservation of judicial and private resources, settlement results in higher levels of satisfaction of the litigants, having determined their own solution to their dispute rather than being subject to a judicially-created solution.... Most importantly, a

settlement produced finality and repose upon which people can order their affairs....

Id. (internal citations omitted).

The *Hasbrouck* Court also recognized that confidentiality is often essential to the settlement of cases without which many lawsuits would remain unsettled, and permitting disclosure of confidential settlement agreements would discourage settlements, contrary to the public interest. *Id.* at 458-59.

Conversely, there is a countervailing public interest in affording a litigant the opportunity to broadly discover information in support of its case. "However, there is no First Amendment right to access information necessary to try a lawsuit; access is permitted by legislative grace." *Id.* at 459 (citing *Seattle Times*, 467 U.S. at 32); *see also Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (First Amendment does not give unrestrained right to gather information). While there may be some public interest in dissemination of information accessed in discovery, there is no constitutional right to do so. *Seattle Times*, 467 U.S. at 31-32.

In granting *Hasbrouck's* motion for a protective order, the District Court held that "[t]here is a strong public interest in encouraging settlements and in promoting the efficient resolution of conflicts. This strong public interest outweighs broad discovery of facts to support [the opponent's] claims and defenses." 187 F.R.D. at 461.

In a legal malpractice action by two doctors who alleged that their former attorneys dropped them from a lawsuit by a group of doctors against a hospital, after which the case settled, the trial court granted the plaintiffs' request for discovery of the confidential settlement to determine what they would have received had they remained in the case. In *Hinshaw, Winkler, Draa, March & Still v. The Superior Court of Santa*

Clara County, 51 Cal.App.4th 233 (1996), the Appeals Court held that the trial court erred in granting the plaintiffs' request for discovery of the confidential settlement. Given the private nature of a confidential settlement, the burden rests on the proponents of discovery to justify compelling production of the confidential settlement agreement. *Id.* at 239. The Appeals Court further held that the proponents of the discovery must do more than show the possibility that production of the confidential settlement may lead to relevant information. "Instead they must show a compelling and opposing state interest." *Id.*

The *Hinshaw* Court recognized the competing public values of privacy and facilitating the ascertainment of truth in connection with legal proceedings. "Article I, section 1's, 'inalienable right' of privacy is a 'fundamental interest' of our society, essential to those rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the U.S. Constitution." *Id.* at 239. But, stated the court, another state interest lies in "facilitating the ascertainment of truth in connection with legal proceedings." *Id.*

In an effort to reconcile these sometimes competing public values, it has been adjudged that inquiry into one's private affairs will *not* be constitutionally justified simply because inadmissible, and irrelevant, matter sought to be discovered *might* lead to other, and relevant, evidence. When compelled disclosure intrudes on constitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information.

Id. (emphasis in original).

The *Hinshaw* Court concluded that privacy of a settlement is generally understood and accepted in the legal system, which favors settlement and therefore supports attendant needs for confidentiality. *Id.* at 241. "We find a private settlement agreement

is entitled to at least as much privacy protection as a bank account or tax information.”

Id.

The court, in *Hulse v. A.B. Dick Co.*, 162 Misc.2d 263, 616 N.Y.S.2d 424 (1994), held that the “need” to obtain the settlement information as a matter of trial strategy did not warrant disclosure of the settlement agreements. *Id.* at 265. The Hulses settled their claims against A.B. Dick Company. An express condition of settlement was that each party would keep confidential the terms of the settlement agreement. The nonsettling defendants desired to know the terms of the settlement agreement and served a notice of discovery requesting production of the agreement. The Court observed that “[a]lthough trial strategy is important to any party in litigation, defendants’ ‘need’ to obtain the settlement information arises not out of materiality or necessity but, rather, desirability.”

Id. at 265.

The *Hulse* Court reviewed the strong public policy considerations that favor settlements. A negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources; courts could not function if every dispute required a trial. *Id.* at 267. In addition, there is a societal benefit in recognizing the autonomy of parties to shape their own solution to a controversy rather than having one judicially imposed. *Id.* Most importantly, a settlement produces finality and repose upon which people can order their affairs. *Id.* “The court must weigh the goals of encouraging the settlement of disputes and stemming the burgeoning tide of litigation against the rights of those not privy to the settlement agreement.” *Id.* at 268.

In weighing the competing interests, the court stated:

[I]f a defendant facing multiple plaintiffs seeks to settle a meritorious claim for a certain sum of money, it may be

deterred from doing so if it knows that the terms of such a settlement would have to be made public.... Many defendant would almost certainly proceed to trial rather than have broadcast to all potential plaintiffs how much they might be willing to pay.

Id.

In holding that the settlement agreement was not discoverable, the court found that for it to decline to support the parties in their reliance upon the agreement they reached would work an injustice on the litigants and would inhibit future settlements. *Id.* at 269.

Some federal courts have noted that admitting settlement agreements would violate the congressional policy favoring settlement by insulating potential litigants from later being penalized in court for resolving their dispute out of court. *McInnis v. A.M.F., Inc.*, 765 F.2d 240 (1st Cir. 1985) (noting that the admission of settlement evidence would discourage settlements and thereby violate congressional policy underlying Federal Rule 408); *Scaramuzzo v. Glenmore Distilleries Co.*, 501 F.Supp. 727, 733 (N.D. Ill. 1980) (opinion that "it would be logically inconsistent to uphold the vitality of Federal Rule 408, while at the same time holding that a settlement offer could be used against the offeror in related cases").

In *McInnis, supra*, the Court of Appeals found that the trial court erred in admitting a settlement agreement because production of same is barred by Federal Rule of Evidence 408. Rule 408 governs the admissibility of evidence of compromise offers or agreements. The Rule, at the time *McInnis* was decided, provided in its entirety:⁹

⁹ FRE 408 is substantially the same today and provides in its entirety:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as either to validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The *McInnis* Court found that the exclusion of evidence of settlement offers is justified on two grounds.

First, the rule illustrates Congress' desire to promote a public policy favoring the compromise and settlement of claims by insulating potential litigants from later being

(a) Prohibited uses. – Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish – or accepting or offering or promising to accept – a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. – This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

West Virginia Rule of Evidence 408 is nearly identical to FRE 408 at the time *McInnis* was decided and provides in its entirety:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

penalized in court for their attempts to first resolve their dispute out of school. Second, such evidence is of questionable relevance on the issue of liability or the value of a claim, since settlement may well reflect a desire for peaceful dispute resolution, rather than the litigants' perceptions of the strength or weakness of their relative positions.

Id. at 247 (citing Fed. Rule of Evid. 408, advisory committee note).

In analyzing the impact of Rule 408 on the admissibility of the release at issue in *McInnis*, the Court of Appeals allayed any doubts that the Rule applies to cases which are posturally like *McInnis*. The settlement agreement in *McInnis* was entered into between a litigant and a third party, rather than between the two litigants themselves. "The Advisory Committee Note clearly acknowledges that the policies underlying the exclusionary rule are equally applicable to such a situation." *Id.* The note states:

While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. *The latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.*

Id. (citing Fed. Rule of Evid. 408, advisory committee note) (emphasis in original court opinion).

Finally, the Court of Appeals in *McInnis* noted that the fact of settlement, as the Advisory Committee has observed, is of questionable relevance to the issue of causation. "An innocent third party may settle, even for a large amount, merely to avoid the burdens of litigation." *Id.* at 249.

The advisory committee notes that accompanied the federal rule when it was proposed gave the following explanation of the rule:

[E]xclusion may be based on two grounds[:] (1) [t]he evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position... [and] (2) ... [the] promotion of the public policy favoring the compromise and settlement of disputes.

Graber v. City of Ankeny, 616 N.W.2d 633, 638 (2000).

In a case very similar to the instant action, the District Court examined the issue of whether a plaintiff may introduce evidence regarding defendant's settlement of other similar cases. *Scaramuzzo v. Glenmore Distilleries, Co.*, 501 F.Supp. 727 (1980). In *Scaramuzzo*, a former employer sued her former employer alleging violations of the Age Discrimination in Employment Act. The employer, Glenmore Distilleries, Co., moved to exclude the plaintiff from introducing evidence at trial regarding charges of age discrimination filed against Glenmore by persons other than the Plaintiff, including settlements of such charges and the terms and conditions of such settlements.

The District Court first observed that Rule 408 of the Federal Rules of Evidence did not appear to directly address the issue of whether a plaintiff may introduce evidence regarding defendant's settlement of other similar cases. The court held that "the same strong public policy favoring out-of-court settlement that underlies Rule 408 is nonetheless applicable." *Id.* at 733. The court rationalized that:

It would be logically inconsistent to uphold the vitality of Rule 408, while at the same time holding that a settlement offer could be used against the offeror in related cases. An offer of settlement can be of no legal relevance as to the offeror's liability, irrespective of whether the offer was made in the instant case or in a related case.

Id.

Accordingly, the *Scaramuzzo* Court found the fact that persons other than the plaintiff filed age discrimination charges against Glenmore to be of "minimal probative value." *Id.* "Additionally, the likely effect of such evidence or testimony would be to raise potentially damaging inferences against Glenmore that are not support by the mere fact that a 'charge' had been filed." *Id.* The Court held that any probative value would be outweighed by the undue prejudice that would result. *Id.*

In the instant case, the fact that other first-party bad faith cases have been filed against Nationwide, and the resulting settlements thereof, is of minimal probative value to the plaintiff. The potentially damaging inferences that could be derived from same would unfairly prejudice Nationwide. "It is reasonable to infer that jurors would view the settlement as an admission of guilt." *McHann v. Firestone Tire and Rubber Co.*, 713 F.2d 161 (5th Cir. 1983). As noted in the advisory committee notes, the settlements could have merely been a business decision on the part of Nationwide, not an admission of liability. To permit production of the settlement agreements is to punish Nationwide for the out-of-court settlements it resolved with its insureds and others, a result specifically not intended by the framers of Rule 408. Additionally, the mere fact that Nationwide entered into a settlement in no way proves liability on the part of Nationwide in the instant action with the Georges.

Thus, courts do not hesitate in denying the disclosure of materials that the parties have agreed to keep confidential as a condition of their settlement agreement, where the need for the discovery is outweighed by the parties' interest in maintaining the document's confidentiality and "the policy of the courts favoring enforcement of stipulations of settlement." *See, e.g., Chemical Bank v. Arthur Andersen & Co.*, 143

Misc.2d 823, 541 N.Y.S.2d 327 (1989). The Court in *Chemical* reasoned that unsealing the agreement could have a chilling effect on future settlements. As noted by the Supreme Court of New York in *Chemical*, a prior confidentiality agreement should also prohibit a subsequent litigant from requesting any discovery materials related to the prior case.

The U.S. District Court for the Southern District of West Virginia studied a similar but not identical issue in *Young v. State Farm Mut. Auto. Ins. Co.*, 169 F.R.D. 72 (D.C.W.Va. 1996). At issue in *Young* was whether a confidential settlement agreement was discoverable in a subsequent action by the *same* plaintiff in a dispute over attorney fees from the case which resulted in the confidential settlement agreement. In that instance, the Court determined that the agreement was relevant on the issue of attorney fees to be paid under the settlement agreement. That, however, is not the issue in the instant case.

The case at bar involves *different* plaintiffs. The present case is not merely a continuation, derivative or subsequent suit by the same parties over an interpretation of the agreement as in *Young*. The *Young* Court provided its opinion, however, as to how it would resolve the present issue in the case at bar when it held that a confidential settlement agreement with a liability insurer was admissible for discovery purposes where it would *not* be offered to prove the insurer's liability, but to prove the existence, nature, terms and proper enforcement of the agreement. *Id.*

The Plaintiffs in the present action are seeking to utilize information and testimony regarding matters which were sealed by prior confidentiality agreements to prove what the *Young* Court held would be improper – the insurer's liability. The *Young*

Court went to great lengths to uphold the desire of the parties to enter into a confidentiality agreement and allow it to be tampered with only by the same signatories to the agreement on a derivative issue. That limited erosion of the confidentiality agreements should be maintained. Moreover, the existence of prior confidentiality agreements has no bearing on the present action. The Plaintiffs allege Nationwide violated the West Virginia Unfair Claims Settlement Practice Act in the handling of their claim. Claims by other individuals based on facts of other claims is irrelevant to Nationwide's actions in the handling of this claim.

To permit the Plaintiffs in the present action to utilize information from confidential settlements which concerned issues separate and apart from those raised by the Plaintiffs in this action also undermines the public policy and stated judicial role of encouraging settlements. To cope with the increasing volume of litigation, many commentators have advocated an active, managerial role for judges in supervising the course of litigation -- a role that includes the encouragement of a variety of alternative means of resolving disputes which fall short of full, direct trials. See Wall, Schiller & Ebert, *Should Judges Grease the Slow Wheels of Justice? A Survey on the Effectiveness of Judicial Mediation Techniques*, 8 Am. J. Trial Advov. 83 (1984); Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982). The judiciary must maintain a vigorous policy of encouraging fair and reasonable settlement of civil claims whenever possible. In fact, the literature on settlement of civil suits speaks not to whether settlement is desirable, but on how best to achieve it and how far a judge should go to encourage it. See Craig and Christianson, *The Settlement Process*, 59 F.R.D. 203, 252 (1973); Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129 (1971). Various

courts have also recognized the judicial role in promoting the settling of civil lawsuits and avoiding the wasted resources and institutional burden of trying every case. For example, the Third Circuit, in *Pennwalt Corp. v. Plough, Inc.*, 676 F.2d 77 (3rd Cir. 1982), stated:

Voluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustment of matters in dispute, as for the most wholesome of reasons they certainly should. When effort is successful, the parties avoid the expense and delay incidental to litigation on the issues; the Court is spared the burdens of a trial and the preparation and proceedings that must forerun it.

Id. at 80.

An article by Arthur Miller of Harvard Law School discussed the very issue presented in this Petition for Writ of Prohibition – whether confidentiality agreements concerning settlements should be upheld. Arthur B. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 486 (1991). In that article, Professor Miller stated:

Whatever the value of disclosure, it should not obscure the strong public interest in, and policy objectives furthered by, promoting settlement. Settlement not only reduces the need for further governmental involvement, but also reduces the cost of dispute resolution to the litigants and helps free valuable judicial resources and thereby promotes more efficient operation of the courts. Our civil justice system could not bear the increased burden that would accompany reducing the frequency of settlement or delaying the stage in the litigation at which settlement is achieved. Thus, absent special circumstances, a court should honor confidentiality agreements that are bargained-for elements of settlement agreements. Moreover, when a confidentiality agreement facilitates settlement, a later court should hesitate to undermine the bargain, for if the effectiveness of the protective order cannot be relied on, its capacity to motivate settlement will be compromised. The

presumption in favor of the continued operability of a protective order is already supported by current law, and its continued vitality should be reaffirmed.

Id. (Citations omitted.) Moreover, Professor Miller also noted that if confidentiality agreements are not upheld, less cases would settle and the already over-burdened judicial system would suffer.

Because the judicial system already is unable to resolve civil disputes in an economical and timely fashion, additional burdens should not be imposed on it. A recent report on state court statistics revealed '[a] strong and disturbing pattern' showing that state 'courts are experiencing difficulty in keeping up with the inflow of new cases.' In many of our federal courts, the constantly expanding criminal docket has caused a restriction of the civil docket.

Id. (Citations omitted.) Obviously, if confidential settlement agreements are not upheld, the impact on the judicial system would likely be immense.

Therefore, while the importance of settlement appears to be self-evident, it is equally obvious that confidentiality is often the key ingredient in a settlement agreement. Clearly, the Respondent exceeded his judicial authority in ordering production of confidential settlement agreements contrary to State public policy and legislative intent, and contrary to the bargained-for confidentiality. Permitting the Plaintiffs in the instant action to discovery and utilize information which the signatories to the confidential settlement agreements are prohibited from using is manifestly unfair and gives the Plaintiffs an unfair advantage, and negates any effect of the confidentiality agreements. Moreover, it will institute a chilling effect upon resolution of litigation without trial, not only in the instant case, but in future cases as well.

D. COURTS SHOULD ONLY CONSIDER VIOLATING THE TERMS OF CONFIDENTIAL SETTLEMENT AGREEMENTS IN CASES INVOLVING PUBLIC HEALTH AND SAFETY ISSUES

The leading argument to mitigate otherwise valid confidential settlement agreements revolves around the public policy of revealing information that may pertain to public safety. A few states, most notably Florida and Texas, have enacted “sunshine laws” that limit a court’s powers to issue protective orders. Jack H. Friedenthal, *Secrecy and the Civil Justice System*, 9 *Journal of Law & Policy* 67 (2000). However, these “sunshine laws” focus on cases involving public health and safety hazards. *Id.* For example, the Florida statute strictly limits its scope to involve only those situations involving the concealment of a “public hazard.” Fla. Stat. Ann. § 69.081. “Public hazard” is defined as “an instrumentality including, but not limited to, any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.” *Id.* Likewise, the Texas Rule bars protective orders having “any probable adverse effect upon the general public health and safety.” Tex.R.Civ.P. 76a(1)(a)(2).

In his article outlining the argument against upholding confidential settlement agreements, Richard Zitrin listed a number of past cases illustrating what he believes to be the need to bar confidential settlement agreements. Richard A. Zitrin, *Legal Ethics: The Case Against Secret Settlements (or, What You Don’t Know Can Hurt You)*, 2 *Journal Inst. Stud. Leg. Eth.* 115, 119-20 (1999). The cases cited by Zitrin include the litigation surrounding the drug Zomax which reportedly was responsible for a dozen deaths and over 400 severe allergic reactions before it was taken off the market, all of which were subject to confidential settlements. *Id.* He also cited the Dalkon Shield,

support that confidential settlements have caused harm to the public. *Id.* Each of these areas of litigation focused upon some sort of dangerous defect or side effect relating to the products.

By examining the sunshine laws, the cases cited by Mr. Zitrin, and more recent litigation in which confidential settlements have been addressed, *i.e.*, silicone breast implants and Ford/Firestone, it becomes evident that they all have one thing in common – each of the cases focus on some inherent danger to the public health and safety. Products liability and toxic tort litigation have the potential to affect numerous individuals other than those immediately involved in the litigation.

In the instant action, there is no public health and safety issue involved in disputes over insurance coverage. In fact, under the definition provided in the sunshine laws, insurance would certainly not fall within the definition of a “public hazard.” Therefore, even in those few states that have enacted statutes or rules limiting the use of confidentiality agreements, the present agreements would be outside the scope of those statutes. Moreover, bad faith litigation does not involve danger to the public, nor would information contained in confidential settlement agreements expose the public to physical danger. (See *Grandstaff v. Allstate*, Order of July 21, 2000, attached as **Exhibit G.**)

E. THE WEST VIRGINIA LEGISLATURE RECOGNIZES THE VALIDITY OF CONFIDENTIAL SETTLEMENT AGREEMENTS

Although the West Virginia Supreme Court of Appeals has not addressed the specific issue presented in this Petition for Writ of Prohibition, it has stated on several occasions that the public policy of West Virginia favors and encourages the resolution of lawsuits by settlement. More specifically, this Court has stated on several occasions that:

The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by liquidation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.

See State ex rel. Ward v. Hill, 200 W.Va. 270, 489 S.E.2d 24 (1997); *Board of Educ. of Monongalia v. Starcher*, 176 W.Va. 388, 343 S.E.2d 673 (1986); *Snyder v. Hicks*, 170 W.Va. 281, 294 S.E.2d 83 (1982); *Sanders v. Roselawn Memorial Gardens, Inc.*, 152 W.Va. 91, 159 S.E.2d 784 (1968).

This strong public policy in encouraging settlement of private litigation is also present in the West Virginia Rules of Civil Procedure. For example, Rule 408 of the West Virginia Rules of Evidence encourages the compromise and settlement of disputes by prohibiting at trial any evidence of settlement or offers of settlement. *See also* W.Va.R.Civ.P. 68. Additionally, Rule 16 of the West Virginia Rules of Civil Procedure includes the pursuit of settlement as an express goal of the Pre-Trial Conference.

The West Virginia Legislature's recognition of the validity of confidential settlement agreements is also evidenced by its action in 1993 when the Legislature defeated a bill which would have limited protective orders and confidentiality agreements. (*See State Protective Order Legislative Activity Report* which was prepared in response to the California Assembly Judiciary Committee Analysis of a similar bill restricting confidentiality agreements, attached hereto as **Exhibit I**.) More than forty states have rejected legislation that would limit protective orders or confidential settlement agreements. (*See Exhibit I*.)

West Virginia's sunshine law also evidences the Legislature's recognition of the sanctity of settlement agreements. W.Va. Code Ann. § 6-9A-1, *et seq.* The legislative

policy of West Virginia's Open Governmental Proceedings Act ("the Act") is to allow the public to educate itself about government decision-making so that the people may retain control over the instruments of government created by them. W.Va. Code Ann. § 6-9A-1. The Legislature, in the Act, also recognizes that the public should not have unfettered access to all public information, and permits certain exceptions to public disclosure of information. W.Va. Code Ann. § 6-9A-4. Among the exceptions to public disclosure are materials which would constitute an unwarranted invasion of an individual's privacy. W.Va. Code Ann. § 6-9A-4(b)(6). Also protected from disclosure are the terms of settlements reached with public agencies *unless the terms of the settlement allow disclosure*. W.Va. Code Ann. § 6-9A-4(b)(11) (emphasis added). Thus, if settlement agreements with public agencies are accorded confidential status, then it stands to reason that confidential settlement agreements between private parties should likewise be upheld and protected.

Therefore, it is clear that West Virginia has expressed, through its Rules of Evidence, Rules of Civil Procedure, the Open Governmental Proceedings Act, as well as the opinions of its highest Court, the strong public interest in encouraging settlement and reducing the substantial cost of litigation.

F. THE RESPONDENT CLEARLY EXCEEDED HIS JUDICIAL AUTHORITY BY ORDERING PRODUCTION OF CONFIDENTIAL SETTLEMENT AGREEMENTS IN SEPARATE, UNRELATED CLAIMS WHICH INVADES THE RIGHTS OF THIRD PARTIES WHO HAVE NOT CONSENTED TO RELEASE

The Respondent has ordered the production of confidential settlement agreements between Nationwide and persons who are not parties to the instant litigation. The settled claims of these third parties were separate and unrelated claims to those of the Georges.

The third parties executed the settlement agreements with the express, written agreement that the settlements would remain confidential. Many of these third parties were represented by the same attorney who represents the Plaintiffs in the instant action. Thus, not only is Plaintiffs' counsel and the Respondent forcing Nationwide to breach its contract with its insureds that it previously settled with, but Plaintiffs' counsel and the Respondent are forcing disclosure of confidential information of third parties, some of whom are former clients of Plaintiffs' counsel, without their consent. Further, Plaintiffs' counsel and the Respondent are forcing this disclosure without notice to the third parties that their bargained-for confidential settlements are about to be made public.

Again, this Court has not squarely addressed the issue of disclosure of settlement agreements of third persons not parties to the instant litigation. However, other courts have examined this issue and have held that same is prohibited. In *Windemuller Electric Co. v. Blodgett Memorial Medical Center*, 130 Mich.App. 17, 343 N.W.2d 223 (1984), the Court of Appeals held that Federal Rule of Evidence 408 governs the admissibility of a completed settlement made by one party to the present lawsuit with a third person. *Id.*, 343 N.W.2d at 225. The Advisory Committee's note explains:

While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

Id.

The *Windemuller* Court stated that it was clear that the policy of encouraging settlements requires exclusion of such settlements to prove liability. *Id.* "We note that the rule excludes the admission of evidence of settlements 'to prove liability for or

invalidity of the claim or its amount.” *Id.* (emphasis in original in case law). “Therefore, we hold that under [Rule] 408, evidence of a settlement made by a party to the present litigation with a third person is not admissible to prove liability.” *Id.* at 225-26. See also *United States v. Contra Costa County Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982) (Rule 408 does apply to situations where the party seeking to introduce evidence of a compromise was not involved in the original compromise); *Baker v. Blue Ridge Ins. Co.*, 215 Neb. 111, 337 N.W.2d 411 (1983) (Offers to compromise or settlement of a claim between the parties is inadmissible. This exclusion extends to settlements, negotiations, and offers to compromise made by either of the parties with or to third persons concerning a cause of action relative to the same transaction or same subject matter involved in the litigation at hand.); *Hudspeth v. C.I.R.*, 914 F.2d 1207, 1213 (9th Cir. 1990) (Rule 408 does apply to situations where the party seeking to introduce evidence of a compromise was not involved in the original compromise).

In the recent case of *McDevitt v. Guenther*, 522 F.Supp.2d 1272 (D. Hawai’i 2007), the District Court held that “[t]he protections of Rule 408 cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury.” *Id.* at 1285. Additionally, “widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party’s chosen counsel who would likely become a witness at trial.” *Id.* at 1285-86 (quoting *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 929 (2d Cir. 1992)).

The *McDevitti* Court also stated:

Rule 408 prohibits the use of settlement negotiations and agreements as evidence of liability or damages regardless of whether a party or nonparty to the negotiations and settlement seeks its introduction. This prohibition applies

even where the settlement evidence favors the settling party.

Id. at 1285 (citing Charles E. Wagner, *Federal Rules of Evidence Case Law and Commentary* 433 (1999-2000 ed.) (citing *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067 (5th Cir. 1986); *Parker v. O'Rion Industries, Inc.*, 769 F.2d 647 (10th Cir. 1985)).

At the time of settlement, parties do not know whether the evidence of the settlement offer will become useful in subsequent claims or whether that evidence will be helpful or prejudicial to their interests. These considerations should not enter the settlement negotiations.

McDevitt, 522 F.Supp.2d at 1287.

In fact, courts usually afford a third party's privacy interest in the information additional weight because it was not a party to the instant action. *See Hasbrouck, supra*, 187 F.R.D. at 458. As noted, the Respondent in the instant action has ordered the production of settlement agreements between Nationwide and its insureds in prior claims. Absolutely no protections have been afforded to these third parties to ensure their bargained-for confidentiality. Furthermore, many of these third parties were represented by Plaintiffs' counsel. It is incumbent upon Plaintiffs' counsel to uphold the bargained-for confidentiality of his former clients and to protect their interests. Seeking disclosure of his former clients' confidential and private information, without their knowledge or consent, is directly adverse to their interests and is in breach of the confidential settlement agreements.

V. CONCLUSION

The Respondent clearly exceeded his judicial authority in ordering production of confidential settlement agreements contrary to State public policy and legislative intent. The parties to the confidential settlement agreements imposed their own restrictions on

their ability to speak publicly about the matter and bargained for the confidentiality of the agreements. The rights of the parties as contracted between them deserves the protection of the Court.

West Virginia recognizes the strong public policy of encouraging settlements and in promoting the efficient resolution of conflicts. This strong public interest outweighs broad discovery of facts to support a party's claims and defenses. As held by the United States Supreme Court, "there is no First Amendment right to access information necessary to try a lawsuit; access is permitted by legislative grace." *Seattle Times*, 467 U.S. at 32. The West Virginia Legislature previously defeated a bill which would have limited protective orders and confidentiality agreements. Further, the need to obtain the settlement information as a matter of trial strategy does not warrant disclosure of the confidential settlement agreements. *Hulse, supra*.

The Respondent failed to consider the fact that production of confidential settlements will inhibit future settlements. Nationwide and other defendants will have no incentive to settle future cases if they know that the details of settlements will be made public. Further, the prejudice to Nationwide of production of the confidential settlement agreements is not outweighed by the Plaintiffs' mere desire to obtain same. The fact that other first-party bad faith cases have been filed against Nationwide, and the resulting settlements thereof, is of minimal value to the plaintiffs in the instant matter. The potentially damaging inference that could be derived from same would unfairly prejudice Nationwide. It is reasonable to infer that jurors would view the settlements as an admission of guilt. However, as noted in the advisory committee notes to Federal Rule of Evidence 408, settlements could have merely been a business decision on the part of

Nationwide. Additionally, claims by other individuals based on facts of other claims is irrelevant to Nationwide's actions in the handling of this particular claim.

The confidential settlements at issue do not raise any public health or safety concerns. Bad faith litigation does not involve danger to the public, nor would information contained in the confidential settlement agreements expose the public to physical danger. Thus, there is no compelling reason or justification as to why the sanctity of the confidential settlement agreements should be violated.

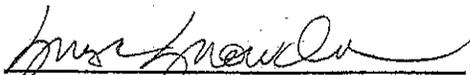
Lastly, the Respondent clearly exceeded his judicial authority by ordering production of confidential settlement agreements in separate, unrelated claims which invade the rights of third parties. The Respondent is not only forcing Nationwide to breach its contract with its insureds that is previously settled with, but the Respondent is forcing disclosure of confidential information of third parties, without notice to the third parties that their bargained-for confidential settlements are about to be made public.

Wherefore, the Petitioner, Nationwide Mutual Insurance Company, respectfully requests that this Court issue a rule to show cause and thereafter issue a Writ of Prohibition to the Circuit Court of Harrison County to prohibit the production of confidential settlement agreements entered into by Nationwide and claimants other than the plaintiffs in the instant matter.

Respectfully submitted,

**NATIONWIDE MUTUAL INSURANCE
COMPANY,
By Counsel**

MARTIN & SEIBERT, L.C.

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MEMORANDUM OF PERSONS TO BE SERVED

Persons to be served the Rule to Show Cause should this Court grant the relief requested by this Petition for Writ of Prohibition are as follows:

The Honorable J. Lewis Marks, Jr.
CIRCUIT COURT OF HARRISON COUNTY
Harrison County Courthouse
301 W. Main Street
Clarksburg, West Virginia 26301

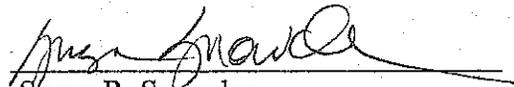
David J. Romano, Esq.
363 Washington Avenue
Clarksburg, West Virginia 26301

CERTIFICATE OF SERVICE

I, Susan R. Snowden, Counsel for the Petitioner, Nationwide Mutual Insurance Company, hereby certify that I served a true copy of the foregoing *Petition for Writ of Prohibition* upon the following individuals by placing the same in the U.S. Mail, First Class, postage prepaid, on this the 28th day of **October, 2008**:

The Honorable J. Lewis Marks, Jr.
CIRCUIT COURT OF HARRISON COUNTY
Harrison County Courthouse
301 W. Main Street
Clarksburg, West Virginia 26301

David J. Romano, Esq.
363 Washington Avenue
Clarksburg, West Virginia 26301


Susan R. Snowden

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE