

No. 35514

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

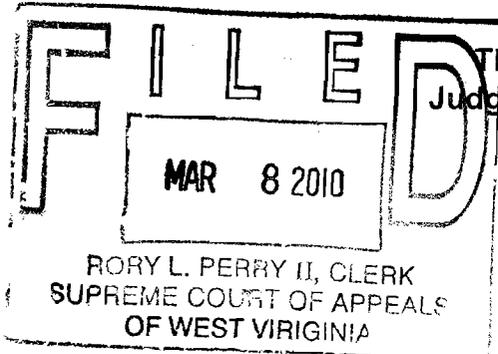
STATE EX REL. STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE THOMAS A. BEDELL,
Judge of the Circuit Court of Harrison County,
West Virginia,

Respondent.



*From the Circuit Court of
Harrison County, West Virginia
Civil Action No. 09-C-67-2*

PETITION FOR WRIT OF PROHIBITION

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I. ISSUE PRESENTED

The present Petition arises from a ruling which places State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") in conflict between adhering either to Insurance Commissioner regulations or an Order of the Circuit Court of Harrison County. Specifically, the Circuit Court of Harrison County entered a protective order that sharply restricts State Farm's access to, use and retention of medical records and information in connection with an insurance claim. State Farm submits that the Circuit Court erred in entering, without good cause, a facially overbroad protective order that both unduly burdens State Farm's claims handling and anti-fraud operations and contradicts and undermines West Virginia statutes and Division of Insurance regulations concerning the oversight of insurers. While the present civil action arises from an underinsured motorist claim, the issue transcends all lines of coverage under any insurance policy whereby a claimant alleges personal injury and seeks insurance benefits for those injuries.

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

model National Association of Insurance Commissioners privacy rules. See 114 CSR §57-15.1.

Notwithstanding these protections under existing law, and the obvious need for State Farm to obtain plaintiff's medical records in order to properly evaluate a claim, Plaintiff has refused to provide her medical records unless and until State Farm executes a medical confidentiality Order. While no such Order is necessary, State Farm is willing to enter into an Order, consistent with existing laws and regulations which is not unduly restrictive, to protect the confidentiality of the records. However, the terms set forth by the plaintiff and later ordered by the Circuit Court impose restrictions and requirements which directly conflict with duties imposed by Insurance Commissioner regulations and which prohibit State Farm from utilizing the records in any electronic format which is key to its claim handling system.

In its February 11, 2010 Order, (Appendix, Exhibit A), the Respondent imposed, *inter alia*, the following terms:

1. No person shall scan or store any of Plaintiff's or the Decedent's medical records or medical information by any method, including but not limited to, computerized storage, filming, photographing, microfiche or other similar method. Any insurer receiving said information, shall, pursuant to the Order, ... agree in writing to be bound by all terms of the Order, including the non-disclosure and non-retention of such material.
2. Upon conclusion of the case, all medical records, and medical information, or any copies or summaries thereof, will either be destroyed with a certificate from Defendants' counsel as an officer of the Court that the same has been done, or all such material will be returned to Plaintiff's counsel without retention by Defendants' counsel or any other person who was furnished such materials and information.¹

¹ While the Order contains a carve-out provision for defense counsel to maintain the records in a sealed

Because the terms of the protective order conflict with duties imposed by state and federal insurance regulations, State Farm is prohibited from utilizing the records in any electronic form which also impedes important efforts to deter insurance fraud. Moreover, in light of an impending trial date, it is incumbent the issue be resolved *via* petition for writ of prohibition as there is no other remedy available. Any resolution of this conflict impacts all insurers transacting business in West Virginia relative to the receipt, use, and retention of confidential information which is necessarily a part of any casualty claim.

II. PROCEEDINGS AND RULINGS BELOW

Following a March 20, 2008, two-vehicle accident in which Lynn Robert Blank was killed and Carla Blank was injured, State Farm offered all available liability and UIM limits with respect to the death claim. After receiving limited medical records concerning the bodily injury claim of Carla Blank, State Farm offered \$85,000 of liability proceeds which was later increased to the \$100,000 liability limits. State Farm prepared the necessary documentation to seek court approval of the death claim at which time the plaintiff below retained counsel. On July 31, 2008, counsel refused to go forward with the wrongful death settlement. Despite all limits offered, that claim has never been resolved.

After counsel's involvement, State Farm repeatedly requested medical records and/or an authorization per policy provisions. Each request was denied.

Plaintiff then filed suit in the Circuit Court of Harrison County on February 12, 2009, against the Estate of Jeremy Thomas and State Farm Mutual Automobile Insurance Company.² The claims against State Farm seek UIM benefits, but also include a

manner, there is no similar provision for any insurer.

² State Farm insured the vehicle Jeremy Thomas was driving on the date of loss under a liability policy. All

declaratory judgment action about available UIM limits³ and a generic “bad faith” claim.

State Farm continued to seek the records and/or authorization after suit was filed. Those requests were met with the same refusals and a demand that State Farm execute a medical confidentiality agreement with the overbroad restrictions at issue here. Plaintiff below has alleged she has “fears” concerning access to her confidential medical information despite the imposition of state, federal, and State Farm privacy protections. State Farm has always been willing to enter into either a pre-suit agreement or a post-suit Protective Order to safeguard the confidentiality of medical records, but simply could not agree to the onerous terms of the Order sought by plaintiff below such as a prohibition on scanning records into State Farm’s electronic claim file, an attempt to limit access to those records and a requirement to return or destroy the records at the conclusion of the litigation. State Farm proffered a Protective Order, consistent with existing laws and regulations and without undue additional restrictions which plaintiff refused. (Appendix, Exhibit B).

State Farm also sought the information through formal discovery. Plaintiff below again refused to answer written discovery to produce, per policy language, an authorization and refused to answer requests for admissions due to the unresolved issues on the appropriate scope of protections. When plaintiff below demonstrated her unwillingness to participate in discovery, State Farm moved to amend its Answer as it was clear plaintiff below was in breach of her contract. The Circuit Court denied that Motion. Simultaneous with refusing to answer the discovery, plaintiff below moved to strike the UIM claim from

available liability limits have been offered. Plaintiff, however, will not release the defendant’s Estate.
3 The specific challenge has never been articulated.

the underlying liability claim. That attempt failed.

To obtain appropriate discovery including the necessary information to allow State Farm to evaluate the claim, the deposition of Carla Blank was scheduled for January 29, 2010. Prior to the deposition, however, counsel for the plaintiff below attempted to exclude State Farm and its counsel from the deposition or, alternatively, sought to prohibit counsel from reporting any information obtained during the deposition to State Farm. (See transcript, Appendix, Exhibit C). Because counsel could not agree to either proposal, Mrs. Blank was not deposed.

When plaintiff below refused to properly participate in discovery based upon her demanded medical confidentiality agreement, State Farm filed a response drawing to the Court's attention the impasse and seeking entry of State Farm's proposed Protective Order. On February 11, 2010, the Circuit Court issued the Order upon which this Petition is based ordering plaintiff below to produce her medical records but which imposed terms and restrictions on the production and use of records. Those terms, however, prohibit State Farm from scanning the records and require return or destruction of the records at the conclusion of the litigation, which is, *inter alia*, in direct violation of West Virginia insurance regulations.

To accept the records per the terms of the Respondent's February 11, 2010 Order would require State Farm to violate Insurance Commissioner regulations which could then subject it to fines and potential suspension of its license to transact business in West Virginia. Neither State Farm, nor any other insurer, can be placed in this untenable position of either violating a Court Order or violating obligations imposed by state regulations. Because of this conflict, as well as the tensions between the Court Order and

State Farm's regulatory compliance as well as the insured's duties under her auto policy, State Farm hereby petitions this Court for issuance of a rule to show cause and ultimately a reversal of the second February 11, 2010 Order, specifically the terms imposed by Respondent as to State Farm's receipt, use, and retention of the medical records.

This decision will impact all insurance claims throughout West Virginia. State Farm seeks a ruling of this Court upholding the record retention regulations of the Insurance Commissioner over the provisions of the contrary Order below. Legitimate interests in confidentiality of medical records are already protected under existing state and federal privacy laws, other regulations of the Insurance Commissioner, and internal policies of State Farm, thus making the additional terms imposed by the Respondent's February 11, 2010 Order unnecessary. As a result, the Circuit Court's restrictions must yield.

In the past year, State Farm has seen a sharp increase in requests for protective orders that seek restrictions that go well beyond established privacy protections. The result of these case-by-case protective orders is a patch-work of judicially-constructed privacy requirements created in a piecemeal fashion, often contradicting state law and regulations. Indeed, specifically addressing the proliferation of requests for overbroad protective orders, the West Virginia Insurance Commissioner recently sent a letter to all insurers in the State, admonishing that: "[i]f [due to return or destroy provision such as those at issue here] records necessary for an adequate market conduct review are missing," the Office of the Insurance Commissioner would "be substantially hindered in carrying out its legislative mandate." Informational Letter No. 172.

III. ASSIGNMENT OF ERROR

1. Did the Respondent exceed his judicial authority in imposing terms and conditions over the production of medical records that both unduly burden State Farm's claims handling and anti-fraud operations and contradict and undermine West Virginia statutes and Insurance Commissioner regulations concerning the oversight of insurers?

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).

The court below exceeded any legitimate power it possesses when it imposed terms and conditions as to the production of plaintiff's medical records which are, inter alia, in direct contravention of Insurance Commissioner regulations and which prohibit State Farm from utilizing the plaintiff's medical records in any electronic format, essentially requiring State Farm to revert to the use of paper claim files which has proven costly and inefficient.

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 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 because State Farm cannot accept the records per the terms of the Order and place itself in jeopardy of violating Insurance Commissioner regulations. Without medical information, State Farm cannot evaluate nor prepare a defense to the claim which is the penultimate deprivation of due process. Thus State Farm requests this Court exercise its original jurisdiction pursuant to Rule 14 of the West Virginia Rules of Appellate Procedure and accept this Petition for Writ of Prohibition, issue a Rule to Show Cause and thereafter grant the Writ of Prohibition reversing the February 11, 2010 Order of the Circuit Court of Harrison County.

B. THE RESPONDENT EXCEEDED HIS AUTHORITY WHEN HE IMPOSED TERMS AND CONDITIONS UPON THE RECEIPT, USE, AND RETENTION OF PLAINTIFF'S MEDICAL RECORDS IN CONTRAVENTION OF INSURANCE COMMISSIONER REGULATIONS, AS WELL AS OTHER APPLICABLE LAW AND PUBLIC POLICY INTERESTS.

1. The scope of the February 11, 2010 Order is overly broad and violates Insurance Commissioner regulations, as well as other applicable law and public policy interests.

Insurers' retention of unaltered claim files is required, *inter alia*: (1) to allow the Insurance Commissioner to protect consumers from unfair claims handling and to assure that insurers maintain appropriate reserves; (2) to comply with other government obligations, such as coordinating private and public payments to Medicare beneficiaries, see, e.g., Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA), 42 U.S.C. 1395y(b)(7); and (3) to permit insurers, individually and collectively and in cooperation with

government law enforcement, to deter criminal insurance fraud that erodes public confidence and increases all premiums. These business practices also benefit State Farm insureds and claimants by accelerating the claim handling process. Yet, in conflict with the directives of the Insurance Commissioner, and these obvious public policy benefits, the Order below prohibits State Farm from maintaining unaltered claim files.

State Farm operates in a highly regulated industry. Its regulator is charged with protecting the citizens of West Virginia from a myriad of ills including fraud, inappropriate claim handling and excessive rates. To carry out her legislative mandate, the Commissioner has utilized her rule-making authority and has issued a number of regulations. Violation of these regulations may subject an insurer to penalties and potential license suspensions. One such regulation requires State Farm to obtain and retain records in its investigation of claims. 114 CSR §15-4.4 states in pertinent part:

4.4. Claim files shall be maintained as follows:

a. A claim file and accompanying records shall be maintained for the calendar year in which the claim is closed plus additional years as set forth in subdivision b, subsection 4.2 of this section. The claim file shall be maintained so as to show clearly the inception, handling and disposition of each claim. The claim files shall be sufficiently clear and specific so that pertinent events and dates of these events can be reconstructed. A claim file shall, at a minimum, include the following items:

1. For property and casualty: the file or files containing the notice of claim, claim forms, proof of loss or other form of claim submission, settlement demands, accident reports, police reports, adjustors' logs, claim investigation documentation, inspection reports, supporting bills, estimates and valuation worksheets, **medical records**, correspondence to and from insureds and claimants or their representatives, notes, contracts, declaration pages, certificates evidencing coverage under a group contract, endorsements or riders, work papers, any written communication, any documented or recorded telephone communication related to the handling of a claim, including the investigation, payment or denial of the claim, copies of claim checks or drafts,

or check numbers and amounts, releases, all applicable notices, correspondence used for determining and concluding claim payments or denials, subrogation and salvage documentation, any other documentation created and maintained in a paper or electronic format, necessary to support claim handling activity, and any claim manuals or other information necessary for reviewing the claim;

114 CSR 15-4.4 (emphasis added). See also 114 CSR §15-2.4, 114 CSR §14-3.

Moreover, 114 CSR §14-3 states in pertinent part:

The insurer's claim files shall be subject to examination by the Commissioner or by his or her duly appointed designees. Such files shall contain all notes and work papers pertaining to the claim in such detail that pertinent events and the dates of such events can be reconstructed.

(emphasis added).

The West Virginia Insurance Commissioner also recently released Informational Letter 172 which specifically addresses this retention issue in light of her growing concern of the proliferation of requests for individualized orders such as that at issue here which conflict with her consistent regulation of insurers and their claim files. As the Commissioner stated:

The applicable insurance law and rules demand consistent and comprehensive maintenance of all essential claim records by insurers to ensure that the laws protecting consumers of this state are being followed and that claims are being properly resolved. If records necessary for an adequate market conduct review are missing, the OIC will be substantially hindered in carrying out its legislative mandate...

(A copy of the Informational Letter is attached as Exhibit I to State Farm's Response, Appendix, Exhibit D).

In short, the provisions of the Circuit Court order below are clearly in conflict with Insurance Commissioner regulations regarding insurers' retention of claim files, including medical records in claims files. Yet the straightforward West Virginia regulations and the

recent pronouncement by the Insurance Commissioner were completely ignored in the Respondent's Order.⁴ The West Virginia Legislature delegated the responsibility to patrol the conduct of insurers to the Insurance Commissioner. That delegation of duties must be respected and upheld by this Court. See, e.g., *Simpson v. WV Office of the Ins. Comm'r*, 223 W.Va. 495, 678 S.E.2d 1 (2009) (Legislative power may be constitutionally delegated to an administrative agency to promulgate rules and regulations necessary and proper for the enforcement of a statute. Procedures and rules promulgated by an administrative agency with authority to enforce a law will be upheld so long as they are reasonable and do not enlarge, amend or repeal substantive rights created by statute).

In exercising her delegated rule-making authority, the Commissioner instituted the aforementioned record retention regulation. The careful balance created by the West Virginia Legislature would be unduly disrupted and would grant to this one Plaintiff the right to "second guess" the wisdom and requirements of the Legislature and the Insurance Commissioner if the February 11, 2010 Order is not reversed.

As noted, the Respondent's Order places State Farm in direct violation of the Commissioner's record retention requirement. The Order does not recognize that such requirements are imposed upon insurers, yet violation of those requirements could subject State Farm to harsh penalties simply to meet the mandates of an Order in a single case. Forcing a party to choose between violating a Court Order or a governmental regulation is at a minimum prejudicial and at worst a due process violation. *Credit Suisse v. Dist. Ct. for the Central Dist. of Cal.*, 130 F.3d 1342, 1345 (9th Cir.1997); *Gaynor v. Melvin*, 573 S.E.2d

⁴ Important public policy concerns underpinning the record retention requirement are set forth in Informational Letter 172 and are adopted herein by State Farm as well.

763, 766 (N.C. App.2002) (“A trial court may not enter orders in conflicts with the statutes and to the extent they are in conflict, those orders are void.”) (citing *Prentiss v. Allstate Ins. Co.*, 548 S.E.2d 557, 559 (N.C.App.2001)). State Farm cannot be ordered to violate its statutory and regulatory obligations nor can the Circuit Court impose an Order that intrudes upon the administrative or executive branch of government. Therefore, the overly onerous Order entered by the Respondent must be reversed.

The Order below, moreover, thwarts not only West Virginia Insurance regulations, but also impedes insurers’ ability to comply with other legal requirements. For instance, insurer retention of medical records and information is necessary for State Farm to meet its obligations under the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA), 42 U.S.C. 1395y(b)(7). Thus, federal interests in insurers’ operations also are implicated by the Order at issue.

Further, the Order is unlawful because it conflicts with existing state and federal law and regulations. Like any other regulated entity that obtains confidential information on a daily basis – including banks, the federal government and even online retailers that collect credit card information and personal data – State Farm follows established privacy laws and has adopted carefully-designed, uniform procedures to protect the confidentiality of the information it receives. If there is a different rule for every claimant who seeks special privacy safeguards, no insurer can implement an automated system for claim handling nor insure compliance with state and federal privacy laws and regulations. This systematic approach is critical to the fair and efficient handling of insurance claims. It is both inappropriate and unwise for individual courts across the State to enter protective orders

that not only second guess the rules established by Insurance Commissioner, but which override them and reverses a decade of investment and progress by the insurance industry in electronic record-keeping systems.

2. The terms of the February 11, 2010 Order also impinge upon State Farm's ability to operate in West Virginia.

Additional terms and conditions in the Respondent's Order are also contrary to established business practices of State Farm – most notably its use of electronic claim files. This business model has been specifically approved by the West Virginia Insurance Commissioner. 114 CSR §15-4.7(a). However, the February 11, 2010 Order prohibits scanning of medical records. (¶1) To revert to paper files, as is implicit in the Order, is not desirable because it would undermine the effective and efficient resolution of claims. It is not cost beneficial to insureds in West Virginia and could cause rate increases. West Virginia law generally promotes the use of electronic records systems. See, e.g., W.Va. Code §11-1A-21 (requiring tax commissioner to establish a “statewide electronic data processing system”). In addition, the Insurance Commissioner is presently seeking requests for quotations for electronic data transfers of West Virginia workers' compensation claims information. (See Exhibit J to State Farm's Response, Appendix, Exhibit D).

State Farm has developed an electronic claim system to comply with laws enacted to safeguard confidential personal information held by regulated entities such as insurers. The system is designed to comply with regulations such as “maintenance of records in a computer-based format ... be archival in nature, so as to preclude alteration of the record after the initial transfer to computer format.” 114 CSR §15-4.7(b). Respondent's Order,

however, ignores the operation of insurance in an electronic world. Denying State Farm the ability to utilize technology available to it that streamlines its process and expedites claim handling is simply unjustified. To strip away technological advancements is in and of itself contrary to public interests and devoid of "good cause."

The benefits of electronic records are well-recognized. There is presently a concerted effort by the U.S. Department of Health and Human Services to encourage health care providers to utilize electronic records, including incentives vital stimulus funds. See, Health Information Technology for Economic and Clinical Health Act of the American Recovery and Reinvestment Act of 2009, (HITECH), 42 USC §13001.⁵ West Virginia University Hospitals has also unveiled its "Merlin" project whereby all medical orders and patient information is automated into an online system. Ironically, to produce her medical records to State Farm, plaintiff below may need to obtain electronic medical records from West Virginia University Hospitals. It is a similar system utilized by State Farm to which the underlying plaintiff objects and which is being thwarted by the Respondent's Order herein.

State Farm's legitimate business interests must be weighed against the requests of a single claimant to "lock down" her medical information in the face of numerous safeguards against unwarranted disclosure of her information. Weighing these interests demonstrates the plaintiff's demands for additional restrictions are unfounded and must yield in the face of federal, state, and company-imposed statutes, regulations, and procedures.

Plaintiff must recognize she faces some disclosure of private medical information by

⁵ For example, §13112 requires all federal health care programs to insist that providers and insurers utilize where available health information technology systems and products.

the mere fact she is presenting a claim for insurance proceeds. She has placed her medical condition at issue and must now provide documentation to support her claim. Moreover, plaintiff has demanded a jury trial. (See Complaint). In order to meet her burden of proof, plaintiff's medical information will be publicly disclosed and discussed. Her evidence will be filed in a court of public record, testimony will be given in open court, and jurors will assess the evidence. In fact, plaintiff below has filed her Exhibit List indicating she intends to publicly disclose her medical records on or about March 22, 2010, when trial is scheduled to begin. (Appendix, Exhibit E). Thus, plaintiff's attempt to keep the information overly protected is for limited duration. These attempts to slow the claim evaluation process and impose undue restrictions on how State Farm receives and utilizes the information are all counterproductive to the result claimant seeks.

Rather than engage in protracted motions practice attempting to impose unnecessary restrictions, plaintiff could simply have provided State Farm the necessary information to evaluate her claim more than a year ago and may even have avoided the filing of suit. Rather than participate in the claims process as she is contractually obligated to do, plaintiff halted the process in July, 2008 and has continually refused to provide any pertinent medical information. (See, Appendix, Exhibit F). Moreover, the refusal to produce medical records without undue restrictions was upheld by the Respondent in the February 11, 2010 Order. That Order, however, makes rulings beyond the authority of the Respondent, unduly restricts the efficient operation of business, and must be reversed.

3. The impact of the February 11, 2010 Order disregards other legitimate contractual and public policy concerns that impacts casualty claims overall.

In addition to the conflict between regulator and court which the February 11, 2010

Order creates, the impact of the Order has other far-reaching effects.

a. **The February 11, 2010 Order ignores contractual obligations imposed on the plaintiff to provide an authorization for her medical records.**

The policy of insurance under which the plaintiff below seeks UIM benefits contains contractual obligations requiring the insured to provide an authorization. Pertinent policy language states:

6. Other Duties Under Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, Death, Dismemberment and Loss of Sight Coverage, and Loss of Earnings Coverage

A *person* making claim under:

a. Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, Death, Dismemberment and Loss of Sight Coverage, or Loss of Earnings Coverage must:

...

(3) provide written authorization for *us* to obtain:

- (a) medical bills;
- (b) medical records;
- (c) wage, salary, and employment information; and
- (d) any other information *we* deem necessary to substantiate the claim.

Neither the Commissioner's regulations nor applicable policy language permits the imposition of restrictions such as those at issue here as to the receipt, use or retention of the records. Despite this, the Order imposed by the Respondent disregarded clear and unambiguous policy language and instead adopted many of plaintiff's requested restrictions which as a result places State Farm in the proverbial "Catch 22." The Respondent failed to apply clear policy language. This is beyond his authority as he made

no finding that the language was inappropriate, vague or ambiguous. Therefore, the language must be enforced and the insured must uphold her end of her contract and produce an authorization.

b. The Order fails to consider whether a Protective Order was even necessary or whether plaintiff demonstrated good cause in seeking an Order.

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

However, to again stress its commitment to the privacy of an insured's medical information, State Farm agreed to enter into an Agreed Order with Mrs. Blank in this case. The proposed Order balanced the competing interests of Mrs. Blank's desire to keep her medical information confidential while permitting State Farm the ability to receive and utilize the information to evaluate the claim. Despite this balanced proffer, the Respondent issued an Order ignoring the regulations imposed upon State Farm and placing it at odds with its regulator and other regulating entities. The Respondent's Order, however, must yield to the

⁶ This rule states an insurer shall not disclose nonpublic personal health information about a consumer or customer unless an authorization is obtained from the consumer or customer whose nonpublic personal health information is sought to be disclosed.

proper rules promulgated by the Insurance Commissioner and uphold appropriate policy language, thus compelling production of the medical records without additional terms or restrictions imposed.

In adopting plaintiff's restrictions, the Court implicitly adopted the vague arguments of the plaintiff below concerning her "fears" that her medical records may be improperly accessed by those without a legitimate business need for the information. Such unarticulated "fears," however, do not rise to the level of "good cause" which is the threshold for seeking a protective Order. Moreover, the Supreme Court of the United States considered these similar unarticulated "fears" in a similar context more than 30 years ago in *Whalen v. Roe*, 429 U.S. 589 (1977). Additionally, this Court, in considering the Rule 26(c) standard, held that a party seeking a protective Order must make a specific demonstration of fact. *AT&T Communications of WV v. Public Service Comm'n of WV*, 188 W.Va. 250, 253, 423 S.E.2d 859, 862 (1992) (emphasis added). This "good cause" standard is a constitutional requirement which can not be ignored or overlooked. *Seattle Times Co. v. Rinehart*, 457 U.S. 20 (1984).⁷ Neither plaintiff nor Respondent stated any facts upon which to assert a protective Order or the overly restrictive terms imposed therein were necessary. Lack of such facts is fatal to the Order and again mandates reversal.

c. The impact of the February 11, 2010 Order thwarts anti-fraud efforts.

Because of the limitations imposed in the February 11, 2010 Order, State Farm and other insurers who receive a similar Order are also hampered in anti-fraud efforts. This transcends to the Insurance Commissioner as well as she will no longer have access to the

⁷ The lack of good cause also impinges upon other Constitutional grounds such as the First Amendment. A Protective Order entered without good cause impinges upon freedom of speech. *Id.* at 37.

information she often requests to investigate and prosecute fraud claims. State Farm is not in any way accusing its insured of committing fraud in this case. However, the impact of the February 11, 2010 Order is broader than this isolated case and there may be future cases in which fraud is attempted. Without the ability to maintain the critical evidence – the medical records upon which evaluations are often based – State Farm and the Insurance Commissioner cannot ferret out fraudulent claims in the future.⁸ This fact alone runs contrary to valid public policy concerns. The West Virginia Legislature is acutely aware of the frequency and costs of insurance fraud in this State and created a Fraud Unit within the Insurance Commissioner's office to investigate and prosecute such claims. See, W.Va. Code §33-41-1, *et seq.* The Fraud Prevention Act requires State Farm to report suspected fraudulent acts and include a listing of documents supporting the suspicion. 114 CSR §71-3.3 (f)-(g). The viability of any successful anti-fraud claim rests with the ability to retain all information. The February 11, 2010 Order eradicates that possibility. Because of these overriding public policy concerns, ignored by the Respondent, the Order must again be reversed.

V. CONCLUSION

The West Virginia Insurance Commissioner has clearly set forth record retention requirements upon insurers which advance legitimate public policy concerns. However, Respondent's Order of February 11, 2010 eviscerates those rules permitting individual claimants to dictate the manner in which their medical information is provided to and utilized by insurers. That approach would eliminate uniform control or regulation of medical

⁸ On March 4, 2010, it was reported that the Insurance Commissioner's Fraud Unit had investigated a staged accident ring which lead to the indictment of three individuals. *3 accused in W.Va. of faking car*

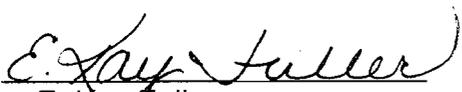
privacy issues and elevate the dictates of an individual claimant above other claimants, other insureds and the regulator herself. The Respondent's Order is overly broad in its terms as to the manner in which State Farm may obtain and use the underlying plaintiff's medical records and is squarely at odds with record retention requirements of the Insurance Commissioner. As such, the February 11, 2010 Order must be reversed.

WHEREFORE, for the foregoing reasons, State Farm Mutual Automobile Insurance Company respectfully requests this Court issue a rule to show cause and thereafter grant a writ of prohibition against enforcement of the February 11, 2010 Order of the Circuit Court of Harrison County, West Virginia.

Respectfully submitted,

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY
BY COUNSEL**

MARTIN & SEIBERT, L.C.

BY: 
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Martinsburg, WV 25402-1286
(304) 262-3209

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 Thomas A. Bedell
CIRCUIT COURT OF HARRISON COUNTY
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301-2967

Joseph Shaffer, Esquire
Prosecuting Attorney
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301-2967

David J. Romano, Esquire
Rachel E. Romano, Esquire
ROMANO LAW OFFICE
363 Washington Avenue
Clarksburg, WV 26301

Tiffany R. Durst, Esquire
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, WV 26508

CERTIFICATE OF SERVICE

I, E. Kay Fuller, counsel for the Petitioner, State Farm Mutual Automobile 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 8th day of **March, 2010**:

The Honorable Thomas A. Bedell
CIRCUIT COURT OF HARRISON COUNTY
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301-2967

Joseph Shaffer, Esquire
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2414 Cranberry Square
Morgantown, WV 26508



E. Kay Fuller

VERIFICATION

Rosetta Miller, team manager of State Farm Mutual Automobile Insurance Company, Petitioner in the foregoing Petition for Writ of Prohibition, being duly sworn, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information and belief, and that so far as they are stated to be upon information, she believes them to be true.

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

BY: Rosetta Miller
Rosetta Miller
Its: Team Manager

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

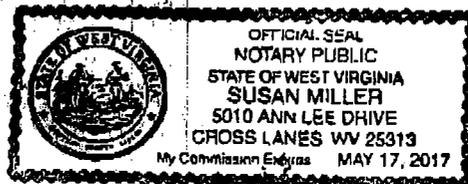
I, Susan Miller, a notary public in and for said state, do hereby certify that Rosetta Miller who signed the writing above, bearing date the 02 day of March, 2010 for State Farm Mutual Automobile Insurance Company, has this day acknowledged before me the said writing to be the act and deed of said company.

Given under my hand this 2nd day of March, 2010.

Susan Miller
Notary Public

My Commission Expires:

May 17, 2017



EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE