No. 125918

In the

Supreme Court of Illinois

AGNIESZKA SURLOCK and EDWARD SURLOCK,

Plaintiffs-Appellees,

v.

DRAGOSLAV STARCEVIC,

Defendant,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Intervenor-Appellant.

ROSEMARIE HAAGE,

Plaintiff-Appellee,

v.

ALFONSO MONTIEL ZAVALA, PATRICIA SANTIAGO, JOSE PACHECO-VILLANUEVO, OKAN ESMEZ and ROSALINA ESMEZ,

Defendants,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Intervenor-Appellant.

On Petition for Leave to Appeal from the Appellate Court of Illinois,
Second Judicial District, Consolidated Nos. 2-19-0499 & 2-19-0500.
There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit,
Lake County, Illinois, Nos. 18 L 39 and 17 L 897.
The Honorable **Mitchell L. Hoffman** and **Diane E. Winter**, Judges Presiding.

BRIEF OF PLAINTIFFS-APPELLEES ROSEMARIE HAAGE and AGNIESZKA SURLOCK

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NATURE OF THE CASE

This matter comes before the Illinois Supreme Court on Intervenor-Petitioner State Farm's petition for leave to appeal under both Rule 315 and Rule 317. This appeal concerns the Lake County Trial Court's decision to grant Plaintiff's proposed Qualified Protective Order (QPO), over the QPO offered by State Farm, and the Second District Appellate Court's ruling affirming that decision.

Plaintiffs' Agnieszka Surlock and Rosemarie Haage sued to recover damages incurred as a result of the negligence of Defendants in driving their automobiles, and their cases were consolidated for appeal. Plaintiffs moved for entry of a HIPAA QPO to permit covered entities to release protected health information (PHI) for the limited purpose of litigation. (R.C630-35). The QPO would (1) prohibit the use or disclosure of Protected Health Information (PHI) for any purpose other than the litigation, and (2) require the return or destruction of the PHI within 60 days after the conclusion of litigation. See 45 C.F.R. § 164.512(e)(1)(v)(A), (B) (2018) (setting forth requirements for a QPO under HIPAA). State Farm Insurance, the liability insurer for the named Defendants, intervened and sought entry of its own proposed. QPO. (R.C.157) Notably, the QPO offered by State Farm did not contain the "use or destruction" provision required by 45 C.F.R. § 164.512(e)(1)(v)(A), (B) (2018).

The trial court was tasked with determining which proposed QPO was appropriate, ultimately determining that Plaintiffs' proposed QPO met HIPAA's requirements to enable a covered entity to disclose PHI, whereas State Farm's proposed QPO did not. The trial court granted Plaintiffs' motion and entered their proposed QPOs. In granting Plaintiffs' motion, the trial court concluded that HIPAA governs the ability of a covered entity to

disclose PHI for litigation, and the court order governs the parties, including the redisclosure of material received pursuant to the QPO. (See generally, A.46-56).

In addressing State Farm's arguments, the trial court noted that, "State Farm's suggested order allows insurance companies to disclose, maintain, use and dispose of PHI outside of the litigation and does not require them to destroy or return the PHI at the end of litigation. This directly contrasts with the requirements of HIPAA." (A.69-70).

The trial court continued that, instead of exceeding the protective rules of HIPAA, a state law requiring State Farm to retain PHI and allowing the disclosure of PHI outside of litigation (if any such law exists) would impermissibly lower the protective floor of privacy that Congress sought to establish in enacting HIPAA and would act as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. (A.53).

The trial court addressed State Farm's claim that it was not a "covered entity" under HIPAA by stating that "such reasoning does not exempt State Farm from obeying a protective order entered by that court with respect to PHI which has been produced by covered entities." (A.54). Thus, any entity, including State Farm, that receives PHI pursuant to a QPO is bound to follow the QPO regarding the use and destruction of the PHI, whether the entity is a "covered entity" as that term is defined by HIPAA or not.

Lastly, the trial court addressed the issue that, "in both State Farm's objection and Plaintiff's reply, the arguments centered around a QPO. Plaintiff has chosen to secure a QPO under 164.512(e)(1)(ii). Thus, whether a different method could be used to permit disclosure is irrelevant as to whether the QPO at issue should be changed." (A.55).

State Farm appealed the decision, and after fully briefing the issue, and having oral arguments heard, the appellate court affirmed the trial court's decision. In doing so, it stated that:

> "After plaintiffs moved for the HIPAA QPOs with respect to the disclosure of their PHI, State Farm intervened and filed objections, requesting entry of an alternative HIPAA protective order, the [State Farm] protective order. As the plain language of the Privacy Rule indicates, a covered entity may disclose PHI to State Farm only if the protective order meets the requirements of section 164.512(e)(1)(v) of the Privacy Rule (45 C.F.R. § 164.512(e)(1)(v) (2018)). Yet, the [State Farm] protective order would exempt State Farm from any obligation to limit the use or disclosure of PHI to the litigation or to return or destroy the PHI at the end of the litigation. State Farm cites no provision in HIPAA, the Privacy Rule, any other regulations, or case law that would allow such exemptions. Again, State Farm obtains the ability to review plaintiffs' PHI only in response to a protective order issued in accordance with the requirements of section 164.512(e)(1)(v) (45 C.F.R. § 164.512(e)(1)(v) (2018)). Hence, if State Farm wishes to access the PHI at issue, it must abide by the terms of the HIPAA QPOs entered by the court. Accordingly, we agree with the trial courts and conclude that State Farm, as an entity wishing to receive PHI from a covered entity in response to a HIPAA QPO, is bound to comply with the use and disclosure restrictions set forth in the orders." (A.23).

State Farm then filed a petition for a certificate of importance, which was promptly denied. (A.79). Subsequently, State Farm filed a petition for leave to appeal to the Illinois Supreme Court, which was granted. This Court is tasked with determining the following issues presented for review:

ISSUES PRESENTED FOR REVIEW

I. Whether the Court erred in entering Plaintiff's proposed HIPAA QPO, which met the requirements of HIPAA, over State Farm's proffered order, which did not meet the requirements of a HIPAA QPO.

II. Whether the Court correctly determined that State Farm failed to direct the Court to any provision of the Insurance Code or the Illinois Administrative Code that requires it to use or disclose plaintiffs' PHI after the conclusion of the litigation.

III. Whether the Court correctly determined that, if State Farm wishes to access PHI from a covered entity in response to a HIPAA QPO, State Farm must abide by the terms of the HIPAA QPO.

IV. Whether the Court correctly determined that State Farm's proposed, which does not contain a return or destroy provision, does not provide the required level of confidentiality and protection of PHI envisioned when the Privacy Rule was promulgated.

V. Whether the Court correctly determined that the McCarran-Ferguson Act does not compel reverse preemption in this case because HIPAA does not invalidate, impair, or supersede any state insurance law or regulation cited by State Farm.

STANDARD OF REVIEW

The trial courts' entry of Plaintiffs' respective proposed QPOs and determination not to enter State Farm's proposed QPOs are subject to an abuse of discretion review. State Farm filed its appeal pursuant to Rule 307(a)(1) appealing the propriety of a discovery order. Where an interlocutory appeal is brought pursuant to Rule 307(a)(1), controverted facts or the merits of the case are not decided. *Yates v. Doctor's Associates, Inc*., 193 Ill. App. 3d 431 (1990). The standard of review in an interlocutory appeal is an abuse of discretion. See, *Zurich Ins. Co. v. Raymark Indus., Inc*., 213 Ill. App. 3d 591 (1st Dist. 1991). Absent an abuse of discretion affirmatively and clearly shown by an appellant, the trial court's order concerning discovery shall not be disturbed on appeal. *Avery v. Sabbia*, 301 Ill. App. 3d 839 (1998); citing *Pickering v. Owens-Corning Fiberglas Corp.*, 265 Ill. App. 3d 806, 823 (5th Dist. 1994). The trial court abuses its discretion only when its ruling "is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009). The parameters of protective orders are entrusted to the court's discretion. An appeals court will alter the

terms of a protective order only if no reasonable person could adopt the view taken by the trial court. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214 (2000).

Statutory construction, however, presents a question of law subject to *de novo* review. *Van Dyke v. White*, 2019 IL 121452, ¶ 45, and thus the trial court's determination that State Farm has failed to identify any regulation that requires the retention of PHI after the end of the litigation is subject to a de novo review, along with the trial court's interpretation of the McCarren-Ferguson Act and its ruling on preemption.

ARGUMENT

This matter came before the trial court on Plaintiffs' motion for entry of a HIPAA Qualified Protective Order (QPO). (R.C.16). State Farm intervened and proposed its own QPO. (R.C.157). The trial court was tasked with determining which proposed QPO was appropriate, ultimately determining that Plaintiff's proposed QPO met HIPAA's requirements to enable a covered entity to release PHI, whereas State Farm's proposed QPO did not. (A.46-56). Notably, Plaintiffs' proposed QPO adequately safeguards Plaintiff's right to privacy by requiring the return or destruction of PHI released for the purposes of the litigation, in line with 45 C.F.R. § 164.512(e)(1)(v), while State Farm's proposed QPO did not. To qualify as a "QPO" it must contain a return or destroy provision. Instead, State Farm's proposed QPO would have permitted the insurer to use, retain and disclose confidential PHI for business purposes unrelated to the litigation and to do so long after the end of the litigation. Therefore, the trial court did not abuse its discretion in entering Plaintiffs' proposed QPO and rejecting State Farm's proposed QPO where Plaintiff's proposed QPO was proper and complied with the requirements of HIPAA and

State Farm's proposed QPO was improper and did not comply with HIPAA's requirements. For the same reason, the appellate court did not err in affirming the trial court's decision.

I. THE COURT CORRECTLY ENTERED PLAINTIFFS' QPO, WHICH MET THE REQUIREMENTS OF HIPAA, OVER STATE FARM'S PROPOSED ORDER, WHICH DID NOT.

A. Plaintiff's proposed QPO satisfies HIPAA's intended purpose to protect privacy rights in medical records.

One of Congress's objectives in enacting HIPAA was to promote the confidentiality of patients' individually identifiable health information. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 264, 110 Stat. 1936; *see also S.C. Med. Ass'n v. Thompson*, 327 F.3d 346, 348, 354 (4th Cir. 2003) ("Recognizing the importance of protecting the privacy of health information in the midst of the rapid evolution of health information systems, Congress passed HIPAA in August 1996") and *Opis Mgmt. Res. LLC v. Sec'y Fla. Agency for Health Care Admin*., 713 F.3d 1291 (11th Cir. 2013). In enacting HIPAA, Congress authorized the Secretary of Health and Human Services to promulgate privacy regulations addressing individuals' rights to individually identifiable health information, procedures for exercising such rights, and the uses and disclosures of such information. Pub. L. No. 104-191, § 264(b) & (c)(1); *S.C. Med. Ass'n*, Case: 12-12593, 327 F.3d at 349.

In compliance with the statute, the Department of Health and Human Services issued final regulations known as the "Privacy Rule." *S.C. Med. Ass'n*, 327 F.3d at 349; *see also Citizens for Health v. Leavitt*, 428 F.3d 167, 172-74 (3d Cir. 2005) (detailing the history of the Privacy Rule's promulgation and explaining its requirements). The Privacy Rule establishes that "[a] covered entity or business associate may not use or disclose PHI," except in certain circumstances not at issue here, or with valid authorization. 45 C.F.R. §§

164.502(a), 164.508(a)(1). HIPAA sets a floor on privacy, and states may not fall below that floor; however, they can implement more stringent controls and heightened privacy standards.

B. Privacy rights in medical records are a fundamental right.

Medical records abound in confidential communications between physicians and patients, and include private details about the patients' health, life, and death. *In re Estate of Longeway*, 133 Ill. 2d 33, 47 (1989). Medical records include a vast amount of personal and familial information that, if disclosed, may "cause those afflicted to be unfairly stigmatized." *Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1997). They contain family medical histories, pregnancies, abortions, surgeries, and medical events and conditions that may be embarrassing and are not at issue in the pending lawsuit. *Parkson v. Cent. DuPage Hosp*., 105 Ill. App. 3d 850, 855 (1982). The medical records that State Farm wishes to use in its private business are constitutionally and statutorily protected as private, and include communications between patient and physician to which a physician-patient privilege attaches. 735 ILCS 5/8-802.

Medical privacy is "a central feature of the physician-patient relationship." *Kunkel*, 179 Ill. 2d at 537. To ensure an accurate diagnosis and receive proper care, Illinois patients share private details about themselves and their families with their doctor. If patients fear that their private information may become disseminated and exploited for reasons or uses unrelated to their medical treatment, this could lead to, "social and psychological harm through embarrassment, economic harm through job discrimination and job loss, patient difficulty in obtaining health insurance, health care fraud, and patient reluctance to share sensitive information with their doctors or pharmacists." *Cohan v. Ayabe*, 132 Haw. 408,

418 (2014), citing to Christopher R. Smith, Somebody's Watching Me: Protecting Patient Privacy in Prescription Health Information, 36 Vt. L. Rev. 931, 945 n. 90 (2012).

C. The Illinois Constitution protects both the right to privacy and the right of a remedy equally.

Under the Illinois Constitution's Bill of Rights, the right to privacy and the right to a remedy are equal and coexisting. Ill. Const. 1970, art. I, §§ 6, 12. This Court rejected in the past oppressive disclosure requirements under a legislative scheme that would have required personal injury plaintiffs to give a blanket disclosure of all their confidential medical information or face a lawsuit dismissal on the basis that the statute violated the doctrine of separation of powers and the prohibition against unreasonable invasions of privacy. *Kunkel*, 179 Ill. 2d at 536-37, 539–40. The *Kunkel* court specifically found that the blanket disclosure rule in 735 ILCS 5/2–1003(a) (West 1996) went beyond the legitimate objectives of discovery and seemed "to be designed to discourage tort victims from pursuing valid claims by subjecting them to the threat of harassment and embarrassment through unreasonable and oppressive disclosure requirements"). *Kunkel*, 179 Ill. 2d at 532.

When personal injury plaintiffs disclose their private medical information in order to be made whole after they become injured, their right to privacy continues beyond the end of the litigation. The apprehension that casualty insurance companies harvest plaintiffs' medical information to use for business purposes has a chilling effect on plaintiffs' exercise of their constitutional right to a remedy under section 12. Ill. Const. 1970, art. I, § 12. At the end of the litigation, the limited purpose for the disclosure ends, and retention of plaintiffs' PHI for insurance business purposes offends Section 12 of the Illinois Bill of Rights.

D. Plaintiffs' proposed QPO contains all of the provisions required by HIPAA, while State Farm's proposed QPO falls below the privacy floor enacted by HIPAA.

In the present consolidated cases, Plaintiffs requested entry of a HIPAA QPO permitting the release of certain PHI from covered entities for the limited purpose of use in the litigation. (R.C.16). Plaintiffs' proposed QPO: (1) requires any person or entity in possession of PHI received pursuant to the QPO, including an insurance company, to return or destroy any and all PHI pertaining to the plaintiffs within 60 days after the conclusion of the litigation, as required by 45 C.F.R. § 164.512(e)(1)(v)(B) (2018), and (2) prohibits the parties, their attorneys, and their insurers from using or disclosing PHI for any purpose other than the litigation at issue, as required by 45 C.F.R. § 164.512(e)(1)(v)(A) (2018). As the lower courts in these cases noted, an order is only a valid QPO under HIPAA if it contains the above provisions that are expressly required by HIPAA. (A.70).

At the hearings on Plaintiffs' motions for entry of a HIPAA QPO, State Farm urged the courts to adopt and enter its proposed QPO, which is identical to the standard "HIPAA Protective Order" used for the past few years by the Law Division of the Circuit Court of Cook County pursuant to General Administrative Order 18-1. (Cook County Cir. Ct. Law Div. Gen. Adm. Order 18-1 (Oct. 29, 2018)). (A.80). Notably, the Cook County Law Division HIPAA Protective Order exempts insurance companies from any "return or destroy" provision, but only for the purposes listed in paragraph two of the order. Id. However, the purposes listed in paragraph two of the order are written so broadly as to provide no practical limitations on the uses of the disclosed PHI, thus having the practical effect that the order does not require that the PHI be returned or destroyed in virtually any circumstance. Id.

The trial courts in the present cases entered Plaintiffs' proposed QPO and rejected State Farm's proposed QPO. On appeal, in reviewing the competing motions, and the trial courts' respective decisions, the appellate court noted that, "Plaintiffs' motions referenced HIPAA and the Privacy Rule, and they proposed the HIPAA QPO, which expressly cites the restrictions set forth in section 164.512(e)(1)(v) of the Privacy Rule (45 C.F.R. § 164.512(e)(1)(v) (2018)). The record reflects that the trial courts considered and ruled on this issue. Ultimately, the Court found that the return or destroy provision is a requirement of a QPO and, thus, entered Plaintiffs' proposed QPO." (A.37).

E. It was not an abuse of discretion to enter a QPO under 45 C.F.R §164.512(e)(1)(ii) when requested, regardless of whether a casualty insurer was involved.

Section 45 C.F.R. § 164.512(e)(1)(ii) was included in HIPAA to establish a procedure by which covered entities could release an individual's PHI in response to a subpoena, discovery request, or other lawful process, for the limited purpose of use in a judicial proceeding. Pursuant to 45 CFR 164.512(e)(1)(ii), a covered entity is only permitted to disclose PHI in one of the following scenarios:

1. If the covered entity receives satisfactory assurances (written statement showing good faith attempt to provide written notice to individual with sufficient information about the litigation in which the PHI is requested to permit the individual to raise an objection to the court and that the time to raise objections has elapsed and no objections were filed) that reasonable efforts have been made by such party to ensure that the individual who is the subject of the PHI has been given notice; or

2. If the covered entity receives satisfactory assurances (written statement and accompanying documentation demonstrating that the parties have agreed to a QPO, or the

party seeking the PHI has requested a QPO) that reasonable efforts have been made to secure a QPO, meeting the requirements of (e)(1)(v) (use and destruction provision).

A statute should be read as a whole and construed so as to give effect to every word, clause, and sentence. *People ex rel. Department of Corrections v. Hawkins*, 2011 IL 110792, ¶ 23. Words and phrases must be interpreted in light of other relevant provisions of the statute and must not be construed in isolation. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 279-80 (2003). Courts have an obligation to construe statutes in a manner that will avoid absurd, unreasonable, or unjust results that the legislature could not have intended. *People ex rel. Alvarez v. Gaughan*, 2016 IL 120110, ¶ 19. When read in its entirety, 45 CFR 164.512(e)(1)(ii) shows a clear focus on notice to the individual whose PHI is being sought to be disclosed and opportunity for the individual to object to the disclosure and to request entry of a QPO to adequately safeguard the individual's PHI from unreasonable invasions of privacy.

By State Farm's logic, any request for entry of a QPO in a judicial proceeding must be denied where a defendant is insured by a casualty insurer, such as State Farm. State Farm's only basis for this position is its alleged duties under certain regulations promulgated by the Illinois Department of Insurance which State Farm claims are in conflict with the use and destruction requirements of a QPO under HIPAA. It is well-known that the vast majority of judicial proceedings which require the disclosure of PHI necessarily involve injured plaintiffs and some form of liability insurance. Therefore, if State Farm's argument were to be accepted, there would be very few instances in which a QPO could be requested. It was clearly not the intent of the drafters of HIPAA that a QPO would be unavailable whenever an alleged tortfeasor was insured by a liability insurer,

which is the case in the vast majority of personal injury cases. The Act makes no such distinction and contains no such limitation, and this must be assumed to have been intentional. This Court should not rewrite a statute in a manner inconsistent with its clear and unambiguous language. *See, e.g. People v. Puller*, 192 Ill. 2d 36, 42 (2000).

F. Trial courts are vested with authority under R.201C to enter a protective order as they are in the best position to evaluate the needs of any given case.

The circuit courts are in the best position to oversee the course of discovery, and to enter protective orders as justice requires. *See e.g*. *Atwood v. Warner Electric Brake and Clutch Co.*, 239 Ill. App. 3d 81, 88 (2nd Dist. 1992). Pursuant to Rule 201(c), the circuit courts are given discretion as to matters of discovery. Ill. S. Ct. R.201(c). The Supreme Court vested the trial courts with this authority because the judge who is most familiar with the case is in the best position to balance the competing needs of the parties and to consider factual matter, the very sort of determination traditionally residing within the discretion of the trial court. Removing this authority from the trial courts in favor of a state-wide mandated protective order will not serve the purposes of our Supreme Court Rules, nor will it provide the justice anticipated when R.201(c) was implemented.

R.201(c) authorizes a trial court to enter protective orders prohibiting parties and others from using, retaining, or disclosing PHI at the end of litigation. Parties have no legal right to retain PHI for use beyond the litigation. *See May Centers, Inc. v. S.G. Adams Printing & Stationery Co.*, 153 Ill. App. 3d 1018, 1022 (5th Dist. 1987) ("A litigant has no constitutional right to disseminate information made available only for purposes of trying his suit"). Here, State Farm is arguing, without citation to any authority, that it is exempted

from an order of the court and Rule 201 because it claims that state insurance is otherwise "heavily regulated."

By its own admission, State Farm concedes that, "As between plaintiffs and defendants in most cases, there is no reason for a defendant and non-parties to retain PHI after the litigation ends." (See, State Farm Brief, p.23). State Farm continues that, "If there is no order already in place, such an order (QPO) could be granted when there is no reason or need for defendants to retain, use or disclose PHI for non-litigation purposes." Id. While State Farm attempts to distinguish itself from other entities subject to protective orders, the clear language of Rule 201(c) makes no exception exempting property and casualty insurers from being bound by an order of the court.

The trial court did not abuse its discretion in entering a QPO and that order must be complied with. State Farm has no independent right to any PHI. If State Farm wants Plaintiff's PHI, it must comply with the order of the court setting the parameters by which the personal health information may be used, for what purposes it may be used, and for how long the information may be maintained. For these reasons, this Court should affirm the decision of the appellate court, recognizing that the trial court did not abuse its discretion under R. 201(c) in entering Plaintiff's proposed QPO over State Farm's proposed order.

G. While HIPAA includes alternative methods of disclosure, none other than a QPO was requested.

The trial court correctly stated in this case that, "Whether a different method could be used to permit disclosure is irrelevant as to whether the QPO at issue should be changed to avoid conflict with State Farm's alleged obligations and rights under Illinois Law." (A.55). Because there is no abuse of discretion here, the entry of Plaintiff's proposed QPO

by the trial court should not be overturned. The appellate court agreed, stating that, "Although we agree that the Privacy Rule provides several different methods by which a covered entity may disclose PHI in the course of a judicial proceeding, neither Plaintiffs nor State Farm sought the disclosure of PHI by any means other than a protective order. The record reflects that the trial courts considered and ruled on this issue. Given these circumstances, we find that the trial courts did not err in declining to consider an alternate authorized method of disclosing PHI." (A.37).

1. Alternative methods of disclosure of PHI were not requested and would not be proper in any event.

State Farm suggests that the trial court should have sought and used alternative methods of disclosure other than the use of a QPO, such as use of an authorization pursuant to Section 164.508. However, there is a reason that Section 164.508 is not made part of 164.512(e), Standard: Disclosure for judicial and administrative proceedings. Under Section 508, the court would have no supervisory powers over the information disclosed. A plaintiff signing an authorization would be signing away their right of privacy, as well as any protection the court could otherwise offer, so that PHI could be released from a covered entity. Per 164.508 authorization, re-disclosure is expressly permitted, without any judicial oversight. This procedure is not the proper method for PHI to be disclosed for litigation, unless a plaintiff voluntarily choses to do so. One of the "core elements" of a valid authorization is that it must contain the statement "at the request of the individual". 45 CFR §164.508(c)(1)(iv). This is clearly not the case in the context of litigation in which the defendant is seeking the release of the PHI. Furthermore, if an authorization is compulsory and failure to sign could result in the case being dismissed, it is no longer truly "at the request of the individual."

2. State Farm did not request an "Order of the Court" under 45 CFR 164.512(E)(1)(i).

Under Section 164.512, subsection (e)(1) permits a covered entity to disclose PHI in response to an "order of the court," provided the covered entity discloses only the PHI expressly authorized by such order, whereas a QPO is entered pursuant to 164.512(e)(1)(ii). 45 CFR 164.512(e)(1). State Farm asks this Court to find its proposed order is an order pursuant to HIPAA, 45 CFR 164.512(e)(1)(i). (See State Farm's brief, p.15). However, State Farm did not submit the proposed order pursuant to section 164.512(e)(1)(i); rather it specifically submitted a proposed "QPO," which by definition is an order pursuant to section 164.512(e)(1)(ii), and must contain use and destruction provisions. For this reason, this argument has been waived.

H. Even if this Court accepts State Farm's proposed order as submitted pursuant to 164.512(e)(1)(i), it is still not a proper "Order of the Court" under 164.512(e)(1)(i) because it does not "expressly authorize the PHI to be disclosed."

If this Court were to accept State Farm's proposed order as an order under 45 CFR 164.512(E)(1)(i), it still must fail as the State Farm order does not expressly authorize any PHI to be disclosed. Section 164.512(e)(1)(i) specifically mandates that "the covered entity disclose only the PHI expressly authorized by such order." (Emphasis added.) However, the State Farm order proposed does not address what PHI the covered entity is "expressly authorized" to disclose.

The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent. *Bank of New York Mellon v. Laskowski*, 2018 IL 121995, ¶ 12. The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning. *Id.* It is improper for a court to depart from the plain statutory language

by reading into the statute exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent. *Metropolitan Life Insurance Co. v. Hamer*, 2013 IL 114234, ¶ 18. Where statutory language is clear and unambiguous, it will be given effect without resort to other aids of construction. *Kunkel v. Walton*, 179 Ill. 2d at 534. If the meaning of an enactment is unclear from the statutory language, the court may consider the purpose behind the law and the evils the law was designed to remedy. *Gruszeczka v. Illinois Workers' Compensation Comm'n*, 2013 IL 114212, ¶ 12.

Section 164.512(e)(1)(i) specifically uses the word "only" when referring to the PHI that a covered entity is permitted to disclose. "Only" is a clear and unambiguous term and must be given its plain and usual meaning without resorting to other aids of construction. Merriam-Webster defines "only" as "a single fact or instance and nothing more or different." Therefore, under Section 164.512(e)(1)(i), a covered entity is prohibited from disclosing PHI that is not "expressly authorized" by the order.

"Expressly authorized" is likewise clear and unambiguous. "Express," when used as an adjective, is defined by Merriam-Webster as "directly, firmly and explicitly stated." There can be no doubt that State Farm's order does not "expressly authorize" the disclosure of anything, let alone directly, firmly and explicitly state the PHI to be disclosed.

I. To the extent that State Farm's proposed order is accepted as a 164.512(e)(1)(i) order, permitting disclosure of "any and all" PHI, it is improper.

State Farm's proposed QPO has no language limiting or restricting the PHI permitted to be disclosed pursuant to the order. At best, the order can only be taken as permitting the disclosure of "any and all" PHI, as it in no other way limits or constrains the disclosure because it is unlimited by time or scope. Such an order is not permissible for

multiple reasons: it violates the constitutional right to privacy; it violates the physician-patient privilege as codified by 735 ILCS 5/8-802, and it violates Supreme Court Rule 201 as it is not limited in time or scope of PHI which may be disclosed.

1. To the extent that State Farm's proposed order permits the disclosure of "any and all" PHI, it is improper pursuant to Section 164.512(e)(1)(i).

An order permitting the disclosure of "any and all" PHI also fails to meet the requirements of 164.512(e)(1)(i) for the reasons previously noted; specifically, that the order fails to specify the PHI which a covered is "expressly authorized" to disclose.

2. To the extent that State Farm's proposed QPO permits the disclosure of "any and all" PHI, it violates the constitutional right to privacy.

This Court has previously addressed a substantially similar issue and found that disclosure of any and all of a plaintiff's medical records is overbroad and constitutes an impermissible invasion of plaintiff's privacy. In *Firebaugh v. Traff,* 353 Ill. 82 (1933) (cited to with approval by this Court in *Kunkel v Walton,* 179 Ill.2d at 539), this Court held that the constitutional protection against unreasonable searches and seizures means that while the Court may compel the production of records upon a proper showing that they contain entries tending to prove the issues, no right is given to compel the submission of records to a general inspection and examination, for fishing purposes, or with the view of finding evidence to be used in other suits or prosecutions; such an order cannot be used to procure a general investigation of a transaction not material to the issues in the case before the court. *Firebaugh,* 353 Ill. at 85.

In *Kunkel v. Walton*, this Court addressed an amendment to the Code of Civil Procedure, section 2-1003(a), which at that time required "that upon request of any other

party, the party claiming injury shall sign and deliver separate consent forms authorizing each of his or her health care providers to disclose medical records to the requesting party." *Kunkel v. Walton*, 179 Ill. 2d at 522. This Court found that:

> While *Firebaugh* involved the prohibition against unreasonable searches and seizures, the same analysis applies where the privacy interest in medical information is involved. It is reasonable to require full disclosure of medical information that is relevant to the issues in the lawsuit. But as previously noted, section 2-1003(a) requires a blanket consent to disclosure of all medical information without regard to the issues being litigated. The scope of the required disclosure is unreasonable and unconstitutional. *Kunkel v. Walton*, 79 Ill. 2d 519, 538 (Ill. 1997).

This Court specifically found that the requirement that a plaintiff provide an authorization allowing for the disclosure of all medical records was an unreasonable violation of the right to privacy. *Id*. at 537. Even when limited to the persons listed [parties, counsel, insurers, expert witnesses], disclosure of highly personal medical information having no bearing on the issues of lawsuit is a substantial and unjustified invasion of privacy." *Id.* at 538-39.

Here, just as in *Kunkel*, to the extent that the State Farm's proposed QPO permits the release of PHI by a covered entity, it also requires that Plaintiffs "agree" to the disclosure of their medical records, including those which have no bearing on or relevance to the cases for which they are sought. The fact that the mandate is being made by an order rather than a statute is a difference without a distinction; the resulting injury is the same. Either way, the violation of the constitutional right to privacy in PHI, without regard for issues of relevance or proportionality to the claim being made, is present. If there is a difference, it is that the violation in this matter is worse as the proposed order not only allows for the disclosure of PHI, but it allows private insurance companies to collect, retain and use the Plaintiffs' PHI for purposes other than the litigation, including their own business purposes.

3. To the extent that State Farm's proposed order permits the disclosure of "any and all" PHI, it violates Illinois Supreme Court Rule 201 for failure to address the time and scope of PHI to be disclosed.

In *Kunkel v. Walton,* this Court addressed the issue of a general disclosure of a plaintiff's medical records in the context of restrictions imposed by Rule 201. There, this Court found that "Rule 201 and related rules governing specific discovery methods form a comprehensive scheme for fair and efficient discovery with judicial oversight to protect litigants from harassment. The consent procedure under section 2-1003(a) is inconsistent with this scheme and substantially undermines it." *Kunkel,* 179 Ill. 2d at 531.

This Court further found that, "section 2-1003(a) placed no limitation whatsoever on the scope of medical information subject to disclosure. To the contrary, the mandated disclosure was described in the broadest possible terms. The plaintiff was required to consent to the disclosure of medical information by " *each person or entity* who has provided health care *at any time*," and must authorize them to furnish "a complete copy of the chart or record of health care in the possession of the provider." (Emphasis included in original.) *Kunkel v. Walton,* 179 Ill. 2d at 532.

When this Court addressed 2-1003(a) in the context of Rule 201, it found that section 2-1003(a) circumvented the relevance requirement set forth in Rule 201(b)(1). "To be certain, the scope of information considered "relevant" under this court's discovery rules is expansive, including not only evidence that would itself be admissible at trial, but also information leading to the discovery of admissible evidence." *See Monier v. Chamberlain,* 31 Ill.2d 400, 403 (1964); 166 Ill. 2d R. 201(b), Committee Comments. *Kunkel v. Walton,* 179 Ill. 2d at 531. However, this Court found "[t]here is no language in [2-1003(a)] in any manner restricting the consent requirement to the injury which is the

subject of the lawsuit or to related medical conditions. Under section 2-1003(a), as a condition of proceeding with his or her lawsuit, an injured party was required to consent to the disclosure of medical information wholly unrelated the injury for which recovery is sought. *Kunkel v. Walton*, 179 Ill. 2d at 532.

This Court continued in finding that, "the injured party may have to consent to the release of complete medical records held by health care providers who have never treated the injured party for any condition even remotely related to the subject matter of the lawsuit. The consent procedure set forth in section 2-1003(a) goes well beyond the legitimate objectives of discovery as reflected in this court's rules." *Id*. This Court then noted, "As written, section 2-1003(a) envisions disclosure of medical information without limitation, and without regard to the relevance of the information or the oppressive nature of disclosure." *Id.* at 534.

If the State Farm order is found to act as an order permitting the disclosure of PHI, then it is essentially a repackaging of the version of 2-1003(a) that was struck down by this Court in *Kunkel*. Just as that version of section 2-1003(a) required a plaintiff to sign an authorization allowing for unrestricted access to medical records or face dismissal of the case, the State Farm's proposed QPO requires a plaintiff to waive her right to privacy and to "stipulate to the entire contents of [the] court order" or face dismissal of her case.

Therefore, even assuming that State Farm's proposed order could be found to permit HIPAA-covered entities to disclose PHI, it would still have to be found to be improper because it does not satisfy the relevancy and proportionality requirements of Rule 201. Just as this Court in *Kunkel* found that a plaintiff cannot be required, as a condition of proceeding with her lawsuit, to consent to the disclosure of medical information wholly

unrelated the injury for which recovery is sought, it should not permit virtually the same requirement here.

J. An order permitting the release of "any and all" PHI would have a significant negative impact on the court's ability to manage their case dockets.

Adoption of State Farm's proposed order will negatively impact trial courts' ability to managing their dockets across Illinois. As this Court noted in *Best*:

> A discovery procedure which authorizes unlimited disclosure of information in the first instance, subject only to particularized protective orders, shifts a significant burden to the courts of this State to repeatedly assess and limit, through entry of protective orders, discovery requests that may well be overbroad on their face. The expansive impact of the statutory consent requirements virtually demands that plaintiffs' attorneys file motions for protective order as a matter of course whenever a consent form is requested by defense counsel. Although the judiciary is the proper entity to determine the need for protective orders, on a case-by-case basis, one of the effects of Section 2-1003(a) is to create an assembly line of overbroad discovery requests followed by motions for protective orders. *Best v. Taylor Mach. Works,* 179 Ill. 2d 367, 449 (Ill. 1997).

Simply put, if this Court allows the use of State Farm's proposed QPO, then personal injury plaintiffs will be forced to file protective orders as a matter of course, and trial courts will be unduly burdened in the administration of justice by being forced to sort through hundreds, if not often thousands, of pages of medical records to assess and limit the disclosure of irrelevant PHI on a case-by-case basis. This undue burden can be easily avoided by addressing the issue early in litigation with the use of a proper protective order tailored by the trial court to the individual needs of each case, proactively limiting the time and scope of the PHI which may be sought. Plaintiffs will then be significantly less concerned that unrelated PHI will be disclosed, as they will have assurance that any such PHI will be destroyed at the end of the litigation. The added benefit will be compliance with the Illinois Constitution to protect a plaintiff's right to privacy, in accordance with the

relevancy and proportionality requirements of Rule 201, and the HIPAA requirements as set forth in 45 CFR 164.512(e)(1).

K. Even should this Court find that State Farm's proposed order fully complies with section 164.512(e)(1)(i) of the Privacy Rule, the order would still violate the right to privacy enshrined in the Illinois Constitution.

Even if this Court fully agrees that the State Farm order fully complies with 164.512(e)(1)(i) of the Privacy Rule, the order would still violate the constitutional right to privacy in Illinois. The right to privacy in Illinois for medical records and PHI is well established. *See Kunkel v. Walton*, 179 Ill. 2d at 537 ("The confidentiality of personal medical information is, without question, at the core of what society regards as a fundamental component of individual privacy"). Once a right to privacy is established, the court must determine whether a search and seizure is reasonable. *In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 390. Therefore, the question here become one of reasonableness.

The process for evaluating whether discovery is reasonable, or creates an unreasonable intrusion into a person's privacy, is also well established. For example, as to subpoenas, two guidelines have been followed by the courts in determining whether the intrusion into a person's privacy is a reasonable intrusion: (1) the document sought must be relevant to the inquiry, and (2) a specification of the document to be produced must be adequate but not excessive for the purpose of the relevant inquiry. *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946); *People v. Lurie,* 39 Ill. 2d 331 (1968).

This Court recently affirmed these principles in *People v. Stateline Recycling, LLC,* stating "Rule 201 sets out several of the general principles regarding civil discovery. Ill. S. Ct. R. 201 (eff. July 1, 2014); *People v. Stateline Recycling, LLC*, Docket No. 124417, 8

(Ill. 2020). This Court in *Stateline Recycling* stated that the discovery rules' relevance and proportionality requirements ensure the constitutional reasonableness of discovery orders. *Id*. at 538 (Observing that, in the context of civil discovery, reasonableness is a function of relevance). *See Illinois v. Krull*, 480 U.S. 340, 348 (1987). *People v. Stateline Recycling, LLC*, Docket No. 124417, 8 (Ill. 2020).

Therefore, even if this Court finds that State Farm's proposed order is a permitted order pursuant to section 164.512(e)(1)(i) of the Privacy Rule, the order is not reasonable because reasonableness is a function of relevance. State Farm's order does not address any principles of relevancy or proportionality as to the PHI being disclosed. To that end, the order cannot pass constitutional muster as it is an unreasonable intrusion into a person's privacy.

In a broad stroke, through this appeal State Farm is requesting that this Court ignore the plain language of HIPAA, read into certain regulations of the Illinois Department of Insurance language that does not exist, remove the right of all Illinois trial courts to exercise discretion in the entry of HIPAA QPOs, and, most importantly, subjugate Illinoisans constitutional right to privacy to the purely business purposes of liability insurers and coerce Illinoisans to waive their constitutional right to privacy or forgo their constitutional right to a remedy. This Court should reject State Farm's request and instead give HIPAA its full effect and, once again, reaffirm that it is the public policy of this State, as enshrined in our Constitution, to respect and protect the privacy of all Illinoisans and to allow Illinoisans to pursue a remedy when they have been wrongfully injured without being required to waive their right to privacy.

II. THE COURT DID NOT ERR IN FINDING THAT STATE FARM FAILED TO IDENTIFY ANY PROVISION OF A CODE OR REGULATION THAT REQUIRES IT TO USE OR RETAIN PHI AFTER THE CONCLUSION OF THE LITIGATION.

A. No provision of the Illinois Insurance Code or Administrative Code requires State Farm to use or retain Plaintiff's PHI after the conclusion of this Litigation.

Despite the attempts by State Farm to broaden and expand both the Illinois Insurance Code and Illinois Administrative Code, it has failed to direct the Court to any provision of any state law or regulation which expressly requires the retention of PHI after the conclusion of litigation. Instead, State Farm reads extra language into the codes, expanding their requirements, in an attempt to create a conflict of law where none exists. This violates the well-established rule that it is improper for a court to depart from the plain statutory language by reading into the statute exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent. *Metropolitan Life Insurance Co. v. Hamer*, 2013 IL 114234, ¶ 18.

As the appellate court found, "State Farm has failed to direct us to any provision of the Insurance Code or the Illinois Administrative Code that requires it to use or disclose plaintiffs' PHI after the conclusion of the litigation. We find nothing in the statutory and administrative regulations cited by State Farm in its brief requiring it to retain PHI or use it for any particular purpose after the conclusion of litigation." (A.33).

It is indisputable that "personal health information" and "medical records" are terms well known to our legislature, and, in fact, they have utilized them in the drafting of other statutes. Yet, despite insurance being a "highly regulated" business, the legislature chose not to include those terms anywhere in the rules or regulations cited to by State Farm.

B. The Illinois Administrative Code can be fully complied with, without violating the court's Qualified HIPAA Protective Order.

State Farm claims that it is subject to rules and regulations requiring it to retain PHI. However, upon examination, this is simply untrue.

An analysis of the Administrative Code makes it clear that State Farm's claimed requirements are nowhere to be found in the code. This is especially true when taken with the principle of *expressio unius est exclusio alterius*, literally "the expression of one thing is the exclusion of another," (*In re Application of the County Collector*, 2014 IL App (2d) 140223, ¶ 18, signifies that " '[w]here a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions' " (*In re Application of the County Treasurer & ex officio County Collector*, 378 Ill. App. 3d 842, 850-51 (2007) (quoting *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 151-52 (1997))).

State Farm attempts to rely on part 901 of Title 50 of the Illinois Administrative Code, which provides that, "[n]o domestic company shall destroy any books, records, documents, accounts or vouchers, hereafter referred to as 'records', except in conformity with the requirements of this Part." 50 Ill. Adm. Code 901.5, codified at 7 Ill. Reg. 4213 (eff. Mar. 28, 1983), State Farm has not explained how PHI falls within this definition.

The term "records" is defined in section 901.10 of Title 50 as: "all books, papers and documentary materials regardless of physical form or characteristics, made, produced, executed or received by any domestic insurance company pursuant to law or in connection with the transaction of its business and preserved or *appropriate for preservation* by such company or its successors as evidence of the organization, function, policies, decisions, procedures, obligations and business activities

of the company or because of the informational data contained therein. If doubt arises as to whether certain papers are 'non-record' materials, it should be assumed that the documents are 'records'." (Emphasis added.) 50 Ill. Adm. Code 901.10, codified at 7 Ill. Reg. 4213 (eff. Mar. 28, 1983).

As the appellate court aptly stated, "State Farm does not explain how plaintiffs' PHI is 'appropriate for preservation,' especially given that (1) the trial courts entered HIPAA QPOs expressly requiring the destruction of PHI within 60 days after the conclusion of the litigation, and (2) State Farm failed to cite any statute, regulation, or case law that affirmatively requires the retention of PHI or its use for a particular purpose." (A.32).

Moreover, State Farm attempts to expand Section 901.20 of the Administrative Code to claim it is required to maintain PHI for six years after litigation. This section reads:

> "The company is authorized to dispose of or destroy records in its custody that do not have sufficient administrative, legal or fiscal value to warrant their further preservation and are not needed:
>
> a) in the transaction of current business;
> b) for the final settlement or disposition of any claim arising out of a policy of insurance issued by the company, except that these records must be maintained for the current year plus 5 years; or
> c) to determine the financial condition of the company for the period since the date of the last examination report of the company officially filed with the Department of Insurance, except that these records must be maintained for at least the current year plus 5 years." 50 Ill. Adm. Code 901.20 (2016).

This section explicitly states that entities such as State Farm are authorized to dispose or destroy PHI that may be in its custody after the conclusion of litigation. Certainly, an injured plaintiff's PHI is not needed for State Farm to transact business or determine the

financial condition of the company. State Farm need only retain records of final disposition of the case, such as executed releases, not PHI.

State Farm next reads into Section 919.30 of Title 50 of the Administrative Code terms that do not exist. State Farm argues that section 919.30 of Title 50 of the Illinois Administrative Code requires insurers to make their claim files available to the Director of the Illinois Department of Insurance (Director) for examination upon request. 50 Ill. Adm. Code 919.30(a) (1989). According to State Farm, claim files must include PHI, despite the drafters of the legislation intentionally having left that term out of the statute.

However, a closer look at the statute itself reveals the truth. With respect to examinations by the Director as part of improper-claims practice, Section 919.30 provides in relevant part as follows:

> "b) Each company shall maintain claim data that should be accessible and retrievable for examination by the Director. A company shall be able to provide the claim number, line of coverage, date of loss and date of payment of the claim, date of denial, or date claim closed without payment. [Emphasis added.] This data must be available for all open and/or closed files for the current year and the two preceding years. The examiners' review may include but need not be limited to an examination of the following claims:
>
> 1) Claims Closed with Payment;
> 2) Claims Denied;
> 3) Claims Closed Without Payment;
> 4) First Party Automobile Total Losses; and/or Subrogation Claims.
>
> c) Detailed documentation shall be contained in each claim file in order to permit reconstruction of the company's activities relative to each claim file." [Underlining added.] 50 Ill. Adm. Code 919.30 (1989).

The language could not be clearer; detailed documentation does not include plaintiffs' PHI. According to State Farm, because this regulation requires maintaining "detailed documentation" in each claim file, it effectively mandates an insurer to maintain all PHI records of each claim for all open and/or closed files for the current year and the two preceding years, despite the express requirements of a HIPAA QPO. However, as the

appellate court stated, "we find no language in section 919.30 requiring an insurer to expressly retain PHI. Rather, the regulation refers to 'claim data,' which it describes as 'the claim number, line of coverage, date of loss and date of payment of the claim, date of denial, or date claim closed without payment.'" (A.29). This Court should not be persuaded by State Farm's unjustified attempt to expand the Illinois Administrative Code. State Farm reads terms into the statutes that would create a conflict with HIPAA, but which do not exist.

C. State Farm, and other casualty insurers, are fully capable of complying with a HIPAA QPO entered by the Court, without violating any obligations under the Illinois Insurance Code.

The stated purpose of the Illinois Insurance Code is: "to establish standards for the collection, use and disclosure of information gathered in connection with insurance transactions by insurance institutions, agents or insurance-support organizations; to maintain a balance between the need for information by those conducting the business of insurance and the public's need for fairness in insurance information practices, including the need to minimize intrusiveness…." 215 ILCS 5/1001.

Rather than performing its duties so as to maintain said balance, State Farm reads additional terms and requirements into the insurance code. On numerous occasions, and in reliance on several different provisions of the Act, State Farm tries to broaden the term "records" to specifically include, "Plaintiffs' personal PHI".

As the appellate court correctly concluded, there is nothing in the Illinois Insurance Code which requires the retention of Plaintiff's PHI after the conclusion of litigation. (A.33). Rather, the balance this Article was drafted to establish can be accomplished without creating a conflict with HIPAA or removing the Court's authority to enter QPOs.

State Farm next relies heavily on the Illinois Insurance Code Section 1014 for the proposition that it is required to maintain PHI after litigation. The introductory paragraph of 215 ILCS § 5/1014, states, "Disclosure Limitations and Conditions: An insurance institution, agent or insurance support organization *shall not disclose* any personal or privileged information about an individual collected or received in connection with an insurance transaction…." [emphasis added]. There is a clear divergence between existing language prohibiting disclosure of PHI and the non-existing language mandating the retention of PHI.

Specifically, this section is properly read to mean that any personal or privileged information State Farm may have obtained shall not be disclosed. Preventing the disclosure of information is not the same as mandating that information be retained. State Farm's position is not only a logically fallacy but is also a gross misinterpretation of the statute.

Again, the appellate court correctly found that "the passage to which State Farm directs us [215 ILCS § 5/1014] does not contain any mandatory affirmative language requiring the retention of PHI or its use for any particular purpose. This language in no way supports State Farm's claim that state law requires it to retain or otherwise use PHI." (A.27).

State Farms continues that it requires permission from the Department of Insurance to destroy its "records" under 215 ILCS 5/133(2), and this somehow includes PHI. This argument is misleading and inapplicable when looking at the Act itself. The "records" the Act speaks of in this section are specifically the *company* "books, records, documents, accounts and vouchers." [Emphasis added.] *Id*. They must be retained so that the Director

or investigating agency can, "ascertain the financial condition, affairs and operations of the insurance company". *Id*. Expanding "records" there to include PHI is disingenuous at best.

Finally, State Farm cites to Sec. 154.6 of the insurance code, dealing with Improper Claims Practice. State Farm claims that it is impossible to evaluate improper claims practice without retaining a claimant's medical records and bills. Nowhere does the Code even mention a review of PHI as part of the evaluation of the improper claims practice. Furthermore, the burden of establishing improper claim practice is on the claimant who is alleging said improper conduct. The claimant is the one who must provide sufficient evidence to establish improper conduct. Should State Farm require PHI for such an evaluation, a new QPO could be entered by the trial court in that case, permitting covered entities to disclose PHI necessary for litigation to State Farm.

D. There is no authority or legal basis to allow for the mass collection of personal injury victims PHI under the guise of "Fraud Reporting".

State Farm also continues its attempts to read additional requirements into the Insurance Code by relying on Sec. 155.23. This section authorizes the Director "to promulgate reasonable rules requiring insurers doing business in the State of Illinois to report factual information *in their possession that is pertinent* to suspected fraudulent insurance claims, fraudulent insurance applications, or premium fraud *after* [the Director] has made a determination that the information is necessary to detect fraud or arson." [Emphases added.] 215 ILCS 5/155.23(1) (West 2018).

The Act only requires insurers to report factual information in their possession that is pertinent to suspected fraudulent insurance claims, fraudulent insurance applications, or premium fraud. The Act does not require them to speculate about what might be needed,

and horde PHI in doing so. It does not allow for the sharing of information, unless it is "pertinent to *suspected* [emphasis added] fraudulent insurance claims, fraudulent insurance applications, or premium fraud…" Even then, it does not require the disclosure of the claimant's identify, let alone any actual medical record or bill. Rather, the Act allows for providing:

> (a) Dates and description of accident or loss.
> (b) Any insurance policy relevant to the accident or loss.
> (c) Name of the insurance company claims adjustor and claims adjustor supervisor processing or reviewing any claim or claims made under any insurance policy relevant to the accident or loss.
> (d) Name of claimant's or insured's attorney.
> (e) Name of claimant's or insured's physician, or any person rendering or purporting to render medical treatment.
> (f) Description of alleged injuries, damage or loss.
> (g) History of previous claims made by the claimant or insured.
> (h) Places of medical treatment.
> (i) Policy premium payment record.
> (j) Material relating to the investigation of the accident or loss, including statements of any person, proof of loss, and any other relevant evidence.
> (k) any facts evidencing fraud or arson.
> 215 ILCS 5/155.23(1) (West 2018).

If an insurance company has a reasonable basis to believe it is in possession of records "pertinent to suspected fraudulent insurance claims, fraudulent insurance applications, or premium fraud", there is nothing to prevent it from seeking a modification of the order allowing for the disclosure of those specific documents for the limited purpose of providing such records to proper authorities.

The appellate court correctly found State Farm's reliance on section 155.23 unpersuasive for two principal reasons. "First, the statute applies only to suspected fraudulent insurance claims, fraudulent insurance applications, or premium fraud and only

after the Director has determined that the information is necessary to detect fraud or arson. In this case, there is no indication of fraud and no evidence that the Director has determined that any PHI is necessary to detect fraud or arson. Thus, there can be no factual information pertinent to any suspected fraud. Second, the statute requires an insurer to report only factual information in their possession. An insurer that has returned or destroyed PHI in accordance with a HIPAA QPO cannot violate the statute, because it does not possess any such information." (A.30).

As the appellate court stated, there is no suspected fraud here and no indication there has been any determination that disseminating PHI for that reason is necessary in this case. (A.30). Despite protective orders requiring the destruction of records having been in place, and presumably abided with in the past, the Department of Insurance has clearly and unequivocally stated that the department does not require or need PHI to be retained. Furthermore, neither the Insurance Department nor the Governor have taken action against an insurance company for destroying or otherwise failing to retain PHI. (R.C110, and R.C.114). State Farm's claim that it must retain and, in fact, further disseminate PHI to "assist in the prevention of fraud" is not supported by the law and is not supported by the Department of Insurance itself.

It is evident that there are no requirements for State Farm, or any other insurer, to retain PHI after the close of litigation. State Farm makes every endeavor to read excess terms into the Code, expanding terms beyond their intended and plain meaning, all in an attempt to convince this Court that it must retain PHI- likely so that it can use the PHI for its own private business interests.

E. State Farm fails to identify any federal reporting requirements requiring the retention of PHI after litigation.

State Farm, having exhausted its attempts to claim retention requirements under state law, next alleges that it, and other insurers, are subject to federal reporting requirements. The only statute State Farm cites to in support of this position is 42 U.S.C. Sec.1395y(b)(2). Exclusions from coverage and Medicare as secondary payer (the "Medicare Secondary Payor Act").

First, it should be noted that there is no support in the record that there is or will be any conditional payments to Medicare, or other structured settlement arising out of these consolidated cases. Therefore, such assertions are entirely speculative, and not truly at issue in this case. Furthermore, should it come to pass that Plaintiffs become Medicare beneficiaries prior to settlement or judgment, the insurer making the payment will have ample time to seek modification of the court's protective order before Medicare issues a final demand.

Additionally, the Medicare Secondary Payer Act does not require State Farm, the liability insurer, to retain PHI after litigation even for Medicare beneficiaries. State Farm claims that, "insurers must rely on claimants' medical records to determine whether the conditional payments warrant reimbursement." (See State Farm Brief, p.36). Medicare makes no such requirement. It is Medicare alone that makes that determination based on its own records of payments made by it for a beneficiary.

In addition, Section 8 of the Act, titled 'Required submission of information by or on behalf of liability insurance' states:

> (B) Required information
>
> > (i) the identity of the claimant for which the determination under subparagraph (A) was made; and

> (ii) such other information as the Secretary shall specify in order to enable the Secretary to make an appropriate determination concerning coordination of benefits, including any applicable recovery claim.
> 42 U.S.C. Sec.1395y(b)(8)(B)(i) &(ii).

If a settlement or judgement is to be paid by it, as noted by State Farm itself, all it need do is to report the payment and report the alleged cause of injury. This does not require State Farm to retain or disclose PHI after the conclusion of litigation.

F. State Farm attempts to expand the insurance and administrative codes to attempt to create a conflict with HIPAA, when no such conflict need exist.

State Farm, by claiming that regulations require it to keep "records," sweeps with a broad brush the terms confidential medical records and PHI into its vague notion of "records" or "detailed documentation." In doing so, it ignores the specific protections that federal law, the Illinois Constitution, and the Illinois statutes give to PHI. Essentially State Farm argues that a vague general regulation that references "records" or "detailed documentation" trumps the specific and express constitutional and statutory rights, as well as federal privacy rules. In doing so, it cites not a single regulation or case that holds either of those terms encompass PHI or private medical records.

Despite the thousands of Illinois cases, of which this court may take judicial notice, in which a State Farm insured has been involved in a lawsuit subjecting it and it's insured to a QPOs with use and destruction provisions, there has never been any disciplinary or adverse action taken against State Farm or any other such casualty insurer for "failing to maintain this PHI".

G. The Illinois Department of Insurance itself clearly states that it does not require the retention of PHI.

State Farm's makes the bald assertion that the appellate court, "overrode the considered judgment of the General Assembly and the experience of the Department of Insurance." (See State Farm Brief, p.30). However, the Department of Insurance has unequivocally stated, "The Department *does not instruct examiners to collect PHI…"* It has stated, "The Department does not have any record where retained protected health insurance information by the insurer was the basis for an investigation for an investigation or audit." "The Department does not maintain any record that requires Illinois insurance companies selling automobile and casualty insurance to require and retain PHI." (R.C.110).

There has never been any disciplinary action taken against State Farm or any other such casualty insurer for failing to maintain this PHI. (R.C.111) These FOIA responses from the Illinois Office of the Governor and Illinois Department of Insurance identify no documents relating to any rules or requirements requiring non-health insurance companies to retain PHI that they may have in their files. The insurance code does not contain any mandatory affirmative language for liability insurers to collect or retain PHI; rather, it limits and prohibits these activities. In other words, there is an important difference between "shall not disclose" and "must retain."

"In cases involving an agency's interpretation of a statute which the agency is charged with administering, the agency's interpretation is considered relevant but not binding on the court." *Scholl's 4 Season Motor Sports, Inc. v. Illinois Motor Vehicle Review Board*, 2011 IL App (1st) 102995, ¶ 30. "Nevertheless, the interpretation of a statute by involved administrative bodies constitutes 'an informed source for guidance when seeking to ascertain the legislature's intention when the statute was enacted.'" *Andrews v. Kowa*

Printing Corp., 217 Ill. 2d 101, 116 (2005) (quoting *Johnson v. Marshall Field & Co*., 57 Ill. 2d 272, 278 (1974)).

Here, this Court should accept the Department's clear and unequivocal statement and interpretation that it "does not require Illinois insurance companies selling automobile and casualty insurance to require and retain PHI" where it offers guidance to the contrary. (R.C.111).

III. THE COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT IF STATE FARM WISHES TO ACCESS THE PHI AT ISSUE, IT MUST ABIDE BY THE TERMS OF THE ORDER ENTERED BY THE COURT, THE SAME AS ALL OTHER NON-COVERED ENTITIES, SUCH AS LAWYERS AND EXPERTS.

A. The Court did not abuse its discretion in requiring State Farm to comply with its order.

The parameters of protective orders are entrusted to the court's discretion. An appeals court will alter the terms of a protective order only if no reasonable person could adopt the view taken by the circuit court. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214 (2000). State Farm is bound to comply with the orders of the trial court. State Farm's status as a liability insurer does not exempt it from the court's authority, regardless of its status as a "non-covered entity." If State Farm wants to access the PHI at issue, it must obey the terms of the court order in place regarding the release, use and disclosure of said PHI. The trial court rightly concluded that, "property and casualty insurers are not 'covered entities' under HIPAA". However, "such reasoning does not exempt State Farm from obeying a protective order entered by this court with respect to PHI which has been produced by covered entities." (A.54).

State Farm is not a "covered entity" because it does not keep/maintain PHI (The Privacy Rule defines a "covered entity" as a "health plan," "health care clearinghouse," or

"health care provider who transmits any health information in electronic form." 45 C.F.R.§ 160.103 (2018)). Noncovered entities broadly include attorneys, expert witnesses, and casualty insurers. Congress did not intend for non-covered entities to be free to use PHI for their own private business purposes at the close of litigation because they are "non-covered" entities under HIPAA. In fact, as noted above, Congress specifically included a destruction provision for records sought for use in "judicial and administrative proceedings".

Despite State Farm's status as a non-covered entity, the court did not subject State Farm to HIPAA. Rather, the trial court treated State Farm exactly the same as every other non-covered entity in the lawsuit, merely requiring it, as well as the parties, to comply with its orders. By State Farm's own admission, "As between plaintiffs and defendants in most cases, there is no reason for a defendant and non-parties to retain PHI after the litigation ends." (See State Farm brief, p.23). However, State Farm argues that, as the insurer of defendants, it has an independent reason to retain PHI after litigation, which should trump any conflicting state or federal requirements, including HIPAA and the Illinois Constitution. As noted, it has not directed this Court, nor the courts below, to any authority which states that casualty insurers are exempt from the terms of a court order.

B. Federal agencies have strict disclosure requirements. State Farm, a private company, should not circumvent the privacy requirements imposed even upon federal agencies which investigate fraud.

State Farm asserts that, because the Illinois Department of Insurance "relies" on property and casualty insurers to detect and combat insurance fraud, Illinois law authorizes them to report information, including PHI, to the Illinois Department of Insurance and insurance support organizations, such as the National Insurance Crime Bureau and the

Insurance Services Organization. According to State Farm, if insurers must return to covered entities or destroy all PHI within 60 days of the end of litigation, it cannot later provide "necessary" information to help the state with fraud detection and prevention. This argument fails for several reasons.

First, the Privacy Act of 1974, as amended, 5 U.S.C. Sec.55(2)(a), establishes a code of fair information practices that governs the collection, maintenance, use and dissemination of information about individuals that is maintained in systems of records by federal agencies. The Privacy Act prohibits the disclosure of a record about an individual absent written consent from the individual. "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains [subject to 12 exceptions]." 5 U.S.C. § 552a(b). Federal officials handling personal information are "bound by the Privacy Act not to disclose any personal information and to take certain precautions to keep personal information confidential." *Big Ridge, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 715 F.3d 631, 650 (7th Cir. 2013).

Our federal agencies, including those who use and maintain PHI, have strict requirements regarding PHI. Unlike State Farm, which is a private for-profit entity, the Privacy Act deals with governmental agencies, including those actually tasked with detecting, investigating and prosecuting fraud. Surely, State Farm, as a private company, should not be held to a lower standard regarding the dissemination of PHI than governmental agencies. This is especially true when State Farm incorrectly claims that it must share PHI with other (private) institutions.

In this same light, Executive Order 13181, (12/20/2000) **(**EO 13181: To Protect the Privacy of PHI in Oversight Investigations), restricts investigative and prosecutorial authorities' use of personal health care information gathered by health oversight authorities in the pursuit of individual criminal investigation to those specific instances where a judicial officer has determined, "whether there is good cause by weighing the public interest and the need for disclosure against the potential for injury to the patient, to the physician patient relationship, and to the treatment services." 65 FR 81321. This is similar to the statutory scheme enacted in Illinois, requiring that there be suspected fraud before disclosure may be permitted.

State Farm should not be permitted to do what governmental and prosecutorial bodies, which are actually tasked with detecting, investigating and prosecuting fraud, cannot. State Farm cannot engage in practices which fall below the floor of privacy established by federal regulations under the guise that it is "assisting in fraud prevention."

C. The QPO entered does not place any undue burden or "disparate retention requirements" upon State Farm.

It is an indisputable fact that various courts have, for years, used different protective orders as appropriate in individual cases, some of which have included use and destruction provisions. It is untenable for State Farm to claim that as a result of the rulings in this case, State Farm is <u>now</u> "subject to disparate documentation retention burdens". State Farm's retention burdens have been guided by these "conflicting orders" to which it now objects for many years. In the years since HIPAA was enacted, during which, hundreds of thousands of personal injury cases have been filed in Illinois, State Farm cannot identify a single instance in which it, or any other property and casualty insurer, was disciplined for

not retaining PHI after complying with the use and destructions provisions of a valid protective order.

Records obtained via different court orders, in various types of litigation, will always be subject to somewhat different retention requirements. This is not a new situation for State Farm to encounter. It is something that, like it or not, it must face to use the PHI being disclosed. If State Farm wishes to avoid different retention policies, then it does not have to obtain the PHI from covered entities. Rather, it could rely on the duly licensed attorneys it retains on behalf of its insureds to obtain the PHI and provide proper summaries and recommendations to it. State Farm has no independent right to the PHI at issue and if it wishes to obtain the PHI, it is required to follow the orders of the court.

D. State Farm's "actuarial and rate development" argument remains underdeveloped and unpersuasive.

State Farm claims that other purposes for which property and casualty insurers retain claims files include actuarial and rate development, reinsurance evaluation and pricing, and longtail exposure. However, as the appellate court stated, "State Farm neither develops this argument nor cites any statute, policy, or regulation that would require it to use or retain PHI for any of those purposes. As such, we find any such claim forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (requiring appellant's brief to include argument 'which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities'); (A30-31). *Lee v. Lee*, 2019 IL App (2d) 180923, ¶ 24." Given State Farm's repeated failure to develop this argument or cite any statute, policy, or regulation that requires it to use or retain PHI for any of purposes, this Court should affirm the opinion of the appellate court in finding any such claim forfeited.

IV. THE COURT DID NOT ERR IN DETERMINING THAT THE STATE FARM ORDER FAILS TO PROVIDE THE CONFIDENTIALITY AND PROTECTION OF PHI AS ENVISIONED WHEN THE PRIVACY RULE WAS PROMULGATED.

A. The appellate court correctly found that HIPAA did not preempt any State Law.

State Farm's attempts to raise preemption is based on a statement of dicta. State Farm seeks an advisory opinion from this Court on an issue that was not a basis of the appellate court's ruling. "Courts of review will not decide moot or abstract questions and will not review cases merely to establish precedent or render advisory opinions." *Condon v. America Telephone & Telegraph Co*., 136 Ill. 2d 95, 99-100 (1990).

The lower courts found State Farm failed to direct those courts to any provision of any state law or regulation which expressly requires the retention of PHI after the conclusion of litigation. (A.33). Therefore, there is no preemption because there is no contradictory state law. For all the reasons stated herein, there is no law cited by State Farm which requires the retention of PHI after litigation. The appellate court continued, stating, "Although we have concluded that the terms of the HIPAA QPOs do not conflict with State Farm's obligations under state law, to the extent that they could be so construed, we agree with the trial courts that the state law provisions are preempted by HIPAA." (A.33).

B. Even if State Farm's claimed obligations to retain PHI exist, such obligations would be preempted by HIPAA.

Assuming, *arguendo*, that State Farm must retain PHI pursuant to state rules and regulations, then those rules and regulations are preempted by HIPAA. In drafting HIPAA, Congress included an express preemption provision. 42 U.S.C. § 1320d-7. HIPAA's preemption clause provides that the statute, "shall supersede any contrary provision of State law," and lists certain exceptions that are not at issue here. *Id*. § 1320d-7(a). Other courts

have ruled on similar issues, including federal courts and the Supreme Court of Georgia. Each found that HIPAA preempts a state's ability to lower the mandated level of privacy rights and restrictions, which, in turn, prevents state courts from entering orders not in compliance with HIPAA, such as the one State Farm seeks here. *See generally Allen v. Wright*, 282 Ga. 9, 644 S.E.2d 814 (2007) (Holding state statute relating to requirement that plaintiff sign an authorization allowing defendants to speak with her treating physicians is preempted by HIPAA) and *OPIS Management Resources, LLC v. Secretary, Florida*, 713 F.3d 1291 (11th Cir. 2013) (Holding that state law proving for the release of medical records of deceased residents of nursing homes to certain specified individuals is preempted by HIPAA as an obstacle to the accomplishment and execution of its full purposes and objectives in keeping an individual's PHI strictly confidential).

The trial court was tasked with deciding whether to enter Plaintiffs' proposed QPO or the QPO proposed by State Farm. The trial court stated that, "if State Farm's argument is correct, that HIPAA's requirements for a QPO in 164.512(e)(1)(v)(A) and 164.512(e)(1)(v)(B) conflict with obligations and rights under Illinois Law, then this court must determine whether the HIPAA requirements preempt Illinois state law requirements for State Farm." (A.50). Plaintiffs maintain that State Farm is not required to maintain PHI pursuant to the insurance and administrative codes. However, if certain obligations do exist, then HIPAA's QPO requirements preempt any contrary state obligations. Whether a state law is preempted by federal law is a question of law, subject to *de novo* review. *Fosler v. Midwest Care Center II, Inc.*, 398 Ill. App. 3d 563, 569 (2009).

Any requirement that an insurer be allowed to use and retain PHI beyond the conclusion of litigation would be "less stringent" and lower the floor of privacy protections

HIPAA mandates. As a result, HIPAA preempts the state law that is "less stringent" than the standards set forth in the Privacy Rule. A state law is "more stringent" that HIPAA if the state law provides greater privacy protection or privacy rights. 45 CFR § 160.202.

Here, the state laws at issue (while not expressly requiring the retention of PHI) would fall below the privacy protections of HIPAA if they did, in fact, require retention of PHI. To the extent that such obligations exist, they fall below the privacy protections of HIPAA. This is echoed in the review of the Privacy Act of 1974 and Executive Order 13181. Simply put, State Farm is not permitted to use, maintain, and disclose Plaintiffs' PHI under the claimed requirements because the privacy protections of each rule or regulation fall well below the requirements of HIPAA.

C. The State Farm order would stand as an obstacle to accomplishing the full purposes and objectives of HIPAA.

State Farm's proposed order would stand as an obstacle to accomplishing and executing HIPAA's full purposes and objectives by falling below the permissible privacy floor. When something stands as an obstacle to accomplishing and executing HIPAA's full purposes and objectives, the express preemption clause contained within HIPAA is implicated, and contrary state law, or in this case, a contrary order of the court, should properly be preempted by the more stringent privacy requirements of HIPAA. 42 U.S.C. § 1320d-7. The order State Farm proposed falls below the floor of privacy HIPAA enacted, permitting highly sensitive and personal health information to be used outside litigation. For these reasons, the court did not err in choosing to enter Plaintiff's proposed QPO, over State Farm's because that order conflicts with the requirements for a HIPAA QPO under section 164.512(e)(1)(v) of the Privacy Rule.

The lower courts reviewed Plaintiffs' proposed QPO and State Farm's proposed order. In reviewing these competing QPOs, the Appellate Court held that, "the [State Farm] order does not require an insurer to return or destroy PHI at the conclusion of litigation and would permit the insurer to use and retain PHI outside of litigation. This directly conflicts with the requirements for a HIPAA QPO under section 164.512(e)(1)(v) of the Privacy Rule. Likewise, by eliminating these two requirements, the State Farm protective order would not provide the confidentiality and protection of PHI envisioned when the Privacy Rule was promulgated." (A.34).

Stated differently, "any requirement that an insurer be allowed to use and retain PHI beyond the conclusion of litigation would lower the floor of privacy protections HIPAA mandates. As such, the [State Farm] protective order acts as an obstacle to accomplishing and executing HIPAA's full purposes and objectives." (A.34).

D. There is a waiver procedure for states to permissibly fall below the privacy floor of HIPAA, which was not sought by Illinois.

While HIPAA sets a floor on privacy that States may not fall below, they can implement more stringent controls and privacy standards. In the event that a state desires to implement less restrictive laws, rules or regulations for a specific purpose which fall below that floor/minimum level, then HIPAA sets forth a procedure to receive a waiver of the privacy protections. The regulations, 45 C.F.R. § 160.204, describe the process for a state to seek a HIPAA exemption. The state's chief elected official, or his or her designee, must submit a request in writing to the Secretary. 45 C.F.R. § 160.204(a).

There have been no preemption exception determination request waivers made to the Secretary of the State of Illinois pursuant to 45 CFR § 160.204 for waivers of the HIPAA privacy limits. (R.C.116 & 118). State Farm has not claimed, and the record is

devoid of any fact suggesting that Illinois has requested any such waiver. The only means of permissibly falling below the privacy rules enumerated by HIPAA is to seek this waiver. Since there is no waiver, the minimum floor for privacy standards apply.

V. THE McCARRAN-FERGUSON ACT DOES NOT COMPEL REVERSE PREEMPTION IN THIS CASE.

In relevant parts, The McCarran-Ferguson Act has a preemption provision that states as follows:

> (b) Federal regulation
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, [….], unless such Act specifically relates to the business of insurance [….]. 15 U.S.C.A. § 1012 (West).

This clause is referred to as a "reverse preemption" clause. The McCarran-Ferguson Act does not reverse preempt HIPAA for three reasons: (i) HIPAA does not invalidate, impair, or supersede any state insurance law or regulation; (ii) retention of medical records is not regulation of the "business of insurance," and (iii) HIPAA is an Act that specifically relates to the business of insurance.

A. The McCarran-Ferguson Act does not apply as HIPAA does not preempt, impair, or supersede any state insurance law or regulation.

The appellate court held, "we conclude that the McCarran-Ferguson Act does not compel reverse preemption in this case, because HIPAA does not invalidate, impair, or supersede any state insurance law or regulation cited by State Farm." (A.36). As is fully outlined above, State Farm has failed to identify any state law or regulation that would in any way be invalidated, or impaired as a result of a HIPAA compliant QPO being entered in a personal injury claim.

Throughout the pendency of this current litigation, neither Plaintiffs, nor State Farm have argued application of the McCarren-Ferguson Act. Thus, the argument has properly been waived and need not be further considered by this Court. The lower courts did not reach preemption, stating only that if state laws conflicted, then HIPAA would preempt those state laws. The same application applies to McCarren-Ferguson reverse preemption.

B. The McCarran-Ferguson Act does not apply as retaining PHI is not the "business of insurance."

Reverse preemption of the McCarran-Ferguson Act only applies to laws enacted by the state for the purpose of regulating the "business of insurance," and not the "business of insurers." *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210–11 (1979). The Supreme Court has distinguished between the "business of insurance" and the "business of insurers" as having discrete meanings. *Id*. The "business of insurance" is the relationship between the insurance company and the policyholder. *Id.* at 215–16 (1979) (Citing to *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969)). In enacting the McCarran-Ferguson Act, Congress was concerned with: "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' *SEC v. National Securities, Inc.* at 460.

The Supreme Court interpreted what constitutes the "business of insurance" in § 1012(b) of the McCarran-Ferguson Act in an antitrust case, *Royal Drug Co*. *Grp. Life & Health Ins. Co. v. Royal Drug Co* 440 U.S. at 208–09, 99. In determining what constitutes the "business of insurance" for purposes of preemption under the McCarran-Ferguson Act, the Court identified a three-prong test: (i) whether the law involved the spreading and underwriting of a policyholder's risk; (ii) whether it related to the conduct between the

insurer and the insured, and (iii) whether it was limited to entities within the insurance industry. *Id.* at 214–151.

In *Royal Drug,* an insurance company sold insurance policies that included coverage for prescription drugs. If the insured used a pharmacy in the insurer's plan, the insured had to pay only a $2 copay. If the insured bought drugs from a non-participating pharmacy, then the insured received a 75% reimbursement of the price of the drug. According to the U.S. Supreme Court, the pharmacy agreement failed the first prong because the agreement did not involve "any underwriting or spreading of risk" but only business cost-saving arrangements that did not affect the risk to the insureds. *Id.* at 214–15. "Spreading the risk" is an indispensable characteristic of the business of insurance. *See SEC. v. Variable Annuity Life Ins. Co of America,* 359 U.S. 65 (1959) (Variable annuity contracts were not the "business of insurance" as they did not offer a guarantee of fixed income but placed all the investment risk on the annuitant and not on the company).

The insurance policy defines the scope of risk assumed by the insurer from the insured. The transfer of risk from an insured to the insurer takes place when the contract is completed and does not include acts that represent the business of the insurance company. *Union Labor Life Ins. Co. v. Piereno,* 458 U.S. 119, 131 (1985), citing § 39:3; R. Keeton, Insurance Law § 5.1(a) (1971).

State Farm's argument that its record-keeping operations survive preemption obscures and conflates the Supreme Court's distinction between the terms "business of insurance" and the "business of insurance company." State Farm's desires to retain and use PHI after the conclusion of litigation as a part of its "business of an insurance company," but keeping and using the medical records are not part of the "business of insurance", the

operative term which applies in the McCarran-Ferguson Act. The relationship between State Farm and its policy holder, the alleged negligent tortfeasor, is conducted in writing the policy of coverage. This "business of insurance" is completed prior to any litigation. By the time any litigation is initiated, State Farm had already issued the insurance policy to its insured, and the scope and transfer of the risk had occurred.

The second factor of the "business of insurance" relates to the contract between the insurer and the insured. *Grp. Life & Health Ins. Co. v. Royal Drug Co*., 440 U.S. 205 at 214–16. In *Royal Drug Co.*, the pharmacy agreements failed this prong because they were not between insurer and insured. *Id. See also Bailey v. Rocky Mt. Holdings, LLC*., 889 F.3d 1259 (11th Cir. 2018) (McCarran-Ferguson Act did not preempt state law regarding whether a medical provider could balance bill the insured claimant because it had nothing to do with the policy and occurred "after the insurer had left the picture."). Recordkeeping rules do not relate to the scope of risk *vis a vis* the policy and are imposed long after the insured has left the picture. Therefore, State Farm's recordkeeping policy fails the second prong of the McCarran-Ferguson factor.

The third McCarran–Ferguson factor requires the regulation be limited to entities within the insurance industry. *Grp. Life & Health Ins. Co. v. Royal Drug Co*., 440 U.S. 205 at 214–16. State Farms claim that it is required to retain records, and this requires reverse preemption by McCarran–Ferguson. However, record-keeping requirements are not unique to insurance companies alone. Banks, accountants, lawyers, and other businesses have record-keeping requirements related to conducting of their businesses. Because record keeping is not a unique activity to insurance companies, State Farm Insurance's record keeping rules fail the third prong of the McCarran-Ferguson test.

State Farm's recordkeeping policy, even when viewed in light of the regulations imposed by the Department of Insurance, fails all three prongs of the McCarran-Ferguson Act and is not the "business of insurance." Retention of medical records is a "business of insurance company" and not the "business of insurance." 5 U.S.C.A. § 1012(b).

The personal injury plaintiff who files a claim against an insured party is neither the insured, nor is the insured purchasing insurance from that company as part of the litigation process. The filing of a claim takes place after the "business of insurance" between State Farm and its insured has already occurred. It cannot be interpreted as related to "spreading the risk." Therefore, the retention of PHI relates to the "business of insurer" not the "business of insurance."

C. McCarran-Ferguson Act does not apply as HIPAA specifically relates to the business of insurance.

HIPAA is a federal law that "specifically relates to the busines of insurance", but even if it were a different federal statute with a state law preemption clause, it would still preempt State Farm's proprietary claim on plaintiffs' medical records. Section 1102(b) of the McCarran-Ferguson Act, in relevant parts, provides that state preemption does not apply to federal law that "specifically relates to the busines of insurance." 5 U.S.C.A. § 1012 (West). HIPAA is a federal law that "specifically relates to the busines of insurance;" therefore, HIPAA is not subject to McCarran-Ferguson reverse preemption. 5 U.S.C.A. § 1012 (West). For these reasons, this court should affirm the lower court's decision that the McCarran-Ferguson Act does not compel reverse preemption in this case, because HIPAA does not invalidate, impair, or supersede any state insurance law or regulation cited by State Farm.

CONCLUSION

For all the reasons stated herein, the Plaintiffs-Appellees, Agnieszka Surlock and Rosemarie Haage, respectfully requests that this Court affirm the circuit court's entry of Plaintiffs Qualified Protective Orders entered Match 15, 2019, and deny Intervenor-Appellant State Farm Insurance Company's appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), contains 50 pages.

/s/Robert D. Fink
Robert D. Fink

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

AGNIESZKA SURLOCK, et al., *Plaintiff-Appellees,* v. DRAGOSLAV STARCEVIC, et al., *Defendant,* STATE FARM MUTUAL INSURANCE AUTO-MOBILE INSURANCE COMPANY, *Intervenor-Appellant.*	)	No. 125918
ROSEMARIE HAAGE, *Plaintiff-Appellee,* v. ALFONSO MONTIEL ZAVALA, et al., *Defendant,* STATE FARM MUTUAL INSURANCE AUTO-MOBILE INSURANCE COMPANY, *Intervenor-Appellant.*	)	

The undersigned, being first duly sworn, deposes and states that on April 7, 2021, there was electronically filed and served upon the Clerk of the above court the Brief of Appellees Agnieszka Surlock and Rosemarie Haage. Service of the Brief will be accomplished via by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/Robert D. Fink
Robert D. Fink