

**IN THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA**

No. _____

**NATIONWIDE MUTUAL INSURANCE COMPANY,
a corporation,**

Petitioner

v.

FRANK S. MARTINO,

Respondent.

*From the Circuit Court of
Harrison County, West Virginia
Civil Action No. 01-C-414-1*

**AMICUS CURIAE BRIEF ON BEHALF OF
THE WEST VIRGINIA BANKERS ASSOCIATION AND
THE AMERICAN BANKERS ASSOCIATION[®]
IN SUPPORT OF
NATIONWIDE MUTUAL INSURANCE COMPANY'S BRIEF**

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I. STATEMENT OF INTEREST

This amicus brief is respectfully filed by the West Virginia Bankers Association and the American Bankers Association (hereinafter collectively referred to as “WVBA”). The West Virginia Bankers Association is a trade association representing the interests of approximately eighty (80) federally-insured lenders in the State of West Virginia. Through advocacy, communication, information, and education, the WVBA provides a number of services to its members, including representing the banking industry before the West Virginia Legislature and monitoring legal development which may impact the membership’s interests. The American Bankers Association is the principal national trade association of the banking industry in the United States, having members in each of the fifty states and District of Columbia. Members of the American Bankers Association include banks of all types and sizes, from community banks to regional, to money center banks, national and state chartered, holding company owned and independent banks, commercial and savings banks and savings and loan associations. The WVBA believes an amicus curiae brief is desirable in this case in order to bring to this Court’s attention additional circumstances and policy considerations that have a significant bearing on the Court’s decision. The West Virginia Privacy Rule and the GLBA apply not only to insurance companies, but also to banks, securities firms, mortgage brokers, finance companies and attorneys. Although the certified questions address the restrictions of the West Virginia Privacy Rule and the Gramm-Leach-Bliley Act on the dissemination of nonpublic personal information by insurance companies, this Court’s answers to the certified questions will determine the circumstances in which all entities subject to the West Virginia Privacy Rule and GLBA will be required to disclose nonpublic personal information.¹

II. NATURE OF PROCEEDING AND RULING BELOW

This case arises from a motor vehicle accident in which the Plaintiff, Frank S. Martino, alleges that Betty Jean Barnett (“Barnett”) was negligent and proximately caused him injuries and damages. Prior to filing the Complaint, Plaintiff requested that Nationwide Mutual

¹ Throughout this brief, any references made to financial institutions subject to the GLBA include all other entities that are subject to the GLBA, including, without limitation, insurance companies.

Insurance Company provide him the address of its insured, Barnett, in order to effectuate service on Barnett.² Nationwide Mutual Insurance Company (“Nationwide”) refused to disclose Barnett’s physical address based on the prohibition from disclosure of “nonpublic personal information” contained in the Gramm-Leach-Bliley Act (15 U.S.C. § 6801 et seq.) (hereinafter the “GLBA”). In his Complaint, Plaintiff alleges that Nationwide violated the West Virginia Unfair Trade Practices Act (W.Va. Code § 33-11-1 et seq.) (hereinafter “UTPA”) by, among other things, refusing to provide Plaintiff with Barnett’s physical address.³ Nationwide maintains that it cannot provide Barnett’s physical address to Plaintiff because the GLBA prohibits such disclosure.⁴

On February 6, 2002, Plaintiff gave Nationwide notice of a Rule 30(b)(7) deposition of a Nationwide representative to produce certain factual information relating to Barnett, including her physical address, in order for Plaintiff to effectuate service of process on Barnett.⁵ On February 11, 2002, Nationwide filed a Motion for Protective Order to prohibit the deposition. In support of its Motion for Protective Order, Nationwide argued that the notice did not comply with Rule 34 of the West Virginia Rules of Civil Procedure and that the request for the production of documents, including Barnett’s address, violated the GLBA.⁶

The Circuit Court of Harrison County, West Virginia (the “Circuit Court”) conducted a hearing on February 13, 2002, in which Plaintiff and Nationwide agreed that the issues presented concerning the GLBA were proper for consideration by the West Virginia Supreme Court of Appeals in the form of certified questions.⁷ The Circuit Court conducted a further hearing on August 26, 2002, at which time the Circuit Court, Plaintiff and Nationwide formulated the questions for certification.⁸

² See, Defendant Nationwide Mutual Insurance Company’s Petition on Certified Questions (hereinafter “Nationwide’s Petition”).

³ See, Order Answering Certified Questions, December 6, 2002 (John Lewis Marks, Jr., Circuit Court Judge) (hereinafter “Order”).

⁴ See, Nationwide’s Petition.

⁵ Order at page 3.

⁶ Id.

⁷ Id.

⁸ Id.

On December 6, 2002, the Circuit Court ordered the following three (3) questions certified to this Court:

1. **Does the West Virginia Privacy Rule and the GLBA restrict the dissemination by an insurance company of “nonpublic personal information” regarding an insured or any other person to a claimant or a claimant’s legal representative necessary for the proper adjustment of a claim?**

2. **Does the West Virginia Privacy Act and the GLBA restrict the dissemination by an insurance company of “nonpublic personal information” regarding an insured or any other person through the discovery process to a claimant/plaintiff once civil litigation is instituted against an insured?**

3. **To what degree do the West Virginia Privacy Rule and the GLBA provisions restricting dissemination by an insurance company of “nonpublic personal information” regarding an insured or any other person control an insurance company’s duties under the West Virginia Trade Practices Act, W.Va. Code § 33-11-1 et seq.?**

The Circuit Court answered the first two (2) questions in the negative by finding that:

the West Virginia Privacy Rule [Title 114 CSR Series 57] and the GLBA do not restrict the dissemination of “nonpublic personal information” by an insurance company regarding an insured, or any other person, to (a) a claimant or a claimant’s legal representative that is necessary for the proper adjustment of a claim prior to filing suit or (b) to a claimant/plaintiff through the discovery process once civil litigation is instituted against an insured because said dissemination is permissible if performed to comply with State law and the legislative history of the GLBA indicates that it was designed to prohibit the disclosure of a customer’s nonpublic personal information for marketing purposes.⁹

⁹ Order at page 4.

The Circuit Court also found that the West Virginia Privacy Rule and the GLBA were not applicable where “nonpublic personal information is disclosed by an insurance company in order to comply with federal, state or local laws.”¹⁰ The Circuit Court determined that the West Virginia Rules of Civil Procedure were “State rules” and that Plaintiff was seeking information regarding Barnett in accordance with the West Virginia Rules of Civil Procedure.¹¹ The Circuit Court noted that the GLBA was “passed in order to prohibit the sharing of nonpublic personal information between financial institutions and non-affiliated third parties for marketing purposes” and “the GLBA was not contemplated by Congress to be used by financial institutions to hinder the civil discovery process.”¹² The Circuit Court concluded that “the West Virginia Privacy Rule and the GLBA do not restrict the dissemination by an insurance company of nonpublic personal information regarding an insured, or any other person, where said information is discoverable under the West Virginia Rules of Civil Procedure and is not being disclosed for marketing purposes.”¹³

The Circuit Court answered the third question by concluding that “the West Virginia Privacy Rule and the GLBA provisions restricting dissemination by an insurance company of “nonpublic personal information” regarding an insured or any other person do not control, to any degree, an insurance company’s duties under the West Virginia Unfair Trade Practices Act.”¹⁴

III. STATEMENT OF FACTS

The WVBA hereby adopts the statement of facts submitted by Nationwide in its Brief.

¹⁰ Id.

¹¹ Order at page 5.

¹² Id.

¹³ Order at pages 5-6.

¹⁴ Order at page 6.

IV. ARGUMENT

A. The GLBA and the West Virginia Privacy Rule prohibit financial institutions from disclosing nonpublic personal information where the information is sought (i) by a claimant or a claimant's legal representative for the adjustment of an insurance claim or (ii) by a civil litigant during the discovery process.

As discussed more fully in Nationwide's Brief, the GLBA and the West Virginia Privacy Rule prohibit Nationwide from disclosing Barnett's address to Plaintiff. Nationwide satisfies the definition of a financial institution under the GLBA¹⁵ and Barnett satisfies the definition of consumer under the GLBA.¹⁶ Plaintiff is a non-affiliated third party under the GLBA which defines a non-affiliated third party as "any entity that is not an affiliate of, or related by common ownership or affiliated by corporate control with, the financial institution, but does not include a joint employee of such institution." 15 U.S.C. § 6809(5). As a financial institution under the GLBA, Nationwide "may not disclose nonpublic personal information to [Plaintiff] unless . . . [Barnett] is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party" 15 U.S.C. § 6802(b)(1)(B).¹⁷ As noted in Nationwide's Brief, Barnett's address is classified as "nonpublic personal information" under Section 6809(4) of the GLBA and the legislative history of GLBA supports such classification.¹⁸ Barnett did not permit Nationwide to disclose her address to Plaintiff and therefore Nationwide is prohibited from disclosing Barnett's address to Plaintiff under the GLBA and the West Virginia Privacy Rule.

¹⁵ The GLBA defines financial institution as "any institution the business of which is engaging in financial activities described in section 4(k) of the Bank Holding Company Act of 1956. 15 U.S.C. § 6809(3)(A). Financial activities described in section 4(k) of the Bank Holding Company Act of 1956 include "insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of any of the foregoing, in any State." 12 U.S.C. § 1843(k)(4)(B). The West Virginia Privacy Rule defines financial institution and financial activities in the same manner as the GLBA.

¹⁶ A consumer is defined under the GLBA as "an individual who obtains, from a financial institution, financial products or services which are used primarily for personal, family, or household purposes" 15 U.S.C. § 6809(9). The West Virginia Privacy Rule defined consumer as "an individual who seeks to obtain, obtains or has obtained an insurance product or service from a licensee that is used primarily for personal, family or household purposes, and about whom the licensee has nonpublic personal information, of that person's legal representative." W.Va. C.S.R. § 114-57-2.6.

¹⁷ The West Virginia Privacy Rule contains a similar prohibition. See, W.Va. C.S.R. § 114-57-9.1.

¹⁸ See, Appellant's Brief filed by Nationwide Mutual Insurance Company (referred to herein as "Nationwide's Brief).

The West Virginia Privacy Rule and the GLBA each contain exceptions that permit financial institutions to disclose nonpublic, personal information. Specifically, a financial institution may disclose nonpublic, personal information “to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.” 15 U.S.C. § 6802(e)(8); W.Va. C.S.R. §114-57-14.1(l)-(n).¹⁹ In this case, the Circuit Court concluded that the West Virginia Rules of Civil Procedure were “State rules.” Accordingly, the Circuit Court found that the exceptions set forth in the West Virginia Privacy Rules and the GLBA authorized Nationwide to disclose nonpublic personal information if the information is discoverable under the West Virginia Rules of Civil Procedure. The Circuit Court’s conclusion was based neither on the legislative history of GLBA nor on precedent interpreting the exception. Moreover, the West Virginia Privacy Rules and the GLBA provide no guidance on what it means to “comply with Federal, State, or local laws, rules and other applicable legal requirements.”

To date, only two reported cases have addressed a financial institution’s ability to disclose nonpublic personal information under the exceptions in the GLBA. Unfortunately, these two cases provide no guidance to entities subject to the provisions of the GLBA as to what it means to “comply with Federal, State, or local laws, rules and other applicable legal requirements.”

¹⁹ In order to implement the privacy protections of the GLBA, the bank regulatory agencies, the Office of the Comptroller of the Currency (the “OCC”), Federal Reserve Board (the “FRB”), Federal Deposit Insurance Corp. (the “FDIC”) and Office of Thrift Supervision (the “OTS”), each adopted regulations governing the privacy of consumer financial information. The other agencies charged with implementing the GLBA – the Securities and Exchange Commission, National Credit Union Administration, Federal Trade Commission and the Commodity Futures Trading Commission have also adopted financial privacy rules for the financial institutions over which they have primary supervisory authority. Regulations adopted by the OCC, the FRB, the FDIC and the OTS contain the same language set forth in § 6802(e) of the GLBA and W.Va. C.S.R. § 114-57-14.1(l)-(n). See, 12 C.F.R. § 40.15(a)(7); 12 C.F.R. § 216.15(a)(7); 12 C.F.R. § 332.15(a)(7); 12 C.F.R. § 573.15(a)(7).

The first case, Union Planters Bank, N.A. v. Gavel, 2002 U.S. Dist. LEXIS 8782 (E.D. La. 2002), addressed the application of the restrictions in the GLBA to a subpoena requesting bank records.²⁰ The subpoena was issued to an insurance broker associated with Union Planters Bank (the “Bank”) and the Bank intervened to file a preliminary injunction to prohibit the disclosure of the Bank’s customers’ information in violation of the GLBA. In support of its motion for a preliminary injunction, the Bank contended that the GLBA prohibits the “disclosure of non-public information to third parties unless the consumer is given the opportunity, before the time that the information is disclosed, to direct that the information not be disclosed to said third party.” Id. The Bank noted that “[u]nless Gavel is enjoined from producing the information requested, non-public personal information covered by the GLBA will be disclosed to third parties without any individual customer’s advance knowledge or consent, in clear violation of the statute.” Id. at 4-5. The Bank also argued it would face “irreparable injury” in that the disclosure of the information by Gavel “would result in an invasion of privacy of Union Planters’ customers.” Id. at 5. Moreover, the Bank alleged it would suffer injury to its business reputation when its customers learn that their private financial information was divulged to third parties without their consent. Id.

The District Court concluded that it was “clear” that the GLBA specifically prohibited the insurance broker from disclosing the information sought by the subpoena without the consent of the customers. Id. at 15. The District Court determined that the information sought by the subpoena was “clearly non-public personal information which falls within the provisions of the GLBA prohibiting disclosure.” Id. at 16. The District Court addressed the fraud exception set forth in 15 U.S.C. § 6802(e)(3) but did not address the exception set forth in 15 U.S.C. § 6802(e)(8) (“to comply with Federal, State, or local laws, rules and other applicable legal requirements”). The fact that the District Court in Union Planters did not even consider the

²⁰ The subpoena requested (i) any and all records wherein the bank requested the placement or purchase of flood insurance and the amounts of any such insurance policies; (ii) the names, addresses, and telephone number of any party currently or formerly indebted to the bank by virtue of a residential mortgage/deed of trust loan, the current balance of the said loan, the original loan amount, the loan balance on the effective date of any flood insurance policy where flood insurance was provided by the bank; and (iii) any records showing the mortgage balance and the original amount of the loan where flood insurance was placed by the bank. 2002 U.S. Dist. LEXIS 8782 at 2-3. The subpoena was limited to “all records regarding forced placement of insurance in the State of Louisiana from Union Planters Bank, by and through John A. Gavel, Jr., a Louisiana broker, as requested by WNC from January 1, 1991, through December 31, 2001” as a result of a motion filed by the Bank and the insurance broker. Id. at 3.

exception under 15 U.S.C. § 6802(e)(8) (“to comply with Federal, State, or local laws, rules and other applicable legal requirements”), leads entities subject to the GLBA to believe that this exception does not apply in similar circumstances.

The District Court denied the Plaintiff’s Motion for Reconsideration and Union Planters’ Motion for Permanent Injunction was granted on March 12, 2003. See, Union Planters Bank, N.A. v. Gavel, 2003 U.S. Dist. LEXIS 3820 (2003). In granting Union Planters’ Motion for Permanent Injunction, the District Court noted that “[t]he subpoena issued in the state court proceeding seeks full disclosure of the very nonpublic consumer information which GLBA seeks to protect.” Id. at 26. “Since the subpoena seeks disclosure of information which otherwise would, by law, remain confidential, the action by [Union Planters] to seek injunctive relief as to the specific nonpublic consumer information is correct.” Id. at 27.

The second case, Arbor Place, L.P. v. Encore Opportunity Fund, L.L.C., 2002 Del. Ch. LEXIS 102 (Del. Ch. 2002), provides no analysis for its conclusion that the regulations promulgated by the SEC²¹ implementing the GLBA do not prohibit a limited liability company from disclosing the list of names and addresses of the members of the limited liability company to a member of the company. The Court in Arbor Place summarily concluded that the disclosure of the list of names and addresses of the members fell within the exception set forth in 12 C.F.R. § 248.15(a)(7)(i) (“comply with Federal, State, or local laws, rules and other applicable legal requirements”) “because it would be required under state law and other applicable legal requirements.” Id. at 14. The Court also relied on the language in the limited liability agreement that permitted the disclosure of the list. Id. at 10.

In the instant case, the Circuit Court concluded that the exception “to comply with Federal, State, or local laws, rules and other applicable legal requirements” permits Nationwide to disclose Barnett’s address because the Plaintiff seeks this information in accordance with the West Virginia Rules of Civil Procedure. The WVBA supports Nationwide’s contention that

²¹ The Securities and Exchange Commission adopted Regulation S-P to implement the privacy provisions contained in the GLBA. The regulations at issue in the Arbor case, 12 C.F.R. § 248.15(a)(7)(i) are the same as those set forth in 15 U.S.C. § 6802(e)(8) and the West Virginia Privacy Rules (W.Va. C.S.R. § 114-57-14.1(l)-(n)).

Plaintiff's request for Barnett's address does not fall within the exception "to comply with Federal, State, or local laws, rules and other applicable legal requirements."

Because there is no guidance as to what it means to "comply with Federal, State, or local laws, rules and other applicable legal requirements" this Court must look to the purpose and the language of the GLBA and the ramifications of this Court's decision, when making its determination. Neither the purpose nor the language in the GLBA supports the disclosure of nonpublic personal information to nonaffiliated third parties (i) for the proper adjustment of a claim or (ii) during the discovery process once civil litigation is instituted against an insured.

Section 6802(e) of the GLBA lists the situations where financial institutions may disclose nonpublic personal information notwithstanding a consumer's objection. Neither the adjustment of an insurance claim nor disclosure of nonpublic personal information during the discovery process once civil litigation is instituted against an insured is listed in Section 6802(e). Plaintiff contends that these two situations fall within Section 6802(e)(8) to "comply with Federal, State, or local laws, rules and other applicable legal requirements." Clearly, disclosure by an insurance company of its insured's address to a claimant for purposes of filing suit does not fall into this category. Moreover, it is absolutely unreasonable to conclude that the discovery process set forth in the West Virginia Rules of Civil Procedure provides an exception to the GLBA permitting party litigants to obtain information from a non-party when such information cannot be obtained under the West Virginia Rules of Civil Procedure unless pursuant to a subpoena. The GLBA only permits the disclosure of nonpublic personal information pursuant to a subpoena when the subpoena is issued by federal, state or local authorities. By not including subpoenas issued by private individuals/entities during a civil action in the list of exceptions, it can be inferred that Congress did not intend to except such subpoenas from the prohibition of disclosure.

The GLBA sets forth the important public policy furthered by the privacy laws. The GLBA provides that "[i]t is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." 15 U.S.C. §

6801(a). In order to satisfy this obligation, financial institutions must be able to rely on the regulations implementing the GLBA, including the West Virginia Privacy Rules, when refusing to disclose nonpublic personal information. When customers disclose information to financial institutions, the customers receive the privacy notices required under the GLBA that provide that the customer's information will not be disclosed without the consent of the customer and except in certain circumstances. Based upon the privacy policy contained in the notices, customers believe that their information is being kept confidential and that their information will not be disclosed without their consent and except in the certain circumstances set forth in the privacy policy. If this Court determines that financial institutions must disclose nonpublic personal information to nonaffiliated third parties (i) for the proper adjustment of a claim or (ii) during the discovery process once civil litigation is instituted against an insured, then financial institutions will be required to disclose nonpublic personal information about its customers that it promised to keep confidential. Such disclosure will unduly place financial institutions at risk for liability under the GLBA.

The GLBA was enacted to protect nonpublic personal information. Banks that are members of the WVBA regularly receive requests for nonpublic personal information arising from litigation to which the bank is not a party. The proper determination of the scope of the exception permitting disclosure, "to comply with Federal, State, or local laws, rules and other applicable legal requirements" is critical to avoid the potential reputational risks faced by banks that must secure and safeguard nonpublic personal information. It is also necessary to ensure the reasonable privacy expectations of consumers. The purpose of the GLBA is frustrated if financial institutions are required to disclose nonpublic personal information to nonaffiliated third parties that their customer's believe will be kept confidential. Moreover, if this Court requires non-litigant financial institutions to disclose nonpublic personal information during the adjustment of a claim or during discovery, then this Court will allow claimants and litigants to obtain information that they would not otherwise be able to obtain under applicable state law, i.e. the West Virginia Rules of Civil Procedure and W.Va. Code § 33-11-1 *et seq.* In the case at hand, the sole reason the Plaintiff sought Barnett's address was to file a lawsuit against Barnett. There is no law requiring insurance companies to provide their insured's address to claimants for

purposes of filing suit against the insured. This Court should not permit claimants and litigants to circumvent the judicial system and the privacy protections provided by GLBA.

B. The GLBA and the West Virginia Privacy Rule control an insurance company's duties under the West Virginia Trade Practices Act.

The WVBA hereby adopts Nationwide's argument set forth in subpart D of its Brief. The WVBA would also like to note that it does not believe the West Virginia Trade Practices Act is in conflict with the GLBA and the West Virginia Privacy Act in that the West Virginia Trade Practices Act does not impose a duty on an insurance company to provide claimants and litigants with nonpublic personal information for purposes of filing suit. The West Virginia Trade Practices Act imposes a duty on insurance companies to negotiate in good faith and to effectuate prompt, fair and equitable settlements. This duty is not equivalent to providing nonpublic personal information to claimants and litigants for purposes of filing a lawsuit.

V. RELIEF PRAYED FOR

For the foregoing reasons and for the reasons set forth in Nationwide's Brief submitted to this Court, the WVBA respectfully requests that this Court answer the first two certified questions of law in the positive and overrule the answers of the Circuit Court by stating that (i) the West Virginia Privacy Rule and the GLBA restrict the dissemination by an insurance company of "nonpublic personal information" regarding an insured or any other person to a claimant or a claimant's legal representative necessary for the property adjustment of a claim and (ii) the West Virginia Privacy Act and the GLBA restrict the dissemination by an insurance company of "nonpublic personal information" regarding an insured or any other person through the discovery process to a claimant/plaintiff once civil litigation is instituted against an insured. In addition, the WVBA respectfully requests that this Court overrule the Circuit Court with respect to the third certified question and answer the third certified question by stating that an insurance company's refusal to disclose nonpublic personal information in accordance with the West Virginia Privacy Rule and the GLBA is not in violation of any insurance company's duties under the West Virginia Trade Practices Act, W.Va. § 33-11-1 *et seq.*

WEST VIRGINIA BANKERS ASSOCIATION
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CERTIFICATE OF SERVICE

I, Amy J. Tawney, counsel for the West Virginia Bankers Association, hereby certify that I served a true copy of the foregoing **AMICUS CURIAE BRIEF ON BEHALF OF THE WEST VIRGINIA BANKERS ASSOCIATION AND THE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF NATIONWIDE MUTUAL INSURANCE COMPANY'S BRIEF** upon the following individuals, by placing the same in the U.S. Mail, First Class, postage prepaid, on this 16th day of March, 2003.

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