

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

No. _____

FRANK S. MARTINO,

Plaintiff,

v.

CIVIL ACTION NO. 01-C-414-1

**BETTY J. BARNETT;
SEAN M. SWIGER;
JERRY BOYCE and COLLEEN BOYCE,
husband and wife;
HORACE MANN INSURANCE COMPANY,
a foreign insurance company;
EDGAR BRUCE GARNER, an individual;
NATIONWIDE MUTUAL INSURANCE COMPANY,
a foreign insurance company; and
RODNEY STEWART, an individual.**

Defendants.

**AMICUS CURIAE BRIEF ON BEHALF OF
THE WEST VIRGINIA BANKERS ASSOCIATION
IN SUPPORT OF PETITION OF
NATIONWIDE MUTUAL INSURANCE COMPANY
FOR CERTIFIED QUESTIONS**

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I. STATEMENT OF INTEREST

This amicus brief is respectfully filed by the West Virginia Bankers Association (hereinafter referred to as “WVBA”), 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 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.

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 the physical address of Nationwide Mutual Insurance Company’s insured, Barnett, in order to effectuate service on Barnett.¹ Nationwide Mutual Insurance Company (“Nationwide”) refused to disclose Barnett’s physical address because of the prohibition of disclosure of “nonpublic personal information” 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.² Nationwide’s position is that it cannot provide Barnett’s physical address to Plaintiff because the GLBA prohibits such disclosure.³

¹ ¹ See, Defendant Nationwide Mutual Insurance Company’s Petition on Certified Questions of Law (hereinafter “Nationwide’s Petition”).

² See, Order Answering Certified Questions, December 6, 2002 (John Lewis Marks, Jr., Circuit Court Judge) (hereinafter “Order”).

³ See, Nationwide’s Petition.

On February 6, 2002, Plaintiff noticed 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.⁴ On February 11, 2002, Nationwide filed a Motion for Protective Order to prohibit said 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 the request for the production of documents, including Barnett's address, violated the GLBA.⁵

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.⁶ 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.⁷

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?**

⁴ Order at page 3.

⁵ Id.

⁶ Id.

⁷ Id.

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.⁸

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.”⁹ 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.¹⁰ 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.”¹¹ 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

⁸ Order at page 4.

⁹ Id.

¹⁰ Order at page 5.

¹¹ Id.

information is discoverable under the West Virginia Rules of Civil Procedure and is not being disclosed for marketing purposes.”¹²

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.”¹³

III. STATEMENT OF FACTS

The facts are fully set forth in Part II of this Brief.

IV. ARGUMENT

The WVBA agrees with Nationwide that the three (3) questions presented by the Circuit Court are proper for certification to this Court. W.Va. Code § 58-5-2 provides, in part, that “any questions of law . . . may, in the discretion of the circuit court in which it arises, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back.” This Court has stated that “certification will not be accepted unless there is a sufficiently precise and undisputed factual record on which the legal issues can be determined. Moreover, such legal issues must substantially control the case.” Syl. Pt. 5, Bass v. Coltelli, 453 S.E.2d 350 (W.Va. 1994); State of West Virginia ex rel. West Virginia Dept. of Health and Human Resources, Bureau for Child Support Enforcement v. Wertman, 557 S.E.2d 773, 775 (W.Va. 2001). This Court has also held that “certification is limited to those questions which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of appeals of this State.” Morningstar v. The Black and Decker Manufacturing Co., 253 S.E.2d 666, 669 (W.Va. 1979).

¹² Order at pages 5-6.

¹³ Order at page 6.

The three questions presented are proper for certification to this Court in that (i) the questions involve questions of law, i.e., interpretation of the GLBA and the West Virginia Privacy Rule; (ii) there is a sufficiently precise and undisputed factual record; and (iii) there is no controlling precedent in the decisions of the West Virginia Supreme Court of Appeals.

The West Virginia Privacy Rule and the GLBA not only apply to insurance companies, but they also apply 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 GLBA on the dissemination of nonpublic personal information by **insurance companies**, this Court's answers to the certified questions will determine the situations in which all entities subject to the West Virginia Privacy Rule and GLBA will be required to disclose nonpublic personal information.¹⁴

There is an exception in the West Virginia Privacy Rule and the GLBA which permits financial institutions to 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).¹⁵ The Circuit Court concluded that the West Virginia Rules of Civil Procedure were "State rules" and therefore this exception permitted 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 not based on legislative history or precedent interpreting the exception.

¹⁴ 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.

¹⁵ 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).

Because the West Virginia Privacy Rules and the GLBA do not provide any guidance on what it means to “comply with Federal, State, or local laws, rules and other applicable legal requirements”, this Court should answer the certified questions to inform entities that are subject to the West Virginia Privacy Rules and the GLBA when they are permitted to disclose nonpublic personal information.

Only two cases have addressed a financial institution’s ability to disclose nonpublic personal information under the exceptions in the GLBA. The first case, Union Planters Bank, N.A. v. Gavel, 2002 U.S. Dist. LEXIS 8782 (E.D. La. 2002), involved a subpoena issued to a bank (Union Planter Bank) and an insurance broker (John A. Gavel, Jr.) for the production of certain information relating to the customers of the bank. The subpoena requested (1) any and all records wherein the bank requested the placement or purchase of flood insurance and the amounts of any such insurance policies; (2) 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 (3) any records showing the mortgage balance and the original amount of the loan where flood insurance was placed by the bank. Id. at 2-3. Union Planters Bank and Mr. Gavel filed a motion in state court to quash or for a protective order with regard to the subpoena to the extent that the subpoena sought information barred from disclosure by Louisiana privacy laws and the GLBA. Id. at 3. The state court denied the motion but limited the subpoena 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.” Id. Union Planters Bank subsequently filed an action with the District Court for the Eastern District of Louisiana seeking a temporary restraining order to enjoin Mr. Gavel from disclosing the information requested by the subpoena, as it violated the GLBA. Id. at 4.

In support of its temporary restraining order, Union Planters 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.* Union Planters 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. Union Planters Bank also submitted that 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. “Union Planters will surely 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 stated that it was “clear” that the GLBA specifically prohibited Mr. Gavel 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 found that the fraud exception set forth in 15 U.S.C. § 6802(e)(3) was not applicable in the current circumstances in that the fraud exception was “intended for situations in which a customer is using the privacy associated with his financial account to perpetrate a fraud.” *Id.* at 17. Accordingly, the District Court held that Union Planters was entitled to an injunction to prevent the disclosure of the information sought by the subpoena. *Id.* at 18.

The second case involving disclosure of nonpublic personal information pursuant to the exceptions in the GLBA is Arbor Place, L.P. v. Encore Opportunity Fund, L.L.C., 2002 Del. Ch. LEXIS 102 (Del. Ch. 2002). In Arbor Place, a member of two limited liability companies brought an action to inspect the books and records of the two limited liability companies. The member specifically requested a list of the names and addresses of the other members of the limited liability companies to “contact the other members and discuss with them the business and affairs of the LLCs.” *Id.* at 9. The two LLCs argued that their list of members was not open to inspection. One of the reasons submitted by the LLCs in favor of their position was that the disclosure of the members list would contravene the privacy notices distributed by the LLCs as required by federal law. *Id.* at 13. The Securities and Exchange Commission adopted Regulation S-P to implement the privacy provisions contained in the GLBA. Regulation

S-P, like the West Virginia Privacy Rules, “prohibits the disclosure of confidential customer information unless customers first receive an initial privacy notice explaining what nonpublic personal information will be disclosed, to whom, and under what circumstances, and then are given the chance to opt out of that disclosure.” *Id.* The court agreed that Regulation S-P generally prohibited the disclosure of confidential customer information but that Regulation S-P did not “preclude disclosure in this case because of the exception found in 17 C.F.R. § 248.15(a)(7)(i).” *Id.* This subsection provides that the otherwise applicable requirements of notice and the right to opt out do not apply when nonpublic personal information is disclosed to “comply with Federal, State, or local laws, rules and other applicable legal requirements.” *Id.* The court determined that disclosure of a list of names and addresses, the members list, would fall within the exception in 17 C.F.R. § 248.15(a)(7)(i) because “it would be required under state law and other applicable legal requirements.” *Id.*

The only two cases addressing a financial institution’s ability to disclose nonpublic personal information under the GLBA do not provide any guidance to entities subject to the provisions of the GLBA as to what it means to comply with “comply with Federal, State, or local laws, rules and other applicable legal requirements.” In Union Planters, the District Court did not even consider whether the exception “to comply with Federal, State, or local laws, rules and other applicable legal requirements” permitted the bank to turn over nonpublic personal information when served with a subpoena.¹⁶ In Arbor Place, the Chancery Court found that the exception “to comply with Federal, State, or local laws, rules and other applicable legal requirements” applied but provided no legal analysis as to why it applied.

In the case at hand, the District 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. It is unclear as to when an

¹⁶ Although not discussed by the District Court, it is assumed that the other exceptions set forth in 15 U.S.C. § 6802(e)(8), “to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State or local authorities” and “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” did not apply because the subpoena was not issued by Federal, State or local authorities or by a governmental regulatory authority having jurisdiction over Union Planters.

insurance company or financial institution is permitted to disclose such nonpublic personal information. The certified questions request this Court's guidance as to the timing of the permitted disclosures, i.e., can disclosures be made during the adjustment of a claim or during discovery once a civil action is instituted. Members of the WVBA receive hundreds of requests for nonpublic personal information. These members need to know when the exception "to comply with Federal, State, or local laws, rules and other applicable legal requirements" applies.

The WVBA agrees with Nationwide that Nationwide meets the definition of a financial institution under the GLBA, that as a financial institution within the meaning of the GLBA, Nationwide is prohibited from disclosing nonpublic personal information, that Barnett's address falls within the meaning of nonpublic personal information within the GLBA and that Nationwide is prohibited from disclosing Barnett's address unless one of the exceptions in the West Virginia Privacy Rule or the GLBA applies. The WVBA also agrees that Plaintiff's request for Barnett's address prior to the filing of a lawsuit, does not fall within the exception "to comply with Federal, State, or local laws, rules and other applicable legal requirements." The WVBA also believes that disclosure of nonpublic personal information in the discovery process under the exception "to comply with Federal, State, or local laws, rules and other applicable legal requirements" must be pursuant to discovery requests that otherwise satisfy the West Virginia Rules of Civil Procedure.

The privacy obligation policy set forth in 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, including insurance companies, must be able to rely on the regulations implementing the GLBA, including the West Virginia Privacy Rules, when refusing to disclose nonpublic personal information. If the exceptions to the disclosure of nonpublic personal information are not clearly identified, then the protection and confidentiality of nonpublic personal information is lost as a result of the fear of being sued. By accepting and answering the certified questions, this Court will provide guidance to financial institutions and

help financial institutions satisfy their obligation to their customers to protect the security and confidentiality of their information.

V. RELIEF PRAYED FOR

For the foregoing reasons, the WVBA respectfully requests that this Court docket the three certified questions.

WEST VIRGINIA BANKERS ASSOCIATION

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ADDENDUM