

6 Misc.3d 1038(A)

**(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 6 Misc.3d 1038(A))****C**

This opinion is uncorrected and will not be published in the printed Official Reports.

JEFFREY A. WEILLER, individually and on behalf of all others similarly situated, Plaintiff,
v.

NEW YORK LIFE INSURANCE COMPANY,
UNUMPROVIDENT CORPORATION and THE
PAUL REVERE INSURANCE COMPANY,
Defendants.
604285/04

Supreme Court, New York County

Decided on March 16, 2005

CITE TITLE AS: Weiller v New York Life Ins. Co.

ABSTRACT

Disclosure
Supervision of Disclosure
Preservation Order

Weiller v New York Life Ins. Co., 2005 NY Slip Op 50341(U). Disclosure-Supervision of Disclosure-Preservation Order. (Sup Ct, NY County, Mar. 16, 2005, Cahn, J.)

APPEARANCES OF COUNSEL

Plaintiff was represented by Quadrino & Schwartz, P.C., 666 Old Country Road, Suite 900, Garden City, New York 11530, Richard J. Quadrino, Esq., and Michail Z. Hack, Esq., of counsel. Defendants were represented by Gallagher, Harnett & Lagalante, LLP, 380 Lexington Avenue, Suite 2120, New York, New York 10168, (212) 983-9700, Louis M. Lagalante, Esq., of counsel; and Sullivan & Cromwell, 125 Broad Street, New York, New York 10004, (212) 558-4000, Brian T. Frawley, Esq., of counsel.

OPINION OF THE COURT

Herman Cahn, J.

This is a putative class action alleging improper claims handling by disability insurance carriers. Plaintiff moves for an order compelling defendants to preserve certain material as evidence, [CPLR 3104\(a\)](#), [6301](#), [6311](#).

This Action:

The complaint, filed December 20, 2004, alleges as follows.

In December 1994, defendant New York Life Insurance Company issued a disability policy to plaintiff, who filed a claim for benefits under the policy in December 1998. One year later, a subsidiary of defendant UnumProvident Corporation (“Unum”) ^{ENI} contracted to administer New York Life's disability policies. Plaintiff's benefits were terminated after two years of receiving payments.

The complaint alleges that Unum, the country's leading disability insurer, is engaged in an elaborate scheme to drastically limit its liability to policyholders by denying meritorious claims based on economic factors having nothing to do with insureds' actual qualifications under the policies. Plaintiff alleges that Unum's termination of his benefits comes within that category. The following techniques are alleged to be used by Unum and its subsidiaries in perpetration of the foregoing scheme:

In-house physicians are given financial incentives to “rubber stamp” business decisions made by lay administrators to deny claims for non-medical reasons;

Administrative personnel are awarded bonuses and favorable compensation plans commensurate with the volume of their denials of claims;*2

In-house senior physicians are encouraged to revise the conclusions of in-house junior physicians who have approved claims;

In-house physicians are encouraged to deny claims

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by ignoring medical evidence, stifling their own professional opinions as to the merit of claims, and using prepared statements in their written reports;

Administrative personnel are hired in accordance with their track record of terminating benefits;

Claims filed by disabled insureds suffering from concurrent problems are fragmented such that each particular ailment is reviewed on its own, causing a greater chance of denial of the claims;

Opinions furnished by claimants' physicians are disregarded.

The complaint alleges that former Unum employees have appeared on various televised news programs and described the scheme in connection with other Unum insureds similarly situated to plaintiff.

Related Pending Actions:

Eight other putative class actions similar to this one are part of a Multi-District Litigation ("MDL") presently pending in the United States District Court for the Eastern District of Tennessee, Unum's home venue. Those actions are, in chronological order:

Rombeiro v Unum Life Ins. Co., filed July 15, 2002, in California state court and removed to federal court, Northern District of California, asserting claims for breach of fiduciary duty;

Keir v UnumProvident Corp., filed November 4, 2002, in federal court, Southern District of New York, asserting claims for ERISA violations;

Harris v UnumProvident Corp., filed February 11, 2003, in Illinois state court and removed to federal court, Southern District of Illinois, asserting claims for breach of contract and fiduciary duty, fraud, and ERISA violations;

Davis v UnumProvident Corp., filed February 25, 2003, in federal court, Eastern District of Pennsylvania, asserting claims for ERISA and RICO violations;

Contreras v UnumProvident Corp., filed July 18,

2003, in federal court, Southern District of New York, asserting claims for ERISA violations;

Rudrud v UnumProvident Corp., filed September 17, 2003, in federal court, District of Massachusetts, asserting claims for ERISA and RICO violations, and under state law;

Dauphinee v UnumProvident Corp., filed November 13, 2003, in federal court, Eastern District of Tennessee, asserting claims for ERISA violations; and

*3 *Taylor v UnumProvident Corp.*, filed April 30, 2003, in Tennessee state court and removed to federal court, Western District of Tennessee, asserting claims for breach of contract.

On December 22, 2002, plaintiff's counsel in *Keir v UnumProvident Corp.* (US Dist Ct, SD NY, 02 Civ 8781 [DLC]) applied for an order directing the preservation of evidence. The District Court (Denise L. Cote, J.) granted the application, and issued a preservation order dated December 27, 2002, requiring UnumProvident to preserve 25 categories of documents dating back approximately 10 years, including substantially all computer disks and drives, and e-mail files (Order to Show Cause Ex. M). On March 10, 2004, Judge Curtis L. Collier, overseeing the MDL (*In re: UnumProvident Corp. Secs. Derivative & "ERISA" Litig.*, US Dist Ct, ED Tenn, 1:03 CV 1000) issued an evidence preservation order substantially similar to the order in *Keir, supra*, which governs all the foregoing related actions by virtue of the MDL (Def. Ex. B).

On February 12, 2003, the first of six separate securities class actions (*Knisely v UnumProvident Corp.*) was filed in the U.S.D.C., E.D. Tenn., consolidated as *In re Unum Provident Corp. Secs. Litig.* (US Dist Ct, ED Tenn, 1:03 CV 0049). Those actions similarly accuse Unum of implementing the decade long scheme alleged herein and in the other related actions, and seek damages for Unum's alleged failure to maintain sufficient reserves to account for any resulting liabilities (Def. Ex. C).

On May 7, 2003, the first of four putative securities class actions (*Azzolini v CorTs Trust II for Provident Fin. Trust*) was filed in the U.S.D.C., S.D.NY, which

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were also transferred for MDL to the Eastern District of Tennessee. The allegations are substantially similar to those *In re UnumProvident Corp. Secs. Litig.* and this action.

On November 22, 2002, the first of five shareholder derivative actions was filed in Tennessee. The actions were removed to federal court, and were consolidated as in *In re UnumProvident Corp. Derivative Actions*. The consolidated complaint alleges that various Unum officers and directors breached their fiduciary duties and violated state and federal law by allegedly perpetuating the scheme underlying all the related actions.

On April 29, 2003, the first of two putative class actions on behalf of beneficiaries of Unum's 401 (k) Retirement Plan was filed in the Eastern District of Tennessee (*Gee v UnumProvident Corp.*).

In 2002 and 2003, various state insurance departments, including New York, commenced investigations into Unum's claims handling practices. The New York State Attorney General's Office and the United States Department of Labor commenced similar investigations. In September 2003, the Maine, Massachusetts, and Tennessee Insurance Departments undertook joint oversight of the multi-state investigations. Unum settled more than 40 states' regulatory proceedings. The report ultimately issued by the multi-state examiners found no violations of insurance laws or regulations by Unum.

The instant action and the related actions consist of the same basic gravamen, as detailed above. The principal difference is that this action alleges that Unum engaged in the alleged mishandling of claims as a service agent for defendant New York Life, which was the issuer of the policies (Complaint ¶¶ 91, 98, 102, 103).

*The Parties' Efforts at Preservation of Documents in this Action:**⁴

A little over a month after the commencement of the action, plaintiff's counsel asked defendants' counsel to stipulate to a document preservation order (Order to Show Cause Ex. E). Defendants' counsel agreed to preserve documents, while declining to stipulate to an order (*id.* Ex. F). Specifically, they acknowledged

defendants' ongoing duty to preserve documents and data pursuant to the preservation orders in the *Keir* action and the MDL, and argued that a formal order herein would be redundant and unnecessary (Def. Ex. D). Plaintiff's counsel insisted on a formal order, and filed this motion therefor, compelling the preservation of documents.

The form of order which plaintiff's counsel seeks is conceded by him to be "a word-for-word duplicate of the Order entered in the *Keir* class action litigation and in the *ERISA Benefit Denial Actions* in Tennessee" (Order to Show Cause Ex. E), except for what counsel refers to as "additional categories of material that must be preserved" (*id.*).

The Instant Motion:

The instant application is, in substance, a motion for a preliminary injunction, in that it seeks to restrain defendants, *pendente lite*; specifically, from discarding material asserted to be of possible probative value (*Schwartz v Lubin*, 6 AD2d 108 [1st Dept 1958] [standards for preservation order are equivalent to those for preliminary injunction]). Plaintiff's counsel recognizes this by referring at certain junctures to this application in injunctive terms (Hack Affirm. ¶ 34-35).

Plaintiff's counsel has conceded that the requested preservation order is nearly a "word-for-word duplicate" of the *Keir* and MDL preservation orders already in existence (Order to Show Cause Ex. E).

Apart from the existing federal orders which already restrain defendants, they are additionally bound by the federal statutory document preservation strictures applicable under the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 USC 78u-4. The federal complaint in *In re UnumProvident Corp. Secs. Litig.*, *supra*, similarly accuses Unum of implementing the decade long scheme alleged herein and in the other related actions (Def. Ex. C). Under the PSLRA, a defendant "shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of

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Civil Procedure” ([15 USC 78u-4](#) [b] [3] [C] [i]). Plaintiff’s requested preservation order does not directly add to the protections already afforded under the PSLRA because “[t]he PSLRA provides for the possibility of court-ordered sanctions in response to a party’s ‘willful failure’ to comply with the duty to preserve relevant evidence” ([Pirelli Armstrong Tire Corp. v LaBranche & Co., Inc.](#), 2004 WL 1179311 at *23 [SD NY]; see, [15 USC 78u-4](#) [b] [3] [C] [ii]). However, the federal protections are not directly binding here. It is true that the federal court could, and probably would, enforce the PSLRA and the court’s orders. But, this court could not independently enforce a breach of the obligations to preserve.

Plaintiff’s counsel urges that the requested preservation order is necessary due to alleged “destruction” of e-mail messages by Unum in the past (Hack Affirm. ¶¶ 18-35). He refers to an August 22, 2003, decision of District Judge Cote in *[5Keir v UnumProvident Corp.](#) (2003 WL 21997747 [SD NY]) (Order to Show Cause Ex. B), which took note of a loss by Unum of e-mail backup tapes notwithstanding the prior December 27, 2002, order of that court requiring the preservation of such material (Order to Show Cause Ex. M).

Plaintiff’s counsel’s portrayal of the foregoing finding by the District Court may be exaggerated. To be sure, the District Court made note of Unum’s loss of certain e-mail and made suggestions as to what Unum might have done to minimize the risk of such loss.^{FN2} However, it thereafter expressly recognized that the loss of the e-mail, caused by the overwriting of backup tapes, was not deliberate, but inadvertent: “In sum, through the fault of no one, but as a result of IBM’s actions, some of the email from the six days was lost in the creation of the December snapshot” ([2003 WL 21997747 at *13](#); see also, *id.* [expressly characterizing the overwriting of Unum’s e-mail files as having been done “inadvertently”]).^{FN3}

The court can envision one or more scenarios in which the federal preservation orders might not be sufficient protection for plaintiff in this state action. For example, if the federal court did not require the production of certain materials or documents, and this court did require such production. A separate preservation order in this court might then be necessary as to those materials. Similarly, the allegations in this action might well diverge from

those in the federal actions, causing a divergence in the scope and details of discovery, thus requiring a separate order.

Accordingly, the motion for a preservation order is granted.

Defendants are directed to promptly notify plaintiff’s counsel if the Federal preservation orders are amended or vacated, and if defendants or any of them are accused by the court or their adversaries, of violating either of said orders.*6

In the course of opposing this motion, defendants have identified numerous objections to categories of documents envisioned in plaintiff’s proposed preservation order (Order to Show Cause Ex. E), on grounds of overbreadth.

Defendants object to the requests for documents envisioned by paragraphs 1 through 6 of the proposed order, which, broadly stated, seek: (Request No. 1) disability claim files; (Request No. 2) documents evidencing claims handling policies and procedures; (Request No. 3) board of directors’ documents relating to claims handling policies and procedures, personnel files, contracts with Unum subsidiaries; (Request No. 4) payroll records, incentive plan documents, long-term disability reserve reports, documents relating to long-term disability reinsurance; (Request No. 5) medical evaluation of claims, medical staff policies and procedures regarding disability claims; and (Request No. 6) e-mail back-up tapes, computer hard drives, and disks containing communications relating to the foregoing categories.

As indicated at the outset, the complaint sets forth detailed allegations of a systematic effort to promote broad-based denial of disability claims, without regard to their merit (*e.g.*, Complaint ¶ 6). Consequently, the foregoing categories of documents are within the scope of “all matter material and necessary in the prosecution or defense” of this action ([CPLR 3101](#) [a]). Moreover, in light of the allegations of a widespread corporate scheme, plaintiff’s requested time frame of January 1994, and on, does not breach the bounds of relevance, given the putative class, which is defined as certain claimants whose long-term disability benefits were

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“denied, terminated or suspended on or after December 17, 1998” (Complaint ¶ 33). Any such terminations or suspensions might well have had their genesis in policies originating three or four years earlier.

Defendants further object to the document requests envisioned in paragraph 7 of plaintiff's proposed preservation order (Order to Show Cause Ex. E). That paragraph, through resort to multiple subparagraphs, seeks numerous varieties of documents regarding “Other Insurers, as defined in the Complaint.” This refers specifically to the following allegation in the complaint:

Upon information and belief, UnumProvident's scheme was touted by the company to other disability insurance companies throughout the United States, including New York Life Insurance Company, National Life Insurance Company of Vermont, John Hancock Life Insurance Company, Provident Mutual Life Insurance Company of Philadelphia, The Equitable Life Assurance Society of the United States, General American Life Insurance Company and other companies yet to be identified (“Other Insurers”).

(Complaint ¶ 8.)

Defendants assert that the stated insurance companies are six of the largest insurers in the world.

The discovery process should not “be used as a tool of harassment or for the proverbial ‘fishing expedition’ to ascertain the existence of evidence” (*Reuters Ltd. v Dow Jones Telemate, Inc.*, 231 AD2d 337 [1st Dept 1997]; see also, *Konrad v 136 E. 64th St. Corp.*, 209 AD2d 228 [1st Dept 1994]). The complaint centers around Unum's claims handling practices, and the possible injury caused to disability claimants who were denied coverage by Unum. *7 Although the complaint attempts to define the putative class expansively, as including persons insured by the Other Insurers, and administered by Unum, none of the Other Insurers are defendants in this action apart from New York Life. Requiring Unum or the other defendants to produce documents relating to the Other Insurers, at least at this juncture, is beyond the reasonable scope of the claims asserted herein, and unduly burdensome to defendants.

Accordingly, documents relating exclusively to the Other Insurers need not be produced at this time.

Paragraph 7 (c) of the proposed preservation order further seeks documents transmitted to “any State in the United States regarding the claims handling by

UnumProvident” As defendants note, this presumably relates to documents furnished to state insurance regulators in connection with alleged mishandling of disability claims. To the extent such documents are not covered by privilege, they are relevant.

Paragraph 7 (f) seeks “[a]ll databases, electronic material, tape media, electronic media, hard drives, computer disks and documents” relating to the categories of documents sought in said paragraph, at subparagraphs 7 (a) through (e). Apart from Other Insurers, as discussed above, this request is proper, in light of today's technological realities (*e.g.*, [Zubulake v UBS Warburg LLC](#), 217 FRD 309 [SD NY 2003]).

Defendants attest that preservation of computer hard drives under the preservation order issued in the MDL resulted in a cost to defendants of more than \$1,000,000.00 (Hoehle Aff. ¶ 15). The court is not insensitive to the cost entailed in electronic discovery, and would, at the appropriate juncture, entertain an application by defendants to obligate plaintiff, the requesting party, to absorb all or a part of the cost of the e-discovery it seeks, or will seek, herein (*e.g.*, [Schroeder v Centro Pariso Tropical](#), 233 AD2d 314 [2d Dept 1996]; see, [CPLR 3103](#) [a] [“The court may . . . make a protective order . . . regulating the use of any discovery device. Such order shall be designed to prevent unreasonable annoyance, expense, . . . or other prejudice to any person”]; see also, *Zubulake*, *supra*). However, the court will not constrain the production of possibly relevant evidence on account of the later need to allocate the cost.

This constitutes the decision and order of the court.

FOOTNOTES

FN1. The complaint identifies defendant Paul Revere Life Insurance Company as one of Unum's subsidiaries, but does not

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specifically tie it to the alleged scheme underlying this lawsuit.

[FN2](#). District Judge Cote stated:

Once UnumProvident realized that emails covered by the December 27 Order that had existed as of December 27 had been lost, it could have taken the following steps. It could have promptly investigated what had gone wrong and reported the results of its investigation in a forthcoming manner to the plaintiffs and the Court. It could also have made the investigation that it began of [sic] the eve of the August 7 hearing to determine the extent of the loss, and promptly reported the results of those efforts. If it had done so, it would have saved an expenditure of significant resources by plaintiffs' counsel and the Court (as well as defense counsel).

. . . If UnumProvident had been as diligent as it should have been in complying with the December 27 Order, many fewer tapes would have been inadvertently overwritten.

[\(2003 WL 21997747 at *13.\)](#)

[FN3](#). The term "snapshot" refers to a method instituted by IBM to back up Unum's e-mail, instead of the "full backup" method which may have proven to be more protective of Unum's e-mail files (2003 21997747 at *6).

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