

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

REBECCA H. TREACE,)
)
 Plaintiff,)
)
 vs.) No. 03-2409MLV
)
 UNUM LIFE INSURANCE COMPANY,)
)
 Defendant.)

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION TO COMPEL
AND
GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION FOR PROTECTIVE ORDER

Before the court is the June 25, 2004 motion of the plaintiff, Rebecca H. Treace, pursuant to Rule 37, to compel the defendant, Unum Life Insurance Company, to file more complete responses to two interrogatories and six requests for production of documents. Treace also seeks attorney fees and expenses. Also before the court is the motion of Unum, pursuant to Rule 26 of the Federal Rules of Civil Procedure, for a protective order relieving Unum from responding further to the interrogatories and requests for production of documents which are the subject of Treace's motion to compel and prohibiting Treace from questioning Unum's Rule 30(b)(6) deponent on certain matters. In addition, Unum seeks an order changing the location of the Rule 30(b)(6) deposition from Memphis,

Tennessee, to Portland, Maine, Unum's home office. Both motions have been referred to the United States Magistrate Judge for determination. For the reasons that follow, both motions are granted in part and denied in part.

Treace has sued Unum for breach of contract, violation of the Tennessee Consumer Protection Act, Tenn. Code Ann. 47-18-104, *et seq.*, statutory bad faith pursuant to Tenn. Code Ann. 56-7-105 *et seq.*, and misrepresentation as a result of Unum's denial of her disability claim. She alleges in her complaint that after paying premiums for seventeen years on two disability insurance policies purchased from Unum that Unum wrongfully denied her claim of disability arising out of an automobile accident on March 9, 1999, wrongfully cancelled her policy because of a late premium payment in October of 1999, and wrongfully refused to honor her request for a premium waiver.

Unum maintains that it properly denied Treace's disability claim because she failed to satisfy the 90-day elimination period, which is the number of days at the beginning of a period of disability for which no benefit is payable, and because she failed to timely pay premiums.

On September 19, 2003, Treace propounded interrogatories and requests for production of documents to Unum. Unum served responses on November 3, 2003, and, after consultation between

counsel, Unum supplemented its responses on February 18, 2004. Treace, not satisfied with Unum's responses to two of the interrogatories and six requests for production, filed the present motion to compel on June 25, 2004. Unum responded with the present motion for protective order supported by the affidavits of Leanne Holmes, Benefits Center Consultant for Unum, and of Susan N. Roth, Vice President, Corporate Secretary and Assistant General Counsel for UnumProvident Corporation. In support of her motion to compel and in opposition to Unum's motion for protective order, Treace has submitted the affidavit of Linda Nee, a former employee of Unum Life Insurance Company.

I. The Two Disputed Interrogatories

The following two interrogatories and responses are in dispute:

INTERROGATORY NO. 4: Please identify any and all employees, agents and assigns of Unum who participated in any way with the application for and subsequent administration of the Unum policy and the claim of Treace, and as to each state their title, position, and a brief job description.

RESPONSE: Pursuant to Rule 33(d), the defendant refers plaintiff to the non-privileged portions of the claim file, application file, specimen policy, and the defendant's Rule 26 Disclosures, which have been provided.

and

INTERROGATORY NO. 10: Please provide the names of any and all individuals employed or who were authorized by Unum

who spoke with Treace concerning the claim submitted by Treace on the policies and the dates the conversations took place and the substance of the conversations.

RESPONSE: Defendant objects to the Interrogatory on the grounds that it is overly broad, ambiguous and potentially seeks information protected by the attorney-client and/or attorney work product doctrine. Without waiving and subject to said objections and pursuant to Rule 33(d), the defendant refers plaintiff to the non-privileged portions of the claim file, which has been provided.

Treace argues that Unum's responses to these two interrogatories are incomplete because Unum has failed to provide a list of the individuals whose identities are sought and also failed to provide a telephone log. In addition, Treace is not satisfied with Unum's responses because Unum has failed to provide a privilege log for documents withheld on privilege grounds.

Unum, however, insists that it has responded fully to the two interrogatories because the documents it identified in response, i.e, the claim file and application file, include records of all contacts with Treace such as correspondence, notes, internal memoranda, and the like. Unum states that it does not have a list per se of the individuals whose identities are sought by the two interrogatories but would have to glean the names from the documents in the referenced files. In addition, Unum points out that it has provided a list of all individuals with knowledge of Treace's claim as part of its Rule 26 disclosures.

The Federal Rules of Civil Procedure permit a party to produce business records in response to an interrogatory under certain circumstances. Rule 33 provides:

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify as readily as can the party served, the records from which the answer may be ascertained.

FED. R. CIV. P. 33(d).

It appears to the court that the primary source from which to ascertain the names of individuals who spoke with Treace and handled Treace's claim is the documents contained in the claim files already produced by Unum and that the burden of ascertaining the names is substantially the same for both Treace and Unum. Thus, Unum's motion to compel a list of names is denied.

It also appears that Unum may possess a computerized phone log of contacts with Treace. Unum represents that "[a]ny written record of telephone conversations with a claimant are kept in the claim

file and it would be the same burden on both parties to search through those records to compile such a "telephone log." (Def.'s Mem. in Opp'n to Pl.'s Mot. to Compel at 7.) According to Nee's affidavit, however, Unum has a "computerized database that tracks every activity taken on a claim." (Aff. of Linda Nee at ¶10.) "Each and every phone call and activity is, pursuant to the policy of Unum's Customer Care Claims Organization, to be recorded in this log." (*Id.*) In other words, each time the plaintiff called Unum's Call Center to seek assistance, it should have been recorded in the computerized database." (*Id.*) Nee further states that she has reviewed the documents produced by Unum and the computerized activity log is missing. Based on Nee's sworn affidavit, it appears that Treace's motion to compel should be granted in this respect. Accordingly, Unum is ordered to produce the computerized activity log pertaining to Treace's claim or to supplement its response to state under oath that no computerized activity log exists.

As to privileged documents, Unum represents that despite the wording in its responses that it produced only non-privileged portions of the claim file, no portions of the claim file were actually withheld as privileged. (Def.'s Mem. In Opp'n to Pl.'s Mot. to Compel at 6, n. 4.) Leanne Holmes, Benefits Center Consultant for Unum, avers under oath that the claim file, Document

Nos. UACL 00001 through UACL 00265, "contains all documents Unum Life received or compiled relating to Treace's claim" (Def.'s Reply Brief in Supp. of Its Mot. for Protective Order, Ex. A, Holmes Aff. at ¶2.) Holmes fails to state, however, that no documents were removed from the claim file before it was forwarded to Unum's outside counsel for production. Linda Nee, a former employee of Unum, on the other hand, describes in her affidavit the general practice of Unum of "purging claim" files of certain documents such as communications between the claims handler and the Manager Director or Consultant and records of conversations concerning claim status, before releasing the claim file to the outside counsel or to the claimant who requested it. After examining the documents produced by Unum, Lee testified that she has observed gaps in the Bates numbers stamped on the documents produced. Accordingly, Unum is directed to provide a log describing any item that bears a Bates number which would fall within a gap of the numbers on the documents produced by Unum or supplement its response to explain, under oath, the reason for the gaps in the Bates stamped numbers on the documents produced by Unum and to state that no documents were removed by any employee of Unum prior to providing the files to its outside counsel.

II. The Disputed Document Requests

A. Requests Nos. 7 and 8

These two requests seek copies of Treace's files and of Unum's manuals and guidelines, all of which Unum claims it has produced:

REQUEST NO. 7: Please provide a complete copy of any file maintained by Unum which in any way relates to plaintiff whether maintained by paper format or electronic means.

RESPONSE: A non-privileged copy of the Plaintiff's claim file, application file and policy have been produced.

and

REQUEST NO. 8: Please provide a copy of any and all applicable Unum guidelines, policies, or procedures concerning the acceptance of premium payments by customer and procedures concerning reinstatement of policies.

RESPONSE: Defendant Life objects to this Request on the grounds that : (1) It is overly broad in time and scope; (2) it seeks documents that are not relevant to any claim or defense of any party and are not reasonably calculated to lead to the discovery of admissible evidence; and (3) it seeks documents that are confidential and proprietary. Without waiving said objections, the Defendant states that the language in each insurance policy is approved and in some cases dictated by the departments of insurance of each state in which the policy is sold. The language speaks for itself and is conclusively presumed to be unambiguous and in compliance with the laws of the state of Tennessee. Please refer to the specimen policy which is produced.

Treace again objects that Unum's response is limited to non-privileged documents but Unum has failed to provide a privilege log for documents withheld on privilege grounds. As with its responses to the disputed interrogatories, Unum represents that, despite the

wording in its responses, it produced the entire claim file and no portions of the claim file were actually withheld as privileged. (Def.'s Mem. in Opp'n to Pl.'s Mot. to Compel at 10.)

As previously stated, however, in light of the Nee affidavit and Unum's earlier assertions in its discovery responses that only non-privileged portions of the claim file were being produced, the court is not convinced that no documents were removed as counsel for Unum represents in its memorandum. Accordingly, Treace's motion to compel is granted as to Request No. 7. Unum is directed to provide a log describing any item that bears a Bates stamp number which would fall within the gaps or supplement its response to explain, under oath, the reason for the gaps in the Bates stamped numbers on the documents it produced and to state that no documents were removed from any file related to plaintiff by any employee of Unum prior to providing the files to its outside counsel.

Unum seeks a protective order as to the "guidelines, policies, and procedures" sought in Request No. 8 on the grounds that the information sought is (a) not relevant . . . , (b) unduly burdensome in that it would require Unum to search for and compile documents regardless of the time . . . in which they were in effect, and (c) are confidential and proprietary" (Def.'s Mem. in Opp'n to Pl.'s Mot. to Compel at 11.) Unum insists that

the only applicable manual is its Claims Handling Manual which it has previously agreed to produce. (*Id.*)

Treace acknowledges that its request for guidelines, policies, and procedures is not limited in time and scope but asks the court to infer a reasonable limitation. Treace insists that Unum's guidelines for determining a lapse of a policy for non-payment of premiums and for posting payments is relevant to Treace's claim that Unum wrongfully cancelled her policies for nonpayment of premiums. Treace also points out that even though Unum has offered to produce its complete claims handling manual, it has failed to do so. Finally, Treace draws the court's attention to the existence of a Risk Management Reference Guide (RIMARE) which contains information regarding the waiver of premium payments during the months that disability benefits are payable. (Pl.'s Mem. In Opp. to Def.'s Mot. for Protective Order at 13.) In her affidavit, Nee describes guidelines maintained by Unum concerning the acceptance of premium payments, actions to be taken by billing personnel when a payment is rejected, grace periods, collection of lapsed premiums, and premium waivers. (Nee Aff. at ¶ 11.) In response, Holmes asserts in her affidavit that The Risk Management Reference Guide (RIMARE) is not relevant because it applies only to group long-term disability policies and not individual policies such as Treace purchased.

As written, Request No. 8 is overly broad but the court finds the information sought to be relevant to Treace's claims and not proprietary and confidential. Accordingly, Treace's motion to compel is granted as to Request No. 8 and Unum's motion for protective order is denied as to Request No. 8. In particular, Unum is ordered to produce the RIMARE in order for Treace to verify its applicability and to produce the guidelines described by Nee. The request is limited to guidelines, policies, and procedures of Unum during the time period when Treace's policy was in effect, specifically the months during which Unum claims Treace's policy lapsed for nonpayment of premiums.

B. Requests Nos. 9, 13, and 14

These three requests seek documents concerning investigations, evaluations, and claims made in other states concerning Unum and its business practices:

REQUEST NO. 9: Please produce any and all evaluations of Unum performed by any government agency, including state and local agencies, during the calendar years 1999 through 2003.

REQUEST NO. 13: Please produce any and all documents produced to the State of Georgia Office of Commissioner of Insurance incident to its investigation of the records and activities of Unum Life Insurance Company of America and any related corporations.

REQUEST NO. 14: Please produce any and all documents received from the State of Georgia's office of Commissioner of Insurance which are any way related to its investigation of the records and activities of Unum

Life Insurance Company of America and any related corporations.

RESPONSE TO REQUESTS NOS. 9, 13, AND 14: Defendant Life objects to the Request on the grounds or to the extent that (1) it seeks documents that are not relevant to any claim or defense of any party and that are not reasonably calculated to lead to the discovery of admissible evidence; (2) pursuant to *State Farm Mutual Automobiles, Inc. Co., v. Campbell*, 123 S. Ct. 1513 (2003), the requested discovery is improper because it seeks information regarding alleged conduct that bears no relation or nexus to the harm allegedly suffered and/or the discovery improperly seeks information that pertains to alleged "out of state conduct"; and (3) it seeks information concerning corporate entities that are not named parties to this lawsuit.

The court finds these requests to be overly broad. In addition, Treace has failed to carry her burden to show the relevance of these documents to Treace's case. Treace has not indicated the nature of the business practices and activities which were being investigated by the state of Georgia and how the investigation relates to Treace's allegations in the complaint. Accordingly, Treace's motion to compel is denied as to Request Nos. 9, 13, and 14, and Unum's motion for protective order is granted as to Requests Nos. 9, 13, and 14.

C. Request No. 11

Request No. 11 seeks documents relating to Unum's "goals for cutting or denying claims:"

REQUEST NO. 11: Please produce any Unum memos or internal correspondence which in any way relates to goals for cutting or denying claims including, but not limited

to, memos sent to Unum adjusters concerning goals for claim denials to "meet productions."

RESPONSE: Unum Life objects to plaintiff's Request for Production on the grounds or to the extent that (1) it is vague or ambiguous; (2) it seeks information that is neither relevant to the subject matter of this action or reasonably calculated to lead to the discovery of admissible evidence; (3) it is overly broad in time and scope; and (4) it seeks documents that will constitute or contain confidential, proprietary documents.

Without waiving and subject to said objections, Unum Life states that it is not a practice of the Company to set claim termination or payment quotas. Unum Life has traditionally estimated claims results on a monthly basis. The purpose of the estimates is to project a business plan into the future, as any publicly traded company must do. The same is done for every other part of our company. These estimates are not intended to present approval and/or denial quotas for claims actions. Instead our claim numbers are the result of whatever our fair, thorough and objective evaluation in each case determines.

Unum further states, also without waiving and subject to said objections, that it does not have guidelines suggesting or discussing the denial of a certain number or percentage of individual disability claims, providing incentives for denying claims or meeting any type of goals or "projections" in denying individual disability claims. However, Unum Life does have a claims manual and will agree to produce a copy of the customer care center claims manual as it existed at the time of the denial of the Plaintiffs's claim.

The court finds the request to be neither vague nor ambiguous. Treace has alleged a claim for fraudulent misrepresentation in her complaint. The complaint further alleges beginning in 1993 Unum altered its business practice to engage in a practice of finding any reason to deny disability claims. The court finds the information sought is relevant to these claims.

By way of the affidavit of Nee, Treace has presented independent evidence to the court that at least during the period of 1996 through 2002, Unum set financial targets for closure of claims, the achievement of which was rewarded with bonuses. Accordingly, Treace's motion to compel is granted as to Request No. 11, and Unum's motion for protective order is denied as to Request No. 11. The request is limited to memos and correspondence of Unum during the time period when Treace's policy was in effect, specifically the months during which Unum claims Treace's policy lapsed for nonpayment of premiums.

III. The 30(b)(6) Deposition

Unum also seeks a protective order prohibiting its Rule 30(b)(6) witness from being required to appear in Memphis for a deposition as noticed by Treace and limiting the scope of topics to be explored at the deposition. In her response to the motion for protective order, Treace concedes that the Rule 30(b)(6) deposition should be conducted in Portland, Maine, and agrees to conduct the deposition in Portland, Maine. The motion for protective order is therefore moot as to the location of the deposition.

Treace's Rule 30(b)(6) deposition notice listed eight topics upon which deposition testimony was sought. Unum objects to the following five deposition topics as being overly broad and irrelevant to Treace's claims:

(d) The person or persons with knowledge of the claims handling practices of Defendant including but not limited to knowledge of Unum memos or internal correspondence which in any way relates to goals for cutting or denying claims including but not limited to memos sent to Unum adjusters concerning goals for denials to "meet projections."

(e) The person or persons with knowledge of the business practices of Defendant concerning the disposition of claims as stated in paragraphs 28 through 35 of the Plaintiff's Complaint.

(f) The person or persons with knowledge of the State of Georgia's Office of Commissioner of Insurance investigation into the activities of the Defendant and its related corporations and the results of the investigation performed and a description of the activities of Defendant which were investigated.

(g) The person or persons with knowledge of the premium payment policy of the receipt of premium payments and how such premium payments are recorded including the but not limited to the guidelines, policies or procedures concerning the acceptance of premium payments made by customers and the procedures concerning the reinstatement of policies as well as how communications between Defendant and customers are typically recorded including but not limited to the Plaintiff's attempts at premium payment as referenced in paragraphs 11 and 12 of Plaintiff's Complaint.

(h) The person or persons with knowledge of the Defendant corporation's gross annual revenue, profits and receipts as well as gross revenue and profit obtained from the issuance of disability insurance policies.

Unum's motion for protective order is granted as to topics (f) and (h). As previously indicated, Treace has failed to show the nature of the investigation by the state of Georgia and how it relates to the allegations in Treace's complaint. Further, Treace

has not advanced any argument or basis for its inquiry into Unum's gross annual revenue and other financial information or demonstrated the relevance of that line of inquiry to the allegations in the complaint. Treace does seek punitive damages in her complaint but she has not cited any case law discussing the relevance of the financial information to punitive damages at this stage of the proceeding.

Punitive damages in Tennessee are available "only in the most egregious of cases," and only where "the defendant's intentional, fraudulent, malicious, or reckless conduct" is proven by "clear and convincing evidence." *Hodges v. S.C. Toof & Co.*, 833 S.W. 2d 896, 901 (Tenn. 1992). In Tennessee, punitive damages are calculated after damage liability is established in the first place. *Id.* Only then will a defendant's "financial affairs" and "financial condition" be relevant to assess punitive damages. In *Breault v. Friedli*, 610 S.W.2d 134, 139 (Tenn. Ct. App. 1980), the court of appeals adopted the discovery procedure set forth in *Cobb v. Superior Court for Los Angeles County*, 99 Ca. App. 3d 543 (1980): parties must first take discovery on the merits, and, "if the plaintiff is unable to show through discovery that a factual basis for punitive damages exists, the trial court can prohibit discovery of the defendant's financial condition." Here, Treace has made no showing at this point through discovery in this case that a factual

basis for punitive damages exist.

Unum's motion for protective order is denied as to topics (d), (e), and (g). As discussed herein, these topics are relevant to the claims alleged in the complaint, and Treace has presented an independent evidentiary basis demonstrating that such memos, practices, policies, and procedures exist.

Conclusion

For the above reasons, Treace's motion to compel is granted in part as to Interrogatories Nos. 7 and 8. Unum is ordered to produce the computerized activity log pertaining to Treace's claim or to supplement its response to state under oath that no computerized activity log exists. Unum further is directed to provide a log describing any item that bears a Bates number which would fall within a gap of the numbers on the documents produced by Unum or supplement its response to explain, under oath, the reason for the gaps in the Bates stamped numbers on the documents produced by Unum and to state that no documents were removed by any employee of Unum prior to providing the files to its outside counsel. Unum is not required to compile a list of names from the documents identified in its responses to the Interrogatories Nos. 7 and 8, and Unum's motion for protective order is granted in this respect.

Treace's motion to compel is granted as to Requests Nos. 7, 8, and 11 and denied as to Requests Nos. 9, 13, and 14. Unum's motion

for protective order is granted as to Requests Nos. 9, 13, and 14, and denied as to Requests Nos. 7, 8, and 11. Unum shall produce its guidelines, policies, and procedures for the time period when Treace's policy was in effect, specifically the months during which Unum claims Treace's policy lapsed for nonpayment of premiums.

Unum's motion for protective order is granted as to topics (f) and (h) and denied as to topics (d), (e), and (g) listed in Treace's Rule 30(b)(6) deposition notice. The 30(b)(6) deposition will be conducted in Portland, Maine.

Unum's supplemental responses as required by this order shall be filed on or before ten days from the date of entry of this order. Because each side prevailed on a portion of its motion, no attorney fees and expenses will be awarded. Each shall bear its own fees and expenses.

IT IS SO ORDERED this 10th day of August, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE