

United States District Court,
S.D. New York.
Theresa KEIR, Michelle Washington, Karen M.
Gately, and Thomas Rocco,
individually and on behalf of all others similarly
situated Plaintiffs,

v.

UNUMPROVIDENT CORPORATION, the Paul
Revere Life Insurance Company, Provident
Life and Accident Insurance Company, Provident
Life and Casualty Insurance
Company, First Unum Life Insurance Company,
Unum Life Insurance Company of
America and Colonial Life and Accident Insurance
Company, and J. Harold
Chandler, Defendants.
No. 02 Civ. 8781(DLC).

Aug. 22, 2003.

Richard J. Quadrino, Evan S. Schwartz, Justin C.
Frankel, Michail Z. Hack, Quadrino & Schwartz,
P.C., Garden City, NY, for Plaintiffs.

Louis M. Lagalante, Gallagher, Harentt & Lagalante,
LLP, New York, NY, Gandolfo V. DiBlasi, Brian
Frawley, Sullivan & Cromwell, LLP, New York, NY,
for Defendants.

Opinion

COTE, J.

Through a letter of June 20, 2003, plaintiff's counsel in this ERISA action advised the Court that electronic records which had been ordered preserved had been erased. This began a two month process of discovery, an evidentiary hearing, briefing, and oral argument to address whether the defendants--who will be referred to collectively as UnumProvident--had violated a portion of a December 27, 2002 Order (the "December 27 Order") which required UnumProvident to take steps to preserve six days of email from October and November 2002. The following constitutes this Court's findings of fact regarding the alleged violation.

Conferences Leading Up to Preservation Order

The chronology begins with the events leading up to the entry of the December 27 Order. On November 4, 2002, the plaintiffs filed this ERISA class action against UnumProvident. On November 26, plaintiff's counsel wrote to request a conference at which they would present their request for an Order requiring the

defendants to cease document destruction and requiring the defendants to preserve all evidence relating to this matter. In response, the first conference in this case was held on December 2. The Court denied the request for an immediate preservation order at the conference, but set a schedule for the parties to confer and attempt to craft a joint proposed preservation order.

The second conference with the Court was held on December 18. The parties had not met and conferred since the December 2 conference, but had exchanged written proposals and spoken in at least two telephone conversations. Working from documents submitted by the parties in connection with the plaintiffs' proposed order, the Court outlined principles that would serve as the basis for the parties' draft of a proposed order. Among other things, the Court observed, without contradiction from UnumProvident, that it already had a duty to preserve any tapes containing emails as of the date litigation commenced, that is, November 4.

With respect to back-up tapes for emails, defense counsel explained that the defendants had already preserved certain back-up tapes in connection with a Y2K project, and that there were also back-up tapes that were recycled on a 30 or 60 day basis. The latter group of back-up tapes consists of weekly back-ups done on the weekends and incremental back-ups done during the week. They added that there are hundreds of servers that are backed up, so that the cost of retaining all the back-up tapes is the cost of 60 days worth of back-up tapes for hundreds of servers.

The defendants suggested that plaintiffs' counsel pick a few dates to be preserved or that they contribute to the cost of buying new tapes. The Court observed that the Y2K tapes would present a good historical record, and that to the extent that the defendants could show that there is a burden to keeping additional back-up tapes, that that burden would be weighed in evaluating the plaintiffs' request. The Court required the plaintiffs to present their proposed order and the defendants to present its mark-up of the order before the next conference.

The next conference was on December 20. The areas of disagreement had been narrowed by that time and the Court ruled on several of them. The discussion focused on a proposed order drafted by the plaintiffs. The section of the proposed order that concerned back-ups of emails, electronic and computer media, provided, in pertinent part, that all of the following needed to be preserved:

All backup tapes, hard drives and disks containing electronic media, including internal or external e-mails, generated, created, or dated on or after October 13, 2002 up to and including the date of this Order. The parties shall confer as to any such preserved material that can be discarded or destroyed upon consent of the parties, based upon concerns of alleged burden, expense, or relevance. Randomly selected monthly backup tapes, hard drives, DKs or disks that are generated or created on an ongoing basis after the date of this Order.

* * *

Documents and data defined above that are contained in the desks, ... computers, or computer terminals of employees in their personal offices or work space areas.

Documents generated after the date of this Order that are within its scope must be preserved in accordance with the terms of this Order, during the pendency of this litigation, and for 90 days after the entry of a final order closing this matter, after any appeals have been exhausted.

With respect to the back-up tapes, the defendants explained that it believed that these tapes had a document retention protocol that deletes information older than 90 days. It also reported that it would do a global back-up which would give an immediate snapshot of what is on the system. It was also exploring with IBM, the manager of its electronic storage system, whether the deletion protocol could be changed. The defendants represented again that simply preserving all existing back-up tapes would cost millions of dollars.

The plaintiffs argued that they needed the emails sent during the three days immediately following two nationally broadcast television programs about the defendants aired on October 13 and November 17: NBC's "Dateline" and CBS' "60 Minutes" programs, respectively. If they got those tapes, the plaintiffs were willing to allow the defendants to follow their customary email destruction policy on a going forward basis. The defendants interjected that those tapes might already have been erased. Defense counsel was not certain if the automatic "destruction" occurred on a 30, 60 or 90 day cycle. It was uncertain, therefore, whether any of the tapes the plaintiffs wanted were still available. Defense counsel represented that they needed additional time to discuss this issue with their client and confirm the retention protocol for these tapes.

On December 23, the plaintiffs provided defendants with a revised order, and on December 24, the

defendants provided further revisions to the proposed order. The defendant's proposal required it to preserve all:

backup tapes, hard drives and disks containing internal or external e-mails, generated, created, or dated October 14, 15 and 16, 2002, and November 18, 19, and 20, 2002, if available. The parties shall confer to discuss the availability of the foregoing back-up tapes. Other than the foregoing, there shall be no further or other obligation under this Order to retain back-up tapes for e-mail.

Also on December 24, the parties were ordered to meet and confer regarding their respective proposals and submit a final draft of the proposed order.

On December 27, the parties provided the final draft of the proposed order for preservation of documents. There remained one outstanding dispute, which did not relate to emails. The draft included language regarding back-up tapes that was identical to that adopted in the final order. The Court signed the Order on December 27, and notified the parties that day by telephone that it had been signed. The Order was also mailed to the parties. It was filed on December 30.

December 27 Order

The beginning of the December 27 Order reads:

During the pendency of this litigation, and for 90 days after entry of a final order closing this matter, after any appeals have been exhausted, the Defendants herein and their respective officers, agents, servants, employees, and attorneys shall not alter, destroy, or permit the destruction of, or in any fashion change any "document" in the actual or constructive care, custody, or control of such person, wherever such document is physically located.

This Order provides for the preservation of a variety of documents including claims files, policy and procedure manuals, financial documents and medical files. The December 27 Order also provides for the preservation of certain electronic records and to this end reads in pertinent part that the following must be preserved:

All back-up tapes or other back-up hard drives, disks or other hardware containing material back-up by Defendants regarding Y2K, regardless of the date or dates of the internal or external e-mails, computer information, or electronic media contained thereon.

All back-up tapes, hard drives and disks containing documents and data within the scope of section II. of this Order, including internal and external e-mails, generated, created, or dated October 14, 15

and 16, 2002, and November 18, 19, and 20, 2002. If Defendants allege that said internal or external e-mails for the above enumerated dates are no longer in existence due to routine destruction or otherwise, *Defendants shall provide an affidavit explaining circumstances of the unavailability.* Plaintiffs and the Class Members reserve the right to apply to the Court for additional back-up material in the event that said internal or external e-mails, for the above enumerated dates, are no longer available.

Unless agreed to by the parties or otherwise ordered by the Court, Defendants shall not be obligated by this Order to preserve ongoing back-up tapes for e-mail, after the date of this Order. (Emphasis supplied.)

UnumProvident's Electronic Storage Systems [FN1]

FN1. The accuracy of this section of the Opinion, which describes the electronic storage systems of UnumProvident, was confirmed by counsel for UnumProvident at the August 7, 2003, hearing where they reviewed it in draft form.

Since August 2000, IBM has provided email, file server, and electronic data related disaster recovery services to UnumProvident. IBM's employees work at several UnumProvident offices to back-up UnumProvident's email and other electronic data. UnumProvident has approximately 888 computer servers supported by tape libraries at five locations: Chattanooga, Columbia, Portland, Burlington, and Worcester.

Of these 888 or so servers, in December 2002, approximately 70 were Microsoft Exchange email servers, and several dozen were servers that used Lotus Notes for email. The six days of e-mail were contained on 18 to 20 Exchange Servers that were regularly backed-up. For some time, UnumProvident has been retiring the Lotus Notes databases and moving them onto Exchange servers. As of December 2002, there were around 300 tapes for the entire email system. About 20 to 70 of those 300 tapes would have contained the back-up email data for the six days at issue in the December 27 Order.

IBM uses a commercial disaster recovery software product known as Tivoli Storage Manager or TSM. TSM backs up UnumProvident's electronic information on back-up tapes that are stored off-site. TSM issues a report identifying which tapes in off-site storage contain only "expired" data and may be recalled from off-site storage and reused. When a

tape is reused, it is overwritten. It may be possible to retrieve some data from tapes that are only partially overwritten. It may also be possible to obtain data from the portion of a tape that is overwritten, but a finding of the likelihood of success from such an undertaking would require expert testimony that has not been provided to the Court. Generally, off-site tapes are returned to on-site tape libraries for reuse within one to seven days of the date on which TSM determines that the retention date for all of the data on the tape has expired.

A single tape may have data from multiple systems. Conversely, an email server is backed up as a single file that may be spread across several tapes. To restore a server's emails that were backed-up on a particular date, it is necessary to have a complete set of back-up tapes, that is, a complete set of the tapes that contain the file.

Access to data on the tapes is affected not only by whether the data has been overwritten, but also by whether it can be identified and retrieved through the TSM program. TSM has an indexing system that has been analogized to a card catalogue in a library. Through this index, data on the back-up tapes may be retrieved and reassembled. Without the index, it requires the use of forensic analysis, which may or may not be successful, to retrieve data from tapes, even tapes that have been kept in storage and that have not been overwritten. TSM is itself backed-up on a regular schedule. It appears, as explained below, that IBM was able to recapture a TSM index for a December time frame. This recreation has apparently been useful in the retrieval of data covered by the December 27 Order.

TSM imposes a maximum number of file versions and a maximum retention period for each type of file. When these thresholds are reached, TSM removes the references to the information from its index, thereby making it impossible, without forensic intervention, to retrieve the information from the tapes. UnumProvident has ultimate control over the retention policy and may specify a retention policy other than the default retention policy. It can also customize a retention policy for a server, application or a database.

There are three backup systems. The first is for file servers, which are not at issue here. It requires the file server to retain a backup version for 64 days after a version becomes inactive (which happens when the client stores a more recent backup version or when the client deletes the file from the machine and runs a full incremental back-up).

The second system is the daily default Exchange email system, which operates daily from Monday through Friday. It requires the server to retain a backup version for 15 days after a version becomes inactive.

The third system is the weekly back-up of the Exchange environment. It requires the server to retain a back-up version for 90 days after a version becomes inactive. It is the weekly back-up which has been the focus of the parties' presentation of evidence and the recovery efforts undertaken to date.

Under the Exchange server policy for data deletion, data that is placed in a user's "deleted folder" is not actually deleted from the system for fourteen days. So, a back-up tape will have the data that exists on the current email system as of the date the back-up tape is created, plus any emails deleted within the preceding two weeks.

In sum, there are two ways in which the access to email communications contained on back-up tapes can be impaired: a physical loss and a retrieval loss. In the first, a tape in the relevant group of tapes that contain the e-mail conversations backed-up for a particular server on a particular date, can be overwritten; in the second, the TSM index system, which permits retrieval of the e-mails through use of TSM, can be lost when the expiration date for retention of the emails has passed.

UnumProvident's Efforts to Preserve Data Prior to December 27

Prior to December 27, the entire effort at UnumProvident was directed toward the preservation of data as it existed on November 4, 2002. For the reasons that follow, however, UnumProvident abandoned the effort to save the data from November 4, and instead took a snapshot of the data contained on the company's email system as of December 20 to 23. This effort did not include the preservation of any emails on back-up tapes even as they existed as of late December. The only emails that were preserved other than those on the company's current email system were those that had been deleted by an employee within the prior two weeks. This December effort was largely left in the hands of Jonathan Hyler.

Hyler is UnumProvident's "enterprise security architect" and works from its Chattanooga office. As part of his duties, Hyler is responsible for securing the preservation and retrieval of electronic data. By December 10, Hyler became aware that a class action

had been filed and that UnumProvident was beginning the process of preserving email back-up tapes. Between December 10 and December 20, Hyler consulted with Steve Tucker, the IBM service representative or Delivery Project Executive ("DPE") on site in Chattanooga, about the possibility of preserving email back-up tapes.

On December 17, Hyler received an email from an information technology or IT manager at UnumProvident which stated that the legal department of UnumProvident was requesting that the IT department "secure a *full back up* of Lotus notes and exchange data which was produced prior to 11/4/02." Hyler then talked with Tucker about the possibility of doing this type of full back-up and was told that such a back-up was possible but that UnumProvident should do it as soon as possible since the data was steadily expiring, a reference to the TSM retention protocol. Hyler understood Tucker to indicate that the only way to preserve the data on the back-up tapes was to restore and re-save the data. Based on his conversations with Tucker, Hyler estimated that it would take approximately 15 days to back-up the 30 servers that needed to be backed-up. Hyler decided not to undertake this back-up because he did not have confidence in the success of such a large-scale project, because of the commitment of resources that would be involved, and because relevant data would continue to "expire" during the course of the project.

Instead, Hyler decided to implement a special "snapshot" back-up which would back-up those emails that were on the system as of the day or days the snapshot was taken. This snapshot would be a non-expiring back-up of the current email environment. Since this was a large scale project, Hyler had to obtain authorization from a more senior corporate officer. On December 20, Hyler notified an officer in the legal department of his intention to do the snapshot and was given authorization to proceed. Hyler instructed Tucker on December 20, to create the snapshot. It was on this date, December 20, that Vladimir Kostas, the IBM employee at UnumProvident with the most knowledge of the TSM system, first learned of the need to preserve any data. He was informed that UnumProvident wanted to preserve all December 20 emails in a one-time snapshot.

IBM performed the snapshot between December 20 and 23. It preserved the existing email in employees' mailboxes on the date of the back-up and, because of the Exchange software protocol, any email that the employee had deleted within the preceding two

weeks. There was no further effort undertaken at that time to preserve the email environment as it existed on November 4, 2002, or to preserve any email in the back-up system.

Despite the fact that on December 20 UnumProvident's counsel had discussed with the Court the extension of the expiration parameters for the back-up tapes, UnumProvident did not explore that option with IBM in any meaningful way in December. It is now apparent that UnumProvident could also have directed IBM to copy email back-up tapes from existing unexpired tapes to other back-up tapes that would contain no expiration date. Similarly, it could have copied the data onto a hard drive or into other computer media.

Neither Hyler nor Tucker had sufficient expertise to discuss the preservation project in a meaningful way. Neither of them took the steps that they needed to take to get sufficiently informed advice on the issues involved. Similarly, there was insufficient supervision of Hyler's efforts. UnumProvident allowed Hyler to make critical decisions about how much and what email should be preserved pursuant to UnumProvident's legal obligations. In the end, Hyler made his decision based on inaccurate information. As a result, the November 4 data was not preserved except to the extent it still remained in an employee's computer mailbox or had only been deleted within fourteen days of the date of the snapshot.

Steps Taken Following December 27 Order

On January 3, 2003, UnumProvident's law department forwarded a copy of the Order to senior staff, including Hyler and his UnumProvident supervisor, Linda Fleury, the director of "enterprise security architecture." After reading the Order sometime between January 3 and January 6, the defendants contend that Fleury instructed Tucker orally on January 6 to preserve "all data" until UnumProvident could figure out what the Order required. There is no written confirmation of this instruction, or testimony from Tucker confirming that such a direction was given. It is doubtful whether this conversation occurred.

Fleury's recollection of what she actually said shifted considerably under questioning. Moreover, she lived in a culture where practically everything was documented. There is no email or written communication from Fleury to the legal department, Tucker, or anyone else confirming the instruction, and nothing from Tucker indicating that he had received the instruction or indicating that he took any

action on it. If he had taken any action, it would have involved Kostas, and Kostas did not receive any instructions at all regarding such an issue on or about January 6.

In any event, even if Fleury gave such a general instruction to Tucker, what did it mean? Fleury knew that there were automatic expiration protocols for data retention, including email, and specifically understood that the daily back-up of emails had a 60 day expiration period, and that the weekly back-up had a fourteen week expiration period, yet she did not ask Tucker what impact her request would have on the retention of the data and did not tell Tucker to change any of the expiration protocols.

Whatever the comment meant, it is clear it was far too vague to effect any process directed at saving the email for the six days. For example, Fleury did not instruct Tucker to identify the back-up tapes containing emails for the six days and to withhold those tapes from recirculation. Indeed, from the date of the December 27 Order through at least January 13, IBM was never given any instructions regarding the preservation of emails for the six specific dates.

In addition, Fleury testified that she assumed that Hyler was overseeing all aspects of the Order, including the preservation of the emails for the six days. Fleury, however, never directly informed Hyler that he was responsible for ensuring the preservation of emails for the six dates and did not check with Hyler to confirm that he had taken steps to preserve email regarding the six dates or any email back-up tapes at all. For his part, Hyler essentially abandoned any further effort regarding preservation of emails following the December snapshot. Hyler never ordered IBM to preserve emails regarding the six dates. During early January, the law department of UnumProvident never instructed Fleury or Hyler to confirm that email for the six days had been preserved by IBM.

On January 10, there was a conference call among defense counsel and the company's IT staff regarding the December 27 Order. On January 13, Hyler asked Tucker to contact Barbara Furey in UnumProvident's legal department "regarding our backup systems." Furey asked Tucker to "research whether there is any way we could find the October email referenced on page 8 of the Order." That same day, Furey faxed the December 27 Order to Tucker. This was the first time any IBM employee had been given the Order.

On January 14, Tucker advised Furey that the system was being changed that day "to retain the weekly

backups," and that the back-ups should cover fourteen weeks, which would include October 11, 2002. Furey told Tucker to take the tapes "and lock them up." Tucker told Furey that "[i]n his judgment," they would have "a far better chance" of getting the 6 days of emails from the weekly back-up tapes than the December snapshot.

By this time, UnumProvident was also using the services of Electronic Evidence Discovery, Inc. As reflected in a memorandum from that firm's Project Manager, Geoff Bogie, there was a conference call with outside counsel, UnumProvident personnel, and IBM personnel on January 14. "UnumProvident's biggest concern was that IBM was able to meet the requirements of the preservation order, especially around the highlighted dates in question (Oct-Nov, 2002), and this topic dominated the conversation." The following points, among others, were made during the meeting. The December snapshot was contained on 45 tapes, which might include the October and November emails if they had not been deleted prior to the snapshot being taken. Due to the 90 day window for tape rotation for the weekly Exchange back-ups, there was concern that the back-ups would be destroyed that week. IBM had changed its tape rotation policy to a 52 week cycle to prevent the back-ups from being recycled and overwritten. The discussion about the retention of emails for users who were still using Lotus Notes was not completed.

As a result of the conversations on January 13 and 14, if all had gone smoothly, UnumProvident would have been able to preserve the six days of email. As of January 14, the emails for those days would have existed on the back-up tapes, although they were about to expire without a change to the TSM expiration protocol. All did not go smoothly, however. In creating the December snapshot, IBM had unwittingly taken steps that caused the back-up tapes to re-enter the system prematurely, and as a result, many had already been overwritten.

Overwriting of Back-Up Tapes

In creating the December snapshot, IBM inadvertently reset the TSM settings so that the TSM retention protocols for the back-up tapes in off-site storage expired before their scheduled time. This allowed the back-up tapes in off-site storage to be recalled, reused, and overwritten earlier than they should have been. Neither IBM nor UnumProvident expected that this would occur or realized at the time that it had occurred.

On January 15, after a failed restoration test, IBM

realized for the first time what had happened. IBM immediately identified all server back-up tapes and preserved them. It had already extended the TSM expiration date protocol to 365 days as a result of its discussions with UnumProvident of January 13. It also recovered a version or versions of the TSM database for the period prior to December 20, 2002. As a consequence, as of mid-January, IBM had preserved as much as it could and had gathered the tools it needed to respond to requests from UnumProvident to determine the extent to which the six days of email had been lost or preserved.

In a meeting on January 16, IBM informed Fleury, Hyler and others that the snapshot procedure had resulted in the inadvertent overwriting of certain weekly back-up tapes. IBM representatives also reported that it had already halted the return or reuse of off-site back-up tapes. IBM identified 1,498 tapes that would have contained back-up data from UnumProvident's computer environment from October 11 through December 9, 2002. IBM informed UnumProvident that 881 of these tapes had already been overwritten at least once and 617 had not been overwritten at all. A mathematical calculation, using the number of days since the snapshot was taken, and the number of tapes overwritten as of January 16, suggests that on average 30 back-up tapes were overwritten per day.

IBM performed a test to learn how feasible it was to restore data. The results of that test have not been presented to the Court.

Notification to Plaintiffs and the Court

UnumProvident notified the plaintiffs in late January of the overwriting and loss of emails covered by the December 27 Order. The plaintiffs immediately requested that UnumProvident investigate the extent to which tapes containing the six days of email had been overwritten and provide the affidavit required by the December 27 Order. UnumProvident produced a March 12 affidavit from Fleury.

On April 29, 2003, the Court issued an Opinion denying the defendants' motion to dismiss. At the request of the defendants, discovery had been stayed pending a decision on the motion to dismiss. A conference to set a discovery schedule was set for May 5.

At the May 5 scheduling conference, the following schedule was set: (1) the motion for class certification would be filed on June 6, 2003, and fully submitted by July 11, 2003; (2) document discovery

would be completed by August 29, 2003; and (3) fact discovery would be completed by January 30, 2004. Neither the plaintiffs nor UnumProvident mentioned the overwriting of the email tapes. Immediately following the conference, the plaintiffs served requests for discovery on the defendants' compliance with the December 27 Order.

On May 16, the defendants filed a motion to have the case transferred to the Judicial Panel of Multidistrict Litigation ("MDL"). On June 6, UnumProvident sought a stay of the class certification motion pending the outcome of its MDL application. The stay was granted on June 17.

On June 18, UnumProvident sought a stay of discovery, including discovery regarding its compliance with the Order, pending the outcome of its application to the MDL Panel. Through a letter of June 20, the plaintiffs opposed the stay and notified the Court for the first time that 881 back-up tapes which may have contained emails covered by the December 27 Order had been erased. The Court scheduled an immediate conference.

At a June 25 conference, counsel for UnumProvident was unable to explain what actions, if any, UnumProvident had taken to comply with the December 27 Order's requirement to preserve six days of emails before it discovered in mid-January the problem that had occurred when the December snapshot was taken. [FN2] UnumProvident was ordered to provide within a week an affidavit from one or more witnesses of the defendants or its counsel who had firsthand knowledge of "what instructions were given to IBM and when they were given to IBM to preserve the back-up tapes as discussed at the December 20, 2002 conference and as ordered by the December 27th Order".

FN2. Indeed, counsel was still under the impression that the weekly back-up tapes had a 60 day expiration cycle and that the October tapes would have already been recycled as of December 20.

Following the June 25 conference, counsel for UnumProvident collected the emails between its IT personnel and IBM from December and January that reflect the efforts to preserve electronic data. On July 2, UnumProvident provided affidavits from Hyler and Kostas. While informative about the December snapshot and its unintended consequences, these affidavits did not discuss what instructions were given to IBM to preserve the six days of email or to otherwise comply with the December 27 Order.

On July 15, the plaintiffs took Kostas' deposition. On July 18, the plaintiffs took the depositions of Fleury and Hyler. At that time, the plaintiffs requested documents that related to the subject of the deponents' testimony.

In late July, UnumProvident hired a litigation support firm to determine precisely how much of the email data for the six dates could be retrieved. This firm determined that for the Chattanooga office no email could be recovered from the back-up tapes which had not been overwritten. The December snapshot, however, had some emails for the three days in October. (If email from the six dates resides on an individual user's system or was sent to another city whose email tapes contain retrievable data, it might still be recoverable from those sources.) The firm reported that some email data for the Portland, Worcester and Glendale offices for the three days in October had been recovered from the back-up tapes, but none had yet been recovered from the snapshot. It is not yet known if email data is recoverable for the Columbia office for the October dates. It is also not known whether email data for any of the offices for the three days in November are recoverable from the back-up tapes or the snapshot tapes.

On August 5 and 6, UnumProvident finally provided the plaintiffs with the documents relating to the December and January efforts to preserve electronic information.

On August 7, a hearing was held on the defendants' compliance with section II.B.6 of the December 27 Order. As the issue had been raised by the plaintiffs, they were permitted to present their evidence first. The plaintiffs called Hyler, Fleury and Andrzej Koltun (an expert on electronic storage systems) as witnesses. In addition to examining all of the plaintiffs' witnesses, UnumProvident called Kenneth Mendelsohn, a consultant from the technical consulting firm recently hired by defendants to determine the extent to which email data for the six dates could be recovered. At the hearing, it became clear for the first time that the first instructions to IBM, given in an effort to preserve the six days of email, were given on January 13. [FN3]

FN3. UnumProvident invoked its attorney-client privilege to protect most of its communications concerning the issues addressed at the hearing. They did make limited disclosures of some documents, however. Even with the invocation of the privilege it was still clear that no

instructions had been given to IBM regarding the six days by anyone at UnumProvident until January 13.

At the close of the hearing, and at the request of the parties, the Court provided an outline of its preliminary findings. Oral argument was held on August 21 after the submission of post-hearing briefing.

Prejudice

It is difficult at this point in the litigation to determine the extent to which the plaintiffs have suffered any prejudice from the failure to capture all of the UnumProvident emails for the six days. The principal advantages to the plaintiffs from having the emails from the six days would appear to be the opportunities to capture damaging admissions made on the heels of the two television broadcasts, and to identify witnesses who were willing to acknowledge the existence of damaging practices. To the extent that emails sent in the regular course of business might reflect damaging practices, however, the six days of emails would appear to be superfluous. The Y2K emails, and perhaps the December snapshot, should be sufficient to document the customary practices.

Assuming for purposes of this analysis that the practices alleged in the complaint do exist, then it is quite likely that the two television broadcasts about those practices would have generated comment among UnumProvident employees, and email traffic. [FN4] Loss of the email traffic would therefore likely prejudice the plaintiffs. At this point, however, based on the efforts begun by UnumProvident on the eve of the August 7 hearing, it has already been shown that a portion of the email traffic will be recovered. In addition, to the extent emails were "printed out" by an employee, then they may have been preserved and recovered in the separate measures UnumProvident has undertaken to secure paper files of key and certain other identified employees. Also, to the extent the emails sent or received on those six days were not deleted before approximately December 6 to 9, then they would have been captured in the December 20 to 23 snapshot. In sum, it is premature to estimate the ultimate prejudice to the plaintiffs.

FN4. It should also be observed that, assuming that the practices alleged in the complaint do not exist, UnumProvident likely lost important material too when it lost access to email traffic in the days immediately following the broadcasts. Such

traffic would have reflected unrehearsed expressions of disbelief and disagreement with the charges.

Summary

Based on these findings, the evidence presented in connection with our hearing, and the course of proceedings before this Court, I draw the following conclusions.

UnumProvident had ample time in the weeks before the December 27 Order was signed to consult with its IT Department and with IBM to inform itself about the technological issues relevant to the preservation of electronic data so that it could bring accurate information to the negotiations of the preservation order and the conferences with the Court in which the December 27 Order was shaped, and comply promptly with the Order after it was issued.

Insofar as the December 27 Order addressed electronic data preservation generally, and email preservation in particular, it accommodated all of UnumProvident's requests to the Court. UnumProvident identified no burden or difficulty that would prevent complete compliance with these portions of the December 27 Order. In particular, the selection of the six days in October and November was made in response to its request that the plaintiffs choose a few days of data to preserve, and in exchange it gained for UnumProvident the very considerable advantage of not having to change any of its expiration protocols to preserve any further data on any ongoing basis. Despite this specific request that six days of data be preserved, and the requirement in the December 27 Order that it be preserved, there was no discussion with IBM about the retrieval and preservation of the six days of email until January 13.

The defendants never articulated to the Court that it would have any difficulty in preserving the six days of email, to the extent that they still existed at the time the Order was signed. The fact that the back-up tapes had a set expiration schedule was understood by all, and a subject of extensive discussion with the Court. Counsel for UnumProvident believed that the expiration protocol may have been as short as 30 to 60 days. [FN5] It was, therefore, incumbent on the defendants to act promptly to preserve as much as possible. If they had done so, the back-up tapes overwritten between approximately December 28 and January 15 would have been preserved. If the retrieval of tapes from off-site storage and overwriting had occurred only on December 24, 26

and 27, then an estimated 90 tapes would have been overwritten instead of 881.

FN5. If the expiration protocol had been 30 days, then counsel would have understood that the October emails were already lost, and that the November emails would have been lost as of December 30 (assuming that counsel understood that the back-up also captured emails deleted within fourteen days). If the expiration protocol had been 60 days, then counsel would have understood that the October emails would have been lost as of December 25, and the November emails would have been lost as of January 29 (again, assuming that counsel understood that the back-up also captured emails deleted within fourteen days).

During December and up until January 13, the only effort to preserve any electronic data was in connection with the abortive effort to preserve the e-mail environment as it existed at the time the plaintiffs filed suit, November 4, 2002. Even in that regard, the effort was inadequate to the importance of the endeavor. With an adequate effort, the November 4 email environment could have been preserved. The snapshot that was taken between December 20 and 23 did not include any of the back-up emails. It included only those in user's mailboxes, or the emails deleted from those mailboxes within the prior fourteen days.

The accelerated expiration problem that occurred because of the creation of the snapshot was inadvertent and unintended. Neither IBM nor UnumProvident realized that it had occurred until January 15. If the error had not been made, and because it turned out that the expiration protocol was 90 days (plus 14 days) for the weekly back-up tapes, then the six days could have been preserved in their entirety as of January 15. [FN6]

FN6. The defendants have tried to locate emails for October 14 to 16 on the October 19 back-up tape. The October 19 back-up tape would have expired on January 17, 2003.

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 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).

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. How much has been lost, and the extent of prejudice to the plaintiffs from the loss cannot be determined at this time. [FN7] If UnumProvident had been as diligent as it should have been in complying promptly with the December 27 Order, many fewer tapes would have been inadvertently overwritten.

FN7. It would seem prudent to appoint an independent expert to opine on whether all that needs to be done to retrieve the email for the six days is being done.

SO ORDERED: