

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN; ZACHARY
MARTELL; and BRIAN MCNEMAR,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

CIVIL ACTION NO. 3:20-cv-00740
JUDGE CHAMBERS

WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES; TED CHEATHAM, in his official
capacity as Director of the West Virginia Public
Employees Insurance Agency; and THE
HEALTH PLAN OF WEST VIRGINIA, INC.,

Defendants.

**RESPONSE TO PLAINTIFFS' MOTION FOR ENTRY OF A PARTIAL ESI
PROTOCOL, PROTECTIVE ORDER, DEPOSITION PROTOCOL ORDER, 502(D)
CLAWBACK ORDER, AND ORDER REGARDING VIRTUAL DEPOSITIONS**

Defendant The Health Plan of West Virginia, Inc., by counsel, submits this
Response to *Plaintiffs' Motion for Entry of a Partial ESI Protocol, Protective Order, Deposition
Protocol Order, 502(D) Clawback Order, and Order Regarding Virtual Depositions* ("Plaintiffs'
Motion.") (ECF No. 77).

I. INTRODUCTION

Plaintiffs ask this Court to enter an Order regarding Electronically Stored Information. (ESI.) However, as noted below, ESI will not play a significant role in this matter; therefore, Plaintiffs' proposed EDI Order should be rejected. Additionally, Plaintiffs ask this Court to enter an Order limiting the number of permitted depositions to 5 depositions. However, discovery is in its infancy, as such, limiting depositions at this time is premature.

II. ARGUMENT

A. **Electronically Stored Information (ESI) will not play a significant role in discovery; therefore, Plaintiffs' Proposed ESI Order should be rejected.**

In their Motion, Plaintiffs demand that this Court enter their proposed ESI Order; however, Plaintiffs do not explain why ESI is pertinent to discovery. Instead, Plaintiffs appear to take the position that production of ESI is required as a matter of course. However, that is not the approach that the Southern District of West Virginia takes with respect to ESI. As outlined in the Local Rules of Civil Procedure:

LR Civ P 26.5 Discovery of Electronically Stored Information:

(a) Prior to a Rule 26(f) conference, each party shall individually assess the likelihood that its ESI will play a role in discovery. **When a party in possession of ESI reasonably anticipates, or should anticipate, that its ESI will play a significant role**, the party shall complete the following tasks for discussion at the Rule 26(f) conference:

(1) determine how and where its ESI is stored; how it has been or can be preserved, accessed, retrieved, and produced; and any other issues to be discussed at the Rule 26(f) conference including the issues set forth in subparagraph (c) below; and

(2) identify a person or persons with knowledge about the ESI, with the ability to facilitate, through counsel, the preservation and discovery of ESI.

(LR Civ. P. 26.5, Sthn. Dist. W. Va.)(Emphasis added). In other words, unless ESI will play “a significant role,” The Health Plan should not be forced to endorse an Order that mandates production of ESI.

In the instant matter, Plaintiffs’ threshold question is whether Mr. Martell’s health insurance must comply with Section 1557 of the Affordable Care Act and, if so, whether it *does* comply with Section 1557 of the Affordable Care Act. Given that the health insurance policy at issue speaks for itself, there is no need for metadata, native files, or the other accoutrements outlined in Plaintiffs’ Proposed ESI order. Hard copies (and/or PDFs) of the requested documents are sufficient for Plaintiffs to pursue their claims. Until Plaintiffs sufficiently demonstrate that electronically stored information will “play a significant role” in this litigation, this Court must deny their Motion for entry of Plaintiffs’ proposed ESI Order.

B. This Court should not limit the number of depositions at this time.

In their Motion, Plaintiffs seek entry of their “Order Setting Deposition Protocol.” As a general matter, The Health Plan has no qualms with the general contours of this Order; however, Section B, “Number of Depositions Allowed,” is premature in that it seeks to limit the number of depositions to only 5 depositions.

Discovery in this Class Action matter has just begun. The Health Plan has not served discovery on Plaintiffs. As such, The Health Plan does not know the full scope of Plaintiffs’ evidence, and therefore cannot ascertain how many depositions may be necessary to investigate

Plaintiffs' claims. The Health Plan may be willing to revisit whether limitation is appropriate, once discovery has more meaningfully developed; however, at present, this limitation is improper.

III. CONCLUSION

For the reasons stated more fully above, The Health Plan asks this Court to deny Plaintiffs' motion.

/s/ Aaron C. Boone

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2021, I electronically filed the foregoing
document with the Clerk of the Court using the CM/ECF system, which will send notification of
such filing to the following CM/ECF participants:

Walt Auvil, Esquire
Anna P. Prakash, Esquire
Nicole J. Schladt, Esquire
Sasha Buchert, Esquire
Avatara Smith-Carrington, Esquire
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/s/ Aaron C. Boone _____

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