

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH HUSSEY : CIVIL ACTION  
: :  
v. : :  
: :  
CHASE MANHATTAN BANK, : :  
ET AL. : NO. 02-7099

**SURRICK, J.**

**JULY 27, 2005**

**MEMORANDUM & ORDER**

Presently before the Court is Defendants Chase Manhattan Bank, Chase Manhattan Mortgage Corporation, JP Morgan Chase & Co., and Director of Human Resources, Chase Manhattan Bank's (collectively "Defendants") Motion In Limine To Exclude The Testimony Of Joseph Hussey And Maureen Hussey (Doc. No. 52). For the following reasons, Defendants' Motion will be granted in part and denied in part.

**I. BACKGROUND**

Plaintiff Joseph Hussey joined Chase Manhattan Mortgage Corporation ("CMMC") in June, 1997. Plaintiff joined CMMC as an executive sales manager and loan officer. Upon arriving at CMMC, Plaintiff's supervisor, Greta Huegel, gave Plaintiff a "Welcome to Chase" binder, which contained information about employee benefits, including the Long Term Disability ("LTD") Plan and the LTD Excess Plan.

The LTD Plan, administered by Liberty Life Assurance Company of Boston and Liberty Mutual Group (collectively "Liberty"),<sup>1</sup> provided employees who became totally or permanently

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<sup>1</sup> On December 31, 2003, we granted summary judgment in favor of Defendants Liberty Life Assurance Company of Boston and Liberty Mutual Group, concluding that they were not fiduciaries under ERISA with respect to Plaintiff's claim. (Doc. No. 42 at 7-10.)

disabled with benefits following twenty-six weeks of absence from work. In 1997, employees had the option of choosing among three levels of benefit payments from the LTD Plan: 50% of annual salary with a maximum monthly benefit of \$6,250; 60% of annual salary with a maximum monthly benefit of \$7,500; and 70% of annual salary with a maximum monthly benefit of \$8,750. (Berliner Aff. Ex. 1 at B-46.) The benefits were capped at incomes up to \$150,000. (*Id.*) For employees with an annual Benefit Eligible Compensation (“BEC”) exceeding \$150,000, CMMC provided the option of enrolling in the LTD Excess Plan. (*Id.*) The LTD Excess Plan essentially raised the earning cap on the LTD Plan and allowed participants to choose from the same 50%, 60%, or 70% levels of payment up to a maximum BEC of \$600,000. All of this information was included in Plaintiff’s “Welcome to Chase” binder.<sup>2</sup>

On June 2, 1997, Plaintiff elected the 70% coverage under the LTD Plan. When he joined CMMC, Plaintiff was not yet eligible for the LTD Excess Plan because his salary was commission-based and, as a new employee, he had no earning history to calculate his annual

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<sup>2</sup> The “Welcome to Chase” binder described the LTD Excess Plan as follows:

**Long-Term Disability Excess Plan**

CHASE*Choice* Excess LTD coverage applies to eligible compensation above \$150,000. If your eligible compensation is more than \$150,000 and you elect to participate in the Long-Term Disability Plan, you may also choose to enroll in the LTD Excess Plan. . . . The same level of coverage you elected in the LTD Plan (i.e., 50%, 60%, or 70%) will apply to eligible compensation above \$150,000 up to a maximum of \$600,000.

**Costs**

The contribution rates for the LTD Excess Plan will be higher than those for the LTD Plan. See the “Enrolling in CHASE*Choice*” section.

(Huegel Dep. Ex. 5 at B-48.)

income.<sup>3</sup> (Huegel Dep. at 24.) If Plaintiff's BEC in his first year exceeded \$150,000, he would then be eligible to elect the LTD Excess Plan during the next enrollment period, which ran for several weeks every October and November. Changes made during the enrollment period would become effective at the start of the new plan year on January 1.

The enrollment period for 1999 ran from October 14, 1998, through November 4, 1998. (Doc. No. 26 at 7 (citing Huegel Decl. Ex. 6 at CMMC0001191).) After one year of service, Plaintiff had a BEC of \$204,378.72, making him eligible to enroll in the LTD Excess Plan for the 1999 plan year. (Huegel Dep. Ex. 6 at CMMC000512.) Plaintiff, however, did not enroll in the LTD Excess Plan for 1999.

The parties dispute whether Plaintiff received any information from Chase in October and November, 1998, regarding his eligibility for the LTD Excess Plan. Plaintiff asserts that he did not receive any materials during the enrollment period for the 1999 calendar year. Defendants claim that Plaintiff received the annual enrollment materials and a Personalized Fact Sheet ("PFS"), which is an "individualized document[] that show[s] each employee's Benefits Eligible Compensation ('BEC'), the employee's current level of benefits and the cost of that level of benefit for the next year." (Doc. No. 26 at 7.) Defendants also contend that Plaintiff received the 1999 Enrollment Guide, which explained how to add or remove benefits for the upcoming year:

## **II. How to Use Your Enrollment Materials**

Your Personalized Fact Sheet and Enrollment Guide are valuable materials that can help make your coverage decision-making process and your oneCHASE enrollment phone call as streamlined as possible. Here's how to use your materials:

1. On your Personalized Fact Sheet, review your current coverages

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<sup>3</sup> Upon joining CMMC, Plaintiff's initial BEC was set at \$50,000. (Huegel Dep. Ex. 3.)

and the cost to continue them for 1999.

2. Decide which coverages you want to keep and which ones you want to change for 1999.

3. At the end of each benefit section in this Enrollment Guide, you'll find a "Making Your Elections" box. This box outlines the available options, what you should complete on your Worksheet to make a change, and the next steps.

4. To make a change, turn to the Worksheet in the back of this Enrollment Guide (or on your Personalized Fact Sheet) and fill in the box(es) to the right of the coverage(s) you want to change . . . .

5. After you complete your Worksheet, call oneCHASE . . . and enter your elections as they appear on your Worksheet.

(*Id.* at 8.)

In October, 1999, Plaintiff became totally disabled due to a severe stroke. (Compl. ¶ 18.) For twenty-six weeks following the stroke, Plaintiff received short-term disability benefits. (*Id.*) In April, 2000, Plaintiff became eligible for benefits under the terms of his LTD Plan. Plaintiff was initially informed that he would be eligible for \$9,333.00 per month, which was 70% of the maximum (\$160,000) allowed at that time under the regular LTD Plan. (Glidden Dep. Ex. 2 at CMMC000420.) When Plaintiff's wife, Maureen Hussey, received Liberty's letter explaining Plaintiff's benefits, she questioned why Plaintiff was not eligible for benefits equal to 70% of his total salary for 1999, which would have been \$18,305.03 per month.<sup>4</sup> (Maureen Hussey Aff. ¶ 7.) CMMC thereafter informed Liberty that Plaintiff was eligible for benefits under the LTD Excess Plan. Plaintiff then began receiving payments of \$18,305.00 per month, which was equal to 70% of his total salary for 1999, in May, 2000. (Glidden Dep. Ex. 3.) On October 27, 2000,

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<sup>4</sup> Plaintiff's BEC in 1999 was \$313,800.47. (Huegel Dep. Ex. 6 at CMMC000512.)

however, Liberty informed Plaintiff that an audit had revealed that he was only eligible for benefits equal to 70% of the salary cap of \$160,000 under the LTD Plan, and reduced his monthly disability benefit payments to \$9,333.<sup>5</sup> (*Id.* Ex. 4; *see also* Compl. ¶ 24.)

On August 30, 2002, Plaintiff filed a Complaint, alleging that Defendants breached their fiduciary duty under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. § 1132(a)(3)) by failing “to convey to Plaintiff complete and accurate information regarding the benefits for which he was eligible, and complete and accurate information as to steps to be taken to enroll in those benefits.” (Compl. ¶ 31.)

On July 1, 2005, Defendants filed the instant Motion In Limine, seeking to exclude Plaintiff’s testimony. (Doc. No. 52 at 3-6.) The Motion In Limine also seeks to exclude testimony from Maureen Hussey, Plaintiff’s wife, regarding Plaintiff’s statements and beliefs regarding his long-term disability coverage at CMMC. (*Id.* at 6-9.)

## **II. DISCUSSION**

### **A. Plaintiff’s Testimony**

First, Defendants seek to exclude Plaintiff’s testimony based on prior representations by Plaintiff’s counsel that Plaintiff would be unable to understand or respond to counsel’s questions in a deposition or trial format due to his stroke. (Doc. No. 52 at 1-5.)

At the commencement of litigation, Joseph Hussey was listed as the sole Plaintiff in this action. (Doc. No. 1.) On April 8, 2003, Plaintiff filed a Motion To Substitute Parties Pursuant

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<sup>5</sup> Liberty also initially requested repayment of the overpayment totaling \$46,355.00, but later withdrew that demand. (Glidden Dep. Ex. 4; Compl. ¶ 23.)

To Federal Rule of Civil Procedure 25(b).<sup>6</sup> (Doc. No. 19.) In that Motion, Plaintiff (acting through his counsel) requested the substitution of his wife, Maureen Hussey, as Plaintiff in this case pursuant to Federal Rule of Procedure 25(b). (*Id.*) Specifically, counsel for Mr. Hussey represented that Mrs. Hussey should be substituted as Plaintiff due to Mr. Hussey's incompetency:

Mr. Hussey's treating neurologist and speech therapist state that [Mr. Hussey] cannot communicate effectively and[,] in particular, he cannot respond properly to questions and cannot express himself reliably. *Mr. Hussey cannot effectively understand or respond to questions in a deposition or trial format*, as his physicians advise that he cannot process the questions or provide answers due to the residual expressive and receptive aphasia<sup>7</sup> caused by his severe stroke.

(*Id.* at unnumbered 3 (emphasis added).) This representation was supported by the opinions of Plaintiff's speech-language pathologist, Ms. Sharon W. Milner, and his neurologist, Dr. Michael J. Carunchio, Jr. In support of Plaintiff's Motion to Substitute Parties, Milner stated that Plaintiff was not competent to understand or answer questions at a trial:

I have been treating Mr. Hussey for cognitive-communication deficits resulting from a stroke sustained on October 28th, 1999. He has been my patient for 2½ years. It is my professional opinion that Mr. Hussey is not competent to answer questions presented to him as a witness in a deposition or trial format. Mr. Hussey has difficulty responding to rapid input from unfamiliar conversation partners and is often confused by multi-step directions, lengthy information, pronoun references, and temporal concepts. . . . Mr. Hussey's expressive

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<sup>6</sup> On May 15, 2003, we dismissed Plaintiff's Motion To Substitute Parties, but indicated that Plaintiff could request reinstatement and a hearing on the Motion by letter. (Doc. No. 25 ¶ 6.) As of the date of this Memorandum and Order, Plaintiff's counsel had not made such a request.

<sup>7</sup> Aphasia is defined as “[i]mpaired or absent comprehension or production of, or communication by, speech, writing, or signs, due to an acquired lesion of the dominant cerebral hemisphere.” Thomas Lathrop Stedman, Stedman's Medical Dictionary 110 (27th ed. 2000); *see also* Joseph R. Nolan & Jacqueline M. Nolan-Henry, Black's Law Dictionary 95 (6th ed. 1990) (defining aphasia as “loss of the faculty or power or articulate speech”).

communication deficits parallel his receptive language status.

(*Id.* Ex. A.) Similarly, Dr. Carunchio stated that, in his assessment, Plaintiff would not be able to effectively communicate as a witness:

[Plaintiff] had a left hemisphere cerebrovascular accident in October 1999 and still has a residual expressive and receptive aphasia. This limits his ability to respond to questions and significantly has limited his ability to express himself. Mrs. Hussey informs me that her husband is now involved in legal action and this may require his answering various questions. I think that his residual difficulties with the aphasic disturbance will greatly impair his ability to effectively engage in such.

(*Id.* Ex. B.)

On September 30, 2003, Plaintiff's counsel sought to submit an affidavit by Plaintiff in support of his Combined Response in Opposition to Defendants' Motion for Summary Judgment. (Doc. No. 32 Ex. 7.) Defendants filed a motion to strike Plaintiff's affidavit based on the representations and evidence submitted in Plaintiff's Motion to Substitute Parties. (Doc. No. 40.) On January 13, 2004, we granted Defendants' motion to strike based on Plaintiff's "unambiguous represent[ation] that he will be unable to withstand the rigors of testifying and being cross-examined." (Doc. No. 45 at 4.)

Despite this, on July 15, 2005, Plaintiff's counsel listed Plaintiff as a potential trial witness in their pretrial submissions. Defendants filed a Motion In Limine to preclude Plaintiff from testifying. (Doc. No. 52 at 3-5.) In response to Defendants' Motion, Plaintiff responded that "[t]he parties are in agreement that Mr. Hussey's infirmities would most likely prevent him from being subject to cross-examination as in the usual course of a trial." (Doc. No. 55 at 1.) Plaintiff, however, appears to assert that, despite his acknowledged inability to be cross-examined, he may be called to testify on *direct* examination alone. (*Id.* at 1-3.) We disagree.

“[T]he right of cross-examination . . . [is] a right traditionally relied upon expansively to test credibility as well as to seek the truth.” *Pillsbury Co. v. Conboy*, 459 U.S. 248, 259 (1983).

“[T]he policy of the Anglo-American system of evidence has been to regard the necessity of testing [of evidence] by cross-examination as a vital feature of the law.” 5 John Henry Wigmore, *Evidence* § 1367 (Chadbourn rev. ed. 1974); *see also* Fed. R. Evid. art. VIII advisory committee’s note (“[T]he Anglo-American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination.”).

The Federal Rules of Evidence clearly contemplate that a witness who takes the stand and testifies on direct examination must also be subject to cross-examination by opposing counsel. Under Rule 607, “[t]he credibility of a witness may be attacked by any party . . . .” Fed. R. Evid. 607. This “attack” is often accomplished through cross-examination of the witness on various matters, including veracity, perception, memory, and bias. As the Supreme Court has noted,

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness.

*Davis v. Alaska*, 415 U.S. 308, 316 (1974); *see also Thomas v. Scully*, 854 F. Supp. 944, 959-60 (E.D.N.Y. 1994) (“Subject to certain limitations, any witness is subject to probing cross-examination that is designed to test the witness’s credibility.”). In fact, the most common form of impeachment, the use of a witness’s prior inconsistent statement, 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6094, at 515 (1990), is usually conducted

through cross-examination. *See United States v. Schnapp*, 322 F.3d 564, 571 (8th Cir. 2003) (“Impeachment of a witness by a prior inconsistent statement is normally allowed only when the witness is first provided an opportunity to explain or deny the statement.”); *see also* Fed. R. Evid. 613(b). Similarly, in the criminal context, the Supreme Court has held that impeachment of a witness’s bias and motivation in testifying “is a proper and important function of the constitutionally protected right of cross-examination.”<sup>8</sup> *Davis*, 415 U.S. at 316-17.

Under Federal Rule of Evidence 611, the trial court is granted the discretion to “exercise reasonable control over the mode and order of interrogating witnesses . . . so as to . . . make the interrogation and presentation effective for the ascertainment of the truth . . . .” Fed. R. Evid. 611(a). As discussed above, cross-examination is the primary method of testing a witness’s credibility and ascertaining the truth of his or her testimony. *Conboy*, 459 U.S. at 259; *see also California v. Green*, 399 U.S. 149, 158 (1970) (stating that cross-examination is the “greatest legal engine ever invented for the discovery of truth” (internal quotation and citation omitted)). “Since effective cross examination is generally assumed to be an indispensable means of discovering the truth,” Rule 611(a) “gives courts the power to strike [a witness’s] direct examination testimony where the witness is non-responsive on cross-examination” or “has refused to be cross-examined.” 28 Wright & Gold § 6164, at 350.

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<sup>8</sup> The Court’s holding in *Davis* relied on the Confrontation Clause of the Sixth Amendment, which applies only in criminal trials. *See* U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”). “There is no absolute right of confrontation in civil cases.” *Van Harken v. City of Chicago*, 103 F.3d 1346, 1352 (7th Cir. 1997) (citing *Richardson v. Perales*, 402 U.S. 389, 402 (1971)). At least one Court of Appeals has recognized, however, that “in particular [civil] cases, live testimony and cross-examination might be so important as to be required by [constitutional] due process . . . .” *Id.*

Here, Plaintiff concedes that his mental and physical condition would prevent him from being subject to cross-examination at trial. (Doc. No. 55 at 1.) Consequently, Plaintiff would, at best, be able to testify only on direct examination. This situation, however, would fundamentally undermine the truth-seeking process of trial, as it would deprive Defendants of cross-examination of Plaintiff on any aspect of his testimony. For example, if Plaintiff testified that he never received a calculation of his BEC indicating his eligibility to participate in the LTD Excess Plan in 1999 (Joseph Hussey Aff. ¶ 5), Defendants would be unable to cross-examine Plaintiff regarding whether he was aware through other means, such as his annual compensation, pay stubs, or W-2 returns, that he was eligible to participate in the LTD Excess Plan.

This situation is analogous to cases where a witness testifies on direct, then refuses to answer questions regarding the subject of his direct testimony on cross-examination. In such cases, courts have held that, under Rule 611(a), the trial court may strike the witness's direct testimony. 28 Wright & Gold § 6164, at 350; *see also Denham v. Deeds*, 954 F.2d 1501, 1503 (9th Cir. 1992) (“If the witness . . . precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness's testimony should be stricken in whole or in part.” (internal quotation and citation omitted)); *United States v. Humphrey*, 696 F.2d 72, 75 (8th Cir. 1982) (holding that a district court may strike all or part of a witness's testimony if the witness refuses to answer questions on cross examination, particularly if those questions seek to directly assail the truth of the witness's testimony); *United States v. Toner*, 173 F.2d 140, 144 (3d Cir. 1949) (“Where the witness, after his examination in chief on the stand, has refused to submit to cross-examination . . . his direct testimony should be struck out.” (quoting 5 Wigmore,

Evidence § 1391)). Plaintiff has represented that he will not be able to be cross-examined on any subject raised in his direct testimony at trial. We believe that cross-examination of Plaintiff is necessary to promote the truth-seeking process at trial. Accordingly, we conclude that Plaintiff is precluded from testifying at trial.

In addition, we note that Defendants would be unfairly prejudiced by permitting Plaintiff to testify at trial. Prior to trial, Plaintiff “unambiguously represented that he will be unable to withstand the rigors of testifying and being cross-examined.” (Doc. No. 45 at 4.) Based on this representation, Defendants reasonably elected not to depose Plaintiff, believing that he would not be available as a trial witness. Permitting Plaintiff to take the stand now would unfairly deprive Defendants of the opportunity to depose Plaintiff and to prepare for his trial testimony.

**B. Maureen Hussey’s Testimony**

Defendants request that we exclude anticipated testimony by Maureen Hussey, Plaintiff’s wife, as inadmissible hearsay. Specifically, Defendants seek to exclude Mrs. Hussey’s expected testimony that Plaintiff told her that: (1) he did not receive any enrollment materials for plan year 1999; (2) Chase informed him that he had the maximum disability coverage available; and (3) he considered disability coverage to be a very important benefit.<sup>9</sup> (Doc. No. 52 at 6.)

Federal Rule of Evidence 801 provides that “hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of

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<sup>9</sup> In addition, Defendants seek to exclude Mrs. Hussey’s testimony that Greta Huegel, Plaintiff’s supervisor at CMMC, told her that she (Huegel) also did not receive any benefit enrollment information for plan year 1999, on the grounds that this statement is irrelevant. (Doc. Nos. 52 at 6, 9; 57 at 7.) We disagree. Information that Defendants’ other employees did not receive benefit enrollment materials for 1999 would provide circumstantial evidence in support of Plaintiff’s assertion that he also did not receive such materials.

the matter asserted.” Fed. R. Evid. 801. Hearsay is not admissible unless an established exception or exclusion to the hearsay rule applies. Fed. R. Evid. 802.

1. Truth of the Matter Asserted

Plaintiff first asserts that his out-of-court statement to Mrs. Hussey that he was informed by Defendants that he had as much disability coverage as he was eligible to receive is admissible because it is not being offered for the truth of the matter asserted. (Doc. No. 55 at 4.) Instead, Plaintiff offers it as evidence of Defendants’ alleged “administrative dysfunction” with respect to employee benefits and “to demonstrate how the Defendants exhibited and communicated their confusion concerning the excess LTD benefit at issue in this case.” (*Id.*)

Statements offered “to establish a foundation for later showing, through other evidence, that [such statements] were false” are not hearsay. *Anderson v. United States*, 417 U.S. 211, 220 (1974); *see also United States v. Adkins*, 741 F.2d 744, 746 (5th Cir. 1984) (“When statements are introduced to prove the falsity of the matter asserted, they are not inadmissible as hearsay.”). Here, Plaintiff is not offering the statement as evidence that he actually elected the LTD Excess plan for 1999, nor is he offering it to prove that Defendants included him in the LTD Excess plan. Rather, Plaintiff offers it to establish that Defendants communicated to him a “fact” that, knowingly or unknowingly to Defendants, was false. According to Plaintiff, this false statement is evidence of Defendants’ purported “administrative dysfunction,” which he asserts is responsible for “why critical information [regarding long-term disability benefits] was not provided to Mr. Hussey” in violation of ERISA’s fiduciary duty requirements. (Doc. No. 56 at 8.) Accordingly, we conclude that this statement is not hearsay because it is not offered to prove the truth of the matter asserted.

2. Federal Rule of Evidence 803(3)

Next, Defendants assert that Mrs. Hussey's proposed testimony that Plaintiff told her that he did not receive any benefit enrollment information from Defendants for plan year 1999 is inadmissible hearsay. Plaintiff contends that this statement is admissible under the "state of mind" exception in Federal Rule of Evidence 803(3).

Rule 803(3) provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" may be admissible as a hearsay exception. Fed. R. Evid. 803(3). Rule 803(3) also provides, however, that the "state of mind" exception does not include "statement[s] of memory or belief to prove the fact remembered or believed."<sup>10</sup> As the advisory committee notes to Rule 803 explain:

The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference for the happening of the event which produced the state of mind."

*Id.* advisory committee's note. Accordingly, the Third Circuit has held that hearsay statements offered pursuant to Rule 803(3) "cannot be [introduced] to prove the truth of the underlying facts asserted." *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 252 (3d Cir. 1999) (quoting *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1274 (3d Cir. 1995); *see also* 5 Jack A. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.05[2][a] (2000).

In this case, Plaintiff seeks to introduce his out-of-court statement that he did not receive

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<sup>10</sup> The rule has an exception, not applicable in this case, for statements relating to the execution, revocation, identification, or terms of a declarant's will. Fed. R. Evid. 803(3).

benefit information from Defendants to establish that Defendants in fact “failed to provide [him] with the information he needed to determine whether he was eligible to participate in the excess LTD benefit plan for year 1999.” (Doc. No. 56 at 8 (citing Affidavit of Maureen Hussey).) This clearly violates Rule 803(3)’s requirement that a hearsay statement cannot be admitted to prove the truth of the fact remembered or believed. Accordingly, it is not admissible under the “state of mind exception.”

Plaintiff also asserts that his out-of-court statements that he considered disability insurance to be very important are admissible under the “state of mind” exception. (Doc. No. 55 at 5.) Again, we disagree. A statement falling within the exception of Rule 803(3) must relate to a “*then existing* state of mind.” Fed. R. Evid. 803(3) (emphasis added). A party’s “state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent.” *Shepard v. United States*, 290 U.S. 96, 104 (1933) (emphasis added). For a hearsay statement to be admissible under Rule 803(3), the statement must occur “contemporaneous with the state of mind sought to be proved,” and the party “must not have had time to reflect and possibly fabricate or misrepresent his thoughts.” *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001) (citing *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986)); *see also* Fed. R. Evid 803(3) advisory committee’s note (noting that the “state of mind” exception to the hearsay rule “is essentially a specialized application” of the present sense impression exception in Rule 803(1), which is based upon the theory “that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation”). Here, there is no evidence that Plaintiff made any statements to Mrs. Hussey regarding his beliefs about disability insurance contemporaneously with his opportunity to enroll in the LTD Excess plan. Further, Plaintiff has

had the opportunity to “reflect and possibly fabricate or misrepresent his thoughts,” *Reyes*, 239 F.3d at 743, regarding the importance of long-term disability benefits, as Plaintiff obviously has a financial interest in stating that, prior to October, 1999, he considered the disability insurance to be important and would have elected the LTD Excess Plan if he knew it was available. Accordingly, we conclude that testimony regarding Plaintiff’s beliefs about the importance of long-term disability benefits does not fall within the “state of mind” exception.

3. Federal Rule of Evidence 807

Plaintiff also claims that his out-of-court statements are admissible under the residual hearsay exception, Rule 807. (Doc. No. 55 at 5-8.) Rule 807 provides that:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.

Fed. R. Evid. 807. This residual exception is invoked “very rarely, and only in exceptional circumstances.” Fed. R. Evid. 803(24)<sup>11</sup> advisory committee’s note; *see also Trs. of Univ. of Pa. v. Lexington Ins. Co.*, 815 F.2d 890, 906 (3d Cir. 1987); *Russo v. Abington Mem. Hosp. Healthcare Plan*, Civ. A. No. 94-195, 1998 U.S. Dist. LEXIS 18595, at \*9 (E.D. Pa. Nov. 16,

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<sup>11</sup> In 1997, the residual hearsay exceptions in Federal Rules of Evidence 803(24) and 804(b)(5) were combined and transferred to become Federal Rule of Evidence 807. Fed. R. Evid. 807. No substantive change in the rule was intended. *Id.*; *see also Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 112 n.17 (3d Cir. 2001).

1998) (“A catch-all rule such as Rule 807 must be sparingly invoked, lest its potential breadth swallow the carefully crafted narrowness of the enumerated exceptions.”).

In order to be admissible under this exception, a hearsay statement must: (1) have sufficient guarantees of trustworthiness; (2) be evidence of a material fact; (3) have sufficient probative value; (4) serve the interests of justice; and (5) provide sufficient notice to the adverse party. *Coyle v. Kristjan Palusalu Maritime Co.*, 83 F. Supp. 2d 535, 545 (E.D. Pa. 2000), *aff’d*, 254 F.3d 1077 (3d Cir. 2001) (table). In reviewing whether the proffered hearsay statement has sufficient guarantees of trustworthiness, a court must balance the following factors: (1) whether the declarant was under oath when the statement was made; (2) whether the declarant voluntarily made the statement; (3) whether the statement was based on the declarant’s personal knowledge; (4) whether the statement contradicted a prior statement; (5) whether the statement was videotaped in order to provide the jury with an opportunity to evaluate the declarant’s demeanor; (6) the ability of an adverse party to cross-examine the declarant; (7) the proximity in time between the statement and the events described; (8) whether the statement is corroborated; (9) the declarant’s motivation to fabricate the contents of the statement; (10) whether the statement was prepared in anticipation of litigation; (11) the statement’s spontaneity; and (12) whether the declarant’s memory or perception was faulty. *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 112-13 (3d Cir. 2001).

After balancing these factors, we conclude that Plaintiff’s statements do not have sufficient guarantees of trustworthiness to be admitted under the residual hearsay exception. Plaintiff was not under oath when the statements were made, nor were his statements videotaped to provide the factfinder with an opportunity to evaluate his demeanor. More importantly,

Plaintiff has never been subject to cross-examination regarding these statements. The Supreme Court has stated that a court should not admit a hearsay statement that was not subject to cross-examination unless it is “so trustworthy that adversarial testing would add little to its reliability.” *Idaho v. Wright*, 497 U.S. 805, 821 (1991). Here, Plaintiff’s statement that he did not receive any benefit enrollment information from Defendants for 1999 is not so clearly trustworthy that cross-examination would add little to its reliability. Cross-examination would be useful to evaluate Plaintiff’s memory and recollection on this issue. Furthermore, other evidence in the record, such as testimony from Huegel, Plaintiff’s supervisor, appears to contradict Plaintiff’s statements. (Huegel Dep. at 48-49.) Similarly, cross-examination would be useful to assess the circumstances surrounding Plaintiff’s out-of-court declarations that he believed long-term disability insurance was important, such as when, where, and to whom such statements were made; how much insurance he believed was necessary for proper coverage of his family; and whether he acted upon his belief by, for example, inquiring with Defendants about long-term disability benefits for plan year 1999 after he allegedly did not receive any information about them from Defendants. In addition, other than his wife’s proposed testimony, Plaintiff offers no corroborating evidence for his statements. Nor does Plaintiff offer any information regarding the timing of his statements or their proximity to the events at issue in this litigation.<sup>12</sup> Finally, as previously mentioned, Plaintiff has a motive for fabricating the statements, as they would be favorable evidence in his fiduciary duty claim. Accordingly, we conclude that Plaintiff’s hearsay statements are not admissible under Rule 807 as well. An appropriate Order follows.

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<sup>12</sup> For this reason, we are also unable to determine whether these statements may have been made in anticipation of litigation, which is another factor in the Rule 807 balancing test.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH HUSSEY : CIVIL ACTION  
: :  
v. : :  
: :  
CHASE MANHATTAN BANK, : :  
ET AL. : NO. 02-7099

**ORDER**

AND NOW, this 27<sup>th</sup> day of July, 2005, upon consideration of Defendants' Motion In Limine To Exclude The Testimony Of Joseph Hussey And Maureen Hussey (Doc. No. 52), and all papers submitted in support thereof and in opposition thereto, it is ORDERED as follows:

1. Defendants' Motion is GRANTED with respect to the testimony of Plaintiff.
2. Defendants' Motion is GRANTED with respect to the proposed testimony of Maureen Hussey that Plaintiff told her that (1) he did not receive benefit enrollment information from Defendants, and that (2) he believed long-term disability insurance was important;
3. Defendants' Motion is DENIED with respect to the proposed testimony of Maureen Hussey that (1) Plaintiff told her that Defendants informed him he had the maximum amount of disability coverage available and that (2) Greta Huegel told her that she (Huegel) also did not receive any benefit information for 1999

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge