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

CHRISTOPHER J. FOX	:	CIVIL ACTION
v.	:	
LAW OFFICES OF SHAPIRO & KREISMAN, et al.	:	NO. 97-7393
Newcomer, J.		April , 1998

M E M O R A N D U M

Presently before this Court are plaintiff Christopher J. Fox's Motion for Summary Judgment, and defendants' response thereto. For the following reasons, the Court will deny plaintiff's Motion.

Also before this Court are defendants' Motion for Summary Judgment, and plaintiff's response thereto. For the following reasons, the Court will grant in part and deny in part defendants' Motion.

I. Background

In this action, plaintiff Christopher J. Fox seeks statutory penalties under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ("ERISA"), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), against defendants Shapiro & Kreisman, David S. Kreisman, Gerald M. Shapiro and The LOGS Group, L.L.C.[1] based on alleged

1. Plaintiff initially commenced this action against: The Law Offices of Shapiro & Kreisman (defendants contend that the correct name of said firm is Shapiro & Kreisman); David Kreisman; Gerald Shapiro; The LOGS Group, Inc., the plan administrator for the LOGS National Benefit Plan (the "Plan"); and Allied Benefits Systems, Inc., the third-party administrator/claims processor for the Plan. Subsequently, the parties filed a stipulation

(continued...)

violations of ERISA. Plaintiff specifically claims that defendants failed to provide him with notice of his COBRA rights (i.e., his right to elect continuation coverage of health benefits under the same terms of the employer's health plan) after he was terminated and that defendants failed to respond to his request for information regarding the continuation of his health benefits. Defendants have filed an Answer to plaintiff's Complaint. The facts are as follows.

Plaintiff, a pro se attorney, was hired by defendant Shapiro & Kreisman in its offices located in Berwyn, Pennsylvania,[2] in October 1994 as a litigation and bankruptcy attorney. During plaintiff's tenure with Shapiro & Kreisman, the Berwyn office employed approximately 36 employees - roughly 8 attorneys and 28 non-attorney employees. Plaintiff claims that the Berwyn office had an excessive turnover of employees during his tenure. In this regard, plaintiff states that over

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1. (...continued)
dismissing Allied Benefits Systems from this action and amending the Complaint to add The LOGS Group, L.L.C. (incorrectly named as the LOGS Group, Inc. in the Complaint) and the LOGS National Benefit Plan.

2. Shapiro & Kreisman is a partnership whose principal address is 4201 Lake Cook Road, Northbrook, Illinois. The partners are Gerald Shapiro and David Kreisman. Shapiro and Kreisman are licensed attorneys in Illinois. Plaintiff claims that Shapiro and Kreisman have an ownership interest in law offices in over thirty-five states concentrating in mortgage foreclosure, representing private lenders, commercial banks and the federal government. Defendants, while not denying that Shapiro and Kreisman have an ownership interest in these offices, note that plaintiff has not offered any evidence to establish this ownership interest.

approximately 40 employees left the Berwyn office during his tenure with the firm (approximately two years). Despite this high turnover, plaintiff contends that the Berwyn office of Shapiro & Kreisman had monthly gross revenue in 1996 in excess of $120,000 per month and had a gross yearly revenue in excess of $1,500,000 for 1996.[3]

Each office of Shapiro & Kreisman, including the Berwyn office, is supervised by a managing attorney who is responsible for supervising the attorneys. The non-attorney staff is supervised by the office manager. In or about July 1996, Kris Carman, an employee and office manager of Shapiro & Kreisman's Connecticut office, was transferred to the Berwyn office. During the period of time that both plaintiff and Ms. Carman were employed with Shapiro & Kreisman, plaintiff claims that Ms. Carman "was in constant conflict and confrontation with Plaintiff regarding Plaintiff's staff and the bankruptcy department." (Pl.'s Mem. Law Supp. Mot. Summ. J. at 3).

On or about Monday, October 21, 1996, plaintiff delivered a letter to Shapiro & Kreisman resigning his employment to be effective October 28, 1996. On October 24, 1996, after plaintiff had returned from bankruptcy court, plaintiff discovered that Ms. Carman had allegedly authorized and instructed plaintiff's paralegal Jennifer Havrilla to sign plaintiff's name to legal pleadings that were to be filed in

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3. Defendants contend that plaintiff does not have any evidence to support this allegation.

bankruptcy court. Plaintiff immediately brought this matter to the attention of the managing attorney of the Berwyn office, Margaret Castelli, who was allegedly aware that Ms. Carman had given plaintiff's paralegal the authorization to sign plaintiff's name.[4]

On Monday, October 28, 1996, plaintiff's last date of employment with the firm, plaintiff hand-delivered a memorandum dated October 28, 1996 to the managing attorney and to Ms. Carman indicating that Shapiro & Kreisman should mail plaintiff's "last paycheck" to (and confirm) his current address.[5] The memorandum indicated that plaintiff's address as of October 28, 1996 was 1 East Cooper Avenue, Moorestown, New Jersey 08057. Defendants admit receiving this memorandum.

Despite receiving this memorandum, plaintiff alleges that Ms. Carman or the defendants advised Steven Ruffo, the staff accountant, to notify the Cherry Hill, New Jersey office of Shapiro & Kreisman that plaintiff's "current address" was 40 West

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4. Plaintiff also alleges that on the evening of October 24, 1996, "after the office was closed, someone entered Plaintiff's office and stole (removed) some of Plaintiff's law books, personal possessions, and rolodex from boxes that he packed in anticipation of leaving the firm." (Pl.'s Mem. Law Supp. Mot. Summ. J. at 4). The Court notes, however, that plaintiff has failed to offer any evidence in support of this allegation; instead this allegation rests solely on speculation and conjecture.

5. It should be noted that plaintiff, on October 28, 1996, telecopied a letter to defendants Shapiro and Kreisman in Chicago, Illinois, advising them that Ms. Carman "was out-of-control" and had committed ethical violations by instructing plaintiff's paralegal to sign his name to legal pleadings to be filed in bankruptcy court.

Azalea Lane, Mount Laurel, New Jersey 08054. Plaintiff had resided at 40 West Azalea Lane when he commenced employment with defendant Shapiro & Kreisman, but moved on December 19, 1994 to 1 East Cooper Avenue - the address where plaintiff resided when he resigned. Plaintiff informed the Berwyn office of Shapiro & Kreisman on numerous occasions that he had moved, and he provided this office with his 1 East Cooper Avenue address on numerous occasions. Plaintiff, however, has not produced any direct evidence that Ms. Carman or any of the defendants actually advised Mr. Ruffo that plaintiff's address at the time he resigned was 1 East Cooper Avenue - his former address.

At the time of plaintiff's resignation, plaintiff was covered by the Plan - a medical benefits plan which provided benefits to plaintiff and his family. The "Plan Administrator" for the Plan is identified in the applicable summary plan description booklet as The LOGS National Benefit Plan. The name of the plan administrator, however, was changed in the May 1, 1997 summary plan description booklet to The LOGS Group, L.L.C. [6]

While the plan administrator is described in the summary plan description as having "overall management" responsibilities, the plan administrator delegated virtually all of its duties to Allied Benefits Systems ("Allied"). Defendants claim that Allied was responsible for the operational functions

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6. The LOGS Group, L.L.C. is a limited liability company incorporated under the laws of Delaware with its principal place of business in Northbrook, Illinois. The LOGS Group, L.L.C., pursuant to the terms of the Plan, is now the plan administrator.

of the Plan, including providing notification to Plan participants of any rights to continuation coverage under the health insurance continuation provisions contained in COBRA.

On November 1, 1996, an employee of Shapiro & Kreisman mailed a "Termination and COBRA Initiation Form" to Allied to advise Allied of a "Qualifying Event" so that Allied could issue a COBRA notification letter to plaintiff.[7] Plaintiff contends, without any evidentiary basis, that the Termination and COBRA Initiation Form contained his former address, 40 West Azalea Lane, due to the reckless or intentional conduct of defendants through the acts of Ms. Carman. On the other hand, defendants claim that plaintiff's former address was placed on this form inadvertently.

Nevertheless, Allied, in response to having received the Termination and COBRA Initiation Form on or about November 4, 1996, mailed separate COBRA notices dated November 15, 1996 to plaintiff and his wife at 40 West Azalea Lane in Mount Laurel,

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7. As will be described in greater detail below, a plan administrator must provide sufficient notice of COBRA rights to a covered employee and qualified beneficiaries upon the occurrence of a "qualifying event." 29 U.S.C. § 1166(a)(4). The termination of the covered employee's employment is a qualifying event. 29 U.S.C. § 1166(2). In this case, the parties agree that plaintiff's termination on October 28, 1996 was a qualifying event and that plaintiff was a covered employee, thus entitling him to notice of his COBRA rights.

New Jersey.[8] Since these notices were sent to plaintiff's former address, plaintiff and his wife did not receive these notices.

Although plaintiff did not receive his COBRA notice due to the incorrect address provided to Allied, plaintiff received a letter dated November 6, 1996 from Shapiro & Kreisman's counsel at his correct address - 1 East Cooper Avenue. This letter informed plaintiff that Shapiro & Kreisman was addressing the ethical concerns raised by plaintiff's letter dated October 28, 1996. Plaintiff also received his last paycheck from Shapiro & Kreisman at his correct address - 1 East Cooper Avenue.

On December 2, 1996, plaintiff sent a letter to Ms. Carman of the Berwyn office, informing Ms. Carman that he and his wife had not yet received their COBRA notices. In this letter, plaintiff informed Ms. Carman that he and his son did not have medical coverage, and that "it is imperative that you immediately contact the appropriate individual/administrator to mail (telecopy) the insurance information (including premium amount) to my attention." (Pl.'s Ex. P). Although defendants admit that they received this letter, there is no evidence to suggest that Ms. Carman contacted the plan administrator to ensure that the appropriate COBRA notices were sent to plaintiff and his wife.

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8. On Monday, November 4, 1996, plaintiff commenced employment with another law firm. Plaintiff's new employer did not provide major medical insurance. Nevertheless, plaintiff's new employer did inform plaintiff that it would reimburse him for his insurance premium and suggested that he obtain group major medical insurance coverage through the Philadelphia Bar Association.

On December 24, 1996, plaintiff, not yet having received a response to his letter dated December 2, 1996, sent by overnight mail his enrollment application to Colburn Insurance Company with a check for the first month premium to obtain Blue Cross/Blue Shield health insurance coverage for himself and his son beginning on January 1, 1997.

Plaintiff alleges that on or about December 26, 1996, he developed a serious medical condition - a bleeding cyst on his back - which required urgent medical attention. On December 27, 1996, plaintiff contacted the doctor's office to schedule an appointment in the first week of January 1997. On or about December 30, 1996, plaintiff was contacted and advised by the Colburn Insurance Company that Blue Cross/Blue Shield had closed new applications for enrollment for January 1, 1997 and that insurance coverage for plaintiff and his son would not commence until February 1, 1997. Plaintiff subsequently contacted the doctor's office and rescheduled his appointment with the doctor to February 7, 1997.

On January 7, 1997, plaintiff's spouse, Lauren Fox, received her COBRA notification letter. This letter was dated November 15, 1996, but was placed in an envelope that was postmarked January 2, 1997. The letter informed Mrs. Fox that "[y]ou and your covered family members, if any, may, [], elect to continue coverage" under the LOGS National Benefit Plan pursuant to COBRA. (Pl.'s Ex. N). The letter stated that, if Mrs. Fox wished to continue coverage, she had to complete the forms

attached to the letter and return these forms within 60 days of the date of the letter or the date coverage is lost. A form attached to the letter set forth the premium amounts due, and the letter indicated that the premium amounts were due on the first day of each month with a 30-day grace period. Allied also attached a COBRA Continuation Coverage Notice to the letter, outlining her rights and obligations under COBRA in greater detail. Because Mrs. Fox was covered by her own policy of insurance, she did not elect to continue coverage for herself or plaintiff's son.

Plaintiff, unlike Mrs. Fox, did not receive a separate COBRA notification letter. Nevertheless, plaintiff admits that he read the COBRA notification letter that was sent to Mrs. Fox. Despite the fact that plaintiff did not receive his COBRA notification letter, plaintiff did not contact either Shapiro & Kreisman or Allied to ascertain why he had not received his COBRA notification letter at the same time that his wife received her letter. At his deposition, plaintiff testified that he did nothing to further inquire about obtaining medical insurance for himself or his son or to elect such coverage under COBRA because his name did not appear on the January 2, 1997 envelope or on the COBRA notice contained in the envelope. (Pl.'s Dep. at 163-64).

Near the end of January 1997, plaintiff was advised by Colburn Insurance Company that due to a clerical problem, plaintiff would not be eligible for medical coverage on February 1, 1997 and was advised that his coverage would not commence

until March 1, 1997. Plaintiff rescheduled his appointment with the doctor to March 1997.

During the month of February 1997, plaintiff contacted Shapiro & Kreisman to inform the firm that he had not yet received his mail or his W-2 Form. Admittedly, plaintiff did not mention his failure to receive his COBRA notice in this letter. In response to plaintiff's letter, Shapiro & Kreisman sent a copy of plaintiff's W-2 Form to plaintiff's address at 1 East Cooper Avenue by overnight mail.

On March 25, 1997, plaintiff finally had surgery to remove the cyst from his back. The biopsy of the cyst was benign. The cost of this procedure was covered by the insurance plan that was obtained through the Colburn Insurance Company. In June 1997, plaintiff received a letter from Allied, addressed to Plaintiff's correct address, regarding documentation of health coverage. Plaintiff never contacted Allied at that time to raise any claim that he had regarding any COBRA notice.

Nevertheless, on October 1, 1997, plaintiff sent a letter to Gerald Shapiro and David Kreisman informing them that he had never received his COBRA notice. In this letter, plaintiff informed Shapiro and Kreisman that they were in violation of COBRA. Plaintiff claimed that Shapiro & Kreisman failed to provide him and his son with COBRA notice as required by 29 U.S.C. § 1166 and that Shapiro & Kreisman failed to respond to his request for information about continuation of health benefits in violation of 29 U.S.C. § 1132(c). Plaintiff stated

that defendants would be subject to penalties under ERISA and COBRA in the amount of $120,033.50 based on the noted violations. Finally, plaintiff requested proof from Shapiro and Kreisman that proper notice was provided to him regarding his COBRA rights.

By letter dated October 20, 1997, defendants advised plaintiff that plaintiff was provided with proper COBRA notice. Because plaintiff did not elect coverage, defendants informed plaintiff that his "right to elect coverage under COBRA was . . . forfeited." By letter dated November 4, 1997, Mitchell Wilneff, General Counsel of Allied, advised plaintiff that plaintiff and his spouse were provided with COBRA notification letters dated November 15, 1996. Wilneff advised plaintiff that Allied did not have a copy of the "green card" because the customary practice of Allied was to mail these notices by certified mail.

Mr. Wilneff included a copy of the COBRA notification letters allegedly provided to plaintiff and plaintiff's spouse. These letters, curiously, are dated November 15, 1996 and are identical to the letter received by Mrs. Fox on January 7, 1997, with one glaring exception - the letters that Wilneff provided to Fox in November 1997 had the 1 East Cooper Avenue address on these letters. In striking contrast, the letter dated November 15, 1996 which was received by Mrs. Fox on January 7, 1997 had the 40 West Azalea Lane address on it.

In response to Wilneff's letter, plaintiff filed the instant action. In his Complaint, plaintiff claims that defendants violated ERISA by failing to provide him with a COBRA

notification letter pursuant to 29 U.S.C. § 1166. In addition, plaintiff claims that defendants failed to respond to a valid request for information in violation of 29 U.S.C. § 1132(c)(1)(B). Plaintiff seeks damages in the form of statutory penalties under § 1132(c)(1)(A) and (B).

The parties now cross move for summary judgment. Plaintiff argues that the undisputed facts demonstrate that defendants violated ERISA and its COBRA amendments by failing to provide him with a COBRA notice and by failing to respond to a request for information. Plaintiff moves for judgment on these claims and asks the Court to assess statutory penalties against defendants. In addition, plaintiff seeks to enjoin defendants from engaging in any further violations of ERISA and to compel defendants to send him his COBRA notice.

Defendants argue that they are entitled to summary judgment because: (1) Allied acted in good faith at all times in sending out COBRA notices to plaintiff; (2) neither plaintiff nor his family suffered any injury as a result of the innocent error which took place in sending out the COBRA notices; (3) plaintiff was notified of and was aware of his COBRA rights; (4) The LOGS Group, L.L.C. acted in good faith at all times; (5) defendants Shapiro & Kreisman, David Kreisman and Gerald Shapiro are not plan administrators for purposes of 29 U.S.C. § 1132(c); and (6) plaintiff should be barred from recovery because he knowingly delayed bringing this lawsuit for nearly one year after he learned of his COBRA rights through a COBRA notice which was

received by his wife and which was applicable to all of plaintiff's family. The Court will address the issues raised by the parties seriatim.

II. Summary Judgment Standard

The standards by which a court decides a summary judgment motion do not change when the parties file cross motions. Southeastern Pa. Transit Auth. v. Pennsylvania Pub. Util. Comm'n, 826 F. Supp. 1506 (E.D. Pa. 1993). A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Electric Co., 862 F.2d 56, 59 (3d Cir. 1988). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The evidence presented must be viewed in the light most favorable to the nonmoving party. Id. at 59.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go

beyond its pleading and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322).

Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322). The nonmovant must specifically identify evidence of record, as opposed to general averments, which supports his claim and upon which a reasonable jury could base a verdict in his favor. Celotex, 477 U.S. at 322. The nonmovant cannot avoid summary judgment by substituting "conclusory allegations of the complaint . . . with conclusory allegations of an affidavit." Lujan v. National Wildlife Found., 497 U.S. 871, 888 (1990). The motion must be denied only when "facts specifically averred by [the nonmovant] contradict facts specifically averred by the movant." Id.

III. Discussion

A. COBRA Overview

COBRA requires that an employer provide an employee with the option of electing continuation coverage under the same

terms of the employer's health plan after some qualifying event which would otherwise end the employee's health insurance coverage. 29 U.S.C. § 1161. The continuation period must last for at least eighteen months. 29 U.S.C. § 1162(2)(A)(i). Among the qualifying events, and the one relevant to this case and not disputed, is termination of employment. 29 U.S.C. § 1163(2). Section 1163(2) specifically states that "termination . . . of the covered employee's employment" is a qualifying event. 29 U.S.C. § 1162. Here, there is no dispute that a "qualifying event" occurred when plaintiff was terminated on October 28, 1996.

Once, as here, it is determined that a qualifying event has occurred, COBRA requires employers to provide notice to the covered employee and all qualified beneficiaries informing them that continued health care coverage under their current plan is an option. See 29 U.S.C. § 1165(1)(B). The covered employee or qualified beneficiary has no right to employer subsidization of his health insurance; instead, should he choose to participate in the previous plan, he must pay his own insurance premiums at a cost not to exceed 102% of the employer's cost. 29 U.S.C. § 1162(3); see also Paris v. Korbel & Brothers, Inc., 751 F. Supp. 834, 837 (N.D. Cal. 1990); Phillips v. Riverside, Inc., 796 F. Supp. 403, 406 (E.D. Ark. 1992).

The United States Court of Appeals for the Eleventh Circuit has offered the following explanation of COBRA:

> Congress enacted COBRA because it was concerned about the fate of individuals who, after losing coverage under their employer's ERISA plan, had no group health coverage at all. Continuation coverage would afford these individuals group health coverage until they were able to secure some other coverage. Recognizing the substantial costs continuation coverage would place on employer-operated ERISA plans, and thus beneficiaries of these plans, Congress did not make continuation coverage infinite in duration. Instead, Congress, under ERISA, gave beneficiaries a maximum period of either eighteen or thirty-six months of continuation coverage, a reasonable length of time for most to secure other group health coverage.
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> Additionally, Congress provided for certain termination events. One such event is the beneficiary's obtention of other group health coverage. This provision is consistent with the goals of COBRA. Some beneficiaries are able to obtain new coverage in less than eighteen or thirty-six months. When these individuals obtain their new coverage, coverage under their former ERISA plan is unnecessary. In these cases, Congress' goal has been served--the employee has group health coverage . . . ."

National Companies Health Benefit Plan v. St. Joseph's Hospital of Atlanta, Inc., 929 F.2d 1558, 1569-70 (11th Cir. 1991).

B. COBRA Notice

The plan administrator must provide sufficient notice of COBRA rights on two distinct occasions. First, the plan administrator must provide notification of COBRA rights to covered employees and their spouses at the commencement of plan coverage. 29 U.S.C. § 1166(a)(1). Second, the occurrence of a qualifying event prompts the additional notification of COBRA rights. 29 U.S.C. § 1166(a)(4). In the event of employment termination, the employer must notify the plan's administrator that a qualifying event has occurred within 30 days of that event. 29 U.S.C. § 1166(a)(2). The plan administrator, in turn,

is required to notify the covered employee and all qualifying beneficiaries of their COBRA rights within 14 days. 29 U.S.C. § 1166(a)(4).

In this case, a qualifying event occurred when plaintiff was terminated on October 28, 1996. Thus plaintiff's employer had until November 27, 1996 to notify the plan administrator, The LOGS Group, L.L.C. that plaintiff incurred a qualifying event. In turn, The LOGS Group, L.L.C. was required to notify plaintiff of his COBRA rights within 14 days of the date on which it was notified by the employer. Shapiro & Kreisman, in fact, notified The LOGS Group, L.L.C. of the qualifying event incurred by plaintiff on November 4, 1996, thus satisfying its obligation under § 1166(a)(2). After receiving this notification, The LOGS Group, L.L.C. had until November 18, 1996 to notify plaintiff and his wife, a qualified beneficiary, of their rights under COBRA.

In an attempt to comply with its obligations under COBRA, Allied on behalf of The LOGS Group, L.L.C. sent both plaintiff and Mrs. Fox separate COBRA notification letters dated November 15, 1996. However, unbeknownst to Allied, these letters were sent to plaintiff's former address at 40 West Azalea Lane. Consequently, plaintiff and his wife never received these notices. Allied attempted to confirm delivery of these letters to plaintiff and his wife, but was unable to do so. Therefore there exists no dispute that plaintiff and his wife did not receive their COBRA notices by the statutory-required date of

November 18, 1996. Consequently, as of November 19, 1996, The LOGS Group, L.L.C. was in violation of § 1166(a)(4) & (c).

In an apparent attempt to rectify their technical violation, Allied remailed only Mrs. Fox's COBRA notice to plaintiff's correct address - 1 East Cooper Avenue. On January 7, 1997, Mrs. Fox received a letter addressed to her from Allied which provided Mrs. Fox with notice of her COBRA rights. The letter was dated November 15, 1996 and had plaintiff's former address on it, thus lending support to defendants' position that the letter was originally mailed on November 15, 1996 to plaintiff's former address at 40 West Azalea Lane. Although plaintiff subsequently read the letter addressed to Mrs. Fox, he did not receive his own COBRA notification letter.

Based on the LOGS Group, L.L.C.'s failure to send him a separate COBRA notification letter, plaintiff asks this Court to assess a statutory penalty of $100 per day against all defendants. See 29 U.S.C. § 1132(c)(1)(A). Section 1132(c)(1)(A) provides that any administrator "who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary . . . may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper." 29 U.S.C. § 1132(c)(1)(A). Believing that the undisputed facts demonstrate that defendants

were in violation of § 1166, plaintiff asks the Court to assess the maximum penalty of $100 a day from November 12, 1996 to December 5, 1997 - a period of 388 days, totaling $38,000.

Defendants Shapiro & Kreisman, David Kreisman and Gerald Shapiro argue as a threshold matter that they cannot be liable because they are not plan administrators. The Court agrees. Section 1132(c) specifically provides for liability only against a plan administrator. Under § 1002(16)(A)(i) the term administrator is defined as "the person specifically so designated by the terms of the instrument under which the plan is operated . . . ." 29 U.S.C. § 1002(16)(A)(i). Here, the Plan designates the LOGS National Benefit Plan as the plan administrator; the name of the plan administrator was changed in the May 1, 1997 summary plan description booklet to The LOGS Group, L.L.C. Thus, at the time of the violation in this case, the only plan administrator was The LOGS Group, L.L.C. As a result, the only defendant subject to liability under § 1132(c)(1)(A) is The LOGS Group, L.L.C. The Court thus will grant summary judgment in favor of defendants Shapiro & Kreisman, David Kreisman and Gerald Shapiro on plaintiff's § 1132(c)(1)(A) claim. Because this same reasoning applies with equal force to plaintiff's § 1132(c)(1)(B) claim, the Court will also grant summary judgment in favor of defendants Shapiro & Kreisman, David Kreisman and Gerald Shapiro on this claim.[9]

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9. Under § 1132(c)(1)(B) an administrator:

(continued...)

The remaining defendant, The LOGS Group, L.L.C.[10] advances the argument that a penalty should not be assessed against it pursuant to § 1132(c)(1)(A) because plaintiff was provided with notice of his COBRA rights when he read his wife's COBRA notification letter. In essence, defendant argues that a plan administrator can satisfy the requirements of § 1166(4) by establishing that the covered employee or the qualified employee, which ever the case may be, had knowledge of their COBRA rights despite never receiving the statutory-mandated notice under § 1166. The Court disagrees with defendant's position. In order

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9. (...continued)

> who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion by personally liable to such participant or beneficiary in the amount of $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1)(B). This section, just as with § 1132(c)(1)(A), only subjects the administrator to liability. Thus, the only defendant which is subject to potential liability under this section is The LOGS Group, L.L.C. - the plan administrator.

10. Although plaintiff has sued both the Plan and The LOGS Group, L.L.C., plaintiff has actually sued the same party. As noted above, the Plan was the original plan administrator; however, the name of the plan administrator was changed in the May 1, 1997 summary plan description booklet to The LOGS Group, L.L.C. Therefore, the Court will simply refer to the plan administrator as The LOGS Group, L.L.C.

to accept defendant's position, the Court would have to ignore the plain language of § 1166.

Under § 1166, the plan administrator has 14 days from the time it receives notification from the employer that a covered employee has incurred a qualifying event to notify the employee and any qualified beneficiary of their rights under COBRA. See 29 U.S.C. § 1166(a)(4) & (c). There is no language in § 1166 that would indicate that the plan administrator can satisfy its obligation to notify a covered employee or qualified beneficiary, or both, by demonstrating that these persons had knowledge of their rights under COBRA.

Indeed, many courts have already rejected this precise argument. In this regard, the United States Court of Appeals for the Sixth Circuit has recently explained that "'[a]n employee's knowledge of his COBRA rights does not relieve the plan administrator of its notification duties . . . . [T]he statute does not make the duty to notify dependent upon an employee's knowledge . . . .'" McDowell v. Krawchinson, 125 F.3d 954, 960 (6th Cir. 1997) (quoting Mlsna v. Unitel Communications, Inc., 41 F.3d 1124, 1129 (7th Cir. 1994) (citing Phillips, 796 F. Supp. at 409)).

Rejecting an argument raised by the defendants in McDowell, an argument which is similar to an argument raised by the defendants in this case, the Sixth Circuit stated that:

> Defendants urge this court that to require actual notice to Sidovar would turn COBRA into a "technical labyrinth"; to the contrary, we believe that the clear

> language of the statute not only mandates actual notice, but establishes a simple requirement that will not mire plan administrators and courts in fact-specific inquiries as to whether a covered employee actually notified the covered spouse, whether that notification adequately informed the spouse of his or her rights, and so on.

Id.

The Court finds that the reasoning used by the McDowell court applies with equal force to this case. It is simply irrelevant to this Court's determination - as to whether the plan administrator satisfied the notice requirements of § 1166(a)(4) and (c) - that plaintiff may have read the COBRA notification letter that was sent to his spouse. The statute mandates that the plan administrator notify the covered employee of his COBRA rights upon the happening of a qualified event. In this case, The LOGS Group, L.L.C. failed to do so; thus it was, and still is, in violation of § 1166. If the Court were to find that plaintiff's knowledge of his COBRA rights was sufficient to satisfy the plan administrator's obligation under § 1166, the plain language of § 1166 would be ignored and the purpose behind this language - establishing a simple requirement of notice - would be frustrated. This the Court will not do.

Although the Court finds that The LOGS Group, L.L.C. was in violation of § 1166, this finding does not require the Court to impose a penalty against The LOGS Group, L.L.C. under § 1132(c)(1)(A). Indeed, § 1132(c)(1)(A) specifically states that the court may in its discretion impose a penalty of up to $100 a day against the administrator. 29 U.S.C. § 1132(c)(1)(A); see

Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1148 (3d Cir. 1993). In determining whether to assess a penalty under this section, the court's discretion should usually be confined to a determination of whether any mitigating circumstances exist to excuse the administrator's inaction. See Underwood v. Fluor Daniel, Inc., 106 F.3d 394 (4th Cir. 1997). It is also clear that the Court can assess a statutory penalty even if the plaintiff has not demonstrated any prejudice because the purpose of § 1132 was to punish benefit plan administrators for failing to comply with their statutory obligations. Porcellini v. Strassheim Printing Co., 578 F. Supp. 605, 612 (E.D. Pa. 1983).

Applying these general principles to the matter sub judice, the Court finds that neither party is entitled to summary judgment on this issue because there exists a genuine issue of material fact. On the one hand, The LOGS Group, L.L.C. persuasively argues that there should be no penalty, or a modest one at most, because its failure to notify plaintiff of his rights under COBRA was due to inadvertence - mailing the notices to the incorrect address. On the other hand, plaintiff notes that The LOGS Group, L.L.C. did have its correct address on file and that an inference can be drawn that defendant may have mailed the COBRA notification letters to the incorrect address because of prior animosity between the employees of the Berwyn office and plaintiff. In addition, plaintiff has raised a question of fact as to whether he was unable to secure certain medical treatment due to the fact that he did not have medical insurance; if

plaintiff is able to establish at trial that he did not receive medical treatment due to defendant's failure to provide him with notice of his COBRA rights, then the Court could impose a penalty based on the fact that plaintiff was prejudiced by defendant's conduct. However, because the Court cannot determine as a matter of law that it should impose a penalty on defendant for a violation of § 1166, the Court will deny defendants' and plaintiff's summary judgment motion with respect to this issue.

Although the Court will deny the parties' motions with respect to this issue, the Court will define the potential fine period in order to frame this issue for the parties. As an initial matter, the Court finds that any fine that may eventually be imposed under § 1132(c)(1)(A) shall begin to run on November 19, 1996.[11] The fine period will end on February 28, 1996 - the day before plaintiff and his son obtained group health insurance through Blue Cross/Blue Shield. As the court in National Companies explained, an employer is not required to provide continuation coverage to a former employee after that employee obtains other group health coverage after the election period. In this case, plaintiff obtained other group health insurance for himself and his son on March 1, 1997, which was after his election period. If the Court were to impose a penalty on

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11. In this case, the plan administrator admits that it received notification of plaintiff's termination on November 4, 1996. The LOGS Group, L.L.C. had until November 18, 1996 to provide plaintiff with notice of his COBRA rights. Thus, The LOGS Group, L.L.C. was in violation of § 1166 and subject to a penalty under § 1132(c)(1)(A) for every day after November 18, 1996.

defendant after February 28, 1996, it would simply be awarding a windfall to plaintiff. Thus, the Court will not impose any potential penalty beyond February 28, 1997.

C. Request for Information

Plaintiff also seeks a penalty under § 1132(c)(1)(B) based on The LOGS Group, L.L.C.'s alleged failure to respond to a request for information pursuant to Section 1132(c)(1). Under Section 1132(c)(1), an administrator:

> who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1)(B).

Plaintiff, here, claims that The LOGS Group, L.L.C. failed to respond to his request for information about his right to continue coverage under Shapiro & Kreisman's health plan. By letter dated December 2, 1996, plaintiff advised Shapiro & Kreisman that he had never received his "notice to extend (continue) [his] current medical coverage for [himself] and [his] son . . ." In this letter, plaintiff advised defendant Shapiro & Kreisman that: "neither my son nor myself have any medical coverage, and it is imperative that you immediately contact the appropriate individual/administrator to mail (telecopy) the

insurance information (including premium amount) to my attention."

The evidence clearly demonstrates that The LOGS Group, L.L.C. did not respond to plaintiff's request for information about continued health coverage. Although Mrs. Fox received her COBRA notification letter on January 7, 1997, plaintiff never received such a letter. Thus, his request for information about his right to continue health coverage was never responded to by The LOGS Group, L.L.C. Because of this failure to respond, plaintiff asks this Court to impose a penalty of $100 a day against defendants.

In defense, The LOGS Group, L.L.C. does not argue that it responded to plaintiff's specific request for information. Instead, it argues that plaintiff is not entitled to a penalty under § 1132(c)(1)(B) because this section simply does not provide a remedy to employees or qualified beneficiaries who have not received a COBRA notice pursuant to § 1166. In essence, defendant argues that the sole relief available to individuals who have not received their COBRA notices is to seek a penalty under § 1132(c)(1)(A). Defendant claim that the purpose of § 1132(c)(1)(B) is to provide relief to plan participants and beneficiaries who otherwise cannot obtain relief against an administrator who refuses to provide them with information such as a summary plan description or benefit information. Because employees and beneficiaries can seek relief under § 1132(c)(1)(A) for a violation of § 1166, defendant claims that § 1132(c)(1)(B)

is simply not available to individuals seeking relief based on their plan administrator's failure to send them a notice pursuant to § 1166.

Unlike defendant, the Court does not read § 1132(c)(1) so narrowly. There is no language in § 1132(c)(1) that suggests that an administrator is exempt from penalties under § 1132(c)(1)(B) when an administrator has failed to send a COBRA notice pursuant to § 1166 to an employee or beneficiary and has also failed to respond to a subsequent request from the employee or beneficiary for the information that would be contained in the § 1166 notice. Reading the plain language of § 1132(c)(1) objectively, the Court finds that an employee or beneficiary, who has not received the notice required under § 1166 and who subsequently requests the information that would be contained in the § 1166 notice, may seek penalties under both § 1132(c)(1)(A) and (B) based on the administrator's failure to send the initial § 1166 notice and the administrator's independent failure to respond to a request for this very same information.

Section 1132(c)(1)(A) clearly permits courts to assess a penalty against a plan administrator who has failed to comply with the initial notice requirements of § 1166 - the obligation to send covered employees and qualified beneficiaries information about their right to elect continued coverage under their former employer's health plan. This subsection acts as incentive for administrators to immediately inform covered employees and qualified beneficiaries of their COBRA rights. If plan

administrators fail to comply with their obligations under § 1166, then they are subject to penalties under § 1132(c)(1)(A).

Section 1132(c)(1)(B) acts as a similar, yet distinct, incentive for administrators. This section allows courts to impose a penalty against plan administrators who fail or refuse to comply with a request for any information which such administrator is required by Subchapter I of ERISA, which includes § 1166, to furnish to a participant or beneficiary. This subsection was enacted to ensure that employers supply participants and beneficiaries with the information that they are entitled to under Subchapter I of ERISA. The plain language of this subsection plainly covers a request for information that administrators are required to furnish to participants and beneficiaries under § 1166.[12] Thus, the Court rejects defendant's argument that plaintiff cannot seek a penalty under § 1132(c)(1)(B) based on The LOGS Group, L.L.C.'s failure to respond to plaintiff's letter dated December 2, 1996.

As stated above, whether the Court awards plaintiff monetary damages under 29 U.S.C. § 1132(c)(1) is a matter of

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12. The Court also notes that specific language in § 1132(c)(1) supports this Court's reading of this section. The last sentence of § 1132(c)(1) states that: "[f]or purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation." This sentence plainly indicates that separate violations that may deal with the same subject matter should be treated as independent violations as long as they are in violation independently of subparagraph (A) and (B).

discretion. Hennessy v. Federal Deposit Ins. Corp., 58 F.3d 908, 924 (3d Cir. 1995). In deciding whether to assess a penalty under § 1132(c)(1)(B), others courts have considered such factors as "bad faith or intentional conduct on the part of the administrator, the length of the delay, the number of requests made, the documents withheld, and the existence of any prejudice to the participant or beneficiary." Pagovich v. Moskowitz, 865 F. Supp. 130, 137 (S.D.N.Y. 1994). In this case, because the Court finds that genuine issues of material fact exist with respect to at least some of the factors mentioned above, the Court will deny both plaintiff's and defendants' Motions for Summary Judgment with respect to this issue.

However, the Court will define the relevant fine period in order to provide guidance to the parties as they prepare for trial. Plaintiff sent his letter on December 2, 1996. Defendants, thus, had until January 2, 1997 to respond to plaintiff's request for information; consequently, defendant is subject to a potential fine for each day past January 2, 1997. The fine period, however, concludes on February 28, 1996. As noted above, plaintiff and his son obtained health insurance coverage beginning on March 1, 1997. Thus any penalty that would be imposed past February 28, 1996 would be a windfall to plaintiff. Thus the Court will close the potential fine period on February 28, 1997.

D. Injunctive Relief

Although plaintiff seeks injunctive relief against defendants, seeking an order compelling defendants to provide plaintiff with his COBRA notice, the Court finds that this issue is moot because plaintiff has testified that he would not elect such coverage. Thus, the Court enters summary judgment in favor of defendants and against plaintiff on Count III of plaintiff's Complaint.

IV. Conclusion

Accordingly, for the foregoing reasons, the Court will deny plaintiff's Motion. The Court will grant in part and deny in part defendants' Motion for Summary Judgment. The Motion is granted to the extent that defendants seek dismissal of plaintiff's claims against defendants Shapiro & Kreisman, David Kreisman and Gerald Shapiro; the Motion is also granted to the extent that defendants seek summary judgment on Count III of plaintiff's Complaint. The Motion, however, is denied in all other respects.

An appropriate Order follows.

Clarence C. Newcomer, J.

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

CHRISTOPHER J. FOX	:	CIVIL ACTION
	:	
v.	:	
	:	
LAW OFFICES OF SHAPIRO & KREISMAN, et al.	:	NO. 97-7393

O R D E R

AND NOW, this day of April, 1998, upon consideration of the following Motions, and any responses thereto, it is hereby ORDERED that:

1. Plaintiff Christopher J. Fox's Motion for Summary Judgment is DENIED; and

2. Defendants' Motion for Summary Judgment is GRANTED in part and DENIED in part. The Motion is granted to the extent that defendants seek dismissal of plaintiff's claims against defendants Shapiro & Kreisman, David Kreisman and Gerald Shapiro; the Motion is also granted to the extent that defendants seek summary judgment on Count III of plaintiff's Complaint. The Motion, however, is denied in all other respects.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.