JAMES ALLAN MIDDLETON, JR., and JULIE T. MIDDLETON,
Plaintiffs,

v.

THE RUSSELL GROUP, LTD. (formerly ADS, Inc.) and BROOKE LICENSING, Defendants.

2:95CV00630

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

February 23, 1998, Decided

February 23, 1998, Filed

COUNSEL:
For JAMES ALLAN MIDDLETON, JR., JULIE T. MIDDLETON, plaintiffs: J. DAVID JAMES, SMITH JAMES ROWLETT COHEN, GREENSBORO, NC.

For RUSSELL GROUP, LTD., THE, BROOKE LICENSING, defendants: JACK W. FLOYD, ROBERT VICKERS SHAVER, JR., FLOYD AND JACOBS, L.L.P., GREENSBORO, NC.

JUDGES:
P. Trevor Sharp, U.S. Magistrate Judge.

OPINIONBY:
P. Trevor Sharp

OPINION:

MEMORANDUM OPINION AND ORDER

SHARP, Magistrate Judge

This matter came before the court for a bench trial on February 9, 10, and 11, 1998. In this action, Plaintiffs James Allan Middleton, Jr. and Julie T. Middleton allege that Defendants The Russell Group, Ltd. ("Russell Group") and Brooke Licensing ("Brooke") failed and refused to notify Plaintiffs of their right to elect continuation coverage for health care benefits as required by the Comprehensive Omnibus Budget Reconciliation Act ("COBRA"). The Middletons allege that as a result of the Defendants' failure, they are each entitled pursuant to 29 U.S.C. §1132(c)(1) to recover from Defendants $100 per day from and after August 31, 1992. Section 1132(c)(1) provides for the imposition of a penalty of up to $100 per day (per participant or qualified beneficiary) against a party who fails to provide any notice required by COBRA.

The Middletons previously sued the Defendants in the state courts of North Carolina on claims relating to the health care benefits involved in this case. They obtained a judgment which provided, inter alia, that the Middletons were in fact entitled to COBRA notice from both Defendants after termination of the employment of James Middleton with Russell Group in August 1992, and that the Defendants failed to give such notice. These state court findings are binding upon this court, as Defendants concede. (See Defs.' Br. filed December 1, 1997 at 1). Therefore, the central questions for this court under 29 U.S.C. §1132(c)(1) are what amounts, if any, up to $100 per day per Plaintiff, should be imposed against Defendants, and for what period of time.

After hearing the evidence and argument of the parties, the court makes the following findings of fact and reaches the following conclusions of law.

FINDINGS OF FACT

1. Plaintiffs are husband and wife and were married at all times relevant to this action.

2. Defendant The Russell Group, Ltd. is a North Carolina corporation which was originally incorporated under the name ADS, Inc. The Articles of Incorporation for ADS, Inc. were amended in June, 1992 to change the corporation's name to The Russell Group, Ltd. At all times material hereto, Russell Group had over 20 employees.

3. Defendant Brooke Licensing is a North Carolina corporation.

4. On April 27, 1992, Plaintiff James A. Middleton, Jr., ("Middleton") became an employee of Russell Group.

5. Defendant Russell Group provided a group health plan ("the Plan") for its employees through a policy of health insurance issued by Life Insurance Company of Georgia ("LOG") to Defendant Brooke. The Plan is a group health care plan as defined in 29 U.S.C. § 1167(1).

6. During 1992, Defendant Russell Group was owned by Charlie Russell. Charlie Russell also owned and was the president of Defendant Brooke.

7. Under its employment agreement with Middleton, Russell Group agreed that Middleton and his family

would be covered under the health insurance policy covering employees of Russell Group. Middleton reasonably believed that he was covered under the Plan from the first day of his employment.

8. The LOG insurance policy and a Minimum Premium Agreement entered into between Brooke and LOG governed the relationship between Brooke and LOG. Under that arrangement, Brooke established a separate "Medical Bank Account." Russell Group and two other companies made monthly payments into this account based upon the number of employees covered by the Plan at a rate set by LOG. From this account, Brooke paid LOG for administrative services and for premiums. LOG paid covered expenses, either by paying the health care provider or reimbursing the insured patient. LOG was then reimbursed, up to certain limits, by directly drafting the Medical Bank Account.

9. Russell Group and the other two participating companies informed Brooke on a monthly basis of the names of the employees covered by the Plan and whether coverage was individual or family. These lists were used to calculate the total number of insureds from all three companies and the amount of money to be paid to LOG by Brooke on a monthly basis.

10. Between June 26 and July 14, 1992, Middleton signed the necessary forms to enroll his family for health insurance coverage under the Plan. One form he signed specifically authorized Russell Group to deduct from his earnings his share, if any were required, of the health insurance premiums. Middleton was without fault in the failure of Russell Group to either deduct premiums from his earnings or request that Middleton make direct payment of premiums.

11. In July 1992, Russell Group began reflecting on its reports that Middleton was enrolled in the Plan for family coverage and included Middleton and his covered dependents in its calculations of the amount it was to pay to Brooke. Brooke in turn included Middleton and his family in its calculations for premiums it paid to LOG. Brooke made these payments to LOG for three months for medical insurance for Plaintiffs.

12. Middleton was told by Fred Joseph, the insurance agent handling the purchase of the LOG health insurance for Defendants, that Middleton and his family were covered under the LOG policy.

13. Karen Brown was an employee of Russell Group who compiled medical insurance information and forwarded it to LOG. Middleton met with Karen Brown, who had Middleton complete the form to enroll for family coverage under the LOG policy. Brown gave Middleton the medical insurance handbook showing benefits under the LOG medical insurance plan. Brown also gave Middleton the LOG medical insurance plan ID card for him and his family. This card provides in part:

"We at Life of Georgia are happy to welcome you as one of our insureds.

Your medical insurance coverage has been carefully developed and coordinated with your employer to offer benefits which will protect you in the event of catastrophic illness or injury."

14. Karen Brown also entered Middleton and his family's names in her computer listing of individuals covered by medical insurance. The computer listing run on September 18, 1992 showed Middleton and his family as covered.

15. On July 15, 1992, in reliance upon the statements made to him, his agreement with Russell Group, and the various documents given to him, Middleton canceled coverage for himself and his family under a separate medical insurance policy issued by the Guardian. Thereafter, Middleton and his family's only medical insurance coverage was under the Plan.

16. The Middletons timely received an August 5, 1992, "Explanation of Payment" form from LOG which, in connection with a claim for benefits made on behalf of Tripp S. Middleton (son), showed medical insurance coverage by LOG for the Middleton family.

17. Prior to Julie Middleton's accident on September 22, 1992, no one with Defendants or LOG indicated to Plaintiffs in any way that they were not covered under the health insurance policy issued by LOG. Nor were they told that any portion of a health insurance premium was owed by Middleton. Brooke paid the premiums to LOG to cover Middleton and his family.

18. Middleton was terminated, as a cost-cutting measure by Russell Group, from his employment with Russell Group on August 31, 1992.

19. Plaintiffs were each a participant or qualified beneficiary under 29 U.S.C. §1161(a) and thus entitled to notice of a right to elect continuation

coverage under 29 U.S.C. §1161, et seq.

20. On September 22, 1992, Julie Middleton was seriously injured in an accident at her home. The injuries from that accident resulted in her losing a lung and causing her to be hospitalized from September 22, 1992 into January 1993. Julie Middleton's hospital and other medical bills totaled $356,454.61. Of this amount, $341,894.25 was owed to Moses Cone Hospital. None of those bills had been paid as of the date of trial by Defendants or LOG.

21. On September 22, 1992, at the time of Julie Middleton's admission, Cone Hospital called LOG to verify health insurance coverage. LOG referred Cone to Russell Group. Cone Hospital was told by Vicki Hill, an employee of Russell Group, that Julie Middleton was covered. However, some days later, Hill called Cone Hospital and said there was no insurance coverage.

22. At some point shortly after September 22, 1992, Vicki Hill learned that Middleton had been terminated effective August 31, 1992. Hill drafted a letter dated September 25, 1992, notifying Middleton of his right to continuation coverage under the medical insurance plan and attached the appropriate form for Middleton to elect COBRA coverage. Hill testified that she did this because she felt it was the "appropriate or honest thing" to do.

23. After she prepared the September 25, 1992 letter, Vicki Hill discovered that no portion of the premiums had been deducted from the amounts paid by Russell Group for Middleton's services. No one at Russell Group had ever requested direct payment from Middleton. When Hill told this to Charlie Russell, he stated that if Middleton had not paid the premiums, there never was any coverage, and that Middleton was therefore not entitled to any COBRA continuation coverage. This was different treatment than that given to some other employees, including Charlie Russell, in other circumstances. For example, persons on leave who were not drawing paychecks were given an opportunity to make direct payments to keep their insurance in force. On occasion, the premiums for Charlie Russell were not paid by payroll deduction but were simply paid by Russell Group on his behalf to Brooke. Russell would then later compensate Russell Group for the payments Russell Group had made on his behalf. Russell sometimes reimbursed Russell Group on a quarterly basis, but there was at least one occasion when Charlie Russell paid nothing for a whole year, and at the end of the year gave Russell Group a check to cover all of his premiums for the year. The failure of Defendants in 1992 to deduct premiums from Middleton's earnings, as authorized, or to request direct payment from him was not the fault of Plaintiffs, but resulted entirely from the omissions of Russell Group. Russell Group simply failed to properly account for Middleton's payment arrangements, which had been approved by Vance Huneycutt on behalf of Russell Group.

24. Vicki Hill, pursuant to the instructions of Charlie Russell, did not mail to Plaintiffs the September 25, 1992 letter with COBRA election forms. No COBRA notice was ever sent to Plaintiffs.

25. After September 25, Defendants took the position that there was no coverage for Middleton and his family because the premiums for Middleton and his family had not been deducted from his pay or paid by him. Defendants took the position with all medical providers that there was no coverage, and Defendants refused to pay any portion of the medical bills incurred as a result of the injuries to Julie Middleton on September 22, 1992. Defendants then made entries to their internal records to show that Middleton and his family's coverage had ceased as of May 1, 1992, the approximate time of his hire, indicating that he had never been covered.

26. Defendants had an economic motive for refusing to recognize Plaintiffs' coverage and their right to a COBRA notice. Since Julie Middleton had been severely injured and was incurring large medical bills before the expiration of the Defendants' time to give COBRA notice, Defendants were aware that acknowledging coverage and COBRA rights could cost them money in the form of increased insurance premiums in the future.

27. On October 19, 1993, Plaintiffs brought suit against the Defendants and LOG in the state courts of North Carolina. That lawsuit put in issue the insurance coverage issue and, consequently, Defendants' obligation to give a COBRA notice to Plaintiffs.[1] Following trial, judgment was entered on or about September 1, 1995. Appeals from that judgment followed, and the North Carolina Court of Appeals rendered its decision on April 15, 1997. That decision affirmed most of the trial court's decisions, but remanded certain matters to the Superior Court of Guilford County for further action. Further

[1] The state court action did not involve the possible imposition of a penalty against Defendants under 29 U.S.C. §1132(c)(1) since the federal courts have exclusive jurisdiction over claims under that section.

proceedings were held, and the Superior Court of Guilford County entered its final Order and Judgment on February 2, 1998.

28. The Final Order and Judgment of the state court required Defendants and LOG to pay Plaintiffs certain sums so that Moses Cone Hospital and the other medical providers could be paid for the medical services provided to Julie Middleton. The state court found, and this court accepts under principles of issue preclusion, that both Defendants were required to send a COBRA notice to Plaintiffs but failed to do so.

29. The refusal to send the COBRA notice to Plaintiffs severely prejudiced the Plaintiffs and their family. Moses Cone Hospital filed suit against Plaintiffs for the debt owed. To settle that lawsuit, Plaintiffs gave a Note in the full amount owed plus 8% interest per year beginning March 1, 1993 and secured that Note with a Deed of Trust on all property owned by James and Julie Middleton. That Note remains unpaid and the interest continues to accumulate as neither Defendants nor LOG have paid the debt owed to Plaintiffs and Plaintiffs have otherwise been unable to pay Cone Hospital.

30. Soon after Julie Middleton's hospitalization, Middleton was notified that Defendants took the position he had no insurance coverage and that Defendants and LOG refused to pay any of the medical bills incurred by Julie Middleton. Defendants' refusal to send a COBRA notice and thereby allow Plaintiffs to continue health insurance coverage was a significant aggravating factor contributing to James Middleton's present total disability. Middleton has been unable to return to substantial work since Julie Middleton's accident. On June 19, 1995, Middleton was determined by the Social Security Administration to be totally disabled, with a disability onset date of September 22, 1992, as a result of severe anxiety and dysthymia, post-traumatic stress disorder and depression. Although once a successful advertising executive with a substantial income, Middleton is now unable to work, emotionally disabled and dependant upon Social Security benefits and a private disability policy to support himself and his family. His inability to work, coupled with the large debts incurred for Julie Middleton's medical bills, have left Plaintiffs significantly in debt.

31. Middleton's post-traumatic syndrome was caused by his reaction to the traumatic injury to Julie Middleton, but Defendants' failure to give COBRA notice and to extend continuation coverage to the Middletons was, throughout the relevant time period, a significant stressor and aggravating factor that has contributed to the chronic nature of Middleton's severe emotional problems.

CONCLUSIONS OF LAW

1. Pursuant to the Comprehensive Omnibus Budget Reconciliation Act ("COBRA"), 29 U.S.C. §1161, et seq., Plaintiffs were qualified participants or beneficiaries of the group health care plan of Defendants.

2. The termination of the employment of James Middleton on August 31, 1992 was a qualifying event pursuant to 29 U.S.C. §1163(2).

3. Defendants failed and refused to notify Plaintiffs of their right to elect continuation coverage as required by 29 U.S.C. §1166(a) (4) (A).

4. The issues of whether Plaintiffs were qualified participants and/or beneficiaries of the group health care plan of Defendants, whether the termination of James Middleton was a qualifying event pursuant to 29 U.S.C. §1163(2), and whether Defendants were required but failed and refused to notify Plaintiffs of their right to elect continuation coverage under 29 U.S.C. §1166 (a)(4)(A) are identical to issues previously litigated by the parties in the state court action; those issues were actually determined in favor of the Plaintiffs by the state court; those issues were necessarily decided in rendering the state court judgment; the Defendants had a full and fair opportunity to litigate those issues; and the judgment on those particular issues is binding on this court under principles of issue preclusion.

5. The actions of Defendants in refusing to give a COBRA notice were taken in bad faith without legal justification or excuse. Any reasonable investigation by Defendants into the critically important matter of Plaintiffs' right to notice of an election for continuation coverage would have shown that such right existed. LOG had been paid its premiums for coverage of the Middletons, and Plaintiffs had neither failed to authorize deduction of premiums nor refused to pay direct requests for payment. Defendants' failure to make a reasonable investigation and to send to Plaintiffs the COBRA notice actually prepared by Vicki Hill was, under all the circumstances set out in the findings of the court, an act or omission in bad faith.

6. The actions of the Defendants severely prejudiced Plaintiffs.

7. Pursuant to the provisions of 29 U.S.C. §1132(c)(1), each Plaintiff is entitled to receive $100 per day from October 15, 1992 until the filing of the state court action regarding insurance coverage on October 19, 1993. Defendants are jointly and severally liable to Plaintiffs in the total sum of $74,000 ($37,000 to each Plaintiff), plus the taxable costs of this action and such attorney's fees as the court may hereafter allow.

DISCUSSION

This is an action for imposition of a statutory penalty under 29 U.S.C. §1132(c)(1) due to Defendants' failure to give Plaintiffs notice of their right to elect continuation coverage for health care benefits as required by COBRA. The case is somewhat unusual in that most of the elements of Plaintiffs' cause of action were established in a separate action in state court, where the issue of insurance coverage was litigated. The state court determined, in a finding that is entitled to preclusive effect here, that Plaintiffs were covered under Russell Group's Plan at the time James Middleton was terminated from employment by Russell Group in August 1992, shortly before Julie Middleton suffered traumatic injuries that resulted in over $300,000 in medical expenses. The state court further found that Defendants were required to notify the Middletons of their right to elect continuation coverage following Middleton's August 31, 1992 termination, but failed to do so. The court awarded various remedies to the Middletons, including recovery of Julie Middleton's medical expenses; however, the remedy of a statutory penalty under 29 U.S.C. §1132(c)(1) was not before the state court because actions under that statute lie exclusively within the jurisdiction of the federal courts. See 29 U.S.C. §1132(e)(1). Accordingly, Plaintiffs filed this action for imposition of a penalty against Defendants.

It is established for purposes of this action that Defendants were required to give COBRA notice to Plaintiffs but failed to do so. The court, in its discretion, may impose under 29 U.S.C. §1132(c)(1) a penalty of up to $100 per day for each person entitled to notice. The purpose of the penalty provision is to provide plan administrators with an incentive to comply with the law. While determination of the amount of the penalty lies within the discretion of the court, it is well established that the court's discretion should be exercised with particular regard to any bad faith shown by a defendant in failing to give required notice to the plaintiff, and any prejudice suffered by the plaintiff. See e.g. Davis v. Featherstone, 97 F.3d 734 (4th Cir. 1996). In Featherstone, a case involving a section 1132(c) action based on failure to provide plan documents upon request by a participant, the Court of Appeals wrote:

Two factors generally guide a district court's discretion: prejudice to the plaintiff and the nature of the administrator's conduct in responding to the participant's request for plan documents. Although prejudice is a pertinent factor for the district court to consider, it is not a prerequisite to imposing a penalty.

Id. at 738.

In the case at bar, the court is persuaded by the evidence adduced at trial that the Defendants acted in bad faith in failing to give notice to Plaintiffs of their COBRA rights and that Plaintiffs were severely prejudiced by this failure. The maximum penalty the court can impose is $100 per day for each Plaintiff. In the opinion of the court, the maximum penalty is clearly called for in this case. In fact, under either the "bad faith" prong or the "prejudice" prong standing alone, the court would impose the maximum penalty. When both prongs are considered, the maximum penalty is justified several times over.

The court first looks at the issue of bad faith, as this factor is most closely tied to the purpose of the statutory penalty to foster compliance with COBRA requirements by plan administrators. The findings of fact set forth above identify the reasons for the court's finding of bad faith by the Defendants, and the court will not repeat its findings in full at this juncture. The starting point for judging the actions of the Defendants is the court's finding that the Middletons acted reasonably and in good faith in all their dealings with the Defendants with regard to coverage under the health benefit plan of Russell Group. James Middleton's new position with Russell Group in April 1992 was structured in a unique fashion. His earnings as an employee of Russell Group were, by agreement of the parties, paid in a monthly lump sum, without deductions, to his advertising business, Hege, Middleton, and Neal, Inc. Middleton reasonably understood, based upon his own business experience and provisions of the letter agreement between the parties, that Russell Group would pay all premiums for health insurance on his behalf. Russell Group did not have this understanding, but, in actuality, paid the matter of premium payment for Middleton very little attention. For purposes of internal accounting within Russell Group, Middleton was a "round peg in a square hole"

because of his unusual payment arrangement. The payroll department did not issue his paycheck, so no deductions for premiums or other obligations were made by that department. The "Accounts Payable" department was instructed to pay Middleton monthly, but that department had no experience with payroll deductions, so no one in the department recognized any need for deductions or any possible problem concerning Middleton's status under the Plan. The employees in charge of keeping track of insurance matters for Russell Group had Middleton's payroll deduction card, signed by Middleton, and they therefore properly included him in their record of covered employees. Premiums on the Middletons account were paid by Defendants to Life of Georgia. Life of Georgia responded to a claim made by the Middletons under the Plan in July 1992 by acknowledging coverage, although LOG did not pay benefits because of the annual deductible under the policy. In reliance on these repeated assurances of coverage, the Middletons canceled their only other health insurance policy. In light of all of these facts, on August 31, 1992, at the time of the termination of James Middleton by Russell Group, the Middletons had every reason to understand they were covered under the Plan, and absolutely no reason to believe otherwise.

Julie Middleton suffered a catastrophic injury on September 22, 1992. Defendants were informed about the injury almost immediately. Defendants knew she was in critical condition in a hospital emergency room and would likely require a long period of expensive treatment -- if she survived. Under these circumstances, when the question of coverage of the Middletons under the Russell Group Plan came to the specific attention of management of the Defendants, Defendants discovered that no premiums had been deducted from Middleton's pay and he had made no direct payments, and Defendants quickly concluded that he could not be considered covered under the Plan. This was a conclusion in the economic interest of the Defendants but disastrously against the economic interest of the Middletons. Any reasonable investigation of the facts by Defendants, as shown by the findings of both this court and the state courts, would have led to a contrary decision. A plan administrator proceeding in good faith would certainly have recognized coverage. Even if the administrator concluded that Middleton had an independent obligation to reimburse Defendants for premiums paid on his behalf, it is undisputed that he was never asked for such reimbursement. The Defendants had specific authority given by Middleton to deduct from his earnings any premiums that might be due on his behalf. Vicki Hill, personnel manager of Russell Group, clearly saw that Middleton was entitled to COBRA notice and the opportunity to pay premiums directly. This was an opportunity routinely given to other employees, including Charlie Russell, in other circumstances. Hill actually drafted a letter to the Middletons, informing them of their right to continuation coverage upon payment of premiums. Hill asked Charlie Russell if she should mail the letter. Charlie Russell instructed Hill not to mail the letter and COBRA election form. His decision was hasty, without reasonable investigation, in the economic interest of Defendants but against the interest of the Middletons, unfounded under the facts of the case, and clearly wrong.[2] It may be that all of the events and circumstances that brought Defendants to the point of decision regarding coverage (e.g., Middleton's falling between pigeonholes for Russell Group's accounting purposes) resulted from simple negligence on the part of Defendants rather than intentional action, but Defendants' final decision to deny coverage to the Middletons was an act of bad faith, and the court so finds.

The prejudice to Plaintiffs resulting from Defendants' unjustified refusal to give COBRA notice has been enormous. Plaintiffs have suffered much more than the ordinary aggravation and frustration of forcing a recalcitrant party to live up to its legal obligations. The court may consider emotional harm as a factor in assessing the penalty to be imposed under section 1132(c).[3] See Porcellini v. Strassheim Printing Co., 578 F. Supp. 605, 614-15 n.2 (E.D. Pa. 1983) ("a court in its discretion may properly consider any emotional or psychological harm to a participant or beneficiary in exercising its discretion in determining the amount of the award."); See also Curry v. Contract Fabricators Inc. Profit Sharing Plan, 891 F.2d 842, 847-48 n.10 (11th Cir. 1990); Pagovich v.

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[2] Defendants' initial decision was hasty and wrong, as noted. Further, they had ample time to reconsider their position, as they were free to give COBRA notice to Plaintiffs at any time. While Defendants argued at trial that their coverage denial decision was actually controlled by Life Insurance Company of Georgia, they are simply wrong in this regard. Nothing legally constrained them from giving COBRA notice as they should have, and letting LOG take whatever position it wished on the insurance coverage issue.

[3] At the outset of trial the court denied without prejudice Defendants' motion in limine to exclude evidence of emotional or psychological harm to Plaintiff James Middleton. The court now concludes, for reasons set out in the text, that such evidence is admissible. Therefore the court has considered the evidence of emotional and psychological harm presented at trial.

Moskowitz, 865 F. Supp. 130 (S.D.N.Y. 1994); and Garred v. General American Life Ins. Co., 774 F. Supp. 1190 (W.D. Ark. 1991).

Plaintiff James Middleton suffers from post-traumatic syndrome and other psychological conditions. It is true that the Defendants' failure to provide the legally required COBRA notice did not cause this condition; Middleton suffers from the condition as a result of his reaction to the traumatic injury suffered by his wife in September 1992. However, according to the expert testimony of Dr. Irwin A. Lugo, which the court accepts as persuasive, Defendants' failure to comply with the law has been a significant and aggravating factor in the chronic nature of Middleton's disabling condition. Defendants' failure to provide the required COBRA notice has exacerbated Middleton's condition. Dr. Lugo originally believed that Middleton's condition would respond to treatment over a relatively short period of time. That is no longer his opinion. Instead, he opines that the Defendants' legal default has become an aggravating factor that continues to impact Plaintiff's condition and contribute to its chronicity.

Further, the Plaintiffs have suffered significant financial burdens and reversals because they were unable to pay the large medical bills incurred by Julie Middleton. They have substantial debts they did not have in 1992. Their inability to pay obligations as they became due has had a devastating effect upon them; they have been accustomed in the past to timely living up to their financial obligations. The economic distress of the last few years has created difficulties for the entire Middleton family. The prejudice to Plaintiffs in this case is surely at the extreme end of the range of prejudice in reported section 1132(c)(1) cases.

As a final matter, the court must determine the period of time for which the $200 per day penalty will be imposed. The starting date for the penalty is controlled by statute. James Middleton was terminated by Russell Group on August 31, 1992. An employer must inform the administrator of a "qualifying event" (such as termination) within 30 days of its occurrence; the administrator then has 14 days to notify qualified beneficiaries concerning their rights. 29 U.S.C. §§1166(a)(2), (c). Thus, Defendants had through October 14, 1992 to give COBRA notice to Plaintiffs. Since they refused to do so, the penalty against them begins to run on October 15, 1992.

Plaintiffs contend that the penalty against Defendants should continue to run to the date of the judgment in this action since Defendants have never given COBRA notice to Plaintiffs, even to this day. The court finds this argument to be unpersuasive. The state court of appeals noted in 1997 that the Middletons had never received a COBRA notice from Defendants. In affirming the trial court's award of insurance coverage, it stated:

Since the record indicates that Middleton has never received the statutorily required notice . . . the plaintiffs' election period and corresponding duty to pay the premiums have been, and apparently remain, tolled until such notice is provided. However, requiring defendants to now provide the statutorily required notice would be pointless in light of plaintiffs' present action seeking payment under COBRA. Middleton v. The Russell Group, Ltd., 126 N.C. App. 1, 12, 483 S.E.2d 727, 733 (1997). This court similarly finds it pointless to require a COBRA notice after a lawsuit is filed to enforce payment under COBRA. The filing of coverage litigation places the issue of COBRA notice in the bosom of the court; it would make little sense to expect or require the giving of COBRA notice during litigation over whether notice is legally required. Therefore, the court concludes that the appropriate end-date for the penalty period in this case is October 19, 1993, the date Plaintiffs filed the state court action for determination of their entitlement to coverage under the Russell Group Plan. Accord, Phillips v. Riverside, Inc., 796 F. Supp. 403 (E.D. Ark. 1992) (penalty period extended to date of filing of the legal action for enforcement of payments under COBRA); Shade v. Panhandle Motor Serv. Corp., 91 F.3d 133, 1996 WL 386611 (4th Cir. 1996) (unpublished).

The court imposes a penalty of $100 per day per Plaintiff on Defendants from October 15, 1992, through October 19, 1993. Under the court's calculation, the penalty runs for 370 days, and reaches $37,000 for each Plaintiff, $74,000 in total. The taxable costs of this action will follow the judgment against Defendants. Section 1132(g) provides that an award of reasonable attorney's fees is within the discretion of the court. In light of the findings and conclusions herein, the court expects to award attorney's fees to Plaintiffs. The court will withhold entry of judgment until attorney's fees can be awarded. The parties shall follow the procedures set out in LR54.2, with the 60 day period provided for therein commencing with the entry of this Memorandum Opinion and Order.

CONCLUSION

After trial before the court, and for reasons set forth above, IT IS ORDERED that Plaintiffs shall have and recover of Defendants, jointly and severally, the sum of $74,000 ($37,000 to each Plaintiff). Final Judgment is withheld pending consideration of an award of attorney's fees. Taxable costs will follow the judgment.

P. Trevor Sharp, U.S. Magistrate Judge

February 23, 1998