

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

MARTIN KANE, ANNE BRADLEY, LEONARD : CIVIL ACTION
CHEST, THOMAS SCHWEIZER, WILLIAM :
ROBB, JR., and STEVE CASHIN :
: :
: :
v. :
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: :
UNITED INDEPENDENT UNION WELFARE :
FUND, JULIA BRUNO, FRANCIS :
CHIPPARDI, and MARTIN LIPOFF : NO. 97-1505

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

February 23, 1998

This action was brought under the Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. § 1001 et seq., and the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"), 29 U.S.C. § 1132 et seq. Plaintiffs claim insufficient "in-the-door" and "out-the-door" COBRA notices, as well as breaches of fiduciary duty. Before the court is plaintiffs' motion for class certification. The court will certify a class for the counts involving breaches of fiduciary duty, but not for the counts involving COBRA notices.

BACKGROUND

United Independent Union Welfare Fund ("Fund") is an employee welfare benefit plan, created and maintained to provide medical benefits to persons who are members of the United Independent Union ("Union"). The health benefits are provided by contracts between the Fund and certain insurance carriers, including Keystone Health Plan East ("Keystone") and the Fidelio

Group Dental Plan ("Fidelio"). Julio Bruno ("Bruno"), the Plan Administrator, is a fiduciary of the Fund. The Fund's trustees are Francis Chippardi ("Chippardi"), President of the Union and sole union trustee, and Martin Lipoff ("Lipoff"), sole employer trustee.

Martin Kane ("Kane") and Ann Bradley ("Bradley"), members of the Union employed by Accu-Weld, received family medical benefits from the Fund.¹ Kane also received dental benefits from the Fund. The plaintiffs received employee handbooks and subscriber agreements detailing their COBRA rights. Kane and Bradley allege that these handbooks and agreements did not provide sufficient COBRA notice when individuals began employment ("in-the-door" COBRA notice).

On April 24, 1995, Kane was injured in an on-the-job accident. After working light duty for several months, Kane left work on September 8, 1995, and has not returned. In September 1996, when Kane had been out of work for one year, Accu-Weld notified the Fund to terminate Kane's medical and dental benefits, and the Fund did so. After learning his benefits had ended, Kane called the Fund to complain, and the Fund reinstated his benefits. Kane sent a written request for a copy of the

¹ In their second amended complaint, plaintiffs also propose Leonard Chest as class representative. However, in the motion for class certification, plaintiffs state that they will propose to withdraw Leonard Chest ("Chest") as a class representative by a "motion to be submitted." (Pl. Memorandum of Law in Support of Motion for Class Certification, n. 3). The individual facts of Chest's claims will not be discussed in this memorandum on class certification.

Fund's summary plan, but alleges he has not yet received it. On November 12, 1996, the Fund was notified of Kane's resignation by Accu-Weld, and sent Kane an COBRA notice stating his benefits would be terminated on December 1, 1996, unless he notified the Fund he wished to continue his coverage ("out-the-door" COBRA notice). Plaintiffs claim the notice sent to Kane and all other relevant plaintiffs was misleading and did not comply with COBRA notification requirements. See 29 U.S.C. § 1166(a)(4). Kane, allegedly confused by the notice, did not notify the Fund before December 1, 1996, that he wanted his health coverage to continue.

Defendant Bradley was also injured on the job at Accu-Weld, and subsequently received notice that her health benefits would terminate. She claims she was confused and misled by the notice she received, and did not inform the Fund she wanted her coverage to continue. Bradley subsequently received a second notice of her COBRA rights and did not elect coverage.

Plaintiffs also claim that the Fund trustees engaged in prohibited transactions, including: direct payments to the Union, leasing Fund property to the Union, contracting exclusively with the Union as Fund administrator, and allowing the Union to use Fund resources.

Plaintiffs Thomas Schweizer ("Schweizer"), William Robb, Jr. ("Robb"), and Steve Cashin ("Cashin") are Accu-Weld employees and Union members who receive medical benefits from the Fund. Schweizer also receives dental benefits.

Plaintiffs filed an eleven count amended complaint. The

court granted defendants' motion to dismiss several counts under 12(b)(6) in part; defendants subsequent motion for a judgment on the pleadings was also granted in part. The counts remaining are: Count I, an individual claim by Kane against Bruno for failure to provide a summary plan description; Count II, a class claim against Bruno for failure to provide "in-the-door" COBRA notices; Count III, a class claim against Bruno for failure to provide "out-the-door" COBRA notices; Count X, a class claim against Bruno, Chippardi, and Lipoff (collectively, "the trustees") for engaging in transactions prohibited by ERISA; and Count XI, a class claim against the trustees for breaches of fiduciary duties by the other defendants.

Plaintiffs seek to have four classes certified. Under Count II, an "in-the-door" COBRA Class; under Count III, two "out-the-door" COBRA classes (the Keystone Class for individuals who have claims involving medical benefits, and the Fidelio Class for individuals who have claims involving dental benefits); under Counts X and XI, a Prohibited Transaction Class for the claims involving breaches of fiduciary duty.

DISCUSSION

The class-action device was designed as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Califano v. Yamasaki, 442 U.S. 682, 700-701 (1979). Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and

when they "turn on questions of law applicable in the same manner to each member of the class." Id., at 701. In such cases, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." Id. Class certification is used only in certain situations, the court must be "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982).

For class action certification, plaintiffs must meet all four requisites of Rule 23(a) and at least one part of Rule 23(b). Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). Federal Rule of Civil Procedure 23(a) provides that:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
Fed. R. Civ. P. 23(a).

The plaintiff bears the burden of establishing each of these requirements. See Hutchinson v. Lehman, 1995 WL 31616 (E.D. Pa. Jan. 27, 1995); Lloyd v. City of Philadelphia, 121 F.R.D. 246, 249 (E.D. Pa. 1988); see also Anderson v. Home Style Stores, Inc., 58 F.R.D. 125, 130 (E.D. Pa. 1972).

The standard of proof required in support of certification is subject to the discretion of the court. See Patterson v. General Motors Corp., 631 F.2d 476, 480 (7th Cir. 1980), cert. denied, 451 U.S. 914 (1981). Class certification motions are not subject to the same standards as motions for dismissal for failure to state a claim or motions for summary judgment. Hewitt v. Joyce Beverages of Wisconsin, Inc., 721 F.2d 625, 627 (7th Cir. 1983). The court does not have the authority to "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action". Meiresonne v. Marriott Corp., 124 F.R.D. 619, 622 (N.D. Ill. 1989).

I. NUMEROSITY

Class certification is based on necessity. Rule 23 provides a remedy for situations where plaintiffs are so numerous it is impracticable to bring each member before the court. There is no precise number necessary for class certification. The decision of whether or not to certify a class must be based on the particular facts of each case. See, e.g., Fox v. Prudent Resources Trust, 69 F.R.D. 74, 78 (E.D. Pa. 1975).

"While the absolute number of class members is not the sole determining factor, generally the courts have found the numerosity requirement fulfilled where the class exceeds 100." Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 109 (E.D. Pa. 1992) (quoting Fox, 69 F.R.D. at 78); see Kromnick v. State Farm Ins. Co., 112 F.R.D. 124, 126 (E.D. Pa. 1986). "The numerosity

test is one of practicability of joinder." Ulloa v. City of Philadelphia, 95 F.R.D. 109, 115 (E.D. Pa. 1982). See Ardrey, 142 F.R.D. at 110 (citing Andrews v. Bechtel Power Corp., 780 F.2d 124, 131-32 (1st Cir. 1985), cert. denied, 476 U.S. 1172 (1986)); Kilgo v. Bowman Trans., Inc., 789 F.2d 859, 878 (11th Cir. 1986)); MacNeal v. Columbine Exploration Corp., 123 F.R.D. 181, 185 (E.D. Pa. 1988).

According to the plaintiffs, the Count II "in-the-door" COBRA Class includes more than 100 members. The Count III Keystone Class includes more than 100 plaintiffs; and the Count III Fidelio Class is composed of approximately 66 members. Plaintiffs also claim the Prohibited Transactions Class, to be certified under Counts X and XI, consists of over 400 members. Defendants do not contest these numbers, or whether the numerosity requirement is met. Classes of these sizes make joinder impracticable; the numerosity requirement of Fed. R. Civ. P. 23(a) has been met.

II. COMMONALITY and TYPICALITY

Rule 23(a) requires the proposed representative to show the existence not only of "questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), but that the representative's claims are "typical" of the claims for the rest of the class. Fed. R. Civ. P. 23(a)(3). "Although Rule 23 establishes these two prerequisites as separate and distinct, the analyses overlap, and therefore these concepts are often discussed together."

Hassine v. Jeffes, 846 F.2d 169, 176 n.4 (3d Cir. 1988); see Droughn v. F.M.C. Corp., 74 F.R.D. 639, 642-43 (E.D. Pa. 1977). The two requirements merge in that both "serve as guideposts for determining whether under particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." General Tele. Co., 457 U.S. at 158, n. 13.

Rule 23(a) requires that plaintiffs show there are questions of law or fact common to the class. Bishop v. New York City Dep't of Hous. Preservation and Dev., 141 F.R.D. 229, 237 (S.D.N.Y. 1992). "Commonality does not mandate that all class members make identical claims and arguments," Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 198 (S.D.N.Y. 1992), only that the gravamen of the complaint is that defendants injured all class members in the same general fashion. Open Hous. Ctr., Inc. v. Samson Management Corp., 152 F.R.D. 472, 476 (S.D.N.Y. 1993). The mere presence of some asserted factual differences between class members is not necessarily a bar to commonality. Id. at 476; Trief, 144 F.R.D. at 198. "It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." Sprague v. General Motors, 1998 WL 3382, *6 (6th Cir., Jan. 7, 1998). The common issue must significantly advance the litigation. Id.

Typicality, like commonality, is intended as a safeguard to

insure that the named plaintiffs' interests are substantially coextensive with those of the class. Deutschman v. Beneficial Corp., 132 F.R.D. 359, 373 (D. Del. 1990). The court's inquiry focuses on whether there is potential conflict between the claims of the representatives and the other class members. See Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir.), cert. denied sub nom., Weinstein v. Eisenberg, 474 U.S. 946 (1985) (citing Weiss v. York Hosp., 745 F.2d 786, 809 n.36 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985)). The typicality requirement will not be satisfied if the factual and legal positions of the named plaintiffs are markedly different from those of the members of the putative class. Seidman v. American Mobile Sys., 157 F.R.D. 354, 360 (E.D. Pa. 1994). "The named representatives must be able to establish the bulk of the elements of each class member's claims when they prove their own claims." Brooks v. Southern Bell Tel. & Tel. Co., 133 F.R.D. 54, 58 (S.D. Fla. 1990). If defendants' course of conduct gives rise to the claims of all class members, and if defendants have not taken any action unique to the plaintiffs, the representatives' claims are typical. Deutschman, 132 F.R.D. at 373. If, however, the proposed representatives present claims or defenses that are personal to them and likely to be a significant focus of the litigation, typicality has not been satisfied. Patterson v. General Motors Corp., 631 F.2d 476, 481 (7th Cir. 1980), cert denied, 451 U.S. 914 (1981).

A. COBRA Classes for Counts II and III

Whether a sufficient common question exists depends on what plaintiffs need to establish to recover. Under 29 U.S.C. § 1166, the sponsor of a group health plan is required to notify the plan's beneficiaries they are entitled to continue coverage under the plan if they lose coverage as a result of a "qualifying event." 29 U.S.C. S 1166. Courts that have addressed notices required by § 1166 have held that a good faith attempt to comply with a reasonable interpretation of the statute is sufficient. Branch v. G. Bernd Co., 764 F. Supp. 1527, 1534 n. 11 (M.D. Ga. 1991), aff'd, 955 F.2d 1574 (11th Cir. 1991) (validating the method of notice calculated to reach the beneficiary); Jachim v. KUTV Inc., 783 F. Supp. 1328, 1333 (D. Utah 1992) (finding that mailing the notice was a reasonable method of communicating); see also H.R.Rep. No. 453, 99th Cong., 1st Sess. 563 (stating that pending the promulgation of regulation defining what would constitute adequate notice, "employers are required to operate in good faith compliance with a reasonable interpretation" of COBRA's requirements).

In order to prevail on the counts involving the allegedly defective notification, plaintiffs must show that Defendants did not provide "a simple notification that the employee has the right to continued coverage." Hummer v. Sears, Roebuck & Co., 1994 WL 116117, *4 (E.D. Pa. March 21, 1994). The statute does nothing more than require an employer or plan administrator to provide some notice of an employee's COBRA rights. Id.

Both the notice on the bulletin board and the notices

allegedly sent to all participants upon a "qualifying event" under the statute, may have provided a sufficient common question to warrant class certification on whether the notices were defective or misleading. However, plaintiffs' interactions with Bruno were not limited to the bulletin board and the letter alone. "In-the-door" notices were given originally not only by a notice on a bulletin board, but subsequently when new employees received their health plan documents. There is no evidence before the court that the discussions and the oral representations occurring at those times were uniform.

Plaintiffs COBRA claims are similar to those in Spencer v. Central States, Southeast and Southwest Areas Pension Fund, 778 F. Supp. 985 (N.D. Ill. 1991); plaintiffs were a putative ERISA class of union members who claimed that the union had made representations about their claims at 27 different local union meetings. The court denied class certification because the substance and presentation of the plaintiffs' ERISA rights varied from group to group. Similarly, Bruno's representations regarding "in-the-door" notice varied from individual to individual.

If plaintiffs called Bruno, the plan administrator, as was suggested in the "out-the-door" notice, they would also have received individual oral representations. For instance, the parties seem to admit that Leonard Chest, a plaintiff previously proposed as class representative, had various conversations with a plan representative concerning the extent of his COBRA

coverage. Whether any plaintiff received sufficient notice from these additional oral representations is not a common question, but rather an individual fact-specific inquiry. The notices plaintiffs received after beginning employment, or a qualifying event, do not demonstrate sufficient commonality and typicality to justify certification.

District courts have discretion in awarding the statutory penalty of \$100 per day requested by the plaintiffs. Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1148 (3d Cir. 1993). In exercising that discretion, courts have generally looked to the administrator's good faith or lack of it and the plaintiff's prejudice from the administrator's conduct. See, e.g., Kascewicz v. Citibank, N.A., 837 F. Supp. 1312, 1321-22 (S.D.N.Y. 1993) (concluding that prejudice is just one factor, although a significant one, in determining if sanctions under S 502(c) are appropriate); Cappiello v. NYNEX Pension Plan, 1994 WL 30429, *5 (S.D.N.Y. Feb. 2, 1994) ("no sanctions are warranted here because plaintiff has failed to allege harm or bad faith") (citations omitted). See also Kreutzer v. A.O. Smith Corp., 951 F.2d 739, 743 (7th Cir. 1991) ("the employer must have acted in bad faith ... before recovery for procedural violations is warranted"); Kelly v. Chase Manhattan Bank, 717 F. Supp. 227, 233 (S.D.N.Y. 1989) ("penalties will not be imposed on a plan administrator absent a showing by the plaintiff that he has suffered some degree of harm"); but cf. Gillis, 4 F.3d at 1148 (finding harm to plaintiff was not required to issue injunction, but any monetary

damages were a matter of district court discretion). Determining whether statutory penalties are warranted must be based on a case-by-case, rather than class wide, assessment.

Defendants may also have a complete defense to some of plaintiffs' COBRA claims. COBRA's continuation coverage provisions are applicable only to those who would otherwise find themselves "without any health insurance coverage." H.R.Rep. No. 99-241, pt. 1, p. 44 (1985), reprinted in 1986 U.S.C.C.A.N. 579, 622. Employers are entitled to terminate continuation coverage on the day a former employee becomes a beneficiary under any other group health plan. Plaintiffs would be entitled to equitable relief only if not covered under another plan. Whether each member of the "in-the-door" COBRA Class, the Keystone Class, and the Fidelio Class has independent coverage is necessarily an individual factual determination. "Given these myriad variations, . . . plaintiffs claims clearly lack[] commonality." Sprague v. General Motors Corp. 1998 WL 3382 at *8 (citing In re American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996)).

The claims and defenses involved in the proposed Count II and Count III COBRA classes must be litigated on an individual basis, and do not "turn on questions of law applicable in the same manner to each member of the class." Califano v. Yamasaki, 442 U.S. at 701.

In addition to monetary damages, plaintiffs seek an injunction, requiring the defendants to send another notice, and allowing members of the plaintiff class to purchase continuation

coverage. Determining whether there were past violations of COBRA is necessarily a individual rather than class determination. Any injunctive relief with respect to earlier alleged COBRA violations must be a case by case determination. In their reply to the defendants' supplemental memorandum of law, plaintiffs suggest that defendants be required to send out notices, and process requests for retroactive COBRA coverage. Plaintiffs argue that if defendants deny the application, the denial could be individually litigated through the Plan's internal appeal process. This argument highlights why these COBRA claims must be litigated on an individual basis. The court will not certify a class for injunctive relief only to encourage subsequent individual actions regarding COBRA coverage.

It might have been possible to certify a class for prospective COBRA notice relief. However, even in the third amended complaint, the only named plaintiff representatives for the COBRA classes are Kane, Bradley and Chest, all of whom have left Accu-Weld and are no longer entitled to notice. It is well-settled that a plaintiff must be a member of the class she seeks to represent. Sosna v. Iowa, 419 U.S. 393 (1975); Martin v. Easton Publishing Co., 73 F.R.D. 678, 683 (E.D. Pa. 1977). None of the named plaintiffs are current employees who may receive notice upon a "qualifying event" in the future, so none would adequately represent the class of plaintiffs entitled to prospective injunctive relief. In addition, plaintiffs admit that defendants are no longer using the allegedly defective

notices, so future injunctive relief is unnecessary. If the court were to find that the previous notice did not meet COBRA requirements, and the defendants reused it, an aggrieved party could file suit and defendants would likely be bound by issue preclusion. If the current notice or any future notice fails to meet COBRA's notice requirement, an aggrieved party can file suit for damages and injunctive relief.

Class certification for the proposed COBRA classes in Counts II and III is denied.

B. Prohibited Transaction Class for Counts X and XI

The complaint alleges that the trustees engaged in prohibited transactions with the Union and knew of prohibited transactions others were undertaking or failed to take reasonable care in exercising their fiduciary obligations. Title 29 U.S.C. § 1106 provides that a fiduciary: shall not furnish goods or services to a party in interest; sell, exchange, or lease any property between the plan and a party in interest; or transfer the assets of the plan to a party in interest. All trustees may be personally liable for the transactions of the others if they know of the transactions, or fail to use reasonable care to prevent their co-trustees from committing a breach. See 29 U.S.C. § 1109.

The claims of Schweizer, Robb, and Cashin are common and typical. Current fund participants would all be injured in substantially the same manner by the alleged breach of fiduciary duty, Open Hous. Ctr., Inc. v. Samson Management Corp., 152

F.R.D. at 476 (S.D.N.Y. 1993); the allegations assert a common question with respect to all fund participants. Defendants' course of conduct gave rise to the claims of all class members, and there appears to be no potential conflict between the claims of the representatives and other class members. Plaintiffs' claims under Counts X and XI satisfy the commonality and typicality requirements of Fed. R. Civ. P. 23(a).

III. Adequacy of Representation

The named class members must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Assessing the adequacy of representation is similar to the typicality inquiry: both look to the potential for conflicts in the class. Georgine v. Amchem Products, 83 F.3d 610, 631 (3d Cir. 1996). The adequacy requirement has two components designed to ensure that absentees' interests are fully protected. First, the interests of the named plaintiffs must be sufficiently aligned with those of the absentees. In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 800 (3d Cir. 1995). The named plaintiffs' interests cannot be aligned with those of absent class members if there are conflicts among class members because the interests of the absent class members are not themselves in alignment. Second, class counsel must be qualified and must serve the interests of the entire class. Id. at 801.

With respect to the COBRA classes, the named plaintiffs cannot adequately represent the interests of the class. There

are numerous potential conflicts among class members, and their claims are not in alignment. With respect to the Prohibited Transactions class, plaintiffs seek to have the fiduciaries "personally restore to the Fund any losses incurred." (Second Amended Complaint, ¶132(c)). The named plaintiffs' interests are the same as those of the absentee class members: all seek to increase the value of the Fund. The named plaintiffs in the Prohibited Transactions Class for Counts X and XI are adequate representatives for the absentee class members.

In evaluating class counsel, the attorney must be qualified, experienced, and generally able to conduct the proposed litigation and not have interests antagonistic to those of the class. Wetzel v. Liberty Mutual Ins. Co., 508 F.2d at 247. Plaintiffs' counsel, Joshua Rubinsky ("Rubinsky"), has experience in both ERISA matters and class actions (Affidavit of Joshua Rubinsky, Pl Motion for Class Certification, ex 10), and there is no evidence of any interests antagonistic to those of the class.

Defendants' only objection to plaintiffs counsel is with respect to the COBRA claims. Defendants claim that when Kane called Bruno to inquire about his COBRA rights, Rubinsky was on the line, handled the call for Kane, and instructed Kane not to say anything. Defendants argue that Rubinsky cannot serve as counsel for the COBRA counts because defendants expect to call him as a witness. Class certification on the COBRA counts will be denied, so the court need not consider whether Rubinsky's actions would disqualify him from representing a class on those

counts; he is adequate counsel for the Prohibited Transactions Class of Counts X and XI.

IV. Rule 23(b) Requirements

In addition to requirements of Rule 23(a), plaintiffs must also satisfy one of the requirements of Rule 23(b). The COBRA classes do not meet the requirements of Fed. R. Civ. P. 23(a), so the court need not determine the applicability of Fed. R. Civ. P. 23(b) to those putative classes. For the Prohibited Transactions Class, plaintiffs propose certification under Fed. R. Civ. P. 23(b)(1)(B):

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Fed. R. Civ. P. 23(b)(1)(B).

This clause encompasses situations where the judgment in an action by an individual member of the class, while not technically concluding the other members, might do so as a practical matter. Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee Note. The Notes of the Advisory Committee on Rules suggest that 23(b)(1)(B) certification is appropriate "in an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a larger class of security holders or other beneficiaries, and which requires an

accounting or like measures to restore the subject of the trust." Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee Note (citing Boesenberg v. Chicago T. & T. Co., 128 F.2d 245 (7th Cir. 1942); Citizens Banking Co. v. Monticello State Bank, 143 F.2d 261 (8th Cir. 1944); Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir. 1944), cert. denied, 323 U.S. 776 (1944); York v. Guaranty Trust Co., 143 F.2d 503 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945)).

Under 29 U.S.C. S 1132(a)(2), participants or beneficiaries of an ERISA plan have standing to sue for appropriate relief under 29 U.S.C. S 1109 (1988), imposing liability for breaches of fiduciary duty. An action to enforce fiduciary duties is "brought in a representative capacity on behalf of the plan as a whole." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 n. 9 (1985). Any relief granted by a court to remedy a breach of fiduciary duty "inures to the benefit of the plan as a whole" rather than to the individual plaintiffs. Id. at 140. "Because a plan participant or beneficiary may bring an action to remedy breaches of fiduciary duty only in a representative capacity, such an action affects all participants and beneficiaries, albeit indirectly." Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co., 140 F.R.D. 474, 478 (S.D. Ga. 1991). Since Counts X and XI are brought by Schweizer, Robb and Cashin in their representative capacity, the Court finds that class certification for these claims is proper under Rule 23(b)(1)(B).

CONCLUSION

Plaintiffs have proposed four classes. Class certification for the COBRA notice claims is denied, because the plaintiffs have failed to satisfy the commonality and typicality requirements of Fed. R. Civ. P. 23(a). With respect to the alleged breaches of fiduciary duty, the plaintiffs have shown numerosity, commonality, typicality, and adequacy of representation as required under Fed. R. Civ. P. 23(a). The class also meets a requirement under Fed. R. Civ. P. 23(b); the action as a practical matter will be dispositive of the claims of the absent class members. The court will certify the Prohibited Transactions Class for Counts X and XI.

An appropriate order follows.

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ORDER

AND NOW this 23rd day of February, 1998, upon consideration of plaintiffs' motion for class certification, defendants' response in opposition thereto, plaintiffs' reply in support of class certification, defendants' supplemental memorandum in opposition to class certification, and plaintiffs reply in opposition to defendants supplemental memorandum, it is **ORDERED** that:

1. Plaintiffs' motion for class certification is **GRANTED IN PART** and **DENIED IN PART**:

a. The following class is certified for Counts X and XI only:

All participants and/or beneficiaries of the United Independent Union Welfare Fund during the period February 28, 1991 to the date the complaint was filed.

b. Thomas Schweizer, William Robb, Jr., and Steve Cashin are named as class representatives.

c. All other counts are severed, and stayed pending the outcome of Counts X and XI.

d. Plaintiffs attorneys shall file with the court ex parte and under seal monthly time and expense statements for efforts undertaken only on behalf of the class under Counts X and XI.

2. The court declines to certify the putative Keystone Class, Fidelio Class, or "in-the-door" COBRA notice class.

Norma L. Shapiro, J.

