The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Georgia Tuttle, M. D., LRG Health Care and Derry Medical Center, on behalf of Themselves and Those Similarly Situated

v.

New Hampshire Medical Malpractice Joint Underwriting Association

No. 2010-CV-00294

And

In the Matter of the Winding Down of: the New Hampshire Medical Malpractice Joint Underwriting Association

No. 2015-CV-00347

ORDER

Plaintiffs seek final approval of this Court's Order preliminarily providing that the Class Representative Plaintiffs may represent all other individuals who are policyholders of the New Hampshire Medical Malpractice Joint Underwriting Association ("JUA"), a medical malpractice insurer established by the State of New Hampshire. Plaintiffs also seek final approval of a plan of allocation of funds held by the JUA, case contribution awards for certain class members, and approval of Class Counsel's fees and costs. The JUA is in the process of winding down, and the Insurance Commissioner of the State of New Hampshire, as Receiver for the JUA, has determined that $60 million of assets may be distributed to policyholders if $25 million is held in the JUA estate to cover remaining costs and obligations of the JUA in receivership, including administrative and operational expenses of the JUA, the expenses of the receivership, potential tax obligations of the JUA,

and to provide a reasonable reserve for unknown and unexpected obligations of the JUA. The reasons stated in this Order, the Court finds that the (1) proposed Plan of Allocation is reasonable and is approved; (2) case contribution awards in the amount of $25,000 of each of the three Class Representatives is approved; (3) Class Counsels' costs are approved; and (4) Class Counsels' fee request of 25 % of the common fund is approved and (5) any excess funds that cannot be distributed to a Class Member due to the inability to locate the class member after reasonable efforts shall be distributed, in accordance with the Notice and Plan of Allocation, to a fund within the New Hampshire State Treasury to be administrated by the Department of Health and Human Services for the purpose of providing grants in aid to health care providers servicing medically underserved populations through the Department's State Loan Repayment Program.

I

The lengthy procedural background of this case is important because, in many ways, the current case cannot be considered without reference to earlier litigation.

1. Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n., 159 N.H. 627 (2010) ("Tuttle I")

This litigation stems from Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n., 159 N.H. 627 (2010) ("Tuttle I"). In this case, the Class Members essentially asserted that they were entitled to any surplus generated by the JUA, as it was then constituted. For some years prior to 2009, the JUA administered a mandatory risk sharing plan authorized by RSA 404-C. The plan provided medical providers in the State of New Hampshire with access to professional liability insurance coverage. The JUA was governed by a board of directors, which was vested with authority over the operation of the plan, subject to the oversight of the Insurance Commissioner ("Commissioner"). The

JUA owes contractual and regulatory duties to its policyholders. The rights and obligations between the JUA and the policyholders are set forth in the insurance agreement. The New Hampshire Insurance Department's administrative rules governed application of the excess surplus from premiums remaining after claims and expenses. See N.H. Admin. Rules, Ins 1703.07(d).

In 2009, the Commissioner issued an analysis determining that $55 million would fulfill the JUA's capital needs. The legislature then passed Laws 2009, 144:1, I, which Plaintiffs challenged as unconstitutional. The law required the JUA to transfer a total of $110 million to the State's general fund during fiscal years 2009, 2010, and 2011. Plaintiffs sued, and the trial court found in favor of Plaintiffs. On appeal to the Supreme Court, the Court held the language of the policies and the regulations, taken together, vests the policyholders with contractual rights in the treatment of any surplus for their benefit. Tuttle I, 159 N.H. at 633, 643–44, 650–52.

2. Tuttle, et al. v. New Hampshire Medical Malpractice Joint Underwriting Association, No. 2010-CV-00294 ("Tuttle II")

In July 2010, Plaintiffs brought a lawsuit in this Court to compel disbursement of the excess surplus. Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n, No. 2010-CV-294 ("Tuttle II"). In June 2011, the legislature enacted RSA 404-C:14, II, which required the JUA to conduct an evaluation to determine what funds were "excess surplus funds":

> All such excess surplus funds have resulted from premiums paid under assessable and participating medical malpractice insurance policies, belong to the policyholders who paid these premiums, and shall be returned as directed under this section. Within 60 days from the effective date of this section, all excess surplus funds . . . shall be interpleaded into the Merrimack County Superior Court, docket no. 217-2010-CV-00414 for the purpose of adjudicating all policyholders' claims to excess surplus

funds.

RSA 404-C:14, II (repealed 2015). In addition, RSA 404-C:14, VI removed all participation from the Commissioner: "[t]he approval of the commissioner of insurance shall not be required for any action contemplated under this section." Pursuant to the law, the JUA recognized an obligation to pay $85 million to the policyholders and segregated the remaining $25 million for payment of possible federal tax obligations.

No funds were interpleaded by the Commissioner, the other requisites of an interpleader action had not been complied with, and the Court recognized that an adverse legal claim was necessary for it to have authority to act. The case was certified for class treatment only on a contract claim against the JUA. Plaintiffs alleged that all parties had the same—or substantially identical—insurance contracts with the same provisions, which remained unchanged in all material respects during the class period. Thus, the Court found that the proposed class appeared to meet the requirements of numerosity, commonality, typicality, adequacy, and predominance, and the Court preliminarily approved the Class on February 7, 2012, and ordered that Notice be sent to the putative Class Members. See Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003) (affirming predominance where one claim alleged breach of contract); Oscar v. BMW of North Am., LLC, 274 F.R.D. 498, 506–07 (S.D.N.Y. 2011) (finding commonality fulfilled where one claim alleged breach of contract).

In August 2011, Plaintiffs filed a motion for certification of a settlement class. However, at a hearing on preliminary approval, the parties advised the Court that no settlement existed and asked the Court to certify the Class as a liability class. The Court denied the Motion without prejudice, and Plaintiffs filed a Supplemental Motion. The Supplemental Motion sought to certify a class consisting of all JUA policyholders who

purchased assessable and participating insurance contracts, issued on or after January 1, 1986 through the date of the final fairness hearing ("class period"). The class members would be the named insureds who purchased a policy, as reflected in the JUA books and records. The Court had previously granted summary judgment on liability. The Court granted final certification on June 15, 2012. Since liability had been established by grant of summary judgment, the only issue remaining was the appropriate distribution of the common fund.

Plaintiffs proposed a Plan of Allocation dated March 13, 2012 ("Plan of Allocation"), which provided, in substance, that each Class Member will receive a percentage of the distribution amount equal to their respective percentage of the total premiums paid since 1986. The Court found that the Plan of Allocation provided a fair, reasonable and equitable basis to calculate distributions. The Court's finding was further confirmed by the absence of any substantive objections. The Plan of Allocation was adopted as the Order of this Court for the administration of the "Distribution Fund" and distribution took place in accordance with this Court's Order dated October 9, 2012. The funds were tendered to the Claims Administrator by the Receiver on or about June 10, 2013 for distribution to the Class.

3. Actions taken by the Representative Plaintiffs to Obtain Surplus JUA Funds After the 2012 Distribution

After 2013, the JUA continued to generate surplus funds. In order to protect their interest in the surplus, the Representative Plaintiffs and their counsel took instituted other litigation in order to protect their right to the surplus.

a. Tuttle v. Lynch, Merrimack County Sup. Ct., No. 2010-CV-00750 ("Tuttle III")

This action was brought as a Right to Know action, pursuant RSA 91-A to compel

production of documents which establish that JUA had obtained advice from an outside law firm on the position that any surplus in the JUA belongs to the Plaintiffs.

b. Joint Legislative Committee on Administrative Rules Final Proposal, 2010-67

The Insurance Commissioner had proposed Administrative Rules to essentially circumvent the decision in Tuttle I by providing that any excess surplus be turned over to State and not the policyholders. Class Counsel organized and prepared testimony from policyholders, now class members, adversely affected by the proposed administrative rules and secured both a preliminary and final objection to the proposed changes.

c. Negotiations with the Internal Revenue Service

Following resolution of the initial class action, Plaintiff's Counsel returned to Price Waterhouse Coopers ("PWC") to analyze both the financial implications which could result if the JUA lost its federal tax exemption as well as the consequences associated with different distribution schemes. Class Counsel attempted to resolve all federal tax issues with the Internal Revenue Service ("IRS"). Working with outside tax counsel, Class Counsel developed arguments and was able to enter into a closing agreement with the IRS which resulted in no tax liability so that the $25,000,000, which had been held in escrow from the Tuttle II settlement, could be distributed to the to the class.

d. Representation of the Policyholder Class to Protect the Surplus which Became the Common Fund in this Case After the Initial Distribution

In the years after the settlement of Tuttle II, Class Counsel actively involved themselves in legislation surrounding the future of the JUA. Affidavit of W. Scott O'Connell ("O'Connell Aff.") ¶ 13. This included involvement in a variety of fora publicly opposing attempts to vitiate the rights of the class to the excess funds held by the JUA. In doing so, Class Counsel continued to advocate for the putative class, taking into account

the Class Representatives' oral and written input. Id. In 2015, Class Counsel provided written advocacy and analysis that avoided the risk of legislation which would somehow undo the decision of Tuttle I and require excess JUA funds to be paid to the State. Id. Eventually, Class Counsel was able to obtain statutory language which expressly acknowledged the vested rights of policyholders.

Class Counsel appeared for and represented the lead policyholders in the statutorily directed dissolution of the JUA, which proceeded under the supervision of this Court. In the Matter of the Winding Down of the New Hampshire Medical Malpractice Joint Underwriting Association, Merrimack County Superior Ct., 2015-CV-00347. Class Counsel was involved in the process for selecting a company to assume the JUA's insurance contract, the qualifications of the bidders or proposals, the consideration paid for the assumption of the contract, the indemnities provided, and notice to policyholders. Counsel assisted with the status report review and analysis of financial statements and investor reports in order to minimize risk and expense to protect the new tranche of common fund for distribution. O'Connell Aff.¶ 13.

4. The Renewed Class Action in Superior Court: Tuttle v. JUA, 2010-CV-00414

In 2016, Class Counsel prepared and filed multiple iterations of pleadings seeking to obtain funds held by the JUA to be paid to a putative class of policyholders. The New Hampshire Legislature had enacted a statute, RSA 404-C: 17, III, which contemplated interpleader of funds the Commissioner determined to be surplus, or those funds not needed to continue business operations, into this Court for purposes of adjudicating policyholder claims. However, there is no interpleader statute in New Hampshire. Interpleader, moreover, is a remedy peculiarly unsuited to this litigation; by its terms, common-law interpleader would require notice to each and every single class member and

require them to litigate *inter se*. Tuttle v. JUA, Merrimack County Superior Ct., 2010-CV-00414 (May 2, 2017) (Order, McNamara, J.).

The Class Representatives filed a proposed class action naming no defendant in 2016, but seeking disbursement of those funds in accordance with the Plan of Allocation approved in 2012. In May 2017, this Court declined to certify the proposed class, because it did not believe it had authority to do so. The Court indicated that, based on the pleadings before it, a limited fund settlement, akin to that authorized by Fed. R. Civ. P. 23 (b) (1) (B), would appear to be appropriate. The principle concern behind a limited fund settlement is the potential for insufficiency of assets to satisfy all claims, which justifies "the limit on an early feast to avoid a later famine." Ortiz v. Fibreboard , 527 U.S. 815, 837 (1999). To effectuate the purpose of a limited fund settlement, such settlements are mandatory. William Rubenstein, 2 Newberg on Class Actions, § 4.18 (5th Ed. 2016) (hereinafter "Newberg"): ("To achieve this goal, Rule 23 (b)(1)(B) suits are generally mandatory—that is, class members may not opt out."). But no cognate New Hampshire rule of procedure exists.

At the direction of the Court, Plaintiffs took an interlocutory appeal to the New Hampshire Supreme Court, requesting in substance how the Court and parties should proceed. The New Hampshire Supreme Court held that its decision in Tuttle I, when combined with the subsequent legislation providing for the wind-down and dissolution of the JUA, establishes the liability of the JUA for the return to policyholders of excess surplus funds. Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n, 2018 WL 1724987, at *2 (N.H. Mar. 13, 2018). The Supreme Court then specifically held that this Court has "wide discretion" under Superior Court Civil Rule 16(h) to fashion a remedy in order to see to it that each policyholder receives a fair proportional share of the available

funds by employing a procedure "analogous to that utilized under Federal Rule of Civil Procedure 23(b)(1)(B)." Id.

Accordingly, Plaintiffs filed a Motion for Preliminary and Final Class Certification, Appointment of Class Counsel and Approval of Notice to the Putative Class. By Order dated May 24, 2018, the Court found on a preliminary basis that it would be appropriate for this matter to proceed as a limited fund class action. Tuttle v. JUA, Merrimack County Superior Ct., 2010-CV-00294 (May 24, 2018) (Order, McNamara, J.). The Court preliminarily certified the class, preliminarily approved the proposed settlement, and appointed Kevin M. Fitzgerald, Esq. and W Scott O'Connell, Esq. as Class Counsel. Id. On June 5, 2018, Notice was approved. The Notice was sent to the class and a final hearing was set for August 21, 2016. No Class Member objected to the settlement and no Class Member appeared in opposition to the proposed final order on class certification and Plan of Allocation.

II

The New Hampshire Supreme Court made it clear that it is a sustainable exercise of this Court's discretion to adjudicate the policyholders' claims as a limited fund class action against the funds the receiver seeks to tender to the Court in accordance with RSA 404-C: 17, in a manner akin to Fed. R. Civ. P. 23 (b) (1) (B), pursuant to Superior Court Rule 16. Tuttle, 2018 WL 1724987, at *2 (N.H. Mar. 13, 2018). The Court also noted that the effect of its decision in Tuttle I, when combined with the subsequent legislation providing for the wind down and dissolution of the JUA, "establishes the liability of the [JUA] for the return to policyholders of surplus funds. Thus, the only matter to be determined by the court is damages; that is, the share of the surplus to which each policyholder is entitled." Id.

A. Distribution of the Funds

Plaintiffs seek final approval of both a class action and proposed settlement. Superior Court Civil Rule 16(k) provides that "[a] class action shall not be dismissed, discontinued or settled without the approval of the court." The New Hampshire Supreme Court has relied upon federal cases interpreting the federal rule as an analytic aid, given the similarity between the federal and State rules for class actions. In re Bayview Crematory, LLC, 155 N.H. 781, 784 (2007). The language of Superior Court Civil Rule 16(k) is consistent with Federal Rule of Civil Procedure 23(d) (1) (c), which requires a court to determine whether or not a settlement is "fair, reasonable and adequate."

A limited fund class action is appropriate where three prerequisites are met:

1. The totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims;

2. The whole of the inadequate fund is to be devoted to the overwhelming claims; and

3. The claimants identified by a common theory of recovery are treated equitably among themselves.

Ortiz v. Fibreboard Corp., 527 U.S. at 838–39.

In this case, not a single class member objected to the proposed settlement and plan of allocation. However, "even if there are no or few objections or adverse appearances before or at the fairness hearing, the judge must ensure that there is a sufficient record as to the basis and justification for the settlement". David Herr, Manual for Complex Litigation, § 21.635 (4th Ed. 2018) (hereinafter "Manual for Complex Litigation"). The record and findings must demonstrate to a reviewing court that the judge is made the requisite inquiry has considered the diverse interests and requisite factors in determining the settlements fairness, reasonableness and adequacy. Id.

The common fund is comprised of excess surplus funds which will remain after dissolution of the JUA. Class Counsel have presented affidavits which indicate that the JUA did not have a practice of making annual determinations of excess surplus funds. O'Connell Aff. ¶ 22; Affidavit of Mitchell B. Jean, Esq. ("Jean Aff.") ¶ 25; Affidavit of Thomas Buchanan ("Buchanan Aff.") ¶ 20; Affidavit of George A. Tuttle, M.D. ("Tuttle Aff.") ¶ 20. It therefore never developed a practice or procedure for making individual policyholder determinations for distribution of excess surplus funds. Therefore, considerable time and cost which would be chargeable to the common fund would be necessary to replicate what the JUA might have done and such an analysis would likely be susceptible to attack. Buchanan Aff., ¶ 20; Jean Aff. ¶ 25.

More importantly, if the award included the time value of money there is a risk that the awards would become taxable. Jean Aff.¶¶ 25-26; Buchanan Aff.¶¶ 21, 22; Tuttle Aff.¶¶ 21, 22; Affidavit of David Strang ¶14. Class Counsel have averred that, after obtaining the advice of tax counsel, they have concluded that weighting awards, based upon the time value of money, raises the risk of substantial tax related complications and obligations. O'Connell Aff. ¶ 29. Under the proposed Plan of Allocation, each class member will get a percentage of the distribution equal to his or her respective percentage of total premiums paid since 1986. Plan of Allocation, at ¶ 31. Because the only distinguishing factor among Class Members is the amount of premium the class member paid, the Plan of Allocation uses this premium data to calculate gross share of the common fund. Id. Relying upon the JUA's premium payment method, the Claims Administrator, using class members' percentage of total premiums paid from January 1, 1986, will calculate each class member's share of the net distribution award. Id. On a gross basis, the most current tranche of the common fund returns approximately 35.3% of the total premium. Combined

with the prior tranche, the recovery will result in a total 81% of the total premiums paid by the Class over the Class Period.

This resolution illustrates the necessity for a mandatory, limited fund class. If, for example, individual policyholders brought suit alleging that they were entitled to the time value of money, the common fund would be diminished, perhaps even extinguished, by those who brought suit earliest. Weighting of the contributions would result in a significant expense, and the tax consequences caused by such a calculation would likely resulting in an inequitable distribution-exactly the justification for a limited fund class: "the limit on an early feast to avoid a later famine." Ortiz v. Fibreboard , 527 U.S. at 837[1]. Thus, the Court finds the method of allocation to be fair, reasonable and adequate.

B. Incentive Awards

Class Counsel asks the Court to award case contribution payments of $25,000 to each of the three class representatives. By affidavit, Class Counsel states that for the past six years the three class representatives served the Class through active participation in the post distribution litigation and distribution actions. Furthermore, they have been helpful in preserving, protecting and defending the approximately $85,000,000 common fund. O'Connell Aff. ¶ 26, This participation was materially different and more significant than the contributions of other class members. Id.

Dr. Tuttle recites in her affidavit that she has worked closely with Class Counsel on issues which have arisen throughout the litigation and to identify class members or their heirs or assigns to facilitate distribution. Tuttle Aff. ¶ 6. The other Class Representatives have filed similar affidavits. Buchanan Aff. (Derry Medical Center) ¶ 4;

[1] While the Court is mindful that a limited fund class arguably cuts off due process rights of class members, the concern is limited in this case as not a single class member has chosen to opt out.

Jean Aff. (LRG Healthcare)¶ 4.

Incentive awards generally serve four purposes. First, they compensate class representatives for work done on behalf of the class. Second, they recognize the financial and reputational risk undertaken in bringing the action. Third, they recognize the willingness of the represented class members to act as private attorneys general. Fourth, they incentivize class members to step forward on behalf of all of the class. 5 Newberg, § 17:3; Chieftain Royalty Co. v. Enerverst Energy Institutional Fund VIII-A, L. P., 861 F.3d 1182, 1194 (10th Cir 2017).

Some courts have criticized incentive awards. They have expressed a concern that a class representative can be induced by special payment to sell out non-representative class members' interests. Hadix v. Johnson, 322 F.3d 895, 897 (6th Cir. 2003); Lane v. Page, 862 F. Supp. 2nd, 1182, 1238 (D.N.M. 2012) ("Courts have denied preferential allocation on the grounds that the named plaintiff may be tempted to settle an action to the detriment of the class or come to expect a bounty for bringing suit"). Such courts reason that:

> When a person joins in bringing an action as a class action he has disclaimed any right to a preferred position in the settlement. Were that not the case, there would be considerable danger of individuals bringing cases as class actions principally to increase their own leverage to obtain a remunerative settlement for themselves and then trading on that leveraged in the course of negotiations.

Staton v. Boeing Co., 327 F.3d 938, 976 (9th Cir. 2003).

Yet, despite this criticism, incentive awards have become ever more common. Indeed, the leading authority on class actions has stated that there has been a "remarkable shift" favoring the award of class representative incentives. 5 Newberg, § 17:7. In certain cases, such as securities cases brought under the Private Securities Litigation Reform

Act of 1995 ("PSLRA"), incentive awards are generally lower in part because the statute seems to have a bias against such awards. 15 U.S.C. 78-u4 (a) (4). Further, while the Class Representative in a securities case may be required to produce documents or information about his or her purchases, he or she is unlikely to be involved in assisting counsel in recruiting other class members, providing information about an alleged misrepresentation involving the security claim, or assessing the impact on the market.

As a practical matter, a class action involving sophisticated individuals, such as these health care providers, who make up a relatively small class, requires class representatives who are willing to take on the substantial burden of the litigation. Counsel must be able to rely on members of the class to provide them with information and often help them explain the litigation to absent class members. This case can plainly be characterized as *sui generis* and the class members have, by affidavit, demonstrated the extensive effort expended in order to bring the litigation to fruition. The party seeking approval of incentive award bears the burden of proving that the proposed recipients deserve an award and that their proposed level of the award is reasonable. Typically, facts relevant to the incentive award "are demonstrated by affidavit submitted by Class Counsel and/or the class representatives," explaining the work they have done. 5 Newberg, § 17.12. Class Counsel and the Class Representatives have provided such affidavits. The Court therefore grants the incentive award requested by the Class Counsel for the Class Representatives of $25,000 per representative.

C. Attorney's Fees

Class Counsel have requested a fee which constitutes 25% of the common fund. Unlike Federal Rule of Civil Procedure 23 (b), Superior Court Rule 16 does not directly address the issue of attorney's fees awards in class action cases. Because of the paucity

of case law involving class actions in New Hampshire, New Hampshire trial courts are encouraged to look to federal precedent in interpreting Superior Court Rule 16, which governs class actions. Petition of Bayview Crematory, 155 N.H. at 784. The New Hampshire Supreme Court has made clear that trial courts have wide authority to fashion suitable procedures to ensure that all claims of class members are fairly adjudicated. Tuttle, 2018 WL 1724987, at *2 (N.H. Mar. 13, 2018).

Class Counsel have provided a 13-page Affidavit of William B. Rubenstein, the Sidley Austin Professor at Harvard Law School and the current author of Newberg on Class Actions, supporting the award and opining that the fee request is reasonable. The Affidavit is supported by voluminous exhibits. It is persuasive, and the Court incorporates it by reference. The Court addresses the issues briefly here.

There is authority for awarding fees on either a "percentage of common fund" ("POF") basis or the so-called "lodestar" basis by which the court examines the amount of time spent by attorneys on the case and then either increases or reduces it based upon the result. The "vast majority of [federal] courts of appeal now permit or direct district courts to use the percentage-fee method in common fund cases.". Manual for Complex Litigation, §14.121; see also In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litigation, 56 F.3d 295, 307 (1st Cir. 1995). The rationale for this rule is said to be that an attorney who recovers a common fund for the benefit of others is entitled to "a reasonable fee from the fund as a whole". Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

At heart the POF principle is based upon two doctrines well recognized in New Hampshire. The first is the American rule, under which a litigating party bears its own responsibility for attorney's fees. Guaraldi v. Trans-Lease Group, 136 N.H. 457, 462

(1992). The second is the substantial benefit rule under which a litigant who confers a substantial benefit on another may recover fees. Irwin Marine, Inc. v. Blizzard, Inc., 126 N.H. 271, 314-315 (1985).

The POF approach provides at least three significant advantages over the lodestar approach. First, the POF approach is often less cumbersome to administer than the lodestar method. Rather than forcing the judge to review the time records of a multitude of attorneys in order to determine the necessity and reasonableness of every hour expended, the POF method permits the judge to focus on a showing that the fund conferred a benefit on the class resulting from the lawyer's efforts. Swedish Hospital Corporation v. Shalala, 1 F.3d 1261, 1269 (D.C. Cir. 1993). More importantly, however the lodestar approach encourages inefficiency; attorneys have a financial incentive to spend as many hours as possible (and bill for them) on the case and face a strong disincentive to early settlement. In re Thirteen Appeals, 56 F.3d at 307. Finally, because the POF method in a common fund case is results-oriented, rather than process-oriented, it better approximates the workings of the marketplace: "the market in fact pays not for the individual hours but for the ensemble of services rendered in case of this character." In re Continental Illinois Securities Litigation, 962 F.2d 566, 572 (7th Cir. 1992); In re Rite Aid Corporation Securities Litigation, 396 F.3d 294, 30 536 (3d Cir. 1995). For these reasons, the POF method will be applied by the Court in this case.

The award of attorney's fees in a common fund case, applying the POF method, is ultimately committed to the discretion of the trial court which must consider the unique contours of the case. Manual for Complex Litigation, § 14.121; Camden I Condominium Association v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991). Courts generally agree that there are five factors which must be considered in determining the fee award: (1) the awards in

similar cases; (2) the complexity and duration of risk involved in litigation; (3) negotiations underlying the request; (4) reaction of the class; and (5) Public policy considerations. In re Tyco Int'l, Ltd. Multidistrict Litigation 535 F. Supp.2d 249, 266, 270 (D.N.H. 2007). In considering a fee award, the court may consider actions in multiple legal venues which relate to securing the common fund. Angoff v. Goldfine, 270 F.2d 185, 190-191 (1st Cir. 1959). This Court does not believe that it can take into account legislative efforts as a part of the work done in furtherance of the litigation. This is because a court does not have the expertise to determine the efficiency level of the work done in lobbying.[2] However, the bulk of the work in this case was litigation in various fora, the result of which is known.

First, the requested fee in this case, 25%, is well within the range of fees requested in similar cases. 4 Newberg, § 14:3 (common fee awards fall between 20 and 33%). Federal courts in the First Circuit have approved similar percentage fees in cases involving awards of similar magnitude. See, e.g., In re Thirteen Appeals, 56 F.2d at 295 (31% of $220,000,000); In re Relavin Antitrust Litigation, 231 F.R.D. 52, 84-85 (D.Mass. 2005) (33% of $67,000,000); In re Lupron Marketing and Sales Practices Litigation, 2005 WL 2006833, at *2 (D. Mass. August 17, 2005) (awarding 25% $150,000,000)[3]. Such a percentage is supported by the great weight of authority. Attorney's fees awarded under the percentage method "are often between 25% and 30% of the fund." Manual for Complex Litigation, §14.121, p. 189 (citing Thomas V. Willging,

[2] For example, the legislative efforts in this case apparently resulted in RSA 404-C: 17 which provided for the interpleader of funds into this court and purported to distribute *cy pres* funds. Both determinations are problematic, and the former resulted in the appeal to the New Hampshire Supreme Court. Nonetheless, in terms of the alternatives, the legislation may have indeed advantaged the class. The Court simply has no way of knowing.

[3] Class Counsel has cited a number of other cases, from both in and out of the First Circuit, supporting fee awards in the 25 to 33% range for common funds awards in cases of this magnitude. See Mem. of Law in Support of Mot. to Approve the Plan of Allocation, Case Contribution Awards for Certain Class Members and Class Counsel Fees and Costs, 35-37.

Laural L. Hooper and Robert J, Niemiec, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 69, 146-47 (Federal Judicial Center 1996)); In re Pac. Enters. Litigation 47 F.3d 373, 379 (9th Cir. 1995). Awarding attorneys 25% of the common fund "represents a typical benchmark." Manual for Complex Litigation, §14.121, p.190; see also Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989) (Establishing 25% as a benchmark, to be adjusted up or down depending upon the circumstances of the case).

Second, the litigation was complex and difficult. Class Counsel have provided the affidavit of Professor William B. Rubenstein, the current author of Newberg along with many other books and scholarly articles on class action litigation, in support of their fee application.[4] Professor Rubenstein is probably the United States' preeminent expert on class actions. He has reviewed the pleadings and the record and opined that these cases were complicated in that they involve a series of lawsuits, legislative activities and IRS related negotiations. Professor Rubenstein asserts, and the Court agrees, that "these cases were novel, not cookie cutter". Affidavit of William B. Rubenstein ("Rubenstein Aff.") ¶ 48. While most contingent-fee lawyers specialize in particular types of cases, a practice that enables them to significantly lower their investment in each case, that was not possible here. Id.

Because of the paucity of law regarding class actions in New Hampshire, a procedural mechanism to resolve this case was not clear. The Legislature ordered that funds belonging to the JUA be interpleaded into the Superior Court - despite the fact that New Hampshire has neither an interpleader statute nor rule governing interpleader distributions. See RSA 414-C: 17. Moreover, interpleader would require that moneys be

[4] Prof. Rubenstein's *curriculum vitae* has been filed with the Affidavit.

paid to the Court, notice be given to all claimants, and that the matter would be litigated *inter se*. This would have resulted in expense, delay, and would have been detrimental to the interests of the class members. Class Counsel took an interlocutory appeal to the New Hampshire Supreme Court in order to obtain direction, which that Court provided. The New Hampshire Supreme Court held that while there is no specific provision in Superior Court Rule 16 to allow a limited fund class action to proceed, the trial court has "sufficiently broad equitable power to certify a mandatory class action." That direction gave this Court authority to proceed in the most efficacious way, by the procedural mechanism of a limited fund class action. Tuttle, 2018 WL 1724987, at *2 (N.H. Mar. 13, 2018). Professor Rubenstein has noted that Class Counsel was forced to litigate unusual and unique issues relating to distribution. Additionally, Class Counsel helped clarify New Hampshire procedural law, which now makes explicit that the limited fund class action is viable in this State. Rubinstein Aff. ¶ 12.

Third, Class Counsel entered into 316 contingent-fee agreements with individual class members prior to class certification. Each class member was offered alternative methods of paying the fee. O'Connell Aff. ¶ 9. All of them opted to enter into a 25% contingency agreement. Thus the agreements were obtained through arm's length negotiation and provided for a 25% contingent fee. O'Connell Aff. ¶ 9. The fact that so many class members agreed to this provision, even after being presented with other options, is evidence that it is fair and reasonable; it is more than evidence of market value, it is market value. Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corporation, 73 F.3d 150, 153 (7th Cir. 1996).

Moreover, Class Counsel have been actively involved in this case since 2012, after the first class distribution was approved. This case has been pending for six years, a long

time for a law firm to work diligently without receiving a fee.

Fourth, the reaction of the class has been positive. In fact, there were no objections to the Plan of Allocation and no attempts to opt out or otherwise challenge the proposed Plan of Allocation. There was no challenge to the proposed 25% fee sought by Class Counsel. It is true that the court has an independent obligation to scrutinize applications for fees, regardless of any objection. Zucker v. Occidental Petroleum Corporation, 192 F.3d 1323, 1328-29 (9th Cir. 1999). However, the fact that there have been no objections is a significant factor supporting approval of the fee request. In re Rite Aid, 396 F.3d at 305; see also In re Relafin, 231 F.R.D. at 81 (D. Mass. 2005).

Fifth, the public policy supports rewarding attorneys for prosecuting class actions "especially where counsel's dogged efforts - undertaken on a wholly contingent basis - result in satisfactory resolution for the class." Medoff v. CVS Caremark Corporation, 2016 WL 632238 *9 (D.R.I. Feb. 17, 2016); Tyco, 535 F. Supp.2d at 270. Attorneys should be encouraged to take risks and to vindicate the rights of those who have suffered harm. This case is a particularly compelling. Here, the opposing party was the State of New Hampshire, with unlimited resources and the ability to litigate without regard to the perhaps mundane, but very real, obligations of attorneys in private practice to pay their overhead and staff so that they can continue to practice law.

Most courts which utilize the POF method will still use the lodestar method as a cross check to evaluate the fee request. 5 Newberg §§15.84-15.89. Using a lodestar analysis as a cross check supports the award in this case. Professor Rubenstein opines that the present request is best seen as an extension of the first fee request, since the current $85 million in relief is not solely the consequence of work done since the prior approval, but is the "fruit of class counsel's sustained efforts from the inception of this matter in

2010." Rubenstein Aff. ¶ 1. Considering the 25% fee in both the first and second parts of this case, Class Counsel reported a total lodestar to date of approximately $7.1 million. The total 25% fee award, therefore, amounts to $48.75 million, embodying a lodestar multiplier of 6.89, a number which will decrease as Class Counsel's efforts continue in the coming months and years to administer the class. Rubinstein Aff. ¶ 8. Such multiplier is well within the range of reasonableness for such a complex case of this quality and kind. Rubinstein Aff. Ex. B. (listing exemplary cases with multipliers of 6.0 and higher); Steiner v. American Broadcasting, Inc., 2007 WL 2460326, at *2 ((9th Cir. August 29, 2007) (approving lodestar multiplier 6.45 as "well within the range of multipliers the courts have allowed"); Beckman v. Key Bank, N.A., 293 F.R.D. 467, 481-42 (S.DN. Y. 2013) ("Courts regularly award lodestar multipliers of up to 8 times the lodestar, and in some cases even higher multipliers") (collecting cases).

In sum, all of these factors support an award of 25% of the common fund, the percentage negotiated by a substantial number of class members.

D. Cy Pres

Class Counsel anticipates that some percentage of class members will be unidentifiable or might choose not to make a claim against the funds. Under those circumstances, excess funds will exist. Such funds can either revert to the defendant, escheat to the State, constitute a windfall distribution to the class members filing claims, or be distributed to a chosen charity pursuant to the *cy pres* doctrine. See generally Manual for Complex Litigation, § 21.662; In re Heartland Payment Systems Inc. Customer Data Security Breach Litigation, 851 F. Supp.2d 1040, 1076-77 (S.D. Tex. 2012).

Obviously, reversion to the JUA is not a practical solution as it is winding down. Similarly, additional payment to class members and filed claims is problematic if those

class members have already received their percentage of the excess funds. Just as receiving an award based upon the time value of money could create tax consequences, such could be the case were there to be windfall awards.

The Legislature has purported to adjudicate how this court should resolve any disposition of excess funds. RSA 404-C: 17, IV (a) provides:

> Funds that cannot be distributed to a policyholder in the interpleader proceeding reference in the section due to the inability to locate a policyholder after reasonable efforts shall not be subject to RSA 471-C and shall be transferred to a fund within the treasury to be administered by the Department of Health and Human Services which shall utilize such undistributed funds to provide grants in aid to health care providers servicing medically underserved populations through the Department of State loan repayment program.

However, to the extent this statute purports to adjudicate funds subject to this Court's jurisdiction under Superior Court Rule 16, it raises New Hampshire constitutional concerns. Part 1, Art. 37 of the New Hampshire Constitution specifically states that:

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial ought to be kept as separate from and independent of each other as the nature of a free government will admit, or is as consistent with that chain of connection that binds a whole fabric of the Constitution in one indissoluble bond of unity and amity.

The separation of powers principle in New Hampshire is not a mere description of the workings of the Constitution, but is rather a substantive right. Gould v. Raymond, 59 N.H. 260, 275 (1879). The traditional view of the separation of powers principle is that it is the fundamental protection of private rights. Ashuelot R.R. v. Elliott, 58 N.H. 451, 452 (1878). The New Hampshire constitutional guarantee of separation of powers is violated when one branch of government usurps an essential power of another. Associated Press v. State, 153 N.H. 120, 143 (2005); Petition of Southern New Hampshire Medical Center, 164 N.H. 319, 328 (2012). A statute which requires a court to choose one of many possible alternatives

for distribution of unclaimed funds awarded pursuant to adjudication of a class action is problematical. Adjudication of a case is a core judicial function and non-judicial officers may not render judicial decisions. Opinion of the Justices, 128 N.H. 17 (1986). And the "ultimate decision" to award *cy pres* funds "will always be a judicial decision." 4 Newberg, § 12:34; In re Polyurethane Foam Antitrust Litigation, 2016 WL 14520006 *2 (N.D. Ohio 2016).[5]

But the difficult issue of whether or not the statute passes constitutional muster can be avoided in this case because the Class Representatives have proposed the Court distribute funds in the same manner as RSA 417-C: 17, IV. The Class Representatives have filed supplemental affidavits in support of the *cy pres* provision of the Plan of Allocation. In their Supplemental Affidavits, the Class Representatives discuss how the *cy pres* provision contemplates transfer to an existing, non-lapsing fund to be administered by the New Hampshire Department of Health and Human Services and utilized to provide aid grants to health care providers servicing medically underserved populations through the Department's State Loan Repayment Program. Georgia Tuttle, M.D. Suppl. Aff. ¶ 3; Thomas Buchanan Suppl. Aff.¶ 3; Mitchell Jean, Esq. Suppl. Aff. ¶ 3. They note that the JUA was created, in part, to stabilize the cost of medical malpractice insurance and ensure the availability of health care across the State of New Hampshire. This provision, therefore, will similarly help to provide access to care, particularly to underserved populations. Georgia Tuttle, M.D. Suppl. Aff., ¶ 4; Thomas Buchanan Suppl. Aff., ¶ 4; Mitchell Jean, Esq. Suppl. Aff., ¶ 4. The *cy pres* funds will be used to attract and retain providers who share a professional nexus with class members and whose interests reasonably

[5] It is nonetheless true that a minority of states, by statute, direct where excess funds from class action should be distributed. 4 Newberg § 12.35.

approximate those of class members. Georgia Tuttle, M.D. Suppl. Aff., ¶ 6; Thomas Buchanan Suppl. Aff., ¶ 6; Mitchell Jean, Esq. Suppl. Aff., ¶ 6. Because the *cy pres* provision contemplates that the New Hampshire Department of Health and Human Services administer the funds to an existing, dedicated assistance program, there is little risk of self-dealing within the selection process for grant recipients. Georgia Tuttle, M.D. Suppl. Aff., ¶ 10; Thomas Buchanan Suppl. Aff., ¶ 10; Mitchell Jean, Esq. Suppl. Aff., ¶ 10. The process will be neutrally managed by a state agency and untethered to the class members themselves.

In determining whether *cy pres* of an excess distribution reasonably approximates the interests of the class, courts should consider a number of factors. Such factors include "the purposes of the underlying statute claimed to be violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reasons why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the *cy pres* recipient." In re Lupron Marketing and Sales Practices Litigation, 677 F.3d 21, 33 (1st Cir. 2012) cert. denied, 133 S.Ct. 338 (2012). See also 4 Newberg, § 12:33. Examination of these factors against the facts of this case compels the conclusion that the distribution to the Department of Health and Human Services is appropriate. Ensuring health care for underserved areas is consistent with the principles underlying the *cy pres* distribution. Accordingly, the *cy pres* award is approved.

E. Costs

Class Counsel seeks $3759.09 in expenses. The expenses appear reasonable and necessary in furtherance of the effort to secure, protect, and defend the distribution fund for the class. Law firms are entitled not only to reasonable fees, but to recover their

expenses in an amount necessary to bring the action to a conclusion. Weisbergh v. Fidelity Magellan Fund, 167 F.3d 737, 737 (1st Cir. 1999). The request for costs and expenses is approved.

IV

In sum, the Court finds that the (1) proposed Plan of Allocation is reasonable and is approved; (2) case contribution awards in the amount of $25,000 to each of the three Class Representatives is approved; (3) Class Counsels' costs are approved; (4) Class Counsels' fee request of 25 % of the common fund is approved; and (5) any excess funds that cannot be distributed to a class member due to the inability to locate the class member after reasonable efforts shall be distributed, in accordance with the Notice and Plan of Allocation, to a fund within the New Hampshire State Treasury to be administrated by the Department of Health and Human Services for the purpose of providing grants in aid to health care providers servicing medically underserved populations.

SO ORDERED

9/6/18 *s/Richard B. McNamara*

DATE Richard B. McNamara,
Presiding Justice

RBM/