The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Georgia Tuttle, M.D. et al, 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 to recover certain funds held by the New Hampshire Medical Malpractice Joint Underwriting Association ("JUA"), a medical malpractice insurer established by the State of New Hampshire, and seek to represent all other individuals who were policyholders of the JUA during the years it wrote coverage. 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 New Hampshire Supreme Court has held that the surplus funds belong to the healthcare provider policyholders who paid the malpractice insurance premiums that generated the funds. Plaintiffs have filed a pleading they captioned "Lead Plaintiffs' Memorandum of Law in support of their Renewed Motion For Preliminary and Final Class Certification, Appointment of Class Counsel, and Approval of Notice to the Putative Class." Based upon the pleading, affidavits filed with the pleading and the record before the Court, the Court finds, on a preliminary basis, that it would be appropriate for this matter to proceed as a limited fund class action. Accordingly, the Court preliminarily certifies the class and preliminarily approves the proposed settlement. The Court appoints attorneys Kevin M. Fitzgerald, Esq. and W. Scott O'Connell, Esq. as Class Counsel. A hearing shall be held on June 4, 2018 to discuss the form of notice to be given to the Class, scheduling, and the pleading filed by the Commissioner seeking to interplead funds held by the JUA into this Court.

I

The lengthy procedural background of this case need not be recited in full here, but is discussed briefly.

This case arises from litigation between the parties described in Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n., 159 N.H. 627 (2010) ("Tuttle I"). The JUA administers a mandatory risk sharing plan authorized by RSA 404-C. The plan provides medical providers in the State of New Hampshire with access to professional liability insurance coverage. The JUA is governed by a board of directors, which is 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 govern 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, 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, the trial court found in favor of Plaintiffs, and 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.

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 Insurance Commissioner: "The 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.

After 2013, the JUA continued to generate surplus funds. The Plaintiffs 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. The New Hampshire Legislature had enacted a statute, RSA 404-C:17, III, which contemplates interpleader of funds the Commissioner determines to be surplus, or not needed to continue business operations, into this Court for purposes of adjudicating policyholder claims. As explained in this Court's prior orders, there is no interpleader statute in New Hampshire, and

interpleader is a remedy peculiarly unsuited to the current posture of the litigation; by its terms, common-law interpleader would require notice to each and every single class member and require them to litigate *inter se*.

In May 2017, this Court declined to certify the proposed class, brought by the same Plaintiffs, because it did not believe it had authority to do so, but indicated that, based upon the pleadings before it:

> [Use of the class mechanism] seems appropriate in this case, since excess disbursement of funds might lead to injury to prospective class member policyholders through an inadequacy of reserves for future operations of the JUA. It is conceivable that litigation by policyholders on a breach of contract basis could result in different determinations regarding the amount of funds to be withheld. A policyholder who makes a breach of contract claim against the Receiver can assert a contractual right to 100% of the current surplus of the JUA, seeking distribution though a breach of contract claim of his or her percentage of $86 million rather than of the $50 million the Receiver believes can be appropriately disbursed. This could conceivably render the JUA insolvent in the future, and limit the ability of other policyholders to recover. The principle 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. at 837. To effectuate the purpose of a limited fund settlement, such settlements are mandatory. Rubenstein, 2 Newberg on Class Actions, § 4.18 (5th Ed. 2016): ("To achieve this goal, Rule 23 (b)(1)(B) suits are generally mandatory—that is, class members may not opt out.").

(May 2, 2017) (Order, McNamara, J.) at 14.

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, No. 2017-0427,

2018 WL 1724987, at *2 (N.H. Mar. 13, 2018). The Supreme Court then specifically held that this Court has 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. The Supreme Court stated that, under the Rule and pursuant to its equitable powers, this Court has "wide discretion to fashion suitable procedures to ensure that appropriate class counsel is appointed, that all putative class members receive adequate notice, and that all claims of class members are fairly adjudicated." Id.

II

A limited fund class action is appropriate in circumstances in which three requisites exist:

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. 815, 838–39 (1999).

Plaintiffs seek preliminary 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." Accordingly, since little State law exists regarding class litigation, the Court must turn to cognate federal law.

The current posture of the case is, in substance, a request to approve a proposed certification and settlement of a mandatory class action. A proposed settlement of a mandatory limited fund class action must meet the exacting standards articulated by the United States Supreme Court in Ortiz, because the due process rights of litigants are cut off if the class is certified. Manual for Complex Litigation § 21.132, at 276 (4th ed. 2017). In the ordinary course, a review of any proposed class action settlement generally involves two hearings; first, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. See, e.g., In re Amino Acid Lysine Antitrust Litigation, No. 96-C-7679, 1996 WL 197671 (N.D. Ill. Apr. 22, 1996). There is authority for the proposition that this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions or informal presentations by parties. Manual for Complex Litigation § 21.633, at 381 (4th ed. 2017). Given the extensive history of the litigation, and the fact that the rights of the putative class members have already been adjudicated, the Court finds that a preliminary hearing on class certification and fairness of the settlement is unnecessary.

A court should grant preliminary approval of a settlement where an initial evaluation demonstrates that a settlement agreement is "within the range of possible approval." Tart v. Lions Gate Entm't Corp., No. 14-CV-8004 (AJN), 2015 WL 5945846, at *5–6 (S.D.N.Y. 2015). It has been said that the court need only find that there is

probable cause to submit the settlement proposal to class members and hold a full-scale hearing as to its fairness. Rubenstein, 4 Newberg on Class Actions § 13:13 (2018) (quoting Flynn v. New York Dolls Gentlemen's Club, 2014 WL 4980380, at *1 (S.D.N.Y. Oct. 6, 2014)).

The proposed settlement provides for a pro rata disbursement to Plaintiff Class Members based upon a formula which relates to their payment to the JUA surplus. (Lead Plaintiffs' Mem. of Law in Supp. of Renewed Mot. for Prelim. and Final Class Certification, Appointment of Class Counsel, and Approval of Notice to the Putative Class, Ex. C.) The proposal is consistent with the Plan of Allocation approved by the Court during the prior litigation in 2012.

Based upon the record before the Court, and the pleadings and documents on file, particularly the Lead Plaintiff's Memorandum of Law in Support of their Renewed Motion for Preliminary and Final Class Certification, Appointment of Class Counsel, and Approval of Notice to the Putative Class, the Court finds, on a preliminary basis, that it would be appropriate for this matter to proceed as a limited fund class action. Rubenstein, 2 Newberg on Class Actions § 4:16 (5th ed. 2017).

Accordingly, the Court preliminarily certifies the proposed class as "all entities or individuals who purchased insurance from the JUA on or after January 1, 1986." (See Lead Plaintiffs' Mem. of Law in Supp. of Renewed Mot. for Prelim. and Final Class Certification, Appointment of Class Counsel, and Approval of Notice to the Putative Class, Ex. C.) The Court appoints attorneys Kevin M. Fitzgerald, Esq. and W. Scott O'Connell, Esq., who have ably represented the Plaintiffs in the prior litigation as Class Counsel. The Court authorizes the hiring of the Garden City Group, LLC to serve as claims administrator, and

authorizes Class Counsel to incur reasonable and necessary expenses to provide the Class notice which shall be netted from the common fund prior to distribution.

III

A status conference shall be held on June 4, 2018. The parties should be prepared to discuss the following issues:

1. The form and timing of notice to the Class, and a schedule for further hearings.

2. The Insurance Commissioner's Request to Interplead Sums to the Merrimack County Superior Court in In re the Winding Down of: New Hampshire Medical Malpractice Joint Underwriting Association.

At the final fairness hearing, the proponents of the settlement must establish that the settlement is "fair, reasonable and adequate." In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 316 (3d Cir. 1998). A court approving a class action settlement must act as a fiduciary to the absent class making an unusual, largely nonlegal judgment and doing so in an informational vacuum. 4 Newberg on Class Actions § 13.40 (5th ed. 2017). The Manual for Complex Litigation describes the task this way:

> Because there is typically no client with the motivation, knowledge, and resources to protect its own interests, the judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation.

Manual for Complex Litigation § 21.61(4th ed. 2017); 4 Newberg on Class Actions § 13.40 (5th ed. 2017).

This concern is particularly acute in a limited fund class action in light of the mandatory nature of the class and the correlative due process considerations. See generally 4 Newberg on Class Actions § 13.40 (5th ed. 2017). At the final fairness hearing,

Plaintiffs should be prepared to provide affidavits, declarations or testimony and memoranda so that the Court will be able to make specific findings as to how the settlement meets or fails to meet the statutory requirements as established by Ortiz v. Fibreboard. See 527 U.S. at 838–39. Plaintiffs must address the issue of potential conflict between class members who still obtain insurance coverage from the JUA and those who do not. The Court believes that it has an obligation to make findings to demonstrate to a reviewing court that the requisite inquiry has been made and the diverse interests and requisite factors in determining the proposed settlement's fairness, reasonableness and adequacy have been considered. Manual for Complex Litigation § 21.132, at 276 (4th ed. 2017).

SO ORDERED

5/24/18	*s/Richard B. McNamara*
DATE	Richard B. McNamara, Presiding Justice

RBM/