

Plan of Allocation, Case Contribution Awards, and Class Counsel's Fees and Costs



Tuttle, et al. v. New Hampshire Medical Malpractice Joint Underwriting Association

August 21, 2018

Hearing Agenda

- 1. Plan of Allocation (“POA”)**
- 2. Case Contribution Awards for Class Representatives**
- 3. Reimbursement of Expenses**
- 4. Class Counsel’s Percent of Fund Fees Request**
- 5. Pending Orders on Custodial Account**

Filings Before the Court

- I. Motion to Approve Plan of Allocation, Case Contribution Awards for Certain Class Members and Class Counsel's Fees and Costs
- II. Memorandum of Law in Support of Motion to Approve the Plan of Allocation, Case Contribution Awards for Certain Class Members and Class Counsel's Fees and Costs
- III. Class Representatives' Proposed Plan of Allocation and Distribution of Excess Surplus Funds Remaining After the Liquidation of NHMMJUA
- IV. Appendix of Exhibits to the Memorandum (1 – 6 *infra*)

Filings Before the Court

1. Affidavit of W. Scott O'Connell in Support of Motion to Approve the Plan of Allocation, Case Contribution Awards for Certain Class Members, and Class Counsel's Fees and Costs
 - A. List of Nixon Peabody's NHMMJUA Policyholder Clients;
 - B. Policyholder Retention and Contingent Fee Agreement;
 - C. New Hampshire Department of Insurance Market Conduct Examination Report dated October 24, 2013;
 - D. New Hampshire Department of Insurance Report on Availability of Medical Malpractice Insurance dated February 19, 2015;
 - E. Letter to Senator Sharon Carson dated April 30, 2015;
 - F. Table of Costs Incurred as of July 11, 2018;
 - G. Timekeeper Hours for Initial Distribution Actions (previously attached as Exhibit L to O'Connell Affidavit dated September 5, 2012); and
 - H. Nixon Peabody LLP Timekeeper Hours for Post Distribution Actions.

Filings Before the Court

2. Affidavit of Mitchell B. Jean, Esq. in Support of the Plan of Allocation, Case Contribution Awards, and Class Counsel's Fees and Costs
3. Affidavit of Thomas Buchanan in Support of the Plan of Allocation, Case Contribution Awards, and Class Counsel's Fees and Costs
4. Affidavit of Georgia A. Tuttle, M.D. in Support of the Plan of Allocation, Case Contribution Awards, and Class Counsel's Fees and Costs
5. Affidavit of David E. Strang, M.D. in Support of the Plan of Allocation, Case Contribution Awards, and Class Counsel's Fees and Costs
6. Class Representatives' Proposed Plan of Allocation and Distribution of the Excess Surplus Funds Remaining after the Liquidation of NHMMJUA

Filings Before the Court – Supplements

- V. Affidavit of Professor William B. Rubenstein in Support of Class Counsel's Fee Request

Initial Distribution Actions – 2008-2012

1. *Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass'n*, 159 N.H. 627 (2010)
2. Insurance Department's Order of Examination of the NHMMJUA Issuing on February 22, 2010
3. *Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass'n, et al.*, Docket No. 217-2010-CV-00294, Merrimack County ("Tuttle II")
4. *Tuttle v. Lynch*, Docket No. 217-2010-CV-00750, Merrimack County ("*Tuttle III*")
5. Joint Legislative Committee on Administrative Rules Final Proposal 2010-67
6. *Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass'n, et al.*, Docket No. 217-2010-CV-00414, Merrimack County ("Tuttle IV")
7. Negotiations with the Internal Revenue Service Regarding NHMMJUA Tax Status
8. Development and Support of 2011 N.H. Laws, Chapter 201 (codified at RSA 404-C:14)
9. The Common Fund of Interpleaded Monies

Post Distribution Actions – 2013-2018

1. First Legislative Study Commission regarding the future of the NHMMJUA
2. Second Legislative Study Commission regarding the future of the NHMMJUA
3. 2013 Department of Insurance Market Conduct Examination and Report on NHMMJUA and 2015 Department of Insurance Public Hearings and Report on “Availability of Medical Malpractice Insurance”
4. 2015 N.H. Laws Chapter 15-0265 (codified at RSA 404-C:17)
5. *In the Matter of the Winding Down of the NHMMJUA*, Docket No. 217-2015-CV-00347 (Merrimack County)
6. Renewed Class Action in Superior Court to Adjudicate the Distribution of Excess Surplus Funds in the New Common Fund Tranche. See RSA 404-C:17; *Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass’n, et al.*, Docket No. 217-2010-CV-00414 (Merrimack County)
7. Rule 9 Interlocutory Appeal Without Ruling to the New Hampshire Supreme Court, Case No. 2017-0427
8. Remand to Superior Court for the Adjudication of Distributions owed to Policyholders. See RSA 404-C:17; *Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass’n, et al.*, Docket No. 217-2010-CV-00414 (Merrimack County) (affirming authority for mandatory class and judgment on liability)

Procedural Posture: Class Certification and Notice

- May 24, 2018 – Preliminary Class Certification
 - Numerosity, Commonality, Typicality, Adequacy of Lead Plaintiffs and Counsel, and Superiority
 - January 1, 1986 to December 31, 2015
- June 5, 2018 – Court approved notice, see Super. Ct. R. 16(e), (j)
- June 15, 2018 – Mailing of Notice and Plan of Allocations Completed
 - 3,566 notices mailed to Class Members (consolidation of initial 6,200 class member claims because of commonly owned policies based on work during initial claims process)
 - 87 percent of Class received direct notice
 - Published on www.nhmmjua-class-action.com
- July 16, 2018 – Deadline for Named Insureds to Notify Claims Administrator if seeking distribution
- July 30, 2018 – Deadline for Objections to Plan of Allocation
- August 21, 2018 – Final Hearing

Procedural Posture: Class Certification and Notice

- **No** Objections to Plan of Allocation
- **No** Objections to Case Contribution Awards for Certain Plaintiffs
- **No** Objections to Reimbursement of Expenses
- **No** Objections to the 25 percent of fund attorneys' fees award

Plan of Allocation

Distribution from common fund equals percent of total premiums paid by policyholder

- Most fair, reasonable, and efficient method
- All class members treated equally
- Minimal costs and time for administering the distribution
- Avoids undesirable potential federal tax implications for NHMMJUA
- No established pattern and practice at NHMMJUA for determining annual surplus
- No weighting of dollars or investment return
- No claims experience factored into distribution
- Discourages potential adversity among class members that could threaten the class or risk depletion of the common fund
- Provides for claim dispute arbitration process successfully employed with initial distribution
- Consistent with Court's broad discretionary authority as confirmed by the Supreme Court in its Remand Order; see *also* Super. Ct. R. 16(h) and 16(j)

Case Contribution Awards for Certain Class Members

Legal Standard

- Whether actions protected the interests of the class members and inured to their benefit
- Whether actions assumed substantial indirect or direct financial risk
- The time and effort expended to pursue the class action

Factual Support

- O'Connell Aff. ¶¶ 11-13, 26-27; Exhibit E
- Jean Aff. ¶¶ 4-5, 12, 22-24
- Buchanan Aff. ¶¶ 4-5, 17, 19
- Tuttle Aff. ¶¶ 6-7, 13-19

Class Counsel's Expense Reimbursement

- Class Counsel has advanced and assumed the financial risk of substantial but reasonable and necessary expenses for the benefit of the Class
 - Other usual and customary expenses (transcripts, copying, travel, legal research databases, courier/delivery service, etc.)
 - Citizens Bank Custodial Account expenses/fees
 - GCG Claims Administrator fees and costs

Class Counsel's Percent of Funds Attorneys' Fees Request

Class Counsel's work in the Actions created, protected and preserved a new common fund of approximately \$85,000,000 (total of \$195,000,000) for distribution to Policyholders

- Percent-of-fund is standard in common fund cases (“prevailing praxis” in the First Circuit) and is well supported by New Hampshire law, analogous federal law, and underlying policies
- 25 percent requested is normal, presumptive benchmark
- 316 Policyholder Clients have **25 percent** contingent fee agreements with Nixon Peabody, negotiated at arms' length in a real marketplace
- Represents **9 percent** of the 3,566 total unique Class Members (6,200 original class member claims consolidated to 3,566 associated claims, raising % from 5% to 9%)
- Evidences market reasonableness of the contingent fee
- Consistent with legal benchmark and approved norms in comparable cases
- Supported by Lead Plaintiffs, including single largest policyholder LRGHealthcare
- **No** objections from the Class

Class Counsel's Percent of Funds Attorneys' Fees Request

- 4 Newberg on Class Actions (Prof. William B. Rubenstein)
 - In class actions, most state courts award attorney's fees under the common fund doctrine. When a plaintiff in an individual or representative capacity creates, increases or preserves a fund which benefits an ascertainable class, the court, in exercising its equity jurisdiction, may award attorney's fees by directing payment from the fund. Under this exception [to the "American Rule"], fees are not shifted to the defendant but rather paid by the class members. §13:74

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Class Counsel's Percent of Funds Attorneys' Fees Request

- New Hampshire Law on Fee Requests (POA Brief at 21-28)
 - Broad latitude to determine class counsel's fee
 - Recognizes common fund doctrine
 - *Boeing Company v. Van Gemert* (SCOTUS)
 - *Private Truck Council of America, Inc. v. State*
 - *Peterson v. Reilly*
 - *Irwin Marine, Inc. v. Blizzard, Inc.*
 - Affirmed unless lacking evidentiary support or tainted by error
 - Looks to “cases interpreting federal rule [23] as analytic aids”
 - Remand Order
 - *Petition of Bayview Crematory*
 - *Cantwell v. J & R Properties Unlimited, Inc.*

Class Counsel's Percent of Funds Attorneys' Fees Request

1. The *Tyco* Factors (POA Brief at 32-33)

- Commercial reasonableness/negotiations concerning the fee agreement
- Fee awards in similar cases
- The complexity, duration, and risk involved in the Actions
- Reaction of the class
- Public policy consideration

2. Market-Mimicking Approach (POA Brief at 45-46 & n.13)

- Pre-suit “market rate” requires no speculation here in light of 316 ex ante agreements

3. Lodestar multiple cross check:

- 5.96 through June 2012
- 6.56 through August 18, 2018
- Lower still by conclusion

Class Counsel's Percent of Funds Attorneys' Fees Request

— Affidavit of Prof. William B. Rubenstein

- Court has already correctly awarded 25 percent fee based on numerous findings including the extraordinary results achieved and the unique/unanimous *ex ante* and *ex post* support of the class
- Present fee request best viewed as extension of previous request because total (\$195,000,000) was obtained only by virtue of decade of sustained, essential effort on behalf of class
- 25 percent fee is both reasonable and fully justified based on extraordinary circumstances and superb results
- Modestly enhanced lodestar multiple from that previously approved (5.96 versus mid-6) amply justified by precedent-setting, challenging, sustained commitment essential to securing additional \$85 million, “nearly doubl[ing]” class recovery

Class Counsel's Percent of Funds Attorneys' Fees Request

- Affidavit of Prof. William B. Rubenstein, cont'd
 - Similar or higher lodestar multiplier cross-check is consistent with both smaller and larger cases, as well as those, like this, with extraordinary risks and results. (See Exhibit B, List of Exemplary Cases with Multipliers of 6.0 and Higher)
 - 25 percent fee was negotiated in advance by sophisticated business people
 - Conclusively established the actual “market rate” for Nixon Peabody’s work
 - Represents 9 percent of the Class
 - Contracting clients still support it knowing the fee proposed
 - Reasonableness confirmed by the extraordinary fact of its acceptance by the entire Class *ex post*
 - Nixon Peabody Undertook Significant Risk
 - Substantial time and expenses incurred with no payment for 5+ years
 - Substantial practice and political risk with real consequences

Class Counsel's Percent of Funds Attorneys' Fees Request

- Affidavit of Prof. William B. Rubenstein, *cont'd*
 - Nixon Peabody again shouldered the risk and work alone
 - Nixon Peabody's work was very challenging, "far from ministerial" and the risk of failure was high
 - Nixon Peabody's results were exceptionally successful
 - Created, protected, and preserved the common fund
 - 100 percent recovery of surplus funds protected for distribution to Class (current \$85 million is 35.3 percent of premium paid; total of \$195 million, more than 81 percent)
 - Initial 98.53 percent successful claim return (1.47 percent reverter)
 - Historic degree of success and class support makes this case an outlier among class actions and especially remarkable compared to cases involving comparable common funds