

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 217-2010-CV-414

Georgia Tuttle, M.D., et al.

vs.

New Hampshire Medical Malpractice
Joint Underwriting Association, et al.

**CLASS REPRESENTATIVES' PROPOSED PLAN OF ALLOCATION
AND DISTRIBUTION OF EXCESS SURPLUS FUNDS REMAINING AFTER
THE LIQUIDATION OF NHMMJUA**

The Plaintiffs—who are the Court-appointed Class Representatives—submit this Proposed Plan of Allocation (“Proposed Plan”) for the fair, equitable, and reasonable allocation and distribution of excess surplus funds to Class Members resulting from the liquidation of the New Hampshire Medical Malpractice Joint Underwriting Association (“NHMMJUA”).

Current Procedural Posture of the Case

1. On May 24, 2018, this Court granted preliminary certification of a class that includes policyholders who purchased accessible and participating medical malpractice insurance coverage from the NHMMJUA from January 1, 1986, through December 31, 2015 (the “Class”). A copy of this Order may be viewed at www.nhmmjua-class-action.com. Plaintiffs are the designated Class Representatives. The undersigned attorneys have been appointed as Class Counsel.

2. On August 21, 2018, the Court will have a final hearing to confirm final class certification (the “Final Hearing”). The Court will also consider other issues including the fair, equitable, and reasonable allocation of funds to Class Members and an award of attorneys’ fees

to Class Counsel for their work to protect and preserve assets of the NHMMJUA for the benefit of the Class since the initial \$110 million distribution ordered in October 2012. Since that initial distribution, the work of the Class Representatives and Class Counsel has resulted in a new common fund of approximately \$85 million, the net proceeds of which will be available for distribution to the Class as ordered by the Court after the August 21, 2018 Final Hearing.

3. The Class Representatives, who served that role in the initial class distribution, have considered these complex issues in some detail. As a result of that consideration, as well as their prior experience with these issues, the Class Representatives have developed this Proposed Plan for consideration by the Class and the Court.

Summary of Relevant Facts

4. On October 9, 2012, the Merrimack Superior Court entered an order approving the Class Representatives' prior Plan of Allocation for the distribution of \$110 million to class members. Class Counsel completed that distribution to then-existing class members with the assistance of the Claims Administrator. The overwhelming majority of class members, their successors, or heirs were located and 98.5 percent of the net proceeds were distributed.

5. In the weeks after the initial distribution was approved, activities were undertaken by various state actors to examine the NHMMJUA to determine whether it needed to be reformed, changed, or dissolved. All of these activities threatened in material ways the vested contractual rights of policyholders established in *Tuttle I* and *Tuttle II* to NHMMJUA excess surplus funds.

6. The Class Representatives and Class Counsel, Nixon Peabody LLP, have closely monitored these activities and have taken action during the past five years to protect the vested rights of policyholders and to preserve NHMMJUA assets for a further distribution(s). Specifically, the Class Representatives and Nixon Peabody have been materially involved with

the following proceedings occurring after the *Tuttle II* final hearing and distribution (collectively, the “Post Distribution Actions”), all of which threatened the availability of further excess surplus funds to policyholders:

1. *First Legislative Study Commission regarding the future of the NHMMJUA*

After enacting RSA 404-C:14, the Legislature authorized different study commissions to examine possible changes to NHMMJUA that might have impacted the excess surplus funds owed to policyholders. *See* SB 170, Chapter 201:2, Laws of 2011; HB 489, Chapter 293:2, Laws of 2014. This commission examined many alternatives including dissolution, sale, conversion, and merger. All options created risk that excess surplus funds might be impaired and not available to policyholders. Nixon Peabody attended, provided testimony, and otherwise participated in all hearings about the future of the NHMMJUA. In all such proceedings, Nixon Peabody advocated for protecting the vested rights of policyholders to further excess surplus funds. Among other things, Nixon Peabody communicated that any reformulation of the NHMMJUA that impaired the vested rights of policyholders would likely result in further legal action.

2. *Second Legislative Study Commission regarding the future of the NHMMJUA*

A second legislative study commission was required by HB 489, Chapter 293:2, Laws of 2014. This commission continued the work of the first. Nixon Peabody once again, attended, provided testimony, and otherwise participated in all hearings of the second commission. In all such proceedings, Nixon Peabody advocated for protecting the vested rights of policyholders to further excess surplus funds. Among other things, Nixon Peabody communicated that any reformulation of the NHMMJUA that impaired the vested rights of policyholders would likely result in further legal action.

3. *2015 Department of Insurance Public Hearings and Report on
“Availability of Medical Malpractice Insurance”*

The Department of Insurance (“DOI”) examined the NHMMJUA, as well as other market participants, to determine whether there were sufficient insurance options from the private market such that the NHMMJUA was no longer a necessary residual market mechanism. The DOI took written comments and testimony from the public. Nixon Peabody prepared certain policyholders for testimony, provided both oral and written input, reviewed and analyzed other submissions, and continued advocacy for protecting the vested rights of the putative class. In its report, the DOI concluded that the NHMMJUA was no longer needed and proposed legislation for its dissolution. The DOI’s proposed legislation failed to provide adequate protections for the vested rights of the putative class. Nixon Peabody continued its advocacy for the putative class with stakeholders and continued to inform that the failure to provide policyholder protections would likely result in further litigation.

4. *2015 N.H. Laws Chapter 15-0265 (codified at RSA 404-C:17)*

The Senate and the House took up competing versions of legislation concerning the dissolution of the NHMMJUA. HB 489 mirrored the DOI’s proposed legislation and failed to adequately protect the vested rights of policyholders. Testimony provided by the DOI indicated a position that the prior class had no further rights to excess surplus funds and that only a small number of recent policyholders who paid premiums after the hearing ordering the initial distribution arguably were entitled to a limited premium refund. Indeed, the DOI’s legislation proposed remaining funds escheating to the state. The proposed NHMMJUA liquidation and related regulatory activity thus suggested another effort to confiscate policyholders’ excess surplus funds for state use.

Nixon Peabody provided extensive opposition, written advocacy, and analysis in this agency process that indeed policyholders had continuing vested rights to any newly-identified surplus funds. Recognizing the possibility of further litigation to protect funds for policyholders, the Senate, with considerable assistance from the Class Representatives and Nixon Peabody, made significant changes to HB 489 that expressly acknowledged the vested rights of policyholders.

Working with representatives of the Governor, the Attorney General, the DOI, legislative leadership, and members of the prior class, Nixon Peabody was able to avoid further litigation by helping to negotiate additional changes that: (1) recognized the continuing vested rights of policyholders; (2) compelled the return of excess surplus funds to policyholders through an adjudication process managed by this Court in the docket of the initial distribution; (3) granted standing to policyholders in the NHMMJUA liquidating receivership in order to ensure a commercially-reasonable process for the assumption of insurance obligations and the resulting preservation of surplus funds; (4) required the payment of excess surplus funds into this Court and docket for the adjudication of distributions to policyholders through a class action; and (5) the State of New Hampshire nor any of its agencies had any rights to these funds.

5. In the Matter of the Winding Down of the New Hampshire Medical Malpractice Joint Underwriting Association, *Docket No. 217-2015-CV-00347 (Merrimack County)*

Nixon Peabody appeared for and represented the Class Representatives in the statutorily-directed dissolution of the NHMMJUA. In that role, Nixon Peabody regularly consulted with the Receiver's counsel on many issues, including the bid process for selecting a company to assume the NHMMJUA insurance contracts, the qualifications of the bidders and proposals, the consideration paid for the assumption of the contracts, the indemnities provided, notice to policyholders, counsel and assistance with legal arguments to reduce state tax obligations, review

of monthly status reports, a partial distribution to policyholders, an appropriate reserve to satisfy any potential tax obligations, and joinder in a requested release and discharge for the Receiver upon partial payment of excess surplus funds. Nixon Peabody attended all of the hearings concerning this liquidation proceeding. All of the actions above were intended to minimize expenses in order to maximize the new common fund for distribution.

6. *Renewed Class Action in Superior Court to Adjudicate the Distribution of Excess Surplus Funds in the Tuttle II Proceeding. See RSA 404-C:17, III; Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass'n, et al., Docket No. 217-2010-CV-00414 (Merrimack County)*

Nixon Peabody prepared and filed multiple iterations of pleadings concerning class certification, appointment of counsel, and approval of notice. Nixon Peabody also briefed court-raised issues such as jurisdiction, class certification, adequacy of class representatives in the event of conflict issues, authority for an interpleader process in the absence of a rule of procedure, the authority for a mandatory class in the absence of a rule of procedure, and compliance with the Order directing the preparation and filing of an Interlocutory Appeal to the New Hampshire Supreme Court.

7. *Rule 9 Interlocutory Appeal Without Ruling to the New Hampshire Supreme Court, New Hampshire Supreme Court No. 2017-0427*

By order of the trial court, Nixon Peabody prepared a Rule 9 Interlocutory Appeal Without Ruling on two questions: (1) the authority of the trial court to administer a mandatory class; and (2) if so, whether substantially the same process as used in the initial class distribution proceeding could be used to adjudicate the amount of distributions owed to policyholders. Nixon Peabody prepared the interlocutory statement, appeared for hearing on the same, filed the appeal with the Supreme Court, prepared and filed the appendix, prepared and filed a Motion for Summary Affirmance, and prepared and filed the appeal brief on the questions accepted.

Nixon Peabody analyzed the Supreme Court's Remand Order authorizing a mandatory class and the use of the prior process and procedures to determine amounts to be distributed.

8. *Remand to Superior Court for the Adjudication of Distributions owed to Policyholders. See RSA 404-C:17, III; Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass'n, et al., Docket No. 217-2010-CV-00414 (Merrimack County)*

Nixon Peabody revised all pleadings, class notice, and Plan of Allocation to conform to the Remand Order and renewed its Motion for Preliminary and Final Class Certification, Appointment of Counsel, and Approval of Notice. Nixon Peabody also resumed discussions with Receiver's counsel, proposing an increased initial distribution of \$60 million with a \$25 million reserve to be held until the limitations period to challenge the NHMMJUA federal tax filings lapses on September 2, 2018.

Significantly, all of the Post Distribution Actions were undertaken on behalf of the Class Representatives as well as 313 other individual policyholders who retained Nixon Peabody. While Nixon Peabody was not formally re-appointed as Class Counsel until recently, such work was done by, and mindful of, the interests of the putative class, and the putative class was benefited by the creation and preservation of the new common fund.

During nearly the six years since the initial class distribution was ordered, Nixon Peabody has acted in the Post Distribution Actions to protect additional excess surplus funds for all policyholders under the precedent that this firm helped establish. The work has been challenging, ongoing and occurred in multiple fora where efforts to deprive policyholders of their continuing vested rights were attempted. Throughout this nearly six-year post distribution period, Nixon Peabody has needed to assert policyholder rights, often with the specter of further litigation, to protect these substantial—indeed historic-- surplus funds from confiscation.

7. The Remand Order confirmed the NHMMJUA's liability to pay excess surplus funds into court for distribution to policyholders by way of a mandatory, so-called "no opt out" class action. The only issue remaining to be determined in the class action is the amount of distribution to each policyholder.

8. To facilitate a fair, efficient, and equitable procedure for determining the amount of distribution to each Class Member, the Class Representatives propose the following Plan of Allocation. The method of determining a Class Member's share is the same method used in the initial distribution.

Certain Definitions Applicable to the Proposed Plan of Allocation

As used in this Plan, the following terms shall have the following meanings:

9. "**Administration Costs**" means the all costs necessary to implement this Plan of Allocation, including the costs of the Claims Administrator for services provided including providing Notice and for issuing distributions.

10. "**Binding Arbitration**" means the process that will be used if there are competing claims to the distribution owed, e.g., to a Named Insured who actually paid premiums for coverage or to a representative of a defunct or deceased policyholder, that cannot be resolved by the Claims Administrator. The arbitration shall be conducted in New Hampshire and shall involve all competing claimants to the disputed share. The arbitration shall be governed by New Hampshire law without resort to its choice of law principles. All attorneys' fees for any arbitration shall be paid by the respective competing claimants and the cost of the arbitrator shall be paid by the Claims Administrator from the policyholder distribution at issue.

11. "**Claims Administrator**" means Garden City Group, LLC ("GCG"), which shall administer the distribution of funds to class members.

12. **“Class”** and **“Class Members”** mean all Policyholders or Named Insureds that purchased and paid the premiums for Participating and Assessable insurance coverage from the JUA from January 1, 1986, until the date of the Final Hearing. Only the person or entity that purchased Participating and Assessable insurance coverage and paid the related premiums as reflected on the books and records of the NHMMJUA, or as recognized by the Claims Administrator upon a timely Proof of Claim, or as recognized by the Binding Arbitration process, shall be eligible to receive proceeds from this Plan. Named Insureds who actually paid the premium for coverage or representatives of defunct or deceased Policyholder(s) may be eligible to receive proceeds from this distribution upon a timely and valid claim made to the Claims Administrator to be recognized as a Class Member. Disputes by rival claimants to such shares shall be resolved by Binding Arbitration.

13. **“Class Action”** means this proceeding to determine the amount to be distributed to Class Members. The Court has ordered that this will be administered a mandatory class, which means no Class Member can opt out of this proceeding to pursue a different action. This proceeding is the only means by which policyholders can obtain a portion of excess surplus funds resulting from the dissolution of the NHMMJUA.

14. **“Class Counsel”** means Nixon Peabody LLP.

15. **“Class Representatives”** mean the three named plaintiffs in this action, Georgia Tuttle, M.D., Derry Medical Center, and LRGHealthcare

16. **“Common Fund”** means the aggregate funds protected and secured by the Class Representatives and Class Counsel for the benefit of Class Members.

17. **“Distribution Fund”** means the sum of (i) the initial amount of SIXTY MILLION DOLLARS (\$60,000,000) tendered pursuant to RSA 404-C:17, III; and (ii) such part

of the Receiver's Reserve remaining after all of the obligations of the NHMMJUA have been reasonably provided for from the Reserve, resolved or satisfied.

18. **"Effective Date of Plan" or "Effective Date"** means the date upon which the Final Order becomes a judgment with all applicable appeal periods having expired.

19. **"Final Hearing"** means the hearing scheduled for August 21, 2018, that will be held to consider final class certification as well as all remaining issues, including the entry of judgment, the Plan of Allocation, case contribution awards for Class Representatives, and attorneys' fees and costs.

20. **"Final Order"** means the proposed order to be entered by the Court approving the Distribution substantially in the form attached to the Motion for Class Certification.

21. **"Named Insureds"** means the Person listed as the Client Name in the books and records of the NHMMJUA.

22. **"Net Distribution Fund"** means the Distribution Fund less (i) any Administration Costs as defined herein; (ii) any case contribution awards to the Class Representatives; and (iii) any attorneys' fees and costs awarded to Class Counsel.

23. **"Notice"** means the notice approved by the Court for publication.

24. **"Person"** means an individual, corporation, partnership, limited partnership, limited liability company or partnership, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity and their spouses, heirs, predecessors, successors, representatives, or assignees.

25. **"Plan of Allocation" or "Plan"** means this document.

26. **“Policyholder”** means the Person listed as the Client Name or the Firm Name in the books and records of the NHMMJUA and who paid the premiums for the insurance coverage.

27. **“Prior Distribution”** or **“Initial Distribution”** means the return of the One Hundred Ten Million Dollars (\$110 million), net of expenses, case contribution awards, and attorneys’ fees and costs, approved by the Court in October 2012.

28. **“Total Premiums”** means all *premiums* collected by the NHMMJUA net of any applicable credits for the period January 1, 1986, through the date of the Final Hearing.

29. **“Total Net Premiums”** means all premiums paid by Class Members net of any applicable credits for the period January 1, 1986, through the date of the Final Hearing.

The Net Distribution Fund

30. The Distribution Fund is the total common fund of approximately \$85 million resulting from the work of the Class Representatives and Nixon Peabody over the past six years. All approved administrative fees and expenses, case contribution awards, and attorneys’ fees and costs will be paid from the Distribution Fund. The funds remaining after these payments constitute the Net Distribution Fund, which will be distributed to the Class Members as ordered by the Court.

Determination of a Class Member’s Share of the Net Distribution Fund

31. After considering the cost, complication, and potential adverse tax implications of other allocation methods, the Class Representatives and Class Counsel recommend as follows: A fair, efficient, reasonable, and equitable method for determining a Class Member’s share of the Net Distribution Fund payable to such Class Member is to calculate the percent of Total Net Premium paid by each Class Member and apply that same percentage against the Net Distribution Fund. This method constitutes a return of premiums paid as opposed to an

investment product in which interest is accrued for excess premiums paid which, if utilized, could result in adverse federal tax obligations. The Claims Administrator shall utilize policyholder data, provided by the NHMMJUA and approved by Class Counsel, to calculate the percentage share and amount allocated to each Class Member. The Claims Administrator will provide Class Counsel a master list of distributions calculated for each Class Member. Class Counsel will file with the Court, prior to issuing and distributions, the administrative costs and fees incurred by the Claims Administrator that will be deducted from the Distribution Fund. After passage of the Effective Date, Class Counsel is authorized to pay all approved case contributions awards and attorneys' fees and costs from the Distribution Fund. Also after the passage of the Effective Date, Class Counsel is authorized to make distributions to Class Members from the Net Distribution Fund. Distributions to Class Members from the Net Distribution Fund shall be only after the Effective Date and after: (i) all matters with respect to case contribution awards, attorneys' fees and costs, and disbursements have been resolved by the Court; and (ii) all Administration Costs have been approved and paid.

32. All distributions from the Net Distribution Fund pursuant to this Plan shall be deemed final and conclusive against all Class Members.

33. All proceedings with respect to the administration of this Plan by Class Counsel or the Claims Administrator shall be subject to the jurisdiction of the Court.

34. All disputes between or among Policyholders and Named Insureds as to the rights in any distribution shall be resolved by Binding Arbitration.

35. Funds remaining in the Net Distribution Fund six months after the distribution has been issued shall be transferred to the New Hampshire State Treasurer as provided in 404-C:17 IV (a).¹

36. If you object to any of the terms above and want the Court to consider your objection, you must send to Class Counsel a *written* objection postmarked on or before July 30, 2018. Your objection must state the reasons for the objection and why you do not want the Court to proceed in this fashion. If you want to speak at the Final Hearing on this issue, you must also make that request in this objection.

Case Contribution Awards for the Three Class Representatives

37. Class Representatives Georgia Tuttle, Derry Medical Center, and LRGHealthcare were appointed as the class representatives in this matter. They also served that role in the prior class action proceedings.

38. The Class Representatives have been active with Class Counsel throughout the Post Distribution Actions to help preserve and protect the excess surplus funds for distribution to Class Members. This help has taken time and commitment above and beyond other Class Members.

39. As is usual and customary in class action litigation, courts consider case contribution awards for class representatives who have provided service to class counsel in securing the common fund.

40. In recognition of this superior commitment and value-added service, Class Counsel requests that a contribution award of Twenty-five Thousand Dollars (\$25,000) be given

¹ RSA 404-C:17 IV (a) states: Funds that cannot be distributed to a policyholder in the interpleader proceeding referenced in this section due to the inability to locate the 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's state loan repayment program.

to each of the three Class Representatives and treated as an expense of the Common Fund. Class Counsel believes that this award appropriately recognizes the significant contributions made by these Class Representatives in helping to secure this award. Case contribution awards were approved to certain Class Members for certain substantial contributions provided in advance of the Prior Distribution.

41. If you object to the Case Contribution Award for the Class Representatives and want the Court to consider your objection, you must send to Class Counsel a *written* objection postmarked on or before July 30, 2018. Your objection must state the reasons for the objection and why you do not want the Court to proceed in this fashion. If you want to speak at the Final Hearing on this issue, you must also make that request in this objection.

Award of Attorneys' Fees and Costs

42. As it did in connection with the Prior Distribution, Class Counsel will file a motion seeking an award of the costs incurred as well as twenty-five percent (25%) of the Common Fund for its fees.

43. Class Counsel has worked through all of the Post Distribution Actions to protect and preserve the Common Fund on a contingency fee basis. The Post Distribution Actions have resulted in a Common Fund of approximately Eighty-Five Million Dollars (\$85 million). This is in addition to the One Hundred Ten Million Dollars (\$110 million) secured for the Prior Distribution. Class Counsels' actions since 2009 have secured excess surplus funds for Class Members of approximately One Hundred Ninety-Five Million Dollars (\$195 million).

44. No Class Members have paid any fees in connection with the approximate Eighty-Five Million Dollars (\$85 million) resulting from the Post Distribution Actions.

45. Class Counsel was retained by 316 individual Class Members with retention agreements that provided for a twenty-five percent (25%) contingency fee award. While New

Hampshire law permits a higher contingency fee percentage, Class Counsel agreed to a lower percentage than permitted by law.

46. The law is well-developed that a percentage of the Common Fund is an appropriate way to compensate class counsel for the work, financial risk, and skill necessary to create the Common Fund.

47. In connection with the Prior Distribution, no Class Members objected to the Class Counsels' request for the fee award of twenty-five percent (25%) of the Common Fund.

48. After considering the factors above and other information submitted, the Court ultimately awarded to Class Counsel twenty-five (25%) percent of the then-existing Common Fund as their fee.

49. Class Counsel requests that this Court award as attorneys' fees to Class Counsel twenty-five (25%) of the new Distribution Fund of approximately \$85 million.

50. If you object to the Attorneys' Fee request and want the Court to consider your objection, you must send to Class Counsel a *written* objection postmarked on or before July 30, 2018. Your objection must state the reasons for the objection and why you do not want the Court to proceed in this fashion. If you want to speak at the Final Hearing on this issue, you must also make that request in this objection.

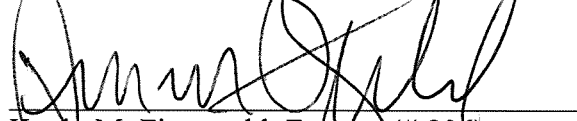
51. On or before July 13, 2018, Class Counsel will file with the Court a Memorandum of Law in Support of the Plan of Allocation, Case Contribution Awards and Attorneys' Fee Award with supporting declarations from the Class Representatives and Class Counsel. Also, Class Counsel anticipate filing a declaration from William B. Rubenstein, the Sidley Austin Professor of Law at Harvard Law School and the author of *Newberg on Class Actions*, concerning Class Counsel's fee request. This additional declaration will be filed in advance of

the Final Hearing. Once filed, these documents may be viewed at www.nhmmjua-class-action.com.

Respectfully submitted,

Class Counsel

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Dated: June 15, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2018, a copy of the foregoing *CLASS REPRESENTATIVES' PROPOSED PLAN OF ALLOCATION AND DISTRIBUTION OF EXCESS SURPLUS FUNDS REMAINING AFTER THE LIQUIDATION OF NHMMJUA* was served electronically and by first-class mail, postage prepaid, on all counsel of record, distributed to Class Member with the Court-Approved Notice by the Claims Administrator, and posted at www.nhmmjua-class-action.com.



W. Scott O'Connell