STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY SUPERIOR COURT

GEORGIA TUTTLE, MD, et al., Plaintiffs, vs. NEW HAMPSHIRE MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOC., Defendant.	) Superior Court Case No. 217-2010-CV-00294) Concord, New Hampshire) August 21, 2018) 10:05 a.m.

FINAL MOTION HEARING
BEFORE THE HONORABLE RICHARD B. MCNAMARA
JUDGE OF THE SUPERIOR COURT

AMENDED (Cover)

APPEARANCES:

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I N D E X

(Proceedings commence at 10:05 a.m.)

THE BAILIFF: If you all would please remain standing for the Honorable Court. Merrimack County Superior Court is in session. Please be seated.

THE COURT: All right. Good morning, everyone. This is the final approval hearing in the matter of a winding down of New Hampshire Medical Malpractice JUA, and I've just received the printout, which probably we should mark it as an exhibit. I've read everything. I understand there are no objectors; is that right?

MR. FITZGERALD: That's correct, Your Honor.

THE COURT: No one's received any objection in writing or?

MR. FITZGERALD: No objections. We've verified that --

THE COURT: Right.

MR. FITZGERALD: -- both with, obviously, our office and the class administrator.

THE COURT: Right. Okay. Well, I've read everything. I have a couple of questions, but I think it's a very good idea to mark this as an exhibit and make a record here because I think that's essential to the Court's obligation, which, as I understand it, is to act as a fiduciary to the class in proving this. Okay?

So why don't you proceed. I think this is an

excellent way to proceed, Mr. Fitzgerald.

MR. FITZGERALD: Thank you, Your Honor. Good morning, first of all. And if you'll indulge me for a moment, I'd like to introduce you -- in the courtroom this morning, directly behind me, is Georgia Tuttle.

THE COURT: All right.

MR. FITZGERALD: To her left is Tom Buchanan of Derry Medical Center, and to Tom's left, Mitch Jean, the general counsel of LRGH. Also in the courtroom this morning is Prof. William Rubenstein of the Harvard Law School, who has offered an affidavit in this case. I thank all of them for being here this morning and more particularly, given the wave of nostalgia, I think, that overcame us when we saw the words final hearing in a case that we've lived with, and I know you can identify with this from your own experience, for the better part of a decade, I'm going to thank each of them for their help and support.

THE COURT: I don't think Prof. Rubenstein came to the last hearing, did he?

MR. FITZGERALD: No.

THE COURT: He should know that I spent yesterday reading Newberg. It would have been nice if I could have just talked to him and asked him questions, but --

MR. FITZGERALD: Last time, he was to be networked by phone, but we never had an occasion to call him.

THE COURT: Right.

MR. FITZGERALD: And on this occasion, he was kind enough to join us.

THE COURT: Well, I read his affidavit with respect to the field work. But frankly, I've read -- I mean, I've got print-offs, you know, because I generally read it online. So --

MR. FITZGERALD: Well, it would probably be inappropriate to volunteer him for an autographed copy of the Newberg series, but he's --

THE COURT: Well, I was wondering whether or not you'd want to offer him if I ask you some questions. I mean, for example, some of the questions I have -- I've got a couple areas I want to talk about: incentive awards, method of calculating incentive awards, cy pres. Some of those things, I printed off the sections of his book.

MR. FITZGERALD: Right.

THE COURT: I would be happy to hear from him.

MR. FITZGERALD: Well, I would propose, Your Honor, we go through our presentation --

THE COURT: Yeah. Let's go through this. And at some point, if I ask you a question, if you want, you can put Prof. Rubenstein under oath, but he's an attorney. I mean, obviously, a very qualified and able attorney. I mean, a national expert in his field. I don't think that's necessary,

but I don't see how it would hurt to have his comments on the record.

MR. FITZGERALD: Certainly.

THE COURT: Okay. Go ahead, Mr. Fitzgerald.

MR. FITZGERALD: So Your Honor, by way of an overview, this morning, we have structured as an agenda for the hearing, obviously, the matters that were calling upon the Court in this final hearing to consider, the first of which is the plan of allocation, the components to which you just referred, the case contribution awards for our class representatives here today, accounting for the reimbursement of expenses related to the final administration of this class, class counsels, percent of funds fee request. And we also have pending before the Court a proposed order on the custodial account that actually physically will facilitate the transfer of funds from the JUA's receivership estate into the class case for distribution.

THE COURT: All right. Let me ask you about that, about the mechanism. The last time -- I understood the last time there was 110,000-dollar settlement, that there was money held out for IRS issues that never resolved, the money was paid back to the class. That's, essentially, what's going to happen now: 85,000, 60 is going to be paid out, 25 is going to be held. Do I understand that correctly?

MR. FITZGERALD: Exactly.

THE COURT: All right. Is that likely -- is the JUA being liquidated, will that be the end? Will there ever be another tranche of money?

MR. FITZGERALD: It is possible there could be a very small tranche --

THE COURT: Okay.

MR. FITZGERALD: -- owing to this. When the 25 million dollars comes out, there'll be roughly a million to a million-and-a-half dollars remaining in the JUA as a final reserve for the receiver to wind up, pay his bills, et cetera. He may not use all that money. So if, for example, it turns out he only used a half a million dollars, there may be a million dollars that would be a very small third tranche. It's not going to be a substantial amount.

We've addressed this with the claims administrator. It does not add significantly to the cost. Obviously, we have the cost of mailing another round of checks, but on the whole, manageable. So it's possible, but at a very, very small number of dollars.

THE COURT: Okay.

MR. FITZGERALD: Your Honor, what we had proposed to do today, and I'll just review specifically the filings before the Court, and then I'm going to sit down and divide this presentation with my partner, both literally and figuratively in this case for the last ten years, Scott O'Connell, to go

through the substance of the matters, which led us here today.

But the filings before the Court, as I just mentioned, by way of agenda or the motion filed by class counsel to approve the plan of allocation, case-contribution awards, and counsel fees, you have our memorandum, which I know you've read. We have the actual plan of allocation, which is referred to and developed in the memorandum. And then we filed a fairly robust appendix in this case, the first, and most substantial, of which was the affidavit of Scott O'Connell, which attached and authenticated -- and I will make an offer of proof, as will he, that these are true and accurate copies of the documents appended to his affidavit.

THE COURT: I have read Mr. O'Connell's affidavit. I have actually read Mr. Jean's affidavit, and I've skimmed most of the other documents.

MR. FITZGERALD: And you'll see included in the series of affidavits in addition to Attorney Jean's --

THE COURT: And Mr. Tuttle -- Ms. Tuttle.

MR. FITZGERALD: -- is that of Mr. Buchanan and that of Dr. Tuttle -- there is a item 5 there, David Strang, who actually offered an affidavit in the prior case. There's an affidavit for him, as well. And then, there is the actual copy as published and distributed to the class, the plan of allocation accompanying the notice. And then, finally, you

had, as you mentioned, the affidavit of Prof. Rubenstein with respect to the matters addressed in his affidavit.

At this point, Your Honor, I'm going to sit down. I'm going to turn the lectern over to Scott and review the substance of the matters.

THE COURT: All right. Thank you.

MR. O'CONNELL: Good morning, Your Honor.

THE COURT: Good morning.

MR. O'CONNELL: I know that you are prepared. I think it is wise that we make a record. I will be expeditious. We will take the PowerPoint and put it on the website for all class members to see, together with a transcript, which we will order at the conclusion, so that anybody who is not here today can have the benefit of your colloquy with us and perhaps Prof. Rubenstein. Just for the record, I think we should ask the court monitor to mark the PowerPoint as Exhibit 1, and I'll refer to that during the hearing. A little bit of the history --

THE COURT: Hold on. Give her a second to do it.

MR. O'CONNELL: Yeah. Sorry.

THE CLERK: All set.

(Plaintiffs' Exhibit 1 marked for identification)

MR. O'CONNELL: Awesome. Thank you so much.

THE CLERK: You're welcome.

MR. O'CONNELL: Some of the arguments today require

us to harken back to the initial distribution section. I will not be on this subject for a long period of time. But the Court will remember there was a three-year period starting, actually, late 2004 and ending in late 2012 when this Court issued an order for the first distribution, which had eight different fora in which efforts to take the excess surplus funds for other purposes had to be battled by the lead plaintiffs, who are lead plaintiffs in this class, together with other stakeholders who are class members.

There were several different total actions that were brought, the first of which wound up before the Supreme Court and made the law that governs through today, which is the policyholders have vested rights to the excess surplus funds. And that is what we are here to discuss as far as fair allocation, based on the plan of allocation.

There were collateral proceedings brought by the insurance department in an administrative context to try and change rules involving who had excess surplus funds. There was an effort to do an accounting of the JUA. There was an effort to seek mandamus. There was a battle before the Joint Legislative Committee when rules were brought forward that were to change who had the excess surplus funds. And of course, there was ultimately the class action that this Court administered last time that resulted in the return of 110 million dollars of net distribution after fees and expenses.

After this Court ordered that, in October of 2012, work continued with the IRS because there was a concern that some of the proceeds could be taxable. The Court will remember it was an undecided issue.

THE COURT: Let me ask you. This is what I've been trying to understand. You say that the plan of distribution, as I understand it, is simply a mechanical approach of figuring out what somebody's paid, and they get that back. There's no allocation as to time value of money. And you say that would be difficult. I wondered, in my own mind, how difficult that would be given the ability to do some kind of regression or something. But is the bigger issue here that that would trigger tax consequences?

MR. O'CONNELL: Yes, it is, Your Honor.

THE COURT: That's what I thought.

MR. O'CONNELL: And the tax would eat up the proceeds for the class.

THE COURT: That's what I thought because then it would no longer simply be a return and that would be the tax problem. And that's why you're -- and that's why it's a limited fund because if somebody -- I'm thinking out loud -- because I feel I have a responsibility -- I'm terrified, frankly, of the idea that it's a limited-fund class in a state with no substantive law involving limited funds. But that's why, I think, it's a limited-fund class, because if someone

brought an individual suit and insisted upon the time value of money, that would be a situation where a number of those claimants could come in and could deplete the funds.

MR. O'CONNELL: That's precisely the concern you raised and why we went to the Supreme Court for confirmation that this could be a limited fund, just for that reason.

THE COURT: All right.

MR. O'CONNELL: We did not want to have a circumstance, as we've mused before, before this Court, where someone is going to hold up the resolution, making a claim that time value of money would have been appropriate.

We learned during the last go-round, in close work with our retained counsel, PricewaterhouseCoopers, and Skadden Arps, on behalf of the JUA, that a return-of-premium approach had the best tax-advantageous circumstance for the class members and that continues to be the case.

One more point about taxes. After the resolution of the initial distribution in October of 2012 and the months thereafter, the JUA went through a conversion and became a taxable entity. You would know from the collateral proceeding, which is the winddown proceeding -- this is the class action. I think when the Court came on the bench, you said this was the winddown. And I'll just clarify for the record, the winddown is the liquidation. We're in the class action.

THE COURT: Right.

MR. O'CONNELL: They have referenced the need to get past roughly September 3rd, when any challenge by the IRS to file returns would term out. And so we believe, in early fall, we will have an answer to all obligations --

MR. JEAN: Less than two weeks.

MR. O'CONNELL: I'm sorry?

MR. JEAN: Less than two weeks.

MR. O'CONNELL: Less than two weeks from now, we will have clarity on virtually all of the outstanding obligations of the JUA, except for ministerial windup. We know that they're trying to minister, for example, the return of the SRF fund that was an excess surcharge from 1986 until 1983 to shore up what had been the insolvent part of the JUA's history pre-1986. So they will have some work to do.

And as Mr. Fitzgerald said, there will be in excess of a million dollars left if all 85 million come over in the fall to this case for the winding up of any ministerial acts. And I'm confident that the liquidator and receiver will provide a report to this Court in due course with what remains after this tax obligation is resolved.

And then the Court knows the rest of the history about legislation that was passed that vested jurisdiction in this Court to superintend the process. It did, and of course, we now have the benefit of our Supreme Court's remand order,

which said that this Court could follow the same proceeding as it did last time.

Next slide.

So that's the history. We're here --

THE COURT: Well, it's not quite the same thing as last time because it was an adversary proceeding to sue the insurance commissioner.

MR. O'CONNELL: You're right. And I think what the Supreme Court had said in the third paragraph of the remand order is that given the history of this case, what you had done previously, and the admissions made by the JUA, liability is established. So we still have an adversary, except it's not contested. So for purposes --

THE COURT: Right.

MR. O'CONNELL: -- of our analytical thinking, Judge, I would say --

THE COURT: Right. Liability is not contested.

MR. O'CONNELL: Yes.

THE COURT: It's --

MR. O'CONNELL: That's right. JUA --

THE COURT: -- there's no question about that.

MR. O'CONNELL: Right. So I mean, I think it's on all fours with the last one, except we're not here -- you don't have to determine again on summary judgment that the New Hampshire JUA has liability. That's been confirmed by the

Supreme Court to have been decided.

THE COURT: Right.

MR. O'CONNELL: So here we are on your authority, under Superior Court 16(h), to fashion a remedy.

But a little bit of history as to what happened after the last distribution. From 2013 to 2018, all manner of activity happened in Concord that assaulted the excess surplus funds. There were two, for example, legislative study commissions, which were looking at the future of the JUA. One was -- one study was for liquidation. One was for sale. One was to turn it into a standalone entity separate from government. And in each of those proceedings, it became evident that the belief that the state had access to these funds manifested itself again. In other words, in the process, where they were looking about the future of the JUA, there was a direct assault on the law established in Tuttle.

And Mr. Fitzgerald and I and the lead plaintiffs attended all of those hearings and had to forcefully advocate for changing the thinking. And in every one of those proceedings, we had to say if you do this, you violate Tuttle, and you are giving a lawsuit to the class to sue you. So thankfully, at the conclusion of those two legislative commissions, after being persuaded that there was an obligation to return the funds, they said to the Department of Insurance, go figure out if we still need the JUA. It's a

residual market mechanism that was created when the market was faulty in 1975. And the command went out, figure out if we still need it.

And the Department of Insurance did an examination and concluded, after public testimony, where the lead plaintiffs participated, where we did as well, that there was no need for the JUA anymore, that there was a functional market for malpractice insurance. This residual market mechanism was no longer necessary, and it should be wound up.

Again, in connection with that, testimony was given by the Department of -- the commissioner for the Department of Insurance that he believed funds should be turned over to the general court. Once again, deja vu all over again, as Yogi Barry would say -- Yogi Berra would say. We were back in a regime where the excess surplus funds were at risk. Again, we had to advocate against that.

We actually had to work with legislative leadership and the Department of Justice in the state to craft the law that is governing this case, which is 404-C:17, which, as this Court knows, vests, again, authority for the winddown and distribution of the excess surplus funds. And that was the determinative action that ensured that all continuing efforts by the state to take these funds was put to rest.

The next matter that is relevant is the winding down of the JUA. It was essential for the lead policyholders to

participate, and we had an appearance as counsel for them in that case, because the question was how would those policies be novated and assumed? We had to ensure a couple things. The insurance had to be protected. We knew that that was essential. We also had to make sure that excess surplus funds were not dissipated in an extravagance.

So we worked very closely with the receiver and the liquidator, and they struck a deal after an RFP process for roughly 23 million dollars to novate and assume all the policies. And that's fabulous news. All the covered docs in this class have continuing coverage to the extent it's not termed out, and that's solidly in place with a blue-chip company that we agree was a great choice. The receiver did a good process. We participated, and they took our feedback. We did that on behalf of the lead plaintiffs and the putative class, and we're confident that that piece is firmly in place for the benefit of class members.

We came back to this Court and sought class certification because now we knew, with only 23 million dollars being used of approximately 110 that was still in there, in the JUA, that there would be excess surplus funds. And so we brought those issues to the Court, and we went through a series of hearings. And the Court will remember there were issues about jurisdiction. The Court did not have custody of the money. There were issues about, you know,

whether or not the Court had the authority to run a class action in a limited fund case.

And all of those issues played out over a period of time where the Court gave us guidance. We filed pleadings. We went to the supreme court. They accepted it. They gave us orders that clarify this Court's role. We received the remand order, and here we are on the last piece of this to make sure that the distribution occurs.

The important part to emphasize between slide one, the initial-distribution actions, and the post-distribution actions is they were inextricably linked. We lived it over ten years, and we can say with assurance that what happened in the initial-distribution actions was tried again in the post-distribution actions. And it was necessary to bring forward considerable learning and understanding and context from prior proceedings in order to beat back the effort to take supplemental excess surplus funds. And that point will be relevant when Mr. Fitzgerald gets back up and argues about the fee award.

Next slide, please.

So just a little bit about the procedure as to how we got to this hearing. On May 24th of this year, you preliminarily certified a class. You found, as you had in October of 2012, the requisite numerosity, commonality of claims, typicality of claims, the adequacy of the lead

plaintiffs to represent the class and of class counsel, and the superiority of this proceeding being in a class as opposed to individual proceedings.

We had asked at the time that after this hearing, the Court would find for permanent class certification, and we moved that, again, orally. We believe nothing has changed with the Court's findings and given the fact that we have had no objections and no request to be heard by class members, that your finding has been borne out by acceptance by the class.

On June 5th, you approved court notice, which was mailed on the deadline or before of June 15th. We had a reduction in the number of class members that received notice, simply because there's been a consolidation over the years of ownership of policies. So where we had 6,200 individual policies and notices that went in the initial distribution, we only had to send 3,566 this time. The claims administrator has certified to us that 87 percent of the class received that direct notice. They went through a second round of notice after they did some skip tracing to identify change-of-address information.

The Court may recall, we had 88 percent direct notice last time. So we're on par as far as the high direct notice that this second tranche has received. Of course, everything that's happened in this court and that will happen

today in this court has been published on the website, and the class knows about that.

We set a deadline with the Court's blessing of July 16th for insurants who believe that maybe they should be substituted as class members to notify class counsel. No such notification was necessary. The Court may recall that sometimes policies were paid for by practices and individual docs were named insured, so there was a question as to who owned the policies.

THE COURT: Yeah. I was going to ask you that because I believe the final order includes the same arbitration provision --

MR. O'CONNELL: It does, Your Honor.

THE COURT: -- as the prior order. How many arbitrations, do you know, came out of that first order?

MR. O'CONNELL: They ultimately were never heard. There were three that were noticed that we were aware of. There could have been more, but we were made aware of them because they said, give us some recommendations for arbitrators. And in each one, we recommended retired Judge Kathleen McGuire. So we know of those three. And there was one that was actually appealed to a 3JX panel. So there is actually a 3JX opinion that came out of an arbitration.

THE COURT: There was one in Sullivan County that was -- somebody went to court in Sullivan County and the judge

there sent it here. And I said I didn't have any jurisdiction or any reason to deal with it, it should remain where it is and be dealt with it. That's the one I think went to the --

MR. O'CONNELL: Probably the one that went to the 3JX panel.

THE COURT: -- 3JX.

MR. O'CONNELL: Right.

THE COURT: Okay.

MR. O'CONNELL: And that actually gives a nice recitation of the history of the case and how we got here. Yes, to answer your question, the plan of allocation is the same provision. I think most of the ownership issues were sorted out last time. The Court knows that, you know, from October 2012 until now, new policies have been issued, but that's a discrete number. And the reason we put that deadline in is, from that discreet population, if anybody had the same concern, they could address it in advance. No one has. That leads me to conclude the chance of further arbitrations is very low, but it will not happen in court if indeed there is a dispute.

THE COURT: Okay.

MR. O'CONNELL: July 30th was the date for class members to object and ask to be heard. No one filed anything with the court. We checked with the court. Not with claims counsel -- I'm sorry, class counsel, and not with the claims

administrator. So we are here, again, without any objections of those who were going to benefit from your order, and here we are in the final hearing.

So just to be clear, the plan of allocation was part of the notice. It laid out the formula that I'll go through in a moment. The case-contribution awards were identified in that notice. The reimbursement of expense request was noticed, as well, as was our percent of funds attorney's fee award that we are going to be discussing later today.

So to the plan of allocation, and the Court has already asked why we wound up here, it is the most tax advantageous approach. Plus, it's the most fair and results in a pro rata distribution. And just so that it's clear, every class member has paid eight percent of the total premiums, which is about 240 million dollars from January 1st, 1986 until the JUA ceased writing its policies at the end of December 2015. That percentage will be applied against the distribution, assumed to be around 85 million, and that will be the share of return.

We are not trying to do any kind of waiting. We are not trying to look at claims experience. We have learned through the ten years of managing this that JUAs around the country have different processes for returning funds. But this JUA never had an established practice. And so it would be -- and we discussed this during the last distribution. It

would be completely artificial for us to subject our judgments as to what would be appropriate when the JUA did not.

So there is no waiting for the tax reasons, as well as the fact that the JUA doesn't have an established practice of doing that. So there's no first-dollar-in benefit that accrues here. And at the end of the day, we think the class agrees that this is the most equitable way and cleanest way to return because it's simply a percentage of what they paid in.

Again, no objections to this, and I'll note again that our Supreme Court has made clear that you have immanent authority to enter an order with this as the mathematics.

Next slide, please.

Case-contribution awards. I know you referenced at the beginning, you had questions about this. Let me just summarize. Our three lead plaintiffs here have been with us for ten years. And all 16 of those proceedings, the 8 original and the 8 that were here before the Court on now are things that our three lead plaintiffs have participated in. That means we've had to caucus with them about how to proceed. We worked with them to find class members. We talked with them about strategy. We're talking about 16 different proceedings over the life of this case where they were meaningfully involved.

There's no one else in the class that comes close to the time commitment that these folks have made, although, we

have had some contributions, like Dr. Strang, over time, who have been helpful. But our lead plaintiffs have done the absolute most. The factual support for the request and the time and effort that they have put forward are referenced on this slide, and you can consult these affidavits if you wish, Your Honor, at those paragraphs. It lays out what they did.

THE COURT: No, I read those paragraphs. I was wondering -- one of the things I wondered about, were there 105 incentive awards in the initial class?

MR. O'CONNELL: There was, and I'll explain why.

THE COURT: Okay. That's --

MR. O'CONNELL: It was different. So we had -- in that arrangement, you may recall we had a modified contingency fee that said you had to get a certain amount of money collected from the class --

THE COURT: Right. Right.

MR. O'CONNELL: -- before we were taken on as counsel on a contingency-fee basis. And so what we asked the Court to do, and you did order, was people put financial risk into this case. They pledged some amount of money towards that million dollars. We returned every one of those dollars before we calculated, you know, any -- that was one of the expenses that came off the top.

But you also awarded the equivalent amount that they paid in as a risk premium that they each got. That is no

longer the case. From 2013 forward --

THE COURT: I do --

MR. O'CONNELL: -- we have not needed that seed money for anything.

THE COURT: Right. So that's what I'm trying to find. I skimmed your affidavit, but I remembered the reason for the prior incentive award, and that's common. You know, you have to have some cash before a firm will take on something like this, even a big firm. But what's the risk for the three plaintiffs? I read through your affidavit. What's the risk for the three plaintiffs with you?

MR. O'CONNELL: Yeah. It's not a risk analysis. It's time and effort analysis. And you know, I learned -- actually, I should put this on the table for full disclosure. Prof. Rubenstein told us yesterday that in his new edition of Newberg, he says the average case-contribution award is about 11,000 for a single case. So we are higher than that. But we are higher than that because we had eight proceedings, not just one.

And so when we look at the time and effort and contribution that these three made over the last five-plus years, we think this is an extraordinary contribution that beats the normal securities class action or wage-an-hour class action where there may be a deposition and there may be some consultation. But here there was testimony in different fora,

and there was work over the past five years.

THE COURT: Was there testimony in different fora? Were the class representatives required to testify?

MR. O'CONNELL: They were. So they did at the legislative hearings. They did at the DOI hearings. They never ultimately had to be deposed in this case because, again, liability is established, so the type of testimony they did was to raise the Tuttle law and say we're going to have to sue you again if you take our money away. And they did that in an administrative proceeding and a legislative proceeding as different activities were considered about excess surplus funds.

THE COURT: Because I didn't see that, for example, in the Tuttle affidavit. But I think that makes a difference.

MR. O'CONNELL: I believe it's in there. It may --

THE COURT: Maybe I -- I just skimmed it. I mean --

MR. O'CONNELL: Yeah. Yeah. I think --

THE COURT: -- there's a lot to read.

MR. O'CONNELL: Yeah. There's a lot of paper, Your Honor. I think upon a second review, you'll see that Dr. Tuttle testified before the DOI.

THE COURT: Okay.

MR. O'CONNELL: Mitch Jean's predecessor in the role of lead counsel, Henry Lipman, testified at the DOI hearing, for example, and also testified in the legislative proceedings

as well, so.

THE COURT: All right.

MR. O'CONNELL: So that's the basis for the request. But for their time and attention, we would not have the 85 million dollars or approximately that to distribute. They made a difference, and you know, the class has benefited from them. And we think some type of financial recognition for that time and effort is appropriate.

Next slide, please.

This is a discrete request, Your Honor. Class counsel has advanced approximately 3,756 dollars so far in those eight proceedings. De minimis compared to what we had to do the first time, which was hundreds of thousands of dollars because we had PWC and others. There is one element that is an unknown that I will simply call to your attention.

We agreed with the Court that the distribution of fund should accrue interest while it's waiting distribution. The problem is in the liquidation, the receiver wanted someone else to take custody. We explored all manner of ways to do that to make money, coming to the court in the first instance and working with the judicial center as to whether they had a tax ID we could use. We looked at escrow-fund arrangements. At the end of the day, the only feasible, serviceable, workable circumstance was for Nixon Peabody to put its 1099 on the know-your-client/customer account for tax compliance and

the denote your customer obligations.

So what does that mean? Nixon Peabody will have to file returns for any earnings for the length of holding these funds. Now, we expect the --

THE COURT: Let me --

MR. O'CONNELL: -- length to be short.

THE COURT: Why couldn't you put that in your escrow account?

MR. O'CONNELL: Then it wouldn't earn money. Not for the benefit of the class. That's IOLTA. That would go to the state.

THE COURT: IOLTA. Right.

MR. O'CONNELL: So we couldn't do it. So any type of earnings that would go back to the class would have a tax component to it. And just for purposes of, you know, not creating a problem for either the JUA or the class, it had to be with a taxpayer. And so after exhausting lots of options, it turned out to be Nixon Peabody. But you know, our IOLTA account would have defeated the purpose of getting the recovery for the class.

Now, this may be a nonevent because it's entirely possible that in early September all the monies come, and we get a seasonable order from this Court directing distribution, and we won't hold it for any material amount of time. But just because we have to protect all involved, if there's an

appeal, for example, and a new year gets added to the schedule, and we are having to deal with that and holding the money, then we're talking about potential material tax implications.

And if there is that, we would, before distribution, come back to the Court with affidavits and supporting documents and say these taxes should be paid by the class. It's fair that, you know, it's an obligation of an expense, and we would ask you to consider that. But that's, I would say, in the range of possible, not likely, at this point in time. But I just want it noted in case it happens. Otherwise, the hard costs are around 3,700 dollars.

Next slide.

Okay. So at this point, I turn it back over to Kevin Fitzgerald to talk about the percent-of-funds award that is before the Court. Thank you, Your Honor.

THE COURT: Thank you, Mr. O'Connell.

Mr. Fitzgerald.

MR. FITZGERALD: Thank you, Your Honor. And I was remiss earlier when I was making introductions. My colleague, Kierstan Schultz, is with us today at the end of the table, and we thank her for her hard work on this matter, as well.

MS. SCHULTZ: Thank you, Your Honor.

MR. FITZGERALD: Your Honor, as you know from the filings, counsel is seeking a 25 percent percent-of-funds

award in this case, essentially, consistent with the award sought and granted in the prior iteration of the case. By way of review, as the Court's well aware, the percent-of-funds standard in common-fund cases is the so-called prevailing practice, according to the '13 appeals opinion of the First Circuit, it is the standard, essentially, the common approach used in the federal circuit, which is by weight of the number of cases. Obviously, the prevailing number of class matters that are analogous are what we're here about.

The 25-percent award has emerged as something of a normal, presumptive benchmark in these cases. Although, obviously, the matter of the final-award fix, whether it's lower or higher, is a matter commended to the discretion of the Court. In this case, as in the prior case, we have 316 policyholder clients who negotiated and executed ex ante contingent fee agreements with our firm that were negotiated in a real negotiation at arm's length, by way of review of the record, to bring forward and make an offer of proof in this case.

Initially, our firm had sought, essentially, double the contingent-fee guarantee if we were successful; that is, two million dollars instead of one million dollars, understanding that it was not at all clear in 2008 and 2009 when we were having these discussions that even success on some of the more difficult initial litigation challenging the

constitutionality of the legislative taking, for example, under the contracts clause -- not the most popular and widely litigated clause of either state or federal constitution -- that that would result in the monetization of any money.

So there was a very active and ongoing discussion about whether Nixon Peabody can and would and should undertake the representation initially of this group and whether they would be of a sufficient mass to make the case doable. That resulted, essentially, in a give and take over a period of time, and there was a real discussion, and a real marketplace, that resulted in these 25 percent contingent fee agreements, which call for Nixon Peabody to be compensated on 25 percent of whatever money it recovers on then-past years and then future years up to and including today.

As Scott mentioned, through the work we did in the initial case, and much of this work done, and I should commend GCG again here, by GCG, resulted in a 6,200 original class member claim proposition, essentially, being reduced to 3,566 really unique class members by reason of individual class members. And LRGH is one the lead plaintiffs, Derry Medical is another, are good examples where, actually, a number of insured presumptive class members actually came under the umbrella of the policy premium payer, which was the defined class member criteria.

That, as a practical matter, reduced the class to

3,566 unique class members, and the net arithmetic of that is beginning with the assumption that at 6,200, 316 policyholders with contingency-fee agreements with five percent of the class. In real terms, it's really nine percent of the class, a rather extraordinary number of ex ante agreements representing a real market for the services here, and obviously, reflects on the support of those policyholders now knowing what fee is being asked and what dollars that fee amounts to. And therefore, it evidences market reasonableness of the contingent fee that is embodied in the agreements and reflected in the current percent-of-funds request. It's --

THE COURT: One thing I was going to -- I hadn't ever even thought of this. You know, in securities cases these days, the lead plaintiff is always the plaintiff with the biggest interest. How much bigger is LRGHealthcare's interest than the other policyholders?

MR. FITZGERALD: It's the largest single policyholder. As you mentioned, they recovered --

THE COURT: Right.

MR. FITZGERALD: -- in excess of five million dollars in the last tranche. They -- if the Court were to approve the plan of allocation and distributions were to proceed on the terms assumed, they'd receive something just less than that, but still another five million. So their total recovery in the case would have amounted to somewhere

between 10 or 11 million dollars.

THE COURT: Okay.

MR. FITZGERALD: We have all manner of other premium amounts paid by policyholders along a very long continuum, some of whom were paying premium for only a year or two, up to people like LRGH and Derry Medical, whose claims are seven figures.

And as you heard from Scott, once again, and what we appreciate is somewhat notable, if not remarkable, there is not only no objections from the class, but we've enjoyed the supportive class members with respect to the plan of allocation, including the fee request.

THE COURT: And I think Prof. Rubenstein's affidavit, which I have read, makes clear that it is appropriate to consider related, but not necessarily judicial, proceedings in considering the work done by class counsel.

MR. FITZGERALD: Yes, Your Honor. And in discussions with Prof. Rubenstein, he made the observation -- I won't represent it as my own thought process, but I think it struck me as correct, which is it wasn't exercised here where the first part of this case was very much akin to the litigation that's necessary to secure a judgment. And as we all know, in this profession, there's a big difference between securing a judgment and ultimately collecting it.

Very much of the effort involved in this second

iteration of the case was akin to defending, and collecting, and pursuing payment of the judgment and securing payment of the judgment. And I think there is considerable ring of truth to that as it bore out over the last five to six years in what this effort consisted of. As Scott mentioned, there were remarkably, really, at nearly every turn, efforts to undermine and subvert and end run and qualify the earlier award so that no further funds would come out of this JUA to the class members, despite the adjudication by this Court and by the Supreme Court that made rather clear that their rights were vested.

In the affidavit submitted, and in our briefing, obviously, we provide the Court with anchorage with respect to the origins of the percent-of-funds approach, particularly in the class modality, and have cited here to a representative discussion at Newberg on Class Actions, where most state courts, not just federal courts, will proceed under the common-fund doctrine and will proceed to the matter of compensation of class counsel under a percent of the common fund identified and created.

In this case, as in the prior case, it's quite clear that this Court has very broad, equitable latitude to determine class counsel's fee. It did so in the prior iteration of the case. And it did so without objection or appeal. And in this case, it's amply equipped to do so, as

clarified, frankly, by the remand award, which made this Court's very broad equitable jurisdiction to consider and determine these matters and, frankly, this Court's unique qualifications to do it clear.

There is anchorage in case authority, both state and federal for the Common Fund Doctrine. Obviously, the Boeing case is a landmark Supreme Court of the United States recognition of the wisdom and intellection underpinnings of the matter. We provide anchorage here to state authorities under the variety of doctrines; ironically, even the Peterson case arising in what was fundamentally an interpleader context, but recognizing that payment of counsel fees from a common fund identified and as a very close cousin to the substantial-benefit doctrine, which has long time in common law been recognized in the State of New Hampshire as well as in other jurisdictions serviced by the federal court.

The Court's judgment in these matters is conferred to its equitable jurisdiction. Its findings will be upheld unless they're plainly lacking in any evidentiary support or otherwise tainted by error. And as made clear most recently by the remand order, and this Court identified, without the benefit of the remand order in the earlier iteration of this case, the Court may and should look to the federal courts and specifically, to the federal (indiscernible) class-action rule, Rule 23, as (indiscernible) in considering not only the

request for counsel fees, but the matters commended to the Court by our pleadings here today.

And the specific authority is obviously, anchored in state law. The Petition of the Bayview Crematory and the Cantwell case, both of which actually in turn cite to federal authorities on recognized authorization of this Court to consider the matters that we've submitted.

In the Court's prior order in this case, you looked to, and we suggest again, at our brief at pages 32 through 33, may look again to a multifactorial approach in identifying the reasonableness of the requested counsel fees. Various federal circuits take various approaches, many of them involving other factors. But they all sort of look and feel, at least in my view, very much like those identified by the New Hampshire Federal District Court in the Tyco case, which is to say not to be a slave to or look to any single matter, and certainly not to simply be a review of counsel's hourly work on a case, but to look at a series of factors to assess the reasonableness of the fee being sought for it.

The commercial reasonableness and negotiations concerning the fee agreement, which we've talked about, obviously, are an important type of factor and played a very prominent role in the evolution of this case. Fee awards in similar cases, we've had and been blessed with the guidance of Prof. Rubenstein on this, providing the Court with not only

traditional briefing, but also -- that is, of counsel in the form of memorandum, but also his expert perspective on the landscape generally across the United States and other state and federal cases that look and feel like this, that involve the same number of dollars, that may have similar kinds of factors at play.

Obviously, in the Tyco case, in particular relevance to this is the complexity, the duration, and the various forms of risk associated with the actions. We brief these at paragraphs -- or rather pages 37 through 42 of our brief. I'm not going to repeat them all here. Scott's reviewed them, in general, but suffice it to say this case was different from any case, at least, that I was a part of or aware of that came before it or since.

And the level of challenge that's presented when the adversaries were fundamentally the executive and the legislative branch of government over some period of time, who are uniquely empowered to affect the rights of private parties such as the class we're privileged to represent, creates an enormous series of challenges for counsel. And anyone looking for a quick resolution or a quick payment in such a matter ought to consider moving along to another line of work because this case, obviously, was challenging.

The reaction of the class, and here, particularly unique is the matter we've discussed already, which is

something approaching nine percent of the total class that weighed in ex ante with respect to what would be reasonable. But also, now looking retrospectively at ten years of effort, of which members of the class, and particularly our lead plaintiffs, were active participants and understood very well on nearly a daily basis what challenges this case held for them and for counsel.

Looking back now, we have enjoyed remarkably the complete support of the class, at least insofar as it can be adduced from the lack of objections over two separate tranches of this series of disputes and active support in the form of affirmative testimony of our lead plaintiffs, some of whom are among the people with the largest amount of skin in the game and presumptively, the largest amount of leverage to be able to say, you know what, we think maybe a different kind of fee would be appropriate, not the one you seek, the 25 percent. Here, the reaction of the class is a material consideration, we would submit.

And then there are the public policy considerations at paragraphs -- or briefed at pages 43 to 45 of our brief. Some of those, we've addressed already. But suffice it to say that allowing for the sort of compensation of class counsel, and a recent and predictable legal architecture, encourages lawyers in the position that we were in ten years ago, that you and your firm, frankly, were in -- it's analogous kinds of

circumstances. But knowing that if they are successful, and they stay the course, and they are standing before a judge, seeking review and approval of a fee that's reasonable, that the Court will entertain that, and that reasonable compensation of counsel is to be -- is to be protected and expected.

THE COURT: Yeah. Mr. Fitzgerald, in the Tyco case, I think the factors are relevant. But actually, the case, I was peripherally involved as -- well, not peripherally, I was local counsel for somebody, one of the defendants. That case probably, in many ways, wasn't as complicated at this. It was just a big securities case. A lot of offshoot securities cases. The fee was actually nowhere near 25 percent because the overall award, as I recall, was so large, like 3.4 billion dollars.

So I mean, I think you're -- I think you make a stronger case. The factors are relevant, but I think it's worth saying on the record that the percentage, as I recall, in the Tyco case, was much lower than what you're asking for. And that was simply a result of the magnitude of the settlement, I think.

MR. FITZGERALD: I think that's exactly right, Your Honor. And Prof. Rubenstein writes in Newberg and he's also addressed in his affidavit that the arithmetic law of large numbers, at some level, accounts for that because if you're a

WhirlCom or an Enron case where the total amount that you're discussing as the common fund is in the 6 to 7 billion dollar range --

THE COURT: Right.

MR. FITZGERALD: -- one would really have to have a somewhat extraordinary lodestar story to approach 25 percent of that number.

THE COURT: Right.

MR. FITZGERALD: That's not to say, given the industriousness of some of our colleagues in this profession, that some wouldn't try, but I think that does account for the difference.

THE COURT: Not in Manchester, New Hampshire, anyway.

MR. FITZGERALD: Right. The market-mimicking approach, which we've briefed at pages 45 and 46 and contribute a footnote at note 13 there, really addresses sort of the question that, in most cases, is theoretical. But here, it really is not. It requires no speculation by us about what the market might have done in this situation because indeed, we had a real market and a real negotiation as a result of that, which his the 316 ex ante fee agreements.

The market-mimicking approach, as the Court's well aware, is essentially, what would the market have identified as a reasonable level of compensation at the beginning of this

case, not with the benefit of retrospect and knowing how much money's on the table and that the matter of payment of counsel could be used to leverage to a slightly different, lower number, but rather what would have happened. Here we actually know the answer to that question.

And then at pages 47 through 52 of the brief, we devote a fairly significant amount of time to briefing the lodestar multiple crosscheck. The Court needs, really, no further briefing or argument from me on the origins of lodestar. Suffice it to say, as addressed earlier, that the percent of funds approach, in general, has emerged as a prevailing practice here for cases like this. But there is a role, at least in the view of some, still for use of the lodestar multiple crosscheck.

That is to say if we were looking at this from the point of view of an hourly rate case, given the number of hours that the law firm had to work, and then looked at the percent-of-funds award as a function of that, that's another way to sort of assess sort of reasonableness, taking into account all of the other things, the multiple factors that we have discussed.

In the prior version of this case, as Prof. Rubenstein briefed in his affidavit, the Court was presented with something just under a six multiple, at 5.96, through the time that the matter was briefed. Work continued necessarily

on that case for a period of time. As Scott mentioned, most conspicuously, we were heavily involved, even after that hearing in pursuit of a favorable resolution with the IRS attending administrative hearings in D.C. together with Skadden and the state's counsel and our experts, et cetera. And then as Scott mentioned, then the post-distribution actions were continued for a series of years.

As a functional matter of arithmetic, if one took a snapshot of the lodestar at any of those, we were starting to decline, obviously, well beneath the 5.96 which the Court reviewed and approved as reasonable at the time of the last order. Taking into account all of the work that presented through a couple of days ago, we are roughly now at a 6.56. I think at the time that Prof. Rubenstein submitted his affidavit, we were at about a 6.8. A little higher than that, perhaps, 6.89, and obviously, work continues.

There will be continuing work beyond this hearing if the Court is inclined to approve the plan of allocation. And we will continue to work on this case, probably for the better part of another year, by and through the final distribution, even if it's a small tranche such as the one we discussed. I think our best assessment and the one that Prof. Rubenstein assumed in his affidavit was by the time we were done, we would probably comfortably be about 0.5 multiple, about where we were last time at the end of the case. I think our view is

the same as that endorsed by Prof. Rubenstein, which was, taking into account all of the matters reviewed last time, that that's a reasonable award.

Turning specifically, to Prof. Rubenstein's affidavit, he discusses a number of things and incorporates his very substantial earlier affidavit with respect to some of the matters discussed, such as the course and history and challenge of the lawyering involved here. But these four bullets really are the outline of his analysis of the fee award that is requested here.

First, that the Court had already, in his view, and certainly in ours, correctly awarded that 25-percent fee based on its numerous findings in the earlier case, which apply in most cases with equal force here, including the extraordinary results received, and the unique and, at least insofar as it can be determined from the lack of objection, unanimous ex ante and ex post support of this class.

And although this Court rightly sits as a fiduciary to ask the hard questions about this issue and others, it does have the benefit here of a very experienced set of business people, as you observed last time, primarily a local class that is very closely connected with, and in many cases, directly involved in the substance of the disputes that are underneath this fee request.

And their opinions, one might suggest, are somewhat

more probative than you might be able to adduce from the lack of objection, for example, in a two-million-class-member coupon case, where frankly, most people don't even know they're a class member. Here, you know your class and the most prominent numbers, and the largest stakeholders, are in the courtroom today.

THE COURT: I remember being surprised at the first final approval hearing when, I think, there was one objector. There was nobody trying to hold up the class, which you would expect.

MR. FITZGERALD: Right, and even that objector, as you recall --

THE COURT: Didn't really object to much.

MR. FITZGERALD: -- his issue really wasn't about fees at all. He had some interesting, and actually, somewhat helpful observations.

THE COURT: Yeah. Yeah.

MR. FITZGERALD: But that was remarkable.

THE COURT: Yeah.

MR. FITZGERALD: Here --

THE COURT: I think that is remarkable. I'll put that on the record. I think that's an important part, that there's absolutely no objection to any of this. Obviously, a very sophisticated class.

MR. FITZGERALD: Your Honor, here, ultimately, we

believe that the counsel-fee request are results in terms of where we're going to land and what will ultimately be a modestly enhanced lodestar multiplier beyond the 5.96 that the Court found reasonable in the last case. And here, we suggest that we are in agreement with Prof. Rubenstein's analysis that on these facts, particularly given some of the ancillary qualities, which are equally unique and valuable and important, not the least of which was the precedent-setting clarification of how this court, this New Hampshire state court, should and can proceed, particularly in a set of circumstances under Rule 16 that present, really, fundamentally a limited fund, mandatory class modality, and the ability to provide that clarification to litigants future cases in this state provides a value that's extrinsic to the merits of this case, but nonetheless important.

There was, at the risk of necessarily, I suppose, standing here pumping the tires of class counsel, which I can do because so many people in my firm and so many people associated with our consultants, beginning, most importantly, with our lead plaintiffs, our colleagues at PWC, who actually were invaluable to fight what was really a very, to my eye, self-interested set of predictions of doom and in many respects, a navigation of an IRS process that was inviting, having the class take it on the chin, surfaced great credibility that, frankly, even Nixon Peabody couldn't provide

to result in an outstanding outcome there, which in the first iteration of the case secured 25 million dollars additional for this class. And today, allows us to propose that an extraordinary additional 85 million dollars, for a total recovery approaching 200 million dollars is possible.

THE COURT: The PWC fees were paid as an expense?

MR. FITZGERALD: Nixon Peabody advanced those fees and paid them. Yes.

THE COURT: Advanced those fees and you'll recover them.

MR. FITZGERALD: And you approved --

THE COURT: Right.

MR. FITZGERALD: -- that as an expense --

THE COURT: Right.

MR. FITZGERALD: -- in your last order.

THE COURT: Right.

MR. FITZGERALD: Moving onto the next slide, Prof. Rubenstein addressed the natural and legitimate question, which was present in the last case and present in this case, which is what about other case authorities looking to whether a multiplier in and around 6 or higher have been granted, and under what circumstances. Prof. Rubenstein's affidavit has an accompanied Exhibit B, which lists, by way of example, a number of cases that are multiples of six or higher. These are just examining the multiples.

As you pointed out, Your Honor, there are obviously cases in which there are fees, some of them astronomically higher than that, which would result, in this case that came from lower multiples because of the magnitude of the common fund. But here, these are looking just at the issue of the multiple. And as our case has evolved, we now would be actually somewhat below the midpoint at about position 15 of just under 30 cases. So we would be sort of strongly in the broad stripe of the middle of cases like ours, which had multiples of six or higher, which we'd suggest supports a finding an award here would be reasonable.

At the risk of somewhat retracing our steps here, the 25-percent-fee award, which is the request here, was negotiated in advance by sophisticated business people. It is conclusively establishing the market rate for not only Nixon Peabody's work, but any work. As the Seventh Circuit has observed, it's not evidence of the market, it is the market, the fact we have a real record here of negotiated fee agreement.

It's just under ten percent of the total class. The contracting clients, as Prof. Rubenstein observed, still support the fee, knowing what it is. And it's reasonableness is confirmed by its acceptance by the entire class ex post.

Here, the Court is aware of our activity and our work in this case. I will call upon the Court's memory of its

time in private practice. Suffice it to say that working for five or six years on a matter that involves a substantial investment of time, and I personally and Scott and others, probably more than most in our firm, were heavily invested in this without being paid, creates a very interesting, and sometimes substantial, practice risk.

But in addition, there was the legal risk that was associated here, particularly, where the Department of Insurance, which is the executive agency, which controlled the rulemaking and ultimately, by reason of its regulatory approach to the JUA, actually controlled the JUA itself, was enabled, as the proverbial fox guarding the henhouse, to continue, by reason of modalities veiled as market studies, competitive market analyses, to keep coming back time and time again with regulatory approaches that not only threatened, but actively proposed, the gutting of the vested rights of policyholders in this case.

Insofar as, for example, proposing windup legislation which expressly took the position that, say, for the return of any premium paid by a policyholder after this court's last fairness hearing, that the money that remained in the JUA, which at that point, class counsel insisted was at least 85 million dollars, and the Department of Insurance and its advisors insisted was probably zero. But if there were any money, it would escheat to the state.

Obviously, standing here today, we know class counsel's view of that reality and those risks was borne out. And obviously, the risk to the class of either doing nothing or being unsuccessful as measured by at least 85 million dollars. There were substantial risks, obviously, that continued here. As time evolved and the executive evolved and the attorney general's office evolved, I suppose one of the great ironies is the absent colleague from our last meeting is now the Attorney General of the state.

Some of those things changed, but there obviously, remained very significant challenges and oppositions in our three lead plaintiffs, as they, I think, explained in terms that were very real to them, understood the very real risks, both financial, political, that we face during this second phase of the case.

Here we are, I think, comfortable saying that we agree with Prof. Rubenstein's view that this is not the typical class case. Nixon Peabody and Scott and I spend most of our time, actually, on the defense side of these cases. Our familiarity with how they tend to go provided us with very little preparation for how this case actually arced. And the trajectory of this case was, in many respects, completely unique and sui generis. I think in Prof. Rubenstein's initial affidavit, and repeated here, he termed the colorful observation that if there were a definition of one-off in the

dictionary, that this case would be there as the pictorial answer to that definition.

Nixon Peabody's outcome here, and the class' outcome, was exceptionally successful. It, on its legal merits, represents a 100-percent recovery of excess surplus funds that were identified, that were called out, that were actively advocated for preservation, and that were ultimately preserved and will be paid over now for the benefit of this class.

That represents, in the insurance business, a rather extraordinary recovery, which is the policyholders will actually get the benefit of the deal they made back in 1986, which is if there is upside -- you own all the downside, but if there is upside, it's yours. And of course, once the Department of Insurance and the State of New Hampshire identified the magnitude of the upside, they decided reworking of that deal was worth the effort.

By the efforts of the class and class counsel, we have, at the end of a ten-year march, have 195 million dollars in the aggregate, 85 million of which is new to return to the class. In the last distribution, which followed the work of class counsel and the class administrator, we were successful in repatriating over 98-1/2 percent of the class recovery to class members, leaving only slightly under 1/2 percent reverted. We expect the same kind of success here, having had

the benefit of that work and institutional knowledge on this go around.

And this historic degree of success, we think, supports the conclusion that this is really not comparable to a lot of other common-fund cases, including those where 25 percent or more was awarded or lodestars at the level we're proposing were found to be reasonable.

And with that, Your Honor, I'll stop. The opportunity for the Court to have questions.

THE COURT: I do have one question. It's not about fees. It's about a small thing, actually, but it troubles me. It's about the cy pres aspect of this. The statute, the legislature, purports to say that funds that cannot be distributed shall be transferred to a certain fund. I don't know how they can do that. It's not their money. It's your client's money.

MR. FITZGERALD: Well, in the last iteration of the case, there was a similar conversation, I think, that we had and about what would be an aligned and appropriate use of reverter funds.

THE COURT: Right. I mean, Prof. Rubenstein's book has a section on cy pres, which I looked at. And I understand that this might even be reasonably related, as I understand the standards, reasonably related to the members of the class. But I'm troubled by, again, it's this legislation that doesn't

match what's happening.

MR. FITZGERALD: Right.

THE COURT: How can the legislature dictate, apart from the fact that it's adjudicating, and it can't adjudicate? It can't tie my hands --

MR. FITZGERALD: Well, a little bit of a retrospective is helpful because the actual use of the funds last time was of similar use. And the identification of that reverter object was actually the product of a process that Georgia Tuttle and others in the medical society were involved in, which was to identify uses that actually were aligned with the interests of the class. And one of the big problems that existed then, and which continues to exist now in spades, is the underservice, particularly among primary care providers, underservice in certain areas of the state.

And the medical society -- ironically, one of the people involved in an enterprise, a nonprofit, Bi-State Primary Care, the mission of which, at least in part, is to try to find primary care providers to go to places like Coos County and the north country, in general, and other areas of the state -- ironically, even the very western part of the state is having a hard time -- they were involved in suggesting that this would be a really fit and useful application of these funds.

THE COURT: But that's a different issue than the

legislature, essentially, adjudicating part of the resolution.

MR. FITZGERALD: Well, I think what happened in that respect, Your Honor, was the legislature adopted what was fundamentally a request from some of the members of our class, from members of Bi-State Primary Care. There's actually a former member of the JUA board, Mary Bidgood-Wilson, was a very zealous advocate for the application of specific dollars to a loan-repayment fund to assist graduates of medical school for repayment of loans, as an inducement to have them take engagements.

But you're right, there's an interesting tension there. The tension is a legal one, largely, in the view of the class members and of class counsel in the sense that --

THE COURT: Well, it's a separation of powers tension. I mean, the legislature is purporting to tell me where to send the money. The solution seems to be a reasonable one, seems to be related to the interest of the class, seems to meet the standards. But I don't know how the legislature can pass a statute and adjudicate that because that's what they're doing.

MR. FITZGERALD: Yeah.

THE COURT: Apart from the fact that it's your client's money, they're adjudicating, aren't they?

MR. FITZGERALD: I think I see the tension you're identifying and agree there's an argument they are. I think

our view, as class counsel, is that's a legal issue that we would not pursue, in large part, because ultimately, what they're saying is substantively aligned with what we view the class would want. But I think you're identifying a valid issue. Prof. Rubenstein would have more to offer on this, I think, than I would, and perhaps Scott.

THE COURT: Mr. O'Connell?

MR. O'CONNELL: Yeah, just one brief additional point. When we --

THE COURT: I need advice from anybody I can get.

MR. O'CONNELL: Uh-oh, we're in trouble if you're listening to me. The money, we think, if not repatriated to absent class members because we can't find them, they're not living, their heirs are not discernible, would escheat to the state. So the state is going to get --

THE COURT: No, I understand that. I understand --

MR. O'CONNELL: And --

THE COURT: -- if it couldn't be repatriated, it would escheat.

MR. O'CONNELL: -- it is a gratuitous offer that is consistent with the wishes of the lead plaintiffs and others that we socialize with that it would be used for identified purpose, and the legislation recognizes that. Now, if anyone were to challenge it, I think there would be a separation-of-powers issue. We know that no one is objecting. And I --

THE COURT: I know, but --

MR. O'CONNELL: -- don't think you're creating precedent that it's a problem for separation of powers by letting the statute happen when there's no objection. Because the state would get it, and the state has made the gratuitous offer that it will put it in this fund.

THE COURT: I understand it's kind of the tail wagging the dog.

MR. O'CONNELL: Yeah.

THE COURT: But frankly, I want to do this right. I mean the fact that there's no -- if anything, the fact that there's no opposition, the fact that this is a limited-fund class, which I've never been involved in before in a state which has no specific rule even governing how to do it, the fact that, to me, it's a clear infringement on the Court's authority to tell the Court any cy pres goes to a certain place. I have to think about how to deal with that tail.

MR. O'CONNELL: Sure.

THE COURT: That's not the dog.

MR. O'CONNELL: Well, if the Court is not comfortable with allowing that to stand, then I think we would suggest that any reverter be put back to the class on a pro rata basis.

THE COURT: Well, I think that --

MR. O'CONNELL: So the term --

THE COURT: I think that I could allow it to stand, but not accept the order or not accept the ruling that by statute. It's a small point, but it's an important one.

MR. FITZGERALD: Yeah. I --

MR. O'CONNELL: I think the Court has to make it clear that it's ordering it and it's not the statute that's directing it. I think that might solve the problem.

MR. FITZGERALD: Yeah. That would be my suggestion, Your Honor, which is we're not advocating for the legal authority for the legislature to do what they did. We're --

THE COURT: Do you think the legislature can do what they did?

MR. FITZGERALD: I think my view is aligned with yours --

THE COURT: Okay.

MR. FITZGERALD: -- in general, as a constitutional matter.

THE COURT: Yeah.

MR. FITZGERALD: But as a substantive matter, we're not troubled at all with the actual practical use of the money in the fashion that is suggested.

THE COURT: It seems to be within the parameters. I wish they were a little more in the way of perhaps a supplemental affidavit from one of the class representatives, or all of the class representatives, outlining why they

believe that's the best use of the cy pres could be submitted. That wouldn't be hard.

MR. FITZGERALD: We could submit such an affidavit after the hearing, Your Honor, if you --

THE COURT: Well, based on your representation, just for the record, you're representing that this came from the class representatives in the legislative process, that this is what they thought would be appropriate. And from my review of -- you know, what I've learned about cy pres law, primarily from reading Prof. Rubenstein's book, it seems like an appropriate use. But I am troubled by the fact that it seems to be the legislature adjudicating, which they can't do. So I think, perhaps, to complete the record, some affidavits would be appropriate.

If Prof. Rubenstein has anything to add, obviously, I would greatly value your thoughts, Professor.

MR. RUBENSTEIN: Thank you, Your Honor. I'm honored to be here. And thank you for listening to me. I know absolutely nothing about the facts of how the cy pres came about here. I'm learning -- actually listening to it for he first time in real time. But as I understand what's being proffered, there is a specific statute about the cy pres funds in this case.

MR. FITZGERALD: Yes.

MR. RUBENSTEIN: Yeah. And you're raising a good

question, how can legislature do such a thing. I should second say I know absolutely nothing about the structure of the New Hampshire state government and the constitution. The one analogy that jumps to mind, and there's a section in the treatise on this, is it's a problem in every class action what you're going to do with unclaimed funds.

And there are essentially, four approaches to them, cy pres being one --

THE COURT: Right.

MR. RUBENSTEIN: -- reverter being one, escheat to the state being one, and pro rata redistribution among the class members being the fourth.

I think Scott got this right. The justification for the state legislature having a role here is that unclaimed funds will, generally, eventually escheat to the state if no one claims them. And so in about half the states in the country now, state legislatures have enacted laws about residual funds in class action lawsuits.

You raise a totally fascinating question. I don't know if anyone's ever challenged those laws as being unconstitutional for the reasons you raise. Most courts, I think, have taken a position that they should govern what to do with the unclaimed funds where they apply. And I think they've done so on the theory that because that money would be the state's money as an unclaimed fund, then the state has

some authority to direct it in a particular way.

THE COURT: Yeah, and that makes sense. Understand, this was more intellectual. This doesn't really go to the approval of the entire settlement. But it just -- I saw that. I understand your point, the money comes to the state anyway, so they can decide where it goes. But before it ever gets to the state, it doesn't get there if a court adjudicates and decides it goes somewhere pursuant to cy pres with the standards you're talking about in section 12:33 of your treatise, which I printed off --

MR. RUBENSTEIN: Yeah.

THE COURT: -- and read because I was thinking about this.

MR. RUBENSTEIN: And I think -- and again, off the top of my head, 12:34 or 12:35 or 12:36, some surrounding section, will be about these state statutes.

THE COURT: Right.

MR. RUBENSTEIN: I actually -- again, talking off the top of my head, I actually think the way some of them are written are consistent with your concern because they're written as suggestions to a court, here's what the legislature would like to see done, rather than written as a mandate that it has to be done this way. That's my memory.

You have a slightly separate problem. And again, this is a little bit academic. But there's a whole nother

area of constitutional law about the extent to which the legislature can enact rules for specific ongoing cases.

THE COURT: Right. Right. Right.

MR. RUBENSTEIN: And yeah, this -- from what I'm hearing for the first time, this kind of falls into that category, and --

THE COURT: Which is why this case went to the New Hampshire Supreme Court, frankly.

MR. RUBENSTEIN: Yeah.

THE COURT: And I think your -- the lawyers, perhaps after the hearing, can explain how at least I threw up my hands and the case had to go to the New Hampshire Supreme Court to give me some guidance on how to deal with it.

MR. RUBENSTEIN: Well, it does strike me that no one could complain if you wrote an opinion affirming the use of the cy pres funds as being consistent with your sense of what the equities of the case demand because it's an --

THE COURT: It seems that may be the easier thing to do, which is why I asked for the affidavits because then that, apparently -- you're telling me the representation is that the cy pres came from the recommendation of the class representatives. They could simply lay that recommendation out for me in an affidavit, and then it wouldn't matter. It would be a good ruling.

MR. RUBENSTEIN: And you could put in a footnote it

so happens this is consistent with what the legislature would have wanted done with these funds, as well.

THE COURT: Right. Exactly.

MR. RUBENSTEIN: And so it's kind of a win-win.

THE COURT: Exactly.

MR. RUBENSTEIN: Yeah.

THE COURT: Okay. Thank you, Prof. Rubenstein. That's very helpful, and I very much appreciate your addressing the Court.

MR. RUBENSTEIN: Well, thank you very much. If there's anything else you would like me to address, I'm available.

MR. FITZGERALD: Your Honor, with that, I believe the case submitted.

THE COURT: All right. Thank you, counsel. I'll take this under advisement. I'll try to get an order out as quickly as I can. I appreciate your hard work.

I thank you again, Prof. Rubenstein, for coming. It's been very, very helpful and I appreciate your willingness to come up and address the Court.

MR. RUBENSTEIN: Thank you.

MR. O'CONNELL: Judge, one more thing. Congratulations on your impending grandbaby. That's great news.

THE COURT: Thank you. I don't even know if it's --

MR. FITZGERALD: The word's out early.

THE COURT: The word's out? Well, that's number five, so.

MR. O'CONNELL: Yeah. There you go.

THE COURT: Thank you.

(Proceedings concluded at 11:24 a.m.)

CERTIFICATE

I, Shoshana Ben Yaakov, a court-approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

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