UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

KAY BERGONZI, on behalf of herself and all others similarly situated, Plaintiff, vs. CENTRAL STATES HEALTH AND LIFE COMPANY OF OMAHA (CSO). Defendant.	Civ. 02-4096-KES ORDER DETERMINING FAIRNESS OF SETTLEMENT AND REASONABLENESS OF ATTORNEYS' FEES

Plaintiff Kay Bergonzi, on behalf of herself and all others similarly situated, moves for final approval of the class action settlement agreement filed July 3, 2003, and petitions the court for an award of attorneys' fees, reimbursement of expenses, and an incentive award for the class representative. No objections have been filed.

BACKGROUND

Kay Bergonzi purchased an insurance policy from Central States Health and Life Company of Omaha (CSO) in July of 1998. The policy provided for payment of the actual charges incurred for certain procedures, including radiation and chemotherapy, if administered to treat cancer. In December 1998, Bergonzi was diagnosed with cancer. She underwent both chemotherapy and radiation treatment. When she filed a claim with CSO, however, CSO refused to pay for certain services related to her cancer treatments.

On July 24, 2000, four other people holding policies with CSO filed suit in federal district court in the Southern District of South Dakota. See Johnson v. Central States Health and Life Company of Omaha, Civ. 00-4135. They held policies similar to Bergonzi's and

alleged that CSO wrongly denied payment for similar cancer treatments, including chemotherapy and radiation. The court granted partial summary judgment in favor of the plaintiff on July 9, 2001, finding that CSO breached its contract by failure to fully pay for these cancer treatments.

Kay Bergonzi filed this action against CSO on May 6, 2002. She brought the action on behalf of a nationwide class that included all persons who purchased insurance policies from CSO containing provisions for payment of certain cancer treatments. The complaint against CSO alleged breach of contract and bad faith and requested punitive damages and attorneys' fees. CSO denied the allegations and argued that the case did not warrant certification as a class action.

Bergonzi moved for summary judgment on October 30, 2002. The court denied the motion as premature, permitted additional discovery, and allowed for refiling the motion on April 1, 2003. On March 18, 2003, Bergonzi moved to certify the class. The parties filed a stipulation and agreement of compromise and settlement on July 3, 2003. Bergonzi moved for preliminary approval of the settlement on July 10, 2003. On July 22, 2003, the court ordered preliminary approval of the settlement, preliminary certification of the class, and notice of the settlement to all class members. A fairness hearing took place on November 18, 2003.

DISCUSSION

A. Fairness Determination

Because public policy favors agreements between parties, "courts should approach them with a presumption in their favor." Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1148 (8th Cir. 1999). This holds particularly true in class actions. In re General Motors Corp., 55 F.3d 768,

784 (3d Cir. 1995). A class action cannot be compromised without court approval, and all members of the class must receive notice of the proposed agreement. Fed. R. Civ. P. 23(e). The court must determine whether the class settlement is fair, reasonable, and adequate. DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1176 (8th Cir. 1995). The court must "independently analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." General Motors, 55 F.3d at 785. The court need not, however, "undertake the type of detailed investigation that trying the case would involve." Van Horn v. Trickey, 840 F.2d 604, 607 (8th Cir. 1988).

The most important factor in this determination is the strength of plaintiff's case on the merits balanced against the amount offered in the settlement. Grunin v. Int'l House of Pancakes, 513 F.2d 114, 124 (8th Cir. 1975). The court should also consider "the defendant's overall financial condition and ability to pay; the complexity, length and expense of further litigation; and the amount of opposition to the settlement." Id. The court need not determine the value of the settlement with absolute precision, and the court should give weight to the views of the parties and experienced class counsel. DeBoer, 64 F.3d at 1178.

1. Merits of Plaintiff's Case Balanced Against the Terms of the Settlement

The merits of plaintiff's case were strong. In a case involving facts and insurance contracts nearly identical to those alleged in this action, a South Dakota federal court found that CSO breached its obligations under the cancer insurance policies and required payment. Thus plaintiff was likely to have some measure of success had this case proceeded to trial. Any settlement, therefore, should reimburse plaintiff according to the contractual terms. The current

settlement agreement effectively and thoroughly accomplishes this. It affords the class members nearly full relief under their insurance contracts.

The settlement divides the class into two groups, depending upon the type of policy they held. The non-opt out class receives injunctive relief, which prohibits CSO from changing or revoking certain existing payment guidelines, and declaratory relief, in which the court orders CSO to satisfy its contractual obligations. CSO also must reform its policies to provide for specific, additional benefits. With regard to the opt-out class, the settlement creates a ten million dollar fund. Under the distribution plan, class members who had chemotherapy or radiation claims paid by CSO during a specific time period will be paid $7,481,703.60 in cash benefits. It is estimated that the present value of the future benefits over the next ten years, based upon revisions in claims guidelines, is $9.6 million. The distribution plan creates five subclasses and identifies the amount of money each group will receive. The plan establishes a time period for the payments, and requires CSO to locate all members of the class and to pay them accordingly.

The amount of the settlement and the detailed plan for locating and reimbursing all class members demonstrates that the class members were highly successful. Had the parties not reached a settlement, the plaintiff faced several obstacles prior to even reaching trial. Plaintiff needed to prove that the court should certify the class, which motion was strenuously opposed by CSO. Plaintiff's motion for summary judgment was also pending. These additional expenses, risks, and the uncertainties of proving liability for the entire class at trial further support the finding that the settlement successfully addresses plaintiff's allegations. See Van Horn, 840 F.2d at 608 ("a cursory comparison of the improvements sought by the [class] and the

benefits actually received demonstrates that the [class was] highly successful"). Because the agreement provides substantial benefits to the class, this factor favors a finding that the settlement is fair, reasonable, and adequate.

2. Defendant's Financial Condition and Ability to Pay

As a nationwide insurance company, CSO likely has the ability to pay more than the agreed-upon amount. This does not, however, make the settlement inadequate. Petrovic, 200 F.3d at 1152. Prior to reaching the settlement, CSO had vigorously opposed the action. CSO's financial status and resources demonstrate its ability to mount a strong defense against plaintiff. Settlement conserves resources for both parties and the court because the resolution of significant issues remains. The settlement amount is large enough to cover the class members' benefits, yet it does not exceed CSO's ability to pay. See Grunin, 513 F.2d at 125 (settlement was fair because it provided valuable concessions for the class while still maintaining defendant's corporate viability). This factor, therefore, weighs in favor of approving the settlement.

3. Complexity, Length, and Expense of Further Litigation

The parties faced extensive litigation before reaching resolution in this case. First, the court needed to determine whether to certify the class. Next, the court needed to rule on the motion for summary judgment. Further discovery of CSO's records was also necessary before trial could proceed. A potential class action that analyzed multiple insurance claims and cancer treatments would have been lengthy and complex. Complete resolution of the case would have been costly and time consuming. See Petrovic, 200 F.3d at 1152 (settlement on the eve of trial was fair because of the length and expense of a trial and the ensuing appeals); DeBoer, 64 F.3d

at 1178 (class members need not "incur immense expense before settling as a means to justify that settlement").

Furthermore, the class in this case is uniquely sensitive to delay. A long, drawn out trial process undermines the relief sought. All class members either suffered personally from cancer or were married to someone who suffered from cancer. Many members were of retirement age Some members had already died from cancer or experienced the loss of a spouse Prompt payment for cancer treatment was therefore imperative to pay bills, to continue treatment, and to provide peace of mind. Prolonged litigation would deny some members the ability to take advantage of the payments, would cause undue financial distress, and would exacerbate an already difficult period. Accordingly, this factor demonstrates the fairness and adequacy of the settlement.

4. Amount of Opposition

CSO sent a notice of the settlement and an explanation of the distribution plan to thousands of class members. No objections to the settlement were filed. See Van Horn, 840 F.2d at 606 (court approved settlement where 180 out of 400 class members objected to the agreement); Petrovic, 200 F.3d at 1152 (court approved settlement where less than 4 percent of the class objected to it). Approximately twenty people opted out of the settlement. Several class members specifically expressed their approval of the settlement and their relief in receiving payment. The overwhelming approval of the settlement weighs in its favor. See DeBoer, 64 F.3d at 1178.

5. Conclusion

The settlement reached by the parties is fair, reasonable, and adequate. Because CSO keeps records on its policyholders, nearly every potential class member received actual notice of the settlement. The settlement, therefore, will reach all entitled policyholders, which supports a finding of fairness. Attorneys for both parties reached the settlement after arms-length negotiations and detailed a specific plan for distributing the funds. Indeed, the terms of the settlement are reasonable and not a product of fraud or collusion. See DeBoer, 64 F.3d at 1178 (settlement approved where there was no evidence of collusion or bad faith during the negotiation process). CSO calculates the total amount actually to be paid to class members to be $7,504,893.78. The ten million dollar settlement adequately compensates the class members. Accordingly, the court will accept the settlement.

B. Attorneys' Fees

Courts employ two methods for awarding attorneys' fees, and the court must decide which method best applies to the case at hand. Johnston v. Comerica Mortgage Corp., 83 F.3d 241, 244, 246 (8th Cir. 1996). "Under the 'lodestar' methodology, the hours expended by an attorney are multiplied by a reasonable hourly rate of compensation so as to produce a fee amount which can be adjusted, up or down, to reflect the individualized characteristics of a given action." Id. The "percentage of the benefit" method awards a certain percentage of the common fund that the attorneys successfully recovered during the litigation. Id. at 244-45. The lodestar method typically applies in statutory fee-shifting cases that do not require monetary assessments of intangible rights. Id. Courts should apply the percentage of the benefit method in common fund situations. Id.

"[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fees from the fund as a whole." Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 100 S. Ct. 745, 749, 62 L. Ed. 2d 676 (1980). This effectively spreads the fees proportionately among those benefitted by the suit and ensures that class representatives do not bear additional costs. Id. at 749-50. Fees from the common fund "technically derive from the defendant rather than out of the class' recovery" because the entire settlement stems from the same source. Johnston, 83 F.3d at 246. The award must be fair, reasonable, and adequate but not excessive, arbitrary, or detrimental to the class. Grunin, 513 F.2d at 127-28.

Because the current case involves a common fund, the percentage of the benefit method best applies. The attorneys have "recovered a determinate fund for the benefits of every member of the class whom they represent." Boeing, 100 S. Ct. at 750. The settlement awards each individual class member "an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." Id. at 749. There is also no dispute about who belongs in the class, and nearly every class member has received actual notice of the settlement.

This lawsuit has significantly benefitted a large number of people, and class counsel obtained significant monetary relief for the class. In re U.S. Bancorp Litigation, 291 F.3d 1035, 1038 (8th Cir. 2002). Nearly 20,000 people will benefit from the settlement. The total value of the monetary amount received and the future benefits is estimated at $19,622,574. This amounts to 95 percent of the total payments class members were entitled to under their insurance policies. The settlement reimburses past policyholders for payments due and prevents CSO from engaging in similar practices in the future. The amount of requested fees, moreover,

will not deprive any class member of his or her full share in the settlement. See Johnston, 83 F.3d at 246-47 (counsel successfully obtained cash benefits and injunctive relief for the class and "should be rewarded for its efforts").

CSO has sent approximately 20,000 notices, and no class members have objected to the settlement. The notice sent to all class members explained that class counsel would request reimbursement for fees and expenses from the settlement fund. It stated that they sought 25 percent of the fund, which amounted to $2.5 million. The absence of objection to these terms and this agreement supports the award, particularly since the attorneys reached this agreement through arms-length negotiations.

The amount requested is also reasonable in light of class counsel's skill, effort, and experience. Beginning in 1997, Mike Abourezk and his firm spent many hours on the companion case, Kroon v. Central States Health and Life Company of Omaha, Civ. 02-4019, the federal district court case Johnson, and a similar action filed in state court. After Johnson settled, CSO did not change its practices or policies. Counsel continued to litigate the pending state action. CSO finally changed its policies after a state court judge granted plaintiff's motion to compel in the case pending there. The firm of Friedman, Rubin & White became involved in 2000.

Although CSO changed its policies, CSO refused to apply these payments retroactively. Class counsel continued to litigate Johnson and the state court case in part to prepare for the class action and to help establish liability against CSO. Counsel then filed this class action in 2002 to obtain payment for policyholders prior to July 9, 2001. Class counsel took 65 depositions and accumulated over 15,000 pages of discovery from CSO throughout this process

Class counsel filed the necessary pleadings to support a class certification and a motion for summary judgment. Attorneys White and Abourezk estimated that they dedicated over half of their professional time to these cases.

In 2003, the firm of Berger & Montague became involved to provide further assistance because of the complexity of the class action. Attorneys at this firm have extensive experience with class actions against insurance companies. They estimate over 500 hours spent on this litigation, including assistance with drafting the settlement documents. Reaching the settlement required class counsel to research the damages due, the amount each class member should receive, the variations in the differing state laws, and the financial status of CSO. The settlement negotiations lasted over three months.

The length and complexity of the litigation, the skill, experience, and effort by class counsel, the hours dedicated to discovery and motions, the time spent in negotiations, and the results reached justify the award requested in this case. See Grunin, 513 F.2d at 127 (fee awards properly based on number of hours spent in legal activities by attorneys and the quality of the attorneys' work). Furthermore, counsel with extensive experience in class actions assisted in preparing the settlement and in calculating attorneys' fees. Their experience with formulating fees in similar situations and the success of the settlement further justify the amount of the award and demonstrate its reasonableness. See Johnston, 83 F.3d at 247 (court could properly rely on settlement terms regarding attorneys' fees where class counsel had experience with attorney fee awards and the percentage approach was understandable).

Class counsel, moreover, undertook significant risk when pursuing this class action. They faced difficulty proving the class requirements of Rule 23 as a result of the divergent

policies, varying payments received, and procedures undergone by policyholders. Determining damages for each individual class member would also have proved difficult. Litigation would have been lengthy and complex. Due to the nature of the class, time was particularly crucial. Many class members had already died during the pendency of the litigation. This added time pressure spurred class counsel to efficiently reach a satisfactory settlement. See Grunin, 513 F.2d at 128 (court should consider the risk of the litigation when calculating attorneys' fees)

The percentage requested is reasonable. The amount constitutes approximately 24 percent of the monetary value of the settlement and 12 percent of the overall value of settlement benefits. Courts have approved similar awards. See, e.g., Petrovic, 200 F.3d at 1157 (court approved award of 24 percent of the monetary compensation to the class); In re U.S. Bancorp, 291 F.3d at 1038 (approval of award that was 36 percent of the settlement).

A percentage award "requir[es] every member of the class to share attorney's fees to the same extent that he can share the recovery." Boeing, 100 S. Ct. at 750. A percentage of the settlement in this case provides for an equitable award of attorneys' fees. It adequately and reasonably compensates class counsel without being overly generous, excessive, arbitrary, or detrimental to the class. Petrovic, 200 F.3d at 1157; Grunin, 513 F.2d at 127. Additionally, the court will award the out-of-pocket expenses requested by class counsel in the amount of $54,695.84. Counsel documented the nature of these expenses, and given the nature, length, and complexity of this case, the court finds them reasonable. See In Re U.S. Bancorp, 291 F.3d at 1038 ($40,000 cost award to class counsel for out-of-pocket expenses was appropriate).

The court will also grant the requested amount of $10,000 to the named plaintiff, Kay Bergonzi. Her willingness to file suit and to subject herself to the rigors of discovery while

undergoing cancer treatment contributed to the ultimate resolution of the case. Her effort and time spent on the case, as the sole class representative, resulted in significant benefits to thousands of policyholders. She is, therefore, entitled to an incentive award. See In re U.S. Bancorp, 291 F.3d at 1038 ($2,000 incentive award to five representative plaintiffs was warranted).

CONCLUSION

The settlement reached in the current class action is fair, reasonable, and adequate. The court will apply the percentage of the common fund when determining attorneys' fees. The amount requested is reasonable, and the court will also permit recovery of costs and an incentive award to the class representative.

Accordingly, it is hereby

ORDERED that plaintiff's motion for final approval of the settlement (Docket 94) is granted.

IT IS FURTHER ORDERED that plaintiff's petition for attorneys' fees, reimbursement of expenses, and sales taxes on South Dakota fees in the amount of $2,495,106.22 (Docket 92) is granted. Plaintiff's request for an incentive award in the amount of $10,000 for class representative Kay Bergonzi is also granted.

Final judgment will be entered accordingly.

Dated November 20, 2003.

BY THE COURT:

Karen E. Schreier

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

NOTICE OF ENTRY
The original of this document was entered on the docket of the Clerk of the United States District Court for the District of South Dakota on 11/20/03.
CLERK