IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GWEN B. DALUGE, MURRAY YOUNG, and HELENE K. BIRNBAUM, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CONTINENTAL CASUALTY COMPANY,

Defendant.

OPINION AND ORDER

15-cv-297-wmc

Named plaintiffs and class representatives Gwen B. Daluge, Murray Young and Helene K. Birnbaum and defendant Continental Casualty Company ("CNA") have agreed to settle this class action lawsuit concerning CNA's coverage of insurance for long-term care on the terms and conditions set forth in the Settlement Agreement previously filed with the court. (Br, in Supp. of Prelim. Approval, Ex. B (dkt. #172-2).) On April 20, 2018, the court: (1) approved the settlement of two classes preliminarily with respect to Class I, a 23(b)(3) class of current and former policyholders who were denied coverage, and Class II, a 23(b)(2) class of all policyholders involving prospective relief; (2) directed the approved notice be distributed to class members; (3) ordered further submissions in preparation for final approval of the settlement; and (4) set a fairness hearing for October 25, 2018, at 1:00 p.m. (4/20/18 Order (dkt. #175).) Today, the court held a fairness hearing on this settlement at which all parties appeared by counsel. Before the court is plaintiffs' motion for final approval of the settlement, plan of allocation, an award of attorneys' fees and costs and incentive awards (dkt. #177), which the court will grant.

BACKGROUND

A. Overview of Settlement Agreement

The settlement consists of two classes, which are both defined in the court's order preliminarily approving the class. (4/20/18 Order (dkt. #175) ¶ 2.) For Class 1, the settlement provides a claims-made process for past damages of up to 60% of the Policy's Long Term Care Facility Benefit and Waiver of Premium Benefit. These payments are subject to a $4.85 million class-wide payment cap, which also covers an award of attorneys' fees and costs and contribution or incentive awards to the named plaintiffs. For Class 2, the settlement provides for a "significantly relaxed revised claims-handling standards," providing prospective relief at 100% of current policyholders' LTCF Benefit for over 1,800 class members and is not subject to the $4.85 million cap. (Pls.' Opening Br. (dkt. #178) 7.)

B. Notice Process

The court previously approved a notice of the proposed settlement and claim form, directing that it be distributed to all class members. The notice administrator has mailed 24,500 copies of the notice to class members and posted the notice, claim form and settlement agreement on a website specifically established for the settlement. In addition, class counsel sent two letters to 94 class members identified as having a colorable Class 1 claim. Moreover, class counsel attempted to contact each of the 94 members telephonically, as well as an additional 24 potential Class 1 members identified by defendant during the claims process. Class counsel represented that they have spoken to over 200 Class I and Class II members and their representatives.

C. Claims Process

Of the 94 policyholders previously identified as having a potential Class 1 claim, 51 filed claims. Of the 24 additional policyholders later identified as having a potentially claim, 13 filed claims. Moreover, at least six other policyholders not identified as Class 1 members have also filed class claims. To date, 32 Class 1 claims have been approved in full or in part, subject to the court granting final approval, an additional 32 have been identified as having "approval potential," depending on the final review of requested or recently submitted additional supporting information, and class counsel is working with approximately 24 additional Class 1 claimants to track down and submit the requested supplemental information. Moreover, for Class 2 members, defendant had identified 15 policyholders who will be immediately evaluated for the Class 2 benefit once the settlement is approved.

D. Objections and Exclusions

The notice provided class members until September 25, 2018, to send objections to the court. By that date (and through the date of the final approval hearing on October 25, 2018), no objections have been received. Four requests for exclusion were received, three of whom do not appear to be Class 1 members, and the fourth was an individual represented by unrelated counsel who entered into a separate settlement agreement with defendant years ago.

OPINION

I. Final Approval of Class Action Settlement, Plan of Allocation, and Notices

The court may approve a proposed class action settlement only if it determines that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making this determination, the court considers various factors, including: "(1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed." *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014) (internal citation and quotation marks omitted). All of these factors, and others, support the settlement reached by the parties here.

As for the strength of the plaintiffs' case compared to the amount of the settlement, Class 1 members who have been denied coverage, will have the opportunity to recover up to 60% of their benefits, subject to the $4.85 million cap, and importantly, Class 1 members will be fully covered going forward under a relaxed claims process and expanded coverage. These settlement terms are reasonable viewed in light of the challenges faced by plaintiffs in proving a breach of contract and bad faith claim, especially given the parties' fundamental disputes as to the meaning of key terms in the policies at issue.

At the hearing on plaintiffs' motion for preliminary approval of the class, the court voiced concern about the likelihood that a substantial amount of the settlement cap would be remitted to defendant. Defendant CNA submitted a brief explaining why the court's

framing of this concern is not entirely accurate and, more importantly, assuaging the court's concern of a claim process resulting in limited payments by CNA. As to the first point, CNA explains that this is not a common fund case, with the possibility of funds reverting to defendant or donated to a charity. Instead, technically speaking, there will be no residual funds. As the Seventh Circuit recently explained in *Camp Drug Store, Inc. v. Cochran Wholesale Pharm, Inc.*, 897 F.3d 825 (7th Cir. 2018), a "claims-made" settlement like that at issue here, simply requires defendant "to give security against all potential claims." *Id.* at 832 (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980)). Here, the claims-approval process for Class 1 members appears to be robust, with defendant representing that at least one Class 1 member's recovery may exceed $250,000 and another may exceed $150,000. Moreover, the settlement provides significant relief to more than 1,800 active policyholders entitled to prospective relief as Class 2 members. Defendant's explanation adequately addresses the court's concern and provides further support for a finding that the settlement is fair and reasonable.

The complexity of the case and the length and future expense also weigh in favor of finding the settlement fair and reasonable. Plaintiffs' claims turn on the interpretation of policy terms, as well as applicable statutes and regulations governing long-term care insurance and assisted living facilities. Summary judgment was pending at the time the parties filed summary judgment, with a trial likely, not to mention an extended appeal process. Given that a number of class members are currently living in assisted living facilities, this additional delay would be particularly problematic.

The lack of opposition to the settlement, coupled with the positive reaction by class members, including the number of Class 1 members who have filed claims or are in the process of doing so, further supports a finding that the settlement is fair and reasonable. Class counsel, experienced in litigating similar class actions, also support this finding.

Finally, the settlement was reached in arms-length mediation with an experienced mediator, after class counsel had conducted a pre-filing investigation, conducted substantial legal research, prepared an initial and amended complaints, fully briefed class certification and cross-motions for summary judgment, consulted with experts and drafted mediation statements.

The court also previously determined, and now confirms, that the mailed and published notices constitute the best notice practicable under the circumstances, as well as provide adequate notice to class members. These notices were reasonably calculated to apprise class members of the pendency of this lawsuit, the nature of the claims, class definitions, and the proposed settlement, as well as inform members of their opportunity to object to the plan of allocation, class counsel's petition for fees and expenses and named plaintiffs' incentive awards. *See generally* 2 MCLAUGHLIN ON CLASS ACTIONS § 6:17 (10th ed. 2013) ("The settlement notice does not need to describe every facet of the settlement, or describe in exhaustive detail those features it does describe. It must contain enough information about the settlement and its implications for participants to enable class members to make an informed decision about whether to be heard concerning the settlement or, if allowed, to opt-out.") (citing cases).

II. Incentive Fees for Named Plaintiffs

The court also finds reasonable plaintiffs' request for payment of incentive awards of $17,500 each to the named plaintiffs Gwen B. Daluge, Murray Young and Helene K. Birnbaum. Incentive awards for class representatives are fairly common. *See In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722-23 (7th Cir. 2001) (describing purpose of incentive awards as "induc[ing] individuals to become named representatives"). In deciding whether an incentive award is appropriate and what the amount should be, the Seventh Circuit advised that courts may consider "the actions the plaintiff has taken to protect the interest of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

As detailed in their own respective declarations or those of their personal representatives, each of the named plaintiffs actively participated in this litigation, estimating that they have spent between 80 and 150 hours each. Specifically, each collected documents, reviewed documents, sat for a deposition and consulted with class counsel about the case and settlement specifically. (Richard Daluge Decl. (dkt. #184); Murray Young Decl. (dkt. #185); Evan Gorman Decl. (dkt. #186).) As such, the court concludes that an incentive or service award is appropriate for each named plaintiff.

As for the appropriate amount, district courts in this circuit have awarded incentive fee awards ranging from $5,000 to $25,000. *See Cook*, 142 F.3d at 1016 (affirming incentive award of $25,000 where class representative spent hundreds of hours with attorney, providing them with an abundance of information, and reasonably feared

workplace retaliation); *Redman v. RadioShack Corp.*, No. 11 C 6741, 2014 WL 497438, at *12 (N.D. Ill. Feb. 7, 2014) (awarding $5,000 to each class representative); *In re Sw. Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 4510197, at *11 (N.D. Ill. Aug. 26, 2013) (approving $15,000 award for two class representatives because of active participation in litigation); *Heekin v. Anthem, Inc.*, No. 1:05-cv-01908-TWP-TAB, 2012 WL 5878032, at *1 (S.D. Ind. Nov. 20, 2012) (awarding $25,000 each to two class representatives based on extensive involvement over seven years of litigation); *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 412 (E.D. Wis. 2002) (approving $5,000 awards where plaintiffs were "required to respond to discovery requests, produce documents, meet with counsel in preparation for their depositions and undergo depositions"); *see also Chesemore v. All. Holdings, Inc.*, No. 09-CV-413-WMC, 2014 WL 4415919, at *5 n.6 (W.D. Wis. Sept. 5, 2014) (discussing 2006 study, finding average amount of inventive award to be $15,992). While the requested awards here are on the high end of the approved range, the court nonetheless finds that an award of $17,500 each is fair and reasonable.

III. Attorneys' Fee Award and Costs

Plaintiffs are seeking an award of attorney's fees of $1.3 million, an amount contemplated in the settlement agreement, to be paid from the $4.85 million payment cap. "When attorney's fees are deducted from class damages, the district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys." *Williams v. Rohn & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011) (citing *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718-19 (7th Cir. 2001)). While preferable to do this at the outset of

litigation, *see Synthoid*, 264 F.3d at 719, the court was not consulted at that point. In making this determination, the court may either use a percentage method or a lodestar method. *See Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 246-47 (7th Cir. 2014). Here, given that there is no common fund, the court opts to review plaintiffs' request under the lodestar method. The lodestar is "the product of the hours reasonably expended on the case multiplied by a reasonable hourly rate." *Montanez v. Simon*, 755 F.3d 547, 553 (7th Cir. 2014).

Class counsel represents that they have expended more than 3,300 hours on this litigation, at hourly rates ranging from $795.00 for a partner to $225.00 for a paralegal. (Sams Decl., Ex. A (dkt. #181-1); Goldenberg Decl., Ex. B (dkt. #182-2); Pecquet Decl., Ex. B (dkt. #183-2).) Class counsel's work on this case dates back to 2014, and the lodestar amount totals $1,768,932.75. While class counsel did not submit their time records, they offered to do so *in camera*, and provided a categorization of their hours into buckets of activity. (*Id.*) Given the length of this lawsuit, extensive discovery and motions practice, the amount of time appears reasonable. Moreover, class counsel's request of $1.3 million in fees is substantially less than the lodestar amount. In this unique situation, therefore, the court will not require the actual time records. Finally, the court notes that while the percentage method proves an ill-fit here, the fee request also appears reasonable considering the $4.85 million payment cap and the significant prospective relief. As such, the court will grant this portion of the motion.

Class counsel also seeks reimbursement of expenses in the amount of $38,323.28. Class counsel's description of the categories of expenses covered by this request reflects the

type of expenses typically billed by attorneys to paying clients, and the amounts appear reasonable. (Sams Decl., Ex. B (dkt. #181-2); Goldenberg Decl., Ex. C (dkt. #182-3); Pecquet Decl., Ex. C (dkt. #183-3).) Because these expenses are adequately documented, reasonably incurred in connection with the prosecution of this action, and reasonable for a case of this complexity, scope and duration, the court will also grant class counsel's request for reimbursement of expenses.

ORDER

IT IS ORDERED that:

1) Plaintiffs' motion for final approval of the settlement, plan of allocation, an award of attorneys' fees and costs and incentive awards (dkt. #177) is GRANTED.

2) For settlement purposes only, the following classes are CERTIFIED, finding each meets the requirements of Rule 23:

    a. Class 1 includes all current and former CNA policyholders:

        1. who made claims under a Policy for the Long Term Care Facility Benefit for a facility in one of the 11 Class States on or after the start of the Period of Payment;
        2. who were medically eligible for benefits;
        3. but were not afforded coverage for the costs and expenses relating to their stays;
        4. on grounds that included that the facility or facilities did not provide the requisite 24-hour-a-day nursing services by or under the supervision of a registered nurse, licensed practical nurse, or licensed vocational nurse; and
        5. who suffered ascertainable damages as a result of being denied coverage.

    b. Class 2 includes all CNA policyholders with in-force policies as of July 1, 2017.

3) Pursuant to Fed. R. Civ. P. 23(e), the settlement is APPROVED.

4) For purposes of effectuating the Agreement, Sean K. Collins, the Law Offices of Sean K. Collins, Lionel Z. Glancy and Ex Kano S. Sams II, Glancy Prongay & Murray, Jeffrey S. Goldenberg, Goldenberg Schneider LPA, and Janet E. Pecquet, Burke & Pecquet LLC, are APPROVED as Class Counsel. Plaintiffs Gwen B. Daluge, Murray Young, and Helene K. Birnbaum, are also APPROVED as Class Representatives.

5) Class counsel is AWARDED attorney's fees in the amount of $1,300,000.00 and costs in the amount of $38,323.28, both to be paid out of the $4.85 million payment cap.

6) Named plaintiffs Gwen B. Daluge, Murray Young and Helene K. Birnbaum are each AWARDED an incentive award of $17,500, also to be paid out of the payment cap.

7) The parties are DIRECTED to commence claim processing and distribution of the settlement payments and prospective settlement relief consistent with the settlement plan.

8) The claims of named plaintiffs and class members against defendant are DISMISSED WITH PREJUDICE AND WITHOUT FURTHER COSTS.

9) The clerk of court is directed to enter judgment consistent with this order and close this case.

Entered this 25th day of October, 2018.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge