UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 07-186-SRC

MICHAEL H. KIRSCH, D.D.S., individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

DELTA DENTAL OF NEW JERSEY,

Defendant.

SETTLEMENT APPROVAL

February 8, 2012
Newark, New Jersey

B E F O R E: HONORABLE STANLEY R. CHESLER, USDJ

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

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THE COURT: Be seated. Good morning.

THE CLERK: Kirsch v. Delta Dental of New Jersey, 07-186. Please note your appearances for the record.

MR. KATZ: Good morning, your Honor. Eric Katz of the law firm of Mazie, Slater, Katz & Freeman on behalf of the class.

MR. SELLINGER: Good morning, your Honor. Philip Sellinger from Greenberg Traurig on behalf of defendant Delta Dental.

THE COURT: Good morning to both of you. The Court understands that Marc Pakrul, who represents an objector, is also present in court. Is that correct?

MR. PAKRUL: Yes, that's correct. Marc Pakrul, Tompkins McGuire on behalf of objector Dr. Gary Krugman.

THE COURT: Good morning to you. And I understand your objection at this point is limited solely to the attorneys' fee application. Is that correct?

MR. PAKRUL: That's correct.

THE COURT: All right. Fine. Now, at this point let's go through the other aspects of the proceeding. I gather then that the Court is now presented with a situation in which Dr. Krugman's objection to the substance of the settlement has been withdrawn, and there is another objection filed by a Dr. Ray Galvin. Is he present in court today?

MR. KATZ: No, Judge.

THE COURT: All right. And we do have his objection. At this point, Mr. Katz, I'll hear you with regard to first the issue of class certification.

MR. KATZ: Your Honor, just as a housekeeping matter, so I'm clear, because I'm hearing for the first time now that the objection that was filed by -- first of all, Dr. Paris has withdrawn his objection entirely. He's not --

THE COURT: That's my understanding.

MR. KATZ: But the objection which Dr. Krugman had joined, which was docket entry 286, which was Mr. Paris' January 3, 2012 letter, that has been withdrawn in its entirety as well.

THE COURT: That's my understanding, if I recall correctly.

MR. PAKRUL: That's correct, Judge. Only as to the amount of attorneys' fees being sought.

MR. KATZ: Then we'll deal with that in due course. Your Honor, the class that we seek to certify here certainly meets all of the requirements to be certified as a settlement class under Rule 23(a), (b)(2) and (b)(3).

This kind of class is very similar to other classes that I've certified, albeit in state court, both as litigation and settlement classes on behalf of dentists and physicians, because they all focus around the same common

and typical conduct that has been asserted by the health care providers in New Jersey and nationwide, and that deals with the common and typical practices as alleged by the class in which computerized systems, automated systems are utilized to process the claims submitted by providers in the same fashion across the board, without most often any individualized review of the medical records.

In essence, based upon a preprogrammed logic that is utilized to adjudicate claims through various practices which have been challenged by the class in this case, including such practices as bundling, where codes are processed together and only one code is paid and not the other code, practices such as downcoding, where it's alleged that a provider would submit a claim that he has performed a particular procedure and the code would then be downcoded to a code which would compensate the provider for a less -- as if he had rendered a lesser procedure.

All these common and typical practices as alleged by the class go to what we have asserted as being one common theme and, that is, to save money for the carrier and pay less to the class members.

There is another aspect to this case that deals with the uniform application of the New Jersey prompt payment laws, and those laws apply uniformly to all kinds of providers, whether they're in network, out of network,

whether they're general dentists or specialists, and the same computerized or automated systems that process the claims that I just talked about also process the claims under the prompt pay laws, and there are various requirements under the prompt pay laws that are supposed to be followed, so, you have the same common and typical practices.

You have the same kinds of relief or providers are -- we're seeking relief under statutory and regulatory violations that are uniform and across the board or, in terms of network providers, seeking damages for alleged breach of contracts based upon standardized agreements that are not subject to negotiation that are uniformly applicable to all network providers.

So, this is the standard case, we submit, that meets the Rule 23 requirements for class certification and certainly for certification of a settlement class where such issues as manageability is not something that has to be looked at as part of the analysis.

Specifically, when we look at the Rule 23 requirements, 23(a) requirements, beginning with numerosity, we're seeking to certify a national settlement class of roughly 160,000 providers. That certainly meets the numerosity requirement.

23(a)(2), commonality, there must be questions of law

or fact common to the class. A finding of commonality certainly does not require that all class members share identical claims, and there must be at least one question of fact or law that is common amongst everyone, and over the last few minutes I think I've discussed several.

Typicality, 23(a)(3), the claims of the class representative must be typical of the claims or defenses of the class. Again, here Dr. Jungels, who is the class representative for this settlement class, submitted claims that are subject to the same prompt pay laws, the same automated claims processing. He's subject to the same provider agreements as the other providers in the settlement class. Certainly, his claims are typical and meet the typicality requirement, which is not a very difficult hurdle to meet.

23(a)(4), adequacy of representation, Dr. Jungels is obviously an adequate representative of the class. He is a dental provider, an oral maxillofacial surgeon who has been part of the Delta network for several years and has submitted numerous claims that have been subjected to the claims adjudication processes that I've been discussing.

As far as the component as to adequacy of counsel, I do not believe that I need to extoll who I am and what my firm is. We are one of the leading law firms in New Jersey. We have represented numerous classes, been

appointed class counsel on numerous occasions.

I personally have been appointed class counsel in at least five -- make that six other provider class actions, both in New Jersey state court, as well as before the American Arbitration Association in one of the first class arbitration health care class actions in the country, both on behalf of litigation and settlement classes.

We have appeared before this Court on numerous occasions in this case. Your Honor has seen firsthand the vigorous and often contentious litigation between Mr. Sellinger and myself that always has been fought above board, but it's been a tough fight.

We have certainly zealously, adequately represented the class's interest in this case, as we do in all the cases in which we represent our clients. So, I believe the adequacy of representation requirement is met.

We then turn to the next part of the class certification analysis dealing with (b)(2) and (b)(3) classes.

Certainly here we do meet the requirements of (b)(2). The settlement benefits in this case are in the form of business reforms on a going-forward basis. They are injunctive relief that affect the class as a whole, and certainly we, therefore, meet the requirements of 23(b)(2).

These business commitments and business reforms will

be in place for a period of at least five years from the time of their implementation. A number of these reforms already are in the process of being implemented because they were triggered off at the preliminary approval date. Others are triggered off at the final approval date. And we have submitted a certification from Bruce Silverman from Delta Dental that discusses some of the reforms and what's going on to implement them, and how those reforms will benefit the national class of providers here. I could discuss more about that later if the Court wishes.

With regard to (b)(3), we also submit we meet the requirements of 23(b)(3), that there are questions of law or fact that are common to class members that predominate over any questions affecting individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating this controversy.

We've already discussed those common issues and certainly here, where a number of the claims that the providers would seek in terms of monetary damages if this case proceeded to trial, would be very small; yet, the kind of discovery and efforts that would be necessary and the expert discovery and analysis of -- I don't even know how to describe it but other than significant megabytes of electronic data and the computer programs that would have to be prepared to analyze that data under the prompt pay

laws under an analysis of whether Delta Dental was properly or improperly bundling or downcoding claims, the expert costs are more than significant.

They would make it impossible, not even cost prohibitive, make it impossible for an individual class member to ever litigate a case of this magnitude on their own, particularly, as I say, where the amount of damages for an individual class member is likely not be that large.

And we know that, we know that because of the years of litigation, not only in this case, but in other cases that I have litigated on behalf of dental providers, given that the size of the claims submitted by dentists are very small compared to what, say, a neurosurgeon might submit.

You're dealing with a relatively small amount of money per dentist, so, this is not the kind of thing, given their involvement in their practices and their responsibility to their patients, that an individual dentist would get involved with.

So, I submit that we meet the requirements of (b)(3) as well, and I, therefore, respectfully request that the Court certify the settlement class in accordance with the definition that we have provided to the Court in our submissions for final approval.

THE COURT: Thank you. Mr. Sellinger, anything to add?

MR. SELLINGER: No, your Honor. Delta Dental agrees that settlement -- that approval of the class for settlement purposes is appropriate, reserving our right to disagree with factual statements and legal conclusions in the event settlement is not approved.

THE COURT: Okay. The Court is satisfied that on the record before it, that a settlement class can be certified under both Rule 23(a)(2) and Rule 23(a)(3). The Court will emphasize that it is satisfied that demonstration has been made for purposes of a settlement class.

With regard to the requirements, Rule 23(a)(2) requires that there be common questions of law or fact common to the class, the claims or defenses of the representative parties are typical of the claims or defenses.

Rule 23(a) also requires the class is so numerous that joinder of all parties is impractical and that the representative parties will fairly and adequately protect the interests of the class.

The Court is more than satisfied that the class is so numerous that joinder would be impractical. I believe the class is somewhere over 100,000 dentists, if I recall correctly.

There are indeed common questions of law and fact common to the class. They include issues of whether or not

there's been improper bundling, downcoding, violation of prompt payment laws, etc.

The Court is further satisfied that clearly the claims of the representative plaintiff, the doctor, are indeed typical of the claims presented by the members of the class and, again, they relate to business practices, downcoding, prompt payment and so on.

The Court is further satisfied that this particular plaintiff will fairly and adequately protect the interests of the class. The Court knows perfectly well that there was significant litigation as to whether or not the prior class representative was adequate to represent the class. I believe that was Dr. Kirsch. Is that correct?

MR. KATZ: That's right, you Honor.

THE COURT: And Dr. Jungels has been substituted for Dr. Kirsch, and the Court is satisfied that Dr. Jungels is indeed an adequate representative and, furthermore, it is more than satisfied that counsel for the plaintiff class is fully qualified professionally to represent the interests of the class.

The Court then has to consider whether or not the requirements of Rule 23(b) have been satisfied. This class is being certified, sought to be certified under (b)(2) and (b(3).

(B)(2) is typical injunctive relief or declaratory

relief certification. The Court is satisfied that, as it is currently structured, indeed, certification of the class on that ground is warranted.

(B)(2) requires that the party opposing the class has acted or refused to act on grounds that applied generally to the class so that final injunctive relief or corresponding declaratory relief is appropriate regarding the class as a whole.

The Court need look only to the complaint to see that to the extent that there would be claims relating to downcoding, the practices of Delta in processing the claims of doctors and similar types of activity that are alleged against Delta, that indeed, the party opposing the class appears to have acted or refused to act on grounds that apply generally to the class, and under those circumstances, the application for class certification would appear to be appropriate at this time and on this record.

The Court notes that even with regard to (b)(2) classes, where the viability of the class is, in fact, going to be litigated and is going to be pursued through final trial, the cohesiveness of the class is invariably an issue for the court to consider and the cohesiveness of the class in the context of a (b)(2) class frequently involves precisely the same types of issues which would be involved

in certifying a (b)(3) class, including whether or not individual issues predominate over the common class issues.

So, while, as Mr. Katz has cited in his brief, there is case law for the proposition that (b)(2) classes are generally subject to certification, nevertheless, the Third Circuit case law is that, indeed, there is nevertheless a careful -- a requirement that the Court carefully review (b)(2) certifications to ensure that, indeed, the class is cohesive.

In the context of the settlement class, that is also required but here in particular, with regard to the relief that is being sought in connection with this current application, the Court is satisfied that the cohesiveness requirement has been met.

With regard to (b)(3), the Court is required to find that common questions of law and fact common to class members predominate over any questions affecting individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

And then the Court is required to consider the class members' interest in individually controlling the prosecution or defense in this case. While clearly, they would have such an interest, as Mr. Katz has cogently pointed out, the costs of litigating the particular claims

here would be extraordinary compared to the individual class members' interests, the extent and nature of any litigation concerning the controversy already begun by or against class members, and the Court is not aware of any particular litigation involving class members that have been brought in this area. Have they, Mr. Katz?

MR. KATZ: I'm not aware of any such matters, your Honor.

THE COURT: All right. The desirability or undesirability of concentrating the litigation of the claims in the particular forum, and the court sees no particular concerns about that.

And finally, the likely difficulties in managing a class action, and the Court will highlight that issue because, as controlling Third Circuit law has indicated, that particular concern does not arise and is not a subject of consideration by the Court in the context of a settlement class and, therefore, the Court need not consider whether or not there would be substantial difficulties in managing this class if it were a litigation class and not a settlement class.

And the Court does note and will be discussing in connection with its determination of whether or not to approve the settlement the issues which, indeed, the defense has raised with regard to manageability and such

issues with regard to certifying a (b)(3) class for litigation purposes as opposed to settlement.

But based upon this record, the Court is satisfied that, indeed, the class is appropriately certified under both (b)(2) and (b)(3), and will approve the certification of the settlement class.

At this point, Mr. Katz, I will hear you on behalf of the parties concerning approval of the settlement. And, of course, that requires the Court to consider the Girsh v. Jepson factors.

MR. KATZ: Thank you, your Honor. As an initial matter, I would like to note for the record, and as the Court is certainly aware, this settlement which provides significant benefits to class members, to a very large national class, in terms of business reforms that would be in place for five years, was only achieved after intense negotiations and a very lengthy mediation with the assistance, the valuable assistance of former Magistrate Judge Ronald Hedges.

There was no collusion amongst the parties. We engaged in mediation for several months, exchanged numerous drafts of proposed reforms. I had consulted with not only my clients but with other dentists to develop a set of business practice changes that we believed would be most beneficial to the class and, more importantly, address or

most importantly address the issues that were raised by this litigation that had to do with claims that the class has alleged are not being processed in a timely fashion or that the dental providers have been subjected to what they term as the hassle factor, and having to incur significant administrative expenses and hiring people to track down stuff or to wait on the phone or to be on the provider or the Delta Dental's web site, claims processing web site to process claims, all of which detracted from these providers' ability, they allege, to render care to their patients because the time spent in dealing with all the business of claims processing and follow-up was taking time away from the time that they would be spending with their patients.

So, we looked at a set of reforms that would make the dentists' life and their administrative staffs' lives easier and save money or be designed to save money in the administrative area.

And various reforms were discussed. They went back and forth, back and forth over the course of months. We had several sit-downs at my office. We had a number of conference calls, all of which Judge Hedges oversaw, and a lot of head banging went on, and ultimately we --

THE COURT: Judge Hedges wouldn't do that.

MR. KATZ: Am I on the record?

THE COURT: Yes.

MR. KATZ: Judge Hedges was very effective in this case, and ultimately we achieved a settlement. And I mean, the case law is very clear that private mediation conducted by a mediator, in fact, I think there's a case that specifically talks about a retired federal mediator, retired federal judge, certainly supports the inference of an arm's-length negotiation and that there's no collusion. And that's what we had here.

Looking specifically at the Girsh factors, and there are nine of them and some of them are more important than others and, if I recall my fundamental law correctly, that not, you know, not every one weighs as heavily as the other, and you look at it as sort of a totality of the facts and circumstances as they're presented in the particular case. But let me go through these, your Honor. If the Court has any specific questions, I will certainly discuss and respond.

The first one, the complexity and duration of the litigation, this case was heavily fought for five years. It started in state court. It was removed to federal court and, in fact, your Honor may recall because your Honor heard the motion for remand, there was a chance that this case would have been remanded but for the fact that the prompt pay laws could have applied to the national class in

terms of outside providers from out of states who were submitting claims to Delta Dental of New Jersey, and that was a significant factor in keeping this case in federal court.

Over the five years of the litigation, the parties had vigorously litigated both class issues and, to a certain extent, the merits issues because under the Hydrogen Peroxide standard, unlike in New Jersey state court, there is significant overlap between the class and merits issues because the court would have to make a determination at the time of class certification for litigation class as to certain merits matters and, so, there was significant overlap in the discovery that we took.

So, certainly, given the length of time and the complexity of the case and where we stand based upon all the information obtained, I submit, weighs heavily in favor of the settlement being approved.

As far as the reaction of the class to the settlement, out of a class of 160,000 or so providers, there are now two objections, and one of those objections is solely to the fees, leaving only Dr. Galvin's objection as the only one that arguably goes to the approval of the settlement.

Now, we pointed out in terms of Dr. Galvin's

objection, first of all, it didn't actually conform to the requirements of your Honor's preliminary approval order in terms of how it was filed and when it was filed, but putting that aside for a minute, because it was filed by a pro se and not an attorney, the basis of Dr. Galvin's objection essentially went to the hassle factor, that he had to be on the phone too long, and his concerns, we submit, through a variety of the business reforms that have been made part of this settlement should be addressed, so, in that regard, his concerns that he raised had been addressed.

I believe his other issue that he raised was that Delta Dental should pay claims, I think within 15 days or so of when they're submitted. That is a requirement that greatly exceeds that which is required under New Jersey law which says claims that are submitted electronically have to be processed and paid in 30 days and claims submitted on paper, processed and paid in 40 days, so, I do not believe that is a credible objection to the settlement, to require Delta to do something not only greater but significantly greater than what the law actually requires it to do.

So, all that said, then the reaction to the settlement is overwhelmingly positive. There is only a minuscule number of objectors, and I don't remember the number off the top of my head, but I think it's less than

30 or 40.

THE COURT: There are only two objectors and there are approximately 70 opt-outs.

MR. KATZ: Excuse me. The number of opt-outs is approximately 70 opt-outs in a class of 160,000 or thereabouts, obviously, a minuscule number, certainly supports a finding that the reaction to the class has been overwhelmingly positive to this settlement.

The next Girsh factor is the stage of the proceedings. As I noted earlier, this case has been actively and aggressively litigated by both sides for more than five years.

Over that period of time we engaged in extensive document discovery involving the production of tens of thousands of pages of documents, responses to significant sets of interrogatories and multiple supplemental sets of interrogatories.

There has been substantial motion practice of both discovery motion practice before Judge Shipp, and before that former Magistrate Judge Cecchi -- shows you the duration of this case.

There has been dispositive motion practice before your Honor, and at the time the case was settled, there was also a pending motion to dismiss what could have arguably have been the most significant aspect of the prompt pay

claim for the class.

THE COURT: Let me stop you right there for just one second. Mr. Katz, please broad.

MR. KATZ: Certainly the information exchanged by both parties during the course of discovery, as well as the overall experience of both counsel in these kinds of matters, allowed us to have a full appreciation of what the case was about, what its strengths and weaknesses were, and ultimately leading to the conclusion that it would be in our mutual best interest to resolve this matter and to resolve it for what really is a significant set of business commitments going forward.

So, the stage of proceedings certainly satisfies or that requirement is certainly satisfied, I would submit, your Honor.

As far as the risks of establishing liability, obviously, Delta Dental denies and continues to deny any wrongdoing and, obviously, the class believes that we have a case that we could establish liability, but there are a number of factors that go into play. It's not that black and white.

There were certainly, and I have to acknowledge this, significant risks of establishing liability in this particular case that I did not face in any of the other health care or dental care class actions that I have been

involved with. And specifically, they can be looked at in two areas.

Number one is, unlike other insurance companies and related payors that I've been involved with in other litigation, here, through the course of extensive discovery, we determined that Delta Dental does, in fact, disclose a number of the bundling policies and claims adjudication practices that it engages in.

We didn't see that in other cases. In other cases, in other carriers, it was behind the eight ball. It was the proverbial black box.

Therefore, in this particular case, the focus for us to establish liability for breach-of-contract claim would have been that the costs of the adhesive nature of the contracts, take it or leave it basis on limited negotiation or no negotiation offering, the contracts would have to be unconscionable. That's a high -- a much tougher burden, row to hoe than simply you breached the contract because you didn't tell us anything about what you were doing with the claims and we expected to get paid a certain way, so, we had to acknowledge that fact.

More importantly, the significant claim -- the most significant claim to the class here was under the prompt pay statutes and regulations. Two things that we would have had to establish there. One is that, although there

may have been an ancillary breach-of-contract cause of action for violating the prompt pay laws, but the most significant claim would have been implied private right of action. Okay.

I have been successful in litigating that, the first attorney in New Jersey litigating that, but all that was in state court. We were here in federal court. Frankly, I had no idea how the court may come out on implied private rights of action involving state statutes. That was a significant concern.

The other concern regarding the prompt pay issues that were certainly the most significant issue was that in the course of the litigation, the New Jersey Department of Banking and Insurance repealed what we label, what I label as the waiver regulation.

The waiver regulation allowed for providers, because I also litigated this issue and prevailed in state court, it allowed providers to seek the full payment on the claim if the insurance company was late in denying the claim. So, if you had 30 days to pay or deny the claim and on day 31 they sent a denial, even if that denial was a legitimate denial on legitimate grounds, they would have waived the right to contest the claim and would have had to pay it.

That waiver provision was repealed and, moreover, based upon the manner in which it was repealed and the

statements put out by the Department of Banking and Insurance, there was a very serious concern that it would have been retroactive back to the enactment of the H Cap statute in New Jersey, which predates the filing of this lawsuit.

So, we were looking at a potential that not only was the waiver claim repealed on a going-forward basis, but it would have been repealed for the entire class period, which would have significantly undermined the amount of damages that we could have sought if we had been successful, and assuming we could have established a private right of action and assuming your Honor bought into my interpretation of the waiver provision.

So, the risks of establishing liability were great, and even though I feel that we presented a good case, a strong case, we have to acknowledge those risks in determining whether we're going to settle.

And on Delta Dental's perspective, from their standpoint, they also have to weigh those factors and weigh the fact that they know that I have been successful in litigating these issues before and, you know, there's a lot of Russian roulette going on here.

Ultimately, we all decided it was in the best interest of everyone and, most significantly the class members, the providers who are rendering significant

services to Delta Dental's members, to achieve a settlement that provides significant benefits in terms of business commitments that are a part of this agreement.

So, just moving ahead, the risks of establishing damages, I think I've also addressed that in the context of what I just discussed, so, both those factors support settling the case.

The next factor, the risks of maintaining a class action, once again, I think I've touched upon that here because the kind of class we would be seeking to certify would have to be under a private right of action under the prompt pay laws and/or a class of dental providers who can support that they entered into unconscionable agreements, unconscionable being a tough doctrine to substantiate, so, again, we would have to acknowledge that certifying the class was more difficult here or to maintain a class action more difficult here than in other cases.

Throwing in issues of manageability, which come into play also in a case of this type, have to be factored in here. Most of the case, had it been litigated, would have been litigated based upon the electronic data that would have -- presumably would have been produced by Delta Dental in the course of litigation. Delta Dental would have argued that no, no, no, you can't just rely upon our data. We've got to look at the individual records of the

dentists, so, a big fight would have been going on as to, well, you were going to have 160,000 dentists who have to produce their own records. Obviously, that would have been a manageability nightmare, to say the least.

So, all that supports settling the case according of the lines of the significant benefits provided by this --

THE COURT: Let me ask you something, wouldn't there also have been issues concerning the fact that some of your class were participating or, in fact, had contracts and some of your class were submitting claims as nonparticipating doctors and had no contract?

MR. KATZ: Well, there would have -- what we were seeking to certify would have been a class and a subclass. The subclass would have been a contract claim subclass which only would have been network providers, and that would have been the unconscionability claim.

The prompt pay class, the prompt pay laws do apply to network and non-network providers, so, that would have been a larger class if we would have been successful, if we gotten that far and we were successful.

The next factor, the ability of the defendant to withstand a greater judgment is not a factor that plays any meaningful role in this case.

In terms of the range of reasonableness of the settlement in light of the best recovery and litigation

risks, we submit that the settlement is eminently reasonable and certainly compared to the plaintiffs' best possibly recovery, as I just discussed a few minutes ago, the most significant claim of the class involving the waiver damages, was, we must acknowledge, potentially gutted by virtue of the repeal of the waiver provision and the fact that that repeal may have been extended retroactively to prior to the institution of this litigation.

Needless to say, that would have greatly impacted the amount of damages that we could have sought because then we'd be looking at an interest-only damages and the interests that are paid on late pay claims, according to statute and regulation, is 12 percent annual interest, which is not a lot of money compared to getting paid the entire amount of your claim if they had waived the right to contest the claim. So, the amount of damages would have been significantly less than what we hoped for and anticipated when we instituted this litigation.

So, in total, I think in looking at the individual factors and the factors as a whole, I do believe the Girsh factors are satisfied. This particular settlement provides some 15 business commitments going forward for a period of five years. They are laid out in Section 7 of the agreement. Some of them are discussed in Bruce Silverman's

certification that was submitted in support of preliminary approval in October, and these reforms are geared, as I said, to address the issues raised in the complaint dealing with paying claims more timely and reducing the hassle factor and the administrative burden on practices so that they can tend to their patients.

Some of these reforms involve significant changes to Delta Dental's, what's called the benefit connection web site, which allows participating and nonparticipating providers to get information about patient eligibility, the benefits, claim receipt, claim payment status.

There are changes that will enable practices -- changes that have been made as a result of the settlement that will enable dental providers to log in and look at, in greater bulk, what's going on with all of the claims that they have submitted to Delta Dental, you know, where they stand in terms of processing, without having to enter individual patients, which is always a big administrative hassle. You have to enter each individual patient, it takes time, it takes effort, it takes staffing to do that. That's been eliminated.

In addition, Delta Dental is agreeing to supply more specific information about its claims processing policies that have been applied to a particular claim adjudication for which Delta Dental requires more information or

additional information in which to process the claim, and through this procedure, the practices -- through this improvement or enhancement in the benefit web site -- I'm sorry -- the benefits connection web site, providers will know up to as much as ten days earlier what additional documentation they need by logging in and looking at the status of the claim, what's going on and how it was processed and why it couldn't be fully processed.

They'll know as much as ten days earlier than they would have known the old way through getting things in the mail, what additional documentation or information has to be provided to Delta Dental so that the claim could be fully processed and, in turn, the dentist getting paid much more quickly than the dentist would have been paid under the old way.

In addition, Delta Dental has committed to allowing dentists to continue, unlike most clearing houses, electronic clearing houses, to allowing dentists to continue to submit claims electronically free of charge, and this is significant because under the prompt pay laws, claims submitted electronically get paid 25 percent or have to get paid 25 percent more quickly than claims submitted on paper but, at the same time, most electronic clearing houses, and those are the entities through which dentists submit their claims electronically that then, in turn, send

them to the specific insurance company, charge money, 35 cents, 45 cents, 50 cents a claim.

Delta Dental will not do that. It's committed to not charging, at least for another five years, so, not only will dentists -- not only is that an incentive to submit electronically and get paid faster, but dentists will be saving money.

Another significant benefit of this settlement is what's called electronic explanation of benefits. An explanation of benefits, we've all seen them a million times when we go to our providers, are the written communications that you get from the insurance company which explains how the services were processed and what's being paid and your responsibility and so forth and so on.

Under this settlement, Delta Dental will be providing providers electronic explanation of benefits to all dentists and that will expedite the information going back to dentists that will -- and eliminate all the time and the delays that used to be employed through mailing, through, you know, snail mail and this, in turn, will allow dentists, once they see how the claims were processed, what the various responsibilities are, co-payments and so forth, will allow the dentists more expeditiously to collect money that is due and owing to them from their patients than it would have been under the old way in which these things

were handled.

And also, in this paperless system, any documentation that could be sent electronically is a great benefit to professional offices because the electronically EOBs can be downloaded directly into the practice management software systems of the various dental providers, allowing the dental providers to more quickly post payments and reconcile their payments, know what was paid, what wasn't paid, what additional documents they may have to submit. If they need to appeal, if they believe a claim was not rightfully adjudicated, they can get on that more quickly.

All of this is designed to get the process speeding along so in the end, the dentists are getting paid more quickly. So, that is also a significant benefit of this settlement.

Another significant benefit of this settlement is that -- and this was a major complaint with dentists -- there's often a coordination of benefits issues between -- in the dental world between medical and dental services and who's paying first or, you know, the dental company is not going to pay until they get the explanation of benefits from the medical company to see how it's been processed.

As part of this settlement and subject to certain conditions which are set forth in the agreement, Delta Dental has agreed not to require the submission of medical

explanation of benefits for a variety of procedures and that is also a great benefit because, again, it will facilitate the prompt processing and payment of claims and, at the end, get the money in the dentists' hands faster, which was what this litigation was all about.

Another significant benefit is the individualized review of certain claims by professional dental consultants that are employed by Delta Dental. One of the issues raised in this complaint that I alluded to or discussed earlier was the automated processing of claims independent of looking at any records, clinical documents, to see what services were actually rendered and whether the services billed for are supported by the clinical records.

In essence, the complaint was you have a pre-program logic that's going to process a claim no matter what, come hell or high water, no matter what the dentist actually did and is documented in his records.

Under this settlement, Delta Dental, for a variety of dental services, will have a consultant which will be reviewing, manually reviewing the claim to ensure that whether the services were accurately described and the correct codes were submitted. It's a labor intensive effort that requires the consultants to review the x-rays and the treatment records, and Delta Dental is committed to continuing this for the next five years.

I mean, this is the kind of thing that dentists want. They do not want their claims just simply going through a computer system and something being spit out on the other side without the consideration of the services they actually rendered. So, that is also a significant benefit of this settlement.

Another significant benefit of this settlement is where Delta Dental will be sending the payment. In this day and age, you have practices that have multiple locations or dentists practicing in multiple offices. Often what you have are centralized locations where all the administrative work is done, where all the staff is, you know, the billing of staff is located, and as part of this settlement, Delta Dental has agreed to send the payment to the location that is designated by the dentist, so, it's the dentist who now is controlling the administrative aspect of its practice, where does he want a centralized location where all the checks are going, so that that would enure to the ability of the practice to make deposits more quickly as opposed to checks going here and there to different locations and having to collect them and whatnot. Again, money get to the dentists or getting to their bank accounts more quickly, a benefit to the class.

Your Honor, I've only touched on some of the reforms. There are other reforms that are addressed in Mr.

Silverman's certification. All of them are in Section 7 of the agreement but all in all, I believe these are very significant benefits that are designed to achieve what the goal of this litigation was, get dentists paid more quickly; significantly reduce the administrative hassle, the administrative overhead; and to ensure that claims are being processed not based solely on some preprogrammed logic, but based upon the services that are actually rendered, based upon what the dentist documents in his or her records.

I think the settlement reforms here, benefits are significant, and I think they overwhelmingly support final approval of this settlement.

THE COURT: Thank you. Mr. Sellinger.

MR. SELLINGER: As before, your Honor, Delta Dental agrees that the settlement should be approved, reserving our right to disagree with any factual statements or legal conclusions.

THE COURT: All right. Thank you. As the parties have indicated, the Court is required to review the settlement of the class action to determine whether or not it's fair, reasonable and adequate as required by Rule 23(e).

In Girsh v. Jepson, 521 F.2d, 153, Third Circuit 1975, the Third Circuit indicated a number of factors which

are nonexclusive which the court should consider in determining whether or not the settlement is indeed fair and appropriate.

The Third Circuit has indeed indicated that those factors are not exclusive and, indeed, if I recall correctly, the Prudential Insurance litigation indicated that the court may, in its discretion, consider a number of additional factors in order to determine whether or not the settlement is fair and reasonable and adequate.

The Court is satisfied on the record before it that it need only consider the Girsh v. Jepson factors and that, indeed, those factors overwhelmingly demonstrate that the settlement is fair, reasonable and adequate as required by Rule 23(e).

The Court's required to consider, among other things, the complexity and duration of litigation. This litigation has been going on, at least to me, interminably. It has been extraordinarily complex. The parties have, indeed, vigorously and aggressively litigated every single aspect of this case. And as the parties have indicated, to a certain degree, even at this point with all that litigation, we've only started the main event, which would be dealing with the added motion to dismiss, coupled with class certification procedures.

The Court is satisfied that, indeed, this is an

appropriate point in the litigation, given all the discovery and litigation that has occurred, for the case to be settled.

The Court is satisfied furthermore that the reaction of the class to the settlement appears to be overwhelmingly in favor of it. As the Court indicated, there appear to be two objections. One is to attorneys' fees, the other essentially, and interestingly, does not really suggest that a monetary component should have been included in here. Dr. Galvin would like additional procedural remedies put in place and, as Mr. Katz indicated, at least one of them is simply not authorized by any statute. That would be payment within, if I recall correctly, he wanted two weeks.

He would also like, and this Court can certainly understand that, that Delta Dental not keep him on the phone for interminable periods of time when he inquires. Hopefully, that objective will be met in part by the automated procedures that have been adopted by the parties in the settlement, including accessing EOBs electronically and so on.

But in short, the record indicates that the class appears to be overwhelmingly in favor of the settlement.

The stage of the proceedings, I actually discussed while I was discussing the complexity and duration of the

litigation and, that is, that this case is far along but would have much further to go still before it could reach a resolution, depending on how things were determined in motion practice and otherwise.

With regard to the risks of establishing litigation, Mr. Katz has clearly and articulately indicated that the risks, indeed, would be substantial. There would be two classes, assuming they were approved. One would be a group that had a contractual relationship with Delta Dental. The other would be nonparticipating doctors. Presumably, the nonparticipating doctors would have to base their claims virtually exclusively on the prompt pay statutes, while the participating doctors could base claims both upon contractual relations and upon the prompt pay statute.

The risks with regard to the prompt pay statute being available to all of the potential class members has been clearly outlined by Mr. Katz and, indeed, presented a substantial risk.

Likewise, the extent that claims would be brought based upon the contractual relationships between the parties, as Mr. Katz indicated, the viability of those claims would depend substantially upon the determination as to whether or not the provisions were determined to be unconscionable under state law and, as Mr. Katz has indicated, that is an extremely substantial burden and

would be particularly so in the context of a case which was not involving consumers.

Under those circumstances, the Court concludes that the risks of establishing liability would indeed be extremely substantial and that that argues strongly in favor of settling the case.

Mr. Katz has likewise indicated the risks of establishing damages and the Court need not go over them, but it is apparent to the Court that, indeed, the risks of establishing liability are commensurate with the risks of establishing damages in this case, coupled with, of course, an extraordinarily complex and difficult issue with regard to, in fact, calculating damages and, indeed, potentially a further complication of calculating damages in the context of whether or not the providers had, in fact, balance billed or not balance billed patients, and I gather that is an issue which, in fact, you did discuss in the class certification issue, Mr. Katz, if I recall correctly.

MR. KATZ: Well, that's correct, because certainly a dentist -- damages would be reduced if they had collected amounts from patients and that would have to be factored in.

THE COURT: And of course, that would again require an item-by-item calculation in effect. So that, among other things, when one gets to the risks of maintaining a

class action, indeed, for various reasons pointed out by counsel, the risks of maintaining the class could potentially be very substantial, among other things, as the Court and Mr. Katz just indicated, the manageability issues might potentially become paramount, among other things, because, of course, one might have to indeed calculate damages on a patient-by-patient basis and factor in on an accounting basis whether or not patients had been balance billed for particular claims or had not been balance billed, had paid, had not paid and so on, or whether or not they had been paid up front, if I recall correctly.

Indeed, presumably, nonparticipating doctors would be permitted to, in fact, bill patients if they wished to for the total fee up front and then, in fact, collect as an assignee in some manner from Delta Dental and forward those payments or have those payments forwarded to the patient. Correct, Mr. Katz?

MR. KATZ: That is also an issue that would have had to have been dealt with.

THE COURT: All of those suggest that, indeed, there could be very substantial risks and issues in maintaining a class action in this case.

As Mr. Katz indicated, there is no doubt that defendants could maintain a greater judgment in this case and that, of course, the Court does factor into its

consideration.

And finally, the range of reasonableness of settlement in light of the best recovery and the range of reasonableness of the settlement in light of all the attendant risk factors, the Court will deal with both of those issues together and the Court, quite frankly, concludes that on the record before it, ultimately, the risks of obtaining a substantial monetary judgment in this case on behalf of the class were extremely problematic and that, therefore, obtaining substantial business reforms in the form of injunctive relief, indeed, is not only a reasonable settlement in this particular case, but the nature of the business reforms that were obtained by counsel for plaintiff in this negotiation appear to this Court to, indeed, be very substantial, and while there is not a monetary component for the doctors, it is apparent to the Court that a major concern of providers, both in the dental area and other medical providers, has and continues to be the difficulty, inconvenience and expense involved in submitting, processing and dealing with the insurance companies who reimburse them for the services which they have provided.

The Court can certainly take judicial notice of the fact that providers seem to have more and more staff which they have to devote to this particular process and that,

indeed, that kind of staff, time and money is extraordinarily expensive.

The business reforms that the parties have presented to this Court for approval seem to this Court to go a substantial way to ameliorating some of those issues.

The Court finally notes that the settlement in this case was, indeed, negotiated at arm's length with a mediator, Judge Hedges, a former magistrate judge of this court, and that argues also strongly in favor of concluding that the settlement is a fair and reasonable one.

The Court, therefore, is satisfied that, indeed, settlement should be approved as being fair, reasonable and adequate and sufficient to protect the interests of the class in this matter and the settlement will be approved.

Now, the final issue then is attorneys' fees. The Court has received an objection to the fee application in this case and Mr. Pakrul, on behalf of Dr. Krugman, do you wish to be heard further with regard?

MR. PAKRUL: I'll be very brief, Judge. Obviously, our position is set forth in the papers your Honor just referred to. I would just state three things; that class counsel litigated many, many claims and they were largely unsuccessful and a lot of the claims were dismissed.

The lodestar and hourly rate that was being sought has already been rejected by this very Court in the Dewey

matter and we ask that it be rejected here or at least certainly modified, and I guess just very plainly saying that the lawyers shouldn't get a lot of money when the class members didn't get anything, so, the fee should just be modest.

THE COURT: Okay. Mr. Katz, I'll hear you.

MR. KATZ: Your Honor, class counsel submits that our fee application which seeks $575,000 in fees and expenses, from which 2500 will be deducted as an incentive award to Dr. Jungels should be approved in its entirety.

We have certainly submitted a complete and comprehensive fee application with all detailed billing and expense records which certainly gives this Court and gives the objectors, if they chose to do so, which they did not, the opportunity to go through and determine whether, in fact, the hours were reasonably expended and to attack the certification and fee application in the ways that one could attack such an application.

Here, let me point out a few things from the get-go. First of all, the fee application or the amount of fees was only negotiated and agreed upon after all the class benefits were fully negotiated and agreed upon. It's separate and apart from the class benefits and does not diminish the class benefits or their value in any way.

With regard to counsel's, Mr. Pakrul's remark, sort

of colloquial remark that class counsel shouldn't get paid or paid, quote, you quote "a lot of money" if the class is not getting a monetary component, that is certainly not a criteria in analyzing a fee application where there are, in fact, numerous class action settlements providing injunctive relief where there's no money exchanged. The test is to look at, are the benefits significant as such to warrant a fee and here -- and I'm not going to belabor the point that we've addressed at length already -- we have five years of significant business commitments going forward that address the issues that were raised in the lawsuit or the significant concerns raised in the lawsuit, so, and those reforms ultimately will lead to a greater bottom line for the dentists and savings in administrative costs to a class, a national class of 160,000. So, I think that last, what I consider almost off-the-cuff remark should be summarily rejected.

I think what's significant to recognize here, also, your Honor, is that this fee was the subject or the product of a recommendation before your Honor at a court-ordered mediation on the fee. Mr. Pakrul, in his letter which was filed last night, docket entry 296, acknowledges that this Court mediated the fee award but, he goes on to say it is unclear whether there was any analysis of the basis of the lodestar.

Well, your Honor, when we were before the Court, we specifically -- I specifically addressed, Mr. Sellinger was there, the amount of hours that we had been expending on this case, the hourly rates that we are accustomed to getting, and the amount of hours that would have to actually be cut off of the lodestar because they dealt with issues that weren't directly beneficial to the class.

As it is, I deducted 500 hours off of this lodestar before it was ever submitted and, as this Court knows because there was some intense conversations, this was a significantly compromised fee from our perspective that, for the benefit of the class, to get this deal done, that we were willing to take a significant cut in both hours and the amount of money that we'd be looking for under normal circumstances. We forfeited -- I mean, not only did we take half of our lodestar, I mean, we obviously, in the same vein, forfeited any right for any type of an enhancement, even a nominal enhancement which is not uncommon in this district for enhancement of one to four.

So, I certainly think that under these circumstances, even if we were to be, quote, unquote "penalized" for not achieving the ultimate resolution, I don't know how much more we could be, quote, unquote, "penalized" than what we already have. And I think the proof in the pudding is in the next paragraph of Mr. Pakrul's letter, which really

shows that he doesn't understand the facts of this matter and, more specifically, our fee application.

He cites the various cases. He cites to a case that I was involved in in 2006 in the Appellate Division where I was awarded $375 an hour and he also cites to the Dewey matter, which my firm was involved in, where there were rates of -- for the senior partners that went to 00 well, the rates were between 260 and 560.

First of all, the West Morris Pediatrics matter is 2006, which is six years ago. The Dewey matter was 2010, which is two years ago. It's axiomatic in this district that in calculating the lodestar, all of the work is based upon not historical rates but the rates that are in effect at the time that the fee application is made, so, it's irrelevant what I may have been awarded in 2006 or we were awarded in 2010, in terms of work that was done in 2006 and 2010, because it would be based only on the current hourly rate.

But more significantly, far more significantly, Mr. Pakrul's logic is flawed because we aren't even getting paid anything remotely like the 375 that I got paid in 2006. If you look at our hours, our hour are 1900. We have 75,000 in disbursements. We're getting paid essentially a $500,000 fee. Do the math. 500,000 divided by 1900 gives me a rate of $259 an hour, and if you throw

in the 500 hours that I deducted because I concluded they were not reasonably expended, then my hourly rate is $208 an hour.

I submit to the Court, I mean, clearly Mr. Pakrul's analysis is completely flawed and has to be rejected out of hand. But I would submit, aside from that, I would submit that getting compensated, given the experience and expertise and success of myself and my law firm, as this Court is fully familiar with, getting paid an hourly rate of $259 an hour on a case of this magnitude, with all the risks involved that we take on on a contingency basis in essence, is certainly justified. And under the circumstances, I believe that the $500,000 fee is eminently reasonable and should be awarded in this case.

Similarly, the disbursements in this case of $75,000, all of them were reasonably incurred in litigating this matter. Mr. Pakrul didn't say anything today when he got up, but he raises one issue about the $30,000 in expert fees.

I'm assuming he got that, he gleaned that by looking at the chart where I totaled up $30,000 in expert fees, but what these expert fees really were, were both -- would have been testifying and consulting, primarily consulting experts.

We've already discussed the complex issues involved

in this case. The issues involved include an analysis of determining -- reviewing, for example, the discovery of a technical nature involving the computer and claims adjudication systems of Delta Dental. It required expertise in that area, expertise from people with knowledge of understanding these computer systems and how they adjudicate claims; expertise in provider relations issues, contracts, terms, what they mean, what documents, what should we be asking for, what kind of deposition questions should we be inquiring.

This is all part of the expert costs that were incurred in this case. And also, assisting us once we start engaging in negotiations; how should we formulate the business reforms. Okay. What is the best way? How do we know that Delta Dental, who obviously has better working knowledge of its operations than I do, it's not my business, how do we know, based upon what we know what Delta Dental does, if in fact the reforms we're requesting are providing the kind of benefits that we are seeking and whether we're, you know, we're getting our money's worth, to sort of analogize, and consultants and experts we dealt with helped us in that, in formulating the settlement proposals and the reforms, and the ideas that we needed to get this case done.

Also, this case involved issues of understanding

whether, in fact, just because Delta Dental may bundle codes together doesn't mean that it's breaking any laws, because bundling is permissible under various industry standards. So, it required consulting with people knowledgeable on those standards and whether or not, under accepted industry standards, the CDT, which is the codes that dentists use, and also here we had CPT codes because there's dentists who render medical procedures.

There was considerations of whether Medicare coding guidelines which, you know, could be followed to the extent there were any applicable code lines, or Medicaid code lines were applicable. We needed to consult with people on that.

So, the big ticket item of the $30,000 is certainly substantiated and certainly substantiated given the results we got in this case.

It doesn't seem to me that any of the other expenses are being challenged, so, I will not address that. Moreover, I don't believe I need to address, unless the Court has specific questions about hours expended. I think we've deducted, again, deducted 500 hours out of 2500, so, you know, five over 20, what is that, one-fifth of our hours, 20 percent of our hours for work that was not reasonably expended, I. Think we did our only policing, if you will, and I don't think any further reductions are

necessary there, either, and none have been challenged by the objector.

So, all in all, I think the fee application should be approved in its entirety. We should be awarded the $575,000 in fees and costs, from which 2500 of that we are paying out of our money to Dr. Jungels as the incentive award and, thus, it should be granted in its entirety. Thank you.

THE COURT: Thank you. Mr. Sellinger, do you wish to be heard on this at all?

MR. SELLINGER: No, your Honor. Thank you.

THE COURT: All right. Anything further?

MR. PAKRUL: No, Judge.

THE COURT: All right. As Mr. Katz indicated, the parties have already agreed upon a tentative settlement of the claims with Judge Hedges. They reached an impasse over the attorneys' fees and this Court did indeed mediate the attorneys' fee application.

It would be an understatement to say that the parties' perception of the appropriate attorneys' fee award was vastly different and the Court did carefully consider, in making a recommendation to the parties, the extent to which plaintiff's counsel had spent time and effort on this and made a recommendation to the parties which they ultimately advised the Court they agreed to of this figure

based upon the Court's evaluation that, indeed, the nature of the case and the nature of the relief warranted a substantial reduction from the potential lodestar that plaintiffs' counsel would have been able to use in seeking a fee application.

Now, in cases in which the relief which is awarded to the plaintiff class is non-monetary, one typical way of calculating the fee award which has been approved by the Third Circuit and numerous other circuits is a percentage of the recovery based upon the court's calculation of what the reasonable value of the non-monetary relief would be to the class.

The Court did not engage in any explicit calculation of that figure in mediating the claim, nor had the parties, indeed, engaged in such an explicit calculation. But this Court is fully aware that in class actions in which the overall value of the recovery is relatively small, a fairly typical percentage of the recovery award is in the vicinity of 30 to 33 percent.

It is fairly common for that percentage to decline as the amount of money in the common fund increases, although that is not invariably and necessarily so. But if the Court were to use approximately a one-third percentage of the recovery calculation in this case in determining what would be an appropriate fee award, that would mean that

this settlement would have to be valued at approximately 1.6 or 1.6 and change in benefit to the class in order for such a fee award to be justified.

This Court has no problem concluding that the recovery and the benefits which this class action settlement confers upon class members is well above $1.6 million and, indeed, that would be, by any stretch of the imagination, the most modest valuation of the benefits that were achieved to the class members.

In common fund cases, what is typically done by the court then is to use the lodestar calculation as a cross check to see whether or not the fee award is appropriate.

As Mr. Katz has indicated, after he discounted 500 hours of time spent on the case, he came up with a lodestar calculation which was roughly $1.1 million, slightly less than that, if I recall correctly, one million 95 dollars or something like that. So, as a ballpark, the application which is sought here is approximately half of that lodestar.

The Court is satisfied that under the facts of this case, that is a more than reasonable attorneys' fee. It is not uncommon for percentage of the fund recovered fee awards to be multiples of the lodestar, and one of the reasons for that is because class action litigation is, indeed, contingent fee litigation. If you are not

successful on behalf of the class, you don't get any fees.

The Court is satisfied that this was a difficult, vigorously contested case which resulted in substantial benefits for the class in connection with the settlement and that while the plaintiffs did not get all they wanted or wished for, they did get substantial benefits as a result of the industry and efforts of the plaintiffs' counsel and counsel then is, therefore, entitled to an appropriate fee award.

In the context of this case the $575,000 fee application and the expert fees is indeed a modest one. This Court will note for the record that if the Court had not concluded that this indeed was a settlement which was fair and appropriate and reasonable with regard to the class members, this Court would not have approved it and would not have awarded any fee whatsoever.

This Court is fully aware of the economics of class action litigation, the difficulties and, indeed, the substantial abuses that occur sometimes in class action litigation, including so-called coupon settlements.

This is not a coupon settlement. This is not a settlement in which the only people who benefit are plaintiffs' lawyers. And the Court is satisfied that based upon all the information that's been presented to it, that the fee application and the application for expert fees is,

indeed, warranted and supported by all the documentation.

As Mr. Katz notes, the fee which is, in fact, being awarded, would appear to be somewhere around half of his fees. Correct.

MR. KATZ: The hourly rate, yes, your Honor.

THE COURT: The hourly rate and the lodestar.

MR. KATZ: Well, correct.

THE COURT: All right. There is no way that this Court could conclude that that fee is not an appropriate and fair one which is warranted. The application will be granted. Anything further?

MR. KATZ: Nothing from the class, your Honor.

MR. SELLINGER: No. Thank you, your Honor, for all your diligent attention to this case over many years. It's much appreciated.

THE COURT: Thank you to both of you.