

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
W.D.N.Y. BUFFALO
2006 NOV 15 PM 4:10

KENNETH CONRAD, et al.,

Plaintiffs,

v.

Case No. 91-CV-846C

CESAR PERALES, in his personal
capacity, and
ANTONIA NOVELLO, in her official
capacity, as Commissioner of the
New York State Department of Health,

Defendants.

The parties have advised the Court that they have signed a Settlement Agreement in this case. The parties have joined in a motion to the Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, asking that the Court give preliminary approval to the Agreement, approve the plan of notice documented in Exhibit H to the Agreement and in the Declaration of Andrew J. Novak, and schedule the Fairness Hearing contemplated by Rule 23(e).

For the reasons set forth below, the motion is GRANTED.

This case was filed in 1991 and has been before the Court for some fifteen years. The parties have engaged in extensive discovery and motion practice. Since the Court entered decisions on the parties' cross-motions for summary judgment, defendants have produced over 100 boxes of records, and have answered extensive interrogatories and notices to admit. Presently before the Court are numerous and extensive motions from both parties, dealing with discovery and the merits of the case.

In September 2004, the Court directed the parties to enter into settlement negotiations under the supervision of Magistrate Judge Hugh B. Scott. The Court has monitored the progress of these negotiations, and has received reports concerning the negotiations from the parties and the Magistrate Judge.

The Court is aware that over the ensuing period of more than two years, the parties conducted extensive and detailed negotiations, both before Magistrate Judge Scott and directly among counsel. The Settlement Agreement that has now been presented for approval is the result of these negotiations.

Accordingly, the Court finds that the Settlement Agreement that has been presented for preliminary approval is the product of extensive arms-length negotiations between experienced counsel, based on substantial discovery that has allowed the parties to make an informed evaluation of the merits of the case.

The *Manual for Complex Litigation* provides that the “initial [fairness] evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions or informal presentations by the parties.” *Id.* at §21.632.

The informal nature of the initial fairness review is also stressed by Professors Newberg and Conte in their treatise on class actions: “the parties are well advised to seek informally a preliminary court response in a pretrial conference that the proposed settlement is within the range of possible judicial approval.” 4 *Newberg and Conte on Class Actions* §11:25 (4th Ed. 2002.)

As the Newberg and Conte treatise shows, the threshold standard for review at the present stage is merely whether “the proposed settlement is *within the range of possible judicial approval.*” *Id.* (emphasis added.)

As noted above, the Court's approval at this stage is preliminary only. Final approval awaits the more formal presentations that will take place at the fairness hearing, where members of the class or other qualified claimants will have an opportunity to object to the proposed settlement.

In their treatise on class actions, Professors Newberg and Conte state that a record of "arms-length bargaining" between experienced counsel creates a presumption that the resulting agreement is fair and reasonable. 4 *Newberg and Conte, supra* §11:42 (4th Ed. 2002.) According to Newberg and Conte, when there is a record of appropriate arms-length bargaining among counsel, the "overwhelming majority" of settlements are approved. *Id.*

An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arms-length bargaining. As a practical matter, the overwhelming majority of proposed settlements are approved when the court is satisfied that arms-length bargaining took place during settlement negotiations and experienced class counsel has recommended approval of the settlement. *Id.*

Based on the record in this case, and the presentations of the parties in support of the present motion, the Court finds that the Settlement Agreement falls within "the range of possible judicial approval," *Newberg and Conte, supra* §11:25, and will receive the Court's preliminary approval as provided in Rule 23(e), subject to further evaluation at the Fairness Hearing discussed below.

The Court has also reviewed the notice program proposed by the parties to comply with the requirements of Rule 23(e). In particular, the Court is in receipt of the Declaration of Andrew J. Novak filed in support of the notice plan, and the text of the proposed notices as set forth in Exhibit H to the Settlement Agreement. The Court has also had an opportunity to review the proposed notice program with counsel as necessary.

The Court notes that the proposed notice program was designed by Mr. Novak and his firm, Kinsella/Novak Communications, Ltd. Mr. Novak's experience in designing such programs is reviewed in his Declaration, which lists prior class actions in which he has been involved and provides quotations from various courts that have approved notice programs designed by Mr. Novak and his firm. The Court recognizes Mr. Novak's experience and expertise in designing notice programs to meet the requirements of Rule 23.

The notice program designed by Mr. Novak calls for publication of the "short form" notice in the newspaper with the highest circulation in each county in New York State. In addition, Mr. Novak proposes to publish the short form notice in a list of many of the highest circulation community newspapers published throughout the State. Mr. Novak also proposes to publish the short form notice in the *New York Times* and *USA Today*, in order to insure national exposure.

The short form notice provides pertinent information concerning the basic provisions of the settlement and directs the reader to a web site, a mailing address and an 800 number for additional information, including a copy of the "long form" notice which provides greater particulars concerning the proposed settlement.

Counsel for plaintiffs also represent that copies of the short form notice will be mailed to all heirs of class members that have been identified and confirmed to date.

The parties have not yet been able to develop a complete list of all class members entitled to refunds under the Settlement Agreement.

Moreover, the Court recognizes that in 1989, the year at issue in this case, virtually all class members were elderly and infirm nursing home residents. The parties

believe that in the ensuing years, virtually all class members have died, and the Court credits this belief as reasonable. Claimants for the refunds due to deceased class members would be their heirs or distributees. For the most part, the parties have not yet identified such heirs and distributees. Identification of such individuals is part of the plan for administering the settlement, and will take place after the list of class members has been completed.

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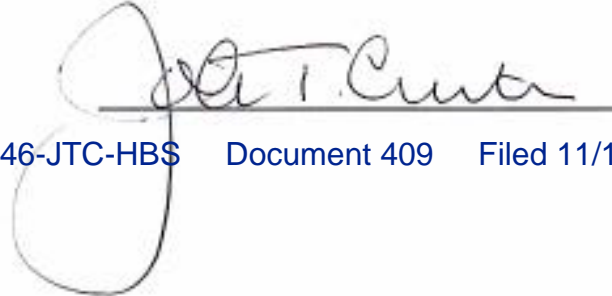
In light of these circumstances, the Court is satisfied that individual notice to the class members or their heirs is impossible at this time, except for the few individuals who have been identified to date and who will be sent individual notice as set forth above.

Under Rule 23(e)(1)(B), the Court must direct notice of the proposed settlement “in a reasonable manner.” *See, 5 Moore’s Federal Practice – Civil* §23.162[2] (“Court May Set Any Reasonable Form and Manner of Notice.”) A district court has “broad discretion” concerning the form and manner of notice of a proposed settlement under Rule 23(e). *Id.*

The Court is satisfied that the form and manner of notice proposed by Mr. Novak in this case meets the requirements of Rule 23(e)(1)(B). Accordingly, the Court approves the form and manner of notice proposed, and directs the implementation of this plan.

The parties have advised the Court that they anticipate notice will appear in newspapers of daily circulation beginning as early as November 19, 2006, and that publication in all papers, including the community newspapers, should be complete by November 30, 2006. Accordingly, the Court orders that any objections to the proposed settlement must be filed with the Clerk and served upon the parties as specified in the long form notice by no later than December 22, 2006, and that the fairness hearing shall

be held in Part I of this Courthouse at 10:15 AM on December 28, 2006. The date of the fairness hearing may be adjourned by further order of the Court, with notice to the parties and to any objectors that have met the filing deadline specified above.

A handwritten signature in black ink, appearing to read "J. T. Curtis", is written over a horizontal line. A large, loopy flourish extends downwards from the signature.

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