Not Reported in A.3d, 2013 WL 5507660 (N.J.Super.A.D.)
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Michael H. **KIRSCH**, D.D.S., Individually, and on Behalf of All Others Similarly Situated,
Plaintiffs–Respondents,
v.
HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY, Defendant–Respondent.

Argued April 24, 2013.
Decided Oct. 7, 2013.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket Nos. L–4216–05 and L–109–08.
Barry D. Epstein argued the cause for appellants Dr. Gary Krugman and Dr. Barry Raphael (The Epstein Law Firm and Nagel Rice, attorneys; Mr. Epstein, on the briefs).

Maxine H. Neuhauser argued the cause for respondent Horizon Blue Cross Blue Shield of New Jersey (Epstein Becker & Green, attorneys; Ms. Neuhauser, of counsel and on the brief; John M. Murdock (Benton Potter & Murdock) of the Virginia bar, admitted pro hac vice, of counsel; Jiri Janko, on the brief).

Eric D. Katz argued the cause for respondents Michael H. **Kirsch**, D.D.S., and plaintiff class (Mazie Slater Katz & Freeman, attorneys; Mr. Katz, of counsel and on the brief; David M. Estes, on the brief).

Before Judges GRALL, KOBLITZ and ACCURSO.

PER CURIAM.

*1 This case presents another front in the private dispute of two former law partners, now rivals, who have lately appeared (either personally or through proxies) on behalf of one or two objectors in class actions filed by the other to try to upend settlements involving thousands of plaintiffs with the aim of depriving the other of fees.

In this matter, a current partner of one of these lawyers [FN1] filed two class actions on behalf of an estimated class of 17,000 dentists against defendant **Horizon** Blue Cross Blue Shield of New Jersey (**Horizon**) alleging various violations of the State's prompt payment laws (***Kirsch*** I) and breach of contract claims arising out of **Horizon's** alleged improper claims processing practices (***Kirsch*** II). After seven years of litigation, the parties settled both suits shortly before trial was to begin in ***Kirsch*** I. The settlement consisted of several business initiatives designed to increase transparency in **Horizon's** payment of claims, reduce the dentists' administrative office overhead and improve relations between the class and the health insurer, and a reversionary fund of $2.85 million with a maximum one-time payment of $167.70 available to each member of the class.

FN1. Designated trial counsel for the class is a current partner of one of the rival lawyers and a former partner of both.

Only two members of the class objected to the settlement. No one disputes that the objection was prompted by class counsel's estranged former partner, although he is not counsel of record for objectors.[FN2] The Law Division approved the settlement over the objection and awarded fees and costs to the level of the agreed cap of $2.5 million using a lodestar analysis and a contingency enhancement.

FN2. ***Kirsch*** I was filed and received class certification when the estranged former partner and class counsel were partners and thus the class consists of the former part-

ner's former clients.

Objectors' arguments on the merits of the settlement consist of two and one-half pages of their opening brief. They argue that the settlement consisted of a "meager monetary settlement" and "minor business reforms" of no quantifiable value. Having reviewed those claims, we are satisfied that the Law Division did not abuse its discretion in approving the settlement. *See Bldrs. League of S. Jersey, Inc. v. Gloucester Cnty. Utils. Auth.*, 386 *N.J.Super.* 462, 471 (App.Div.2006), *certif. denied*, 189 *N.J.* 428 (2007) (noting that the court's approval of a proposed settlement at a fairness hearing is not an adjudication of the merits but rather a determination of whether the settlement is "fair and reasonable"). Changes in the prompt payment laws having retroactive effect, discovery which did not bear out the allegations of "bundling" and "downcoding," and looming *N.J.R.E.* 104 proceedings in which Horizon was poised to mount a very serious challenge to the qualifications and methodology of the class' damages expert likely made the decision to settle before trial a prudent one and the settlement obtained "a good value for a relatively weak case." *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 *F.*3d 768, 806 (3d Cir.1995).

Although objectors and class counsel make a show of contesting the merits of the settlement, the real dispute is over the fees. All are aware that a court reviewing a class action settlement must take particular care to scrutinize the fee arrangement because " 'a defendant is interested only in disposing of the total claim asserted against it, ... the allocation between the class payment and the attorneys' fees is of little or no interest to the defense.' " *Id.* at 819–20 (quoting *Prandini v. Nat'l Tea Co.*, 557 *F.* 2d 1015, 1020 (3d Cir.1977)). Here, Horizon, having agreed "not to oppose or appeal" any fee award not exceeding $2.5 million, has taken no position on objectors' appeal of the fee award.

***2** Although it does not affect our view of the fairness of the settlement to the class, the fee award contains an error that must be corrected. At class counsel's request, the Law Division applied a multiplier to the lodestar. As our Supreme Court established in *Rendine v. Pantzer*, 141 *N.J.* 292, 343 (1995), and recently reiterated in *Walker v. Giuffre*, 209 *N.J.* 124, 139 (2012), contingency enhancements are "only available in those cases that our Legislature has selected for statutory fee-shifting so as to achieve its broader public purposes of attracting counsel to socially beneficial litigation." Class counsel has not identified a statutory fee-shifting provision that would apply in this case. Accordingly, we are aware of no basis for the award of a contingency enhancement.

Although we do not approve the failure to provide hourly rates for each lawyer during each year time was billed, and endorse the use of an alternative method of calculating the fee award as a sensible cross-check of the court's initial fee calculation,[FN3] we are satisfied that the fee awarded, minus the contingency enhancement, was within the trial court's considerable discretion. *Rendine, supra*, 141 *N.J.* at 317. Objectors' remaining claims of error as to the fees do not require discussion in a written opinion. *R.* 2:11–3(e)(1)(E).

> FN3. *See In re Baby Prods. Antitrust Litig.*, 708 *F.*3d 163, 176–77 (3d Cir.2013), in which the Third Circuit recently discussed situations in which courts assessing class action settlements may wish to consider the amount of the fund claimed by the class in addition to the *Girsh v, Jepson*, 521 *F.*2d 153 (3d Cir.1975) factors and the utility of cross-checking a lodestar calculation with a fee calculated on a percentage-of-recovery basis.

Affirmed in part, reversed in part, and remanded for reconsideration of the fee award in accordance with this opinion.[FN4] We do not retain jurisdiction.

> FN4. Plaintiff's motion to supplement the record to include procedural developments

in a related matter is granted.

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