MSBA

November 28, 2017

Minnesota
State Bar
Association

600 Nicollet Mall
Suite 380
Minneapolis, MN 55402-1039

www.mnbar.org

Telephone
612-333-1183
National
1-800-882-MSBA
Fax
612-333-4927

President
Sonia Miller-Van Oort
Minneapolis

President-Elect
Paul W. Godfrey
St. Paul

Treasurer
Tom Nelson
Minneapolis

Secretary
Dyan J. Ebert
St. Cloud

Tim Groshens
Executive Director

Nancy Mischel
Associate Executive Director

Ms. AnnMarie O'Neill
Clerk of Appellate Courts
25 Dr. Rev. Martin Luther King Jr., Blvd.
St. Paul, MN 55155

RE: MSBA Comments Regarding Proposed Amendments to the Minnesota Rules of Civil Procedure, ADM04-8001

Honorable Justices of the Supreme Court:

This letter is submitted in response to the Court's request for comments regarding the recommendations of Minnesota Supreme Court's Advisory Committee (Committee) on the Rules of Civil Procedure. In addition to the comments that follow, the MSBA requests ten minutes to present at the hearing scheduled for December 19. I will speak briefly, joined by MSBA member Eric Magnuson, who will provide the substance of our comments on the cy pres provision, and Daniel Cragg, who will address outstanding federal conformity issues.

I. The MSBA urges the Court to amend Rule 23 to require a portion of unclaimed funds in class-action settlements be dedicated to fund legal aid providers.

Adopting the MSBA's proposed cy pres rule change will increase access to justice for vulnerable Minnesotans. Currently, civil legal aid offices in Minnesota are forced to turn away 60% of eligible clients. A distribution of 50% of the unclaimed funds in class actions to Minnesota's legal aid organizations will be well spent. According to a recent study, every dollar spent on civil legal aid returns $3.94 to Minnesota in savings. How Legal Aid Boosts Minnesota's Economy, Bench & Bar of Minnesota (February 6, 2017).

A. The MSBA's proposal is a mainstream recommendation in line with Minnesota's justice values.

The MSBA's proposal is not a radical proposition. Nationally, the American Bar Association has endorsed the concept of cy pres residuals funding civil legal services. In August of 2016, the American Bar Association (ABA) House of Delegates adopted a resolution that "urges state, local, territorial and tribal jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to civil justice for persons living in poverty." ABA Resolution 104 (August 8-9, 2016). Current ABA

President Hilarie Bass, in a letter dated November 17, 2017, has written to the Court expressing her support for MSBA's proposed rule change as consistent with ABA policy (see attached Exhibit A). To date, 22 other states have adopted similar cy pres distribution provisions.[1] The recommended change was non-controversial and widely supported as it passed through the MSBA's Assembly on June 24, 2016.

The MSBA's proposal is in line with Minnesota's justice values. The Minnesota Supreme Court has a long history of supporting funding for civil legal services. The Minnesota Supreme Court was the first in the country to mandate IOLTA by court rule, becoming effective in 1983. Minn. R. Prof. Conduct 1.15. The Minnesota Supreme Court also has mandated that part of the Attorney License registration fee be distributed to the Legal Services Advisory Committee to help fund civil legal services programs in Minnesota. Rules of the Sup. Ct. on Lawyer Reg. 2 (d). In 2009, the Minnesota Supreme Court ordered an increase in attorney registration fees for civil legal services to counteract the extraordinary financial circumstances surrounding the Great Recession. The fee increase was made permanent by Supreme Court Order in 2011. Order Extending Increase in Lawyer Registration Fees, Minnesota Supreme Court, ADM10-8002 (March 2, 2011).

Mandatory cy pres distribution requirements are quickly becoming a mainstay in the civil legal services funding world. Minnesota has long been a leader in civil legal services funding. The Court should ensure that Minnesota remains a leader in access to justice funding, and not a footnote in the ever-growing list of states who have committed a portion of unclaimed class action residuals to fund access to justice.

B. The MSBA's proposal aligns with ALI principles on cy pres distributions.

The American Law Institute (ALI) framework for distributing unclaimed settlement funds in a class action – accepted and applied by many courts around the country – contemplates "a recipient whose interests reasonably approximate those being pursued by the class." ALI Principles of the Law of Agg. Lit. § 3.07 (2010). The Advisory Committee seized on this principle and concluded without meaningful analysis that "[t]he mandatory and rigid application of a cy pres distribution rule that would require distribution of the class's funds to a predetermined charity, untethered to the nature of the class action or the interests of class members, is inconsistent with cy pres law." See Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure, Final Report (Aug. 1, 2017), p. 11. The MSBA fundamentally disagrees.

Contrary to the Committee's conclusion, the MSBA's proposal aligns with ALI principles. The proposal focuses specifically on distributing unclaimed class action

[1] California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Mexico, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Washington, West Virginia, and Wisconsin. *See* attached Exhibit B, *Legislation and Court Rules Providing for Legal Aid to Receive Class Action Residuals*, ABA Resource Center for Access to Justice Initiatives.

settlement funds to justice-oriented legal services providers whose work and interests are completely in line with the interests of classes pursuing relief in the civil justice system. While the substantive claims at issue may vary widely, legal services providers and class action litigants have a shared goal – access to the legal system for those who otherwise could not afford to bring their substantive claims.

Civil legal aid attorneys in Minnesota provide access to justice to low-income, underserved individuals, vindicating the rights of the disadvantaged and the vulnerable. The core work of these attorneys – and the missions of their law firms – are totally congruent with the common underlying premise of all class actions, i.e., making access to justice a meaningful reality for people who would otherwise not be able to obtain protections of the justice system:

> [L]egal aid or [access to justice] organizations are always appropriate recipients of cy pres or residual fund awards in class actions because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system.

Bob Glaves & Meredith McBurney, Cy Pres Awards, Legal Aid and Access to Justice: Key Issues in 2013 and Beyond, 27 Mgmt. Info. Exch. J., 24, 25 (2013); see also Robert E. Draba, Motorsports Merchandise: A Cy Pres Distribution Not Quite "As near as Possible," 16 Loy. Consumer L. Rev. 121, 122 (2004) (recognizing that the rationale for approving cy pres distributions to two legal aid organizations, like the purpose of the class action device, is "to protect the legal rights of those who would otherwise be unrepresented").

In Minnesota, civil legal aid protects people with disabilities, victims of domestic violence, veterans, the elderly, children, new Americans, the poor, and other vulnerable populations in communities throughout the State. Civil legal aid helps clients to protect their basic needs in the areas of family safety and security, health care, food and sustenance, housing stability, and financial support. Civil legal aid protects disadvantaged populations from discrimination in housing and public accommodations. Civil legal aid saves consumers from predatory business conduct and consumer exploitation. Civil legal aid levels the playing field for underdogs, who – but for civil legal aid – do not have meaningful access to justice.

No other part of either the civil justice system, or the public financial and social services system, has the breadth and depth of reach as does civil legal aid. Civil legal aid operates as an essential societal fail-safe to ensure that legal and social service systems deliver legally required outcomes. Simply put, civil legal aid in Minnesota by its very mission serves the same foundational principles of class action litigation: the quintessentially American concept of equal access to justice for all.

C. Common law trust principles are irrelevant in class action cy pres jurisprudence.

As noted by the Committee, the cy pres doctrine has its roots in trust law. However, in class action litigation, the cy pres doctrine is merely a borrowed convenience. MSBA's proposal rightly focuses on the well-accepted use of the cy pres doctrine in class action litigation. The distinction in how the doctrine is employed in the trust and class action contexts illustrates the values underlying MSBA's proposal.

In trust law, both generally and in Minnesota, the cy pres doctrine has been employed when effectuating a trust is impossible or impracticable according to its terms. The goal is to give effect to a trust grantor's wishes "as near as possible." See Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure, Final Report (Aug. 1, 2017), pp. 9-10.

In the class action context, the goal is somewhat different. There is no actual underlying trust. Rather, cy pres devices are used in a class action to prevent the defendant from walking away with no consequences because of the inability to distribute settlement proceeds. See Mirfasihi v. Fleet Mortgage Corp. 356 F.3d 781, 784 (7th Cir. 2004).

Adopting MSBA's proposal fulfills the goal of applying cy pres principles in the class action context – and it does so by using only a portion of unclaimed settlement funds to support the broad concept of justice embodied by the work and mission of civil legal aid law firms in Minnesota. Narrowly limiting cy pres distributions to target recipients with precisely identical claims takes an overly literal view of how cy pres distributions work in class actions, and is often a very difficult goal to achieve. The Court should adopt the broader, pragmatic, justice-oriented view outlined in MSBA's proposal.

D. MSBA's recommendation warrants departure from conformity with the Federal Rules of Civil Procedure.

Although it recognized the merits of the MSBA proposal, the Advisory Committee declined to recommend it, favoring uniformity of state and federal rules over the undisputed benefit of the proposed rule. Respectfully, that decision exaggerates the importance of uniformity in the present context, and ignores the many differences between Minnesota rules and practice, and their federal counterparts.

While federal conformity is often desirable, it is not absolute. Departure from the Federal Rules is appropriate when it fosters more efficient resolution of disputes, helps avoid undue burdens on the court, improves the litigation process, or reflects important local distinctions. This Court has regularly eschewed conformity with the Federal Rules when it determines there is good reason to diverge. This is such an instance.

There are numerous examples of non-conformity that work well in Minnesota. Most notably, "hip pocket service," commencing an action by service of summons instead of filing, does not conform with its federal counterpart. Compare Minn. R. Civ. P. 3.01. and Fed. R. Civ. P. 3. Another example of non-conformity between Minnesota rules and federal practice is this Court's choice to retain the Frye-Mack standard for admissibility of expert testimony instead of adopting the federal Daubert standard. In the appellate arena, this Court has decided that appeals are to be initiated in the appellate courts rather than the trial courts, unlike the federal system. Compare Minn. R. Civ. App. P. 103.01, subd. 1 and Fed. R. App. P. 3(a)(1). Variations between state and federal procedures are readily accommodated when there is a reason for that variation.

The MSBA's proposal is a similarly appropriate circumstance for non-conformity because it ultimately increases the capacity of civil legal services programs to provide critical access to the courts and streamlines the residual distribution process to make it more uniform. Moreover, the effect of the MSBA's cy pres proposal comes into play only after the time of settlement and distribution of unclaimed funds, meaning that it would not disrupt the current body of class action law that has developed governing substantive and procedural issues concerning how to certify or prosecute a class action.

The Court can and should be open to a rule that serves the justice system and all litigants even if it does not conform with the federal counterpart. Respectfully, the Court should reject the recommendation of the Advisory Committee on this point, and adopt the MSBA proposal.

II. The MSBA urges the Court to adopt MSBA-recommended amendments to Rules 16.02, 26.02, 26.04, and 63.03.

As the Court is aware, the MSBA filed a petition on September 2, 2016, proposing amendments to the Minnesota Rules of Civil Procedure to substantially conform certain rules to the Federal Rules of Civil Procedure. As noted in our statement of position regarding cy pres, we agree with the Committee that there are times when conformity with federal rules is appropriate, but that is not always the case.

We appreciate that the Committee endorsed most of the MSBA's recommendations by including them in their recommendations and report to the Court. Specifically, the Committee endorsed MSBA recommendations modifying the timing mechanisms of many of the Rules to conform to the Federal Rules of Civil Procedure and our recommendations regarding changes to Rules 3.01, 4.05, 14, 26.03, 34, 37, and 56.

However, we maintain our position requesting amendments to Rules 16.02, 26.02, 26.04, and 63.03 and will address each rule in turn.

A. Rule 16.02 should be amended so that all cases require an initial scheduling order and mandatory preparation and attendance at pretrial conferences.

The Committee declined to endorse this recommendation, citing an excessive burden on the courts due to large caseloads and a lack of judicial adjuncts in state court. But initial scheduling conferences and scheduling orders improve judicial efficiency by streamlining the case management at the outset of the case. By way of example, whenever possible, family law cases in Minnesota require an initial case management conference within four weeks of filing the first pleading.[2] In 2015, there were 43,066 family law cases and 36,668 major civil cases filed in Minnesota.[3] The burden on family courts has not become unreasonable, even when the vast majority of those cases involve pro se litigants. Similarly, the burden on Federal Courts, which utilize the recommended rule, is not excessive. This is because scheduling orders improve litigation efficiency and scheduling clarity at the outset of litigation. For this reason, we reiterate our recommendation to amend Rule 16.02 to mandate scheduling orders and attendance at pretrial conferences.

B. Rule 26.01 should be amended to require service of initial disclosure at or within 14 days after the parties' Rule 26.06 conference, with a similar amendment to timing of discovery in Rule 26.04.

The proposed change to Rule 26.01 would prioritize the Rule 26.06 conference as well as providing clarity on the timing for initial disclosures and the commencement of discovery. Currently, the timing is based on the original due date for when an answer is required. The commencement of discovery should be based on the Rule 26.06 conference, which sets the plan for discovery, rather than basing it on the initial date that an answer to the complaint was due. In addition to these benefits, allowing 14 days after the Rule 26.06 conference for initial disclosures would reduce delays in the early stages of cases.

The Committee also declined to recommend a similar amendment to Rule 26.04. Our petition requested a restructuring of Rule 26.04 to remove the initial clause and base the timing of discovery on the Rule 26.06 discovery planning conference. This change would clarify the timing of the beginning of discovery as well as centralizing the timing provisions for discovery in a single rule rather than spreading it across several different rules. This change would also prioritize the Rule 26.06 conference, further clarifying discovery planning. We maintain this recommendation.

---

[2] *See* Minnesota Judicial Council, *Early Case Management and Early Neutral Evaluation Best Practices for Family Court* (2012) http://www.mncourts.gov/mncourtsgov/media/scao_library/ENE/ECM-ENE_Statewide_Best_Practices_520-1_(final_5-17-12).pdf. Certain types of cases are excepted from this practice.

[3] *See* Minnesota Judicial Branch, *Annual Report* (2015) http://www.mncourts.gov/mncourtsgov/media/assets/ documents/reports/2015AnnualReport.pdf.

C. Rule 63.03 should be amended to change the deadline to remove a judge from 10 to 14 days.

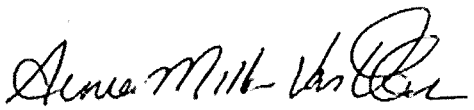
Because the Committee provided no explanation as to why it did not recommend this change, it is presumably due to the conflict which would be created with Minn. Stat. § 542.16. In this situation, the Minnesota Rules of Civil Procedure would control, resolving the conflict. Thus, we stand by our recommendation to amend Rule 63.03.

III. The MSBA supports the Board of Judicial Standards' recommended changes to Rule 63 to incorporate the standard for disqualification from the Code of Judicial Conduct

On December 9, 2016, upon the recommendation of its Judiciary Committee, the MSBA Assembly voted to support the changes to Rule 63 requested by the Board of Judicial Standards. The MSBA believes consistency among sources is desirable and in this instance will result in greater efficiency for judges and court staff, who would no longer need to address questions related to discrepancies between various rules.

We appreciate the opportunity to provide these comments to the Court.

Sincerely,



Sonia Miller Van-Oort

Exhibit A

Hilarie Bass
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5109
Fax: (312) 988-5100
abapresident@americanbar.org

November 17, 2017

AnnMarie O'Neill
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. De. Martin Luther King Jr. Boulevard
St. Paul, MN 55155

Re: Court File No. ADM 04-8001

Honorable Justices of the Minnesota Supreme Court,

This letter is submitted in response to the Order filed on September 29, 2017, inviting comments on proposed amendments to the Minnesota Rules of Civil Procedure, as outlined in the Recommendations and Report from the Supreme Court's Advisory Committee (Committee) on the Rules of Civil Procedure.

I write to urge the Court to adopt the proposed amendments to Rule 23, and proposed new Rule 23.11, as set forth in the Petition filed by the Minnesota State Bar Association (MSBA) with the Court on September 2, 2016. The MSBA's proposal would amend Rule 23 to require that 50 percent of unclaimed, undistributed funds in state class-action lawsuits (*cy pres*) be donated to legal services organizations.

ABA policy endorses such an approach. In August 2016 the ABA House of Delegates adopted Resolution 104, stating:

RESOLVED, That the American Bar Association urges state, local, territorial and tribal jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to civil justice for persons living in poverty.

FURTHER RESOLVED, That before class action residual funds are awarded to charitable, non-profit or other organizations, all reasonable efforts should be made to fully compensate members of the class, or a determination should be made that such payments are not feasible.

I attach a copy of the resolution, and the careful analysis provided in the report upon which the ABA based its action. This resolution was adopted following the leadership demonstrated by – at the time – 19 states which had adopted rules or legislation of this

nature. Currently, 22 states have such a rule, and 13 of those states devote a percentage of all class action residual awards to civil legal aid organizations. As the report accompanying the resolution makes clear, legal aid organizations are appropriate recipients of class action residual funds, so long as the underlying premise of expanding access to justice is properly articulated. Thus, federal and state courts throughout the country have long recognized organizations that provide access to justice for low-income, underserved, and disadvantaged people as appropriate beneficiaries of *cy pres* distributions from class action settlements or judgments. The access to justice nexus falls squarely within the guidance set forth in *American Law Institute Principles of the Law, Aggregate Litigation* that "there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests."

For the reasons set forth above, we endorse the recommendation of the MSBA that the Minnesota rules of civil procedure be amended to devote a portion of class action residuals to civil legal aid organizations.

Sincerely,

Hilarie Bass

Enclosure: ABA Policy Resolution 104 (Annual Meeting 2016)

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 8-9, 2016

RESOLUTION

RESOLVED, That the American Bar Association urges state, local, territorial and tribal jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to civil justice for persons living in poverty.

FURTHER RESOLVED, That before class action residual funds are awarded to charitable, non-profit or other organizations, all reasonable efforts should be made to fully compensate members of the class, or a determination should be made that such payments are not feasible.

REPORT

Introduction

The unmet need for civil legal services among those living in poverty is well documented: study after study has demonstrated that the majority of poor people who need civil legal services are turned away due to a severe shortage of legal aid resources. This not only has grave consequences for the people who are unable to get this critical legal help; everyone with matters before the courts and the justice system suffers as well as a result of the large increase in people left with no choice but to represent themselves in court on often complex legal matters.

Funding for legal aid services is woefully inadequate and the Association annually organizes bar leaders from around the country to lobby for more funding for the Legal Services Corporation to partially address this problem. The Association has adopted policy statements in support of adequate funding for LSC, as well as called upon bar associations and lawyers to "undertake vigorous leadership and aggressive advocacy to identify, pursue and implement creative initiatives that will result in new funding mechanisms for legal services providers.[1]"

A creative initiative that has now been adopted in 19 U.S. jurisdictions helps provide critical funding for legal aid while at the same time providing a balanced resolution to what otherwise can often become a thorny issue in class action litigation. Specifically, these rules and statutes authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of awards of undistributed class action settlement residuals. This resolution seeks to have the Association go on record as supporting this approach for the reasons articulated below.

The Origins of the Cy Pres Doctrine

Cy pres awards are distributions of the residual funds from class action settlements or judgments (and occasionally from other proceedings, such as probate and bankruptcy matters) that, for various reasons, are unclaimed or cannot be distributed to the class members or other intended recipients. The term cy pres derives from the Norman-French phrase, cy pres comme possible, meaning "as near as possible." Originating at least as early as sixth-century Rome, the cy pres doctrine has its roots in the laws of trusts and estates, operating to modify charitable trusts that specified a gift that had been granted to a charitable entity that no longer existed, had become infeasible, or was in contravention of public policy. In such instances, courts transferred the funds to the next best use that would satisfy "as nearly as possible" the trust settlor's original intent.

When class actions are resolved through settlement or judgment, it is not uncommon for excess funds to remain after a distribution to class members. Residual funds are often a result of the inability to locate class members or class members failing or declining to file claims or cash settlement checks. Such funds are also generated when it is "economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed.[2]"

---

[1] House of Delegates policy resolution 95A124.

[2] *In re* Baby Prods. Antitrust Litig.,708 F.3d 163, 169 (3d Cir. 2013)

In these circumstances courts have used the cy pres doctrine to accomplish the distribution of residual funds to charities that benefit persons similarly-situated to the plaintiffs, or that advocate to improve access to justice more generally. This preserves the deterrent effect of the class action device, and allows courts to distribute residual funds to charitable causes that reasonably approximate the interests pursued by the class action for absent class members who have not received individual distributions.

Cy Pres is a Well-Established Practice

The application of the cy pres doctrine in class actions, as with any other doctrine throughout legal history, has evolved as courts have been required to grapple with complex and unique facts and circumstances in each particular case. Because of such complexities, trial courts sometimes fashion unique cy pres distributions; some such awards have been reversed on appeal. The vast majority of such reversals are not for "abusing" the cy pres doctrine (i.e., using cy pres for personal gain for counsel or judges). Rather, most reversals are due to the misapplication of the doctrine within the particular circumstances of the case (e.g., failure to make every effort to fully compensate class members or misalignment between the interests of the class members and the interests of the cy pres recipients). While addressing these problems, federal courts have consistently found that the cy pres doctrine is valid in the class action context. The American Law Institute's Principles of Law of Aggregate Litigation ("ALI Principles") agrees and provides key guidance on the application of cy pres awards in class actions, which is respected and generally followed by the courts. The ALI Principles acknowledge that "many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members.[3]"

With respect to funds left over after a first-round distribution to class members, the ALI Principles express a policy preference that residual funds should be redistributed to other class members until they recover their full losses, unless such further distributions are not practical:

> If the settlement involves individual distributions to class members and funds remain after distribution (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.[4]

As the ALI Principles recognize, when further distributions to class members are not feasible, the court has discretion to order a cy pres distribution, which puts the settlement funds to their next-best use by providing an indirect benefit to the class.

Legal Aid and Access to Justice Organizations Are Appropriate Recipients of Cy Pres Distributions

---

[3] PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. a (2010) [hereinafter ALI PRINCIPLES]

[4] ALI PRINCIPLES, *supra* note 3, § 3.07(b)

The fundamental purpose of every class action is to offer access to justice for a group of people who on their own would not realistically be able to obtain the protections of the justice system. This purpose is closely aligned with the mission of every civil legal aid and access to justice initiative across the nation.

In class action suits, when distributions to the class members are not feasible, it is necessary to determine other recipients who would be appropriate to receive the residual cy pres funds. The ALI Principles state that such recipients should be those "whose interests reasonably approximate those being pursued by the class," and, if no such recipients exist, "a court may approve a recipient that does not reasonably approximate the interests" of the class.[5]

Courts evaluate whether distributions to proposed cy pres recipients "reasonably approximate" the interest of the class members by considering a number of factors, including: the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reason why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the cy pres recipient.

Organizations with objectives directly related to the underlying statutes or claims at issue in the relevant class action are clearly appropriate cy pres recipients. But narrowly limiting the scope of appropriate cy pres recipients to the precise claims in the class action may not always be possible or practical. Too narrow of a focus on the subject matter of the case can unnecessarily complicate the socially desirable settlement of large class action disputes. In a typical class action, counsel for plaintiffs and a defendant are resolving a complex dispute, and the disposal of residual funds is typically a detail in a larger resolution. While some court opinions speak of residual funds as "penalties" or "recoveries" for violations of the law, settling defendants usually see themselves as making a pragmatic business decision that specifically avoids any admission that they violated the law. Moreover, settling defendants have a practical interest in how residual funds are used, and may wish to avoid funding interest groups that campaign against the interests of the defendant.

There have been cases where parties improperly attempted to direct cy pres awards to causes that had no connection to the class or the case or to access to justice through the courts. Examples have included general awards to charities or educational institutions with no particular relationship to the class action. The concerns in the cy pres context are not about whether these are good and effective charities and institutions; it is their relevance to the class action where there are residual funds to be awarded. In some instances, the reasons for including the organization have not been articulated, leaving the appeals court to guess about the connection of a particular organization to the issues of the case.

An appropriate recipient in most cases will be a legal services organization, so long as the underlying premise of expanding access to justice is properly articulated. Thus, federal and state courts throughout the country have long recognized organizations that provide access to justice for low-income, underserved, and disadvantaged people as appropriate beneficiaries of cy pres distributions from class action settlements or judgments. The access to justice nexus falls squarely

[5] ALI PRINCIPLES, *supra* note 3, § 3.07(c)

within ALI Principles' guidance that "there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests.[6]"

An issue that sometimes arises in disposition of class action residuals is whether the scope of a suit (local or national) has been properly matched to the scope of a cy pres award. It is clearly disfavored under the case law for a cy pres award in a national class action case to be directed solely to a local charity. One advantage of an award to an organization with a broad access to justice mission is that such organizations exist throughout the country so any distribution can easily be structured to take into account the national nature of the case.

Because organizations with broad access to justice missions are widely recognized as appropriate recipients of cy pres awards, a growing number of states have adopted statutes or court rules codifying the principle that cy pres distributions to organizations promoting access to justice are an appropriate use of residual funds in class action cases. The state courts and legislatures in 19 states have adopted rules and statutes that specify, as appropriate cy pres recipients, charitable entities that promote access to legal services for low-income individuals.[7] Nine of these courts and legislatures have mandated a minimum baseline distribution (usually 25% to 50%) to the pre-approved category of recipients.[8] Because such statutes and court rules establish that it is permissible for any residual funds in class action settlements or judgments to be distributed to organizations that provide access to justice/civil legal aid, they make clear that such organizations are distinct from other charitable causes that have drawn legitimate concerns regarding a lack of nexus with the interests of the class members.

Conclusion

Class action litigation has become an important device for resolving a wide range of disputes between individual plaintiffs and corporate defendants. Cy pres awards of undistributed class action settlement residue are an important part of the settlement process. Distributing funds to appropriate recipients is a practical variant of the cy pres device long recognized in trust law and is generally accepted as preferable to returning undistributed funds to the settling defendants or escheat of those funds to the state.

Awards of class action settlement funds should follow these principles: (1) compensation of class members should come first; (2) cy pres awards are appropriate where cash distributions to class members are not feasible; (3) cy pres recipients should reasonably approximate the interests of the class; (4) cy pres distributions should recognize the geographic make-up of the class, and where

---

[6] ALI PRINCIPLES, *supra* note 3, § 3.07 cmt. b.

[7] The states are: California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Mexico, North Carolina, Oregon, Pennsylvania, South Dakota , Tennessee, Washington. As of this writing, it has been reported that the Wisconsin Supreme Court adopted a petition for a cy pres rule, which is expected to become effective January 1, 2017 after final orders are drafted.

[8] The states with rules requiring a percentage of cy pres awards to be devoted to access to justice organizations are: Colorado (50%), Illinois (50%), Indiana (25%), Kentucky (25%), Montana (50%), Oregon (50%), Pennsylvania (50%), South Dakota (50%) and Washington (50%). When effective, Wisconsin (50%) will become the 10th state.

circumstances dictate should be made on the basis of such factors; (5) legal aid and access to justice organizations should be considered as appropriate cy pres recipients.

The American Bar Association therefore urges that state, local, territorial, and tribal jurisdictions adopt court rules or legislation that authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of class action residual funds.

Respectfully submitted,

Jacquelynne J. Bowman, Member
Standing Committee on Legal Aid & Indigent Defendants

August 2016

Exhibit B

ABA RESOURCE CENTER FOR
ACCESS TO JUSTICE
INITIATIVES

Legislation and Court Rules Providing for Legal Aid to Receive Class Action Residuals*

California

Legislature amended Section 384 of the California Code of Civil Procedure to state that 25% of class action residuals shall go to the Equal Access Fund for distribution to legal aid programs; 25% shall go to grants to trial courts for new or expanded collaborative courts or grants for Shriver Civil Counsel; and the 50% balance shall go "to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, further the objectives and purposes of the underlying class action or cause of action.....to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent."

Effective date: Original legislation, effective January 1, 1994, permitted class action residuals to go to legal aid. Statute was amended, effective June 27, 2017, to provide the set-asides described above.

Implementation work and analysis: A cy pres brochure and a more comprehensive cy pres toolkit are updated regularly and distributed at appropriate venues.

For more information, please contact: Stephanie Choy, Managing Director, Legal Services Trust Fund Program, State Bar of California, stephanie.choy@calbar.ca.gov, 415/538-2249

Entry updated: 8/17

Colorado

The Colorado Supreme Court amended Sec. 23(g) of the Colorado Rule of Civil Procedure in 2016 to state that "**.....In matters where the claims process has been exhausted and residual funds remain, not less than 50 percent of the residual funds shall be disbursed to the Colorado Lawyer Trust Account Foundation (COLTAF) to support activities and programs that promote access to the civil justice system for low income residents of Colorado. The court may disburse the balance of any residual funds beyond the minimum percentage to COLTAF or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying

litigation or otherwise promote the substantive or procedural interests of members of the certified class."

Effective Date: July 1, 2016

Implementation work and analysis: There are plans to begin to publicize the new rule. Hoping to use state rule to encourage federal court cy pres awards.

For more information, please contact: Diana Poole, Executive Director, Colorado Lawyer Trust Account Foundation, diana@legalaidfoundation.org, 303/863-9544

Entry updated: 8/16

Connecticut

The Connecticut Supreme Court amended Sec. 9-9 of the Connecticut Superior Court Rules in 2014 to state that "**.....Any order, judgment or approved settlement in a class action that establishes a process for identifying and compensating members of the class may designate the recipient or recipients of any such residual funds that may remain after the claims payment process has been completed. In the absence of such designation, the residual funds shall be disbursed to the organization administering the program for the use of interest on lawyers' client funds pursuant to General Statutes 51-81c for the purpose of funding those organizations that provide legal services for the poor in Connecticut."

Effective Date: January 1, 2015

Implementation work and analysis: Connecticut Bar Foundation (the IOLTA program) receives periodic awards from both state and federal class action cases. CBF sends letters to the state's chief justice, the chief United States district court judge, the DBA's federal practice and litigation sections and noted members of the class action bar.

For more information, please contact: Don Philips, Executive Director, Connecticut Bar Foundation, don@cbf-1.org, 860/722-2494

Entry updated: 8/16

Hawaii

The Hawaii Supreme Court amended Rule 23 of Hawaii's Rules of Civil Procedure, in January, 2011, to state that "....it shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds, as agreed to by the parties, including nonprofit tax exempt organizations eligible to receive assistance from the indigent legal assistance fund under HRS section 607-5.7 (or any successor provision) or the Hawaii Justice Foundation, for distribution to one or more of such organizations. Judges may approve the distribution of residual funds to legal aid organizations or to the Hawaii Justice Foundation to disburse to one or more of such organizations."

Effective date: July 1, 2011

Implementation work and analysis: In 2011, the Hawaii Access to Justice Commission prepared a Toolkit.

For more information, please contact: Bob LeClair, Executive Director, Hawaii Justice Foundation, hjf@hawaii.rr.com, 808/537-3886

Entry updated: 8/16

Illinois

Legislature amended Section 5 of the Code of Civil Procedure to add new Section 2-807 (735 ILCS 5/2-807), to establish a presumption that residual funds in class actions will go towards organizations that improve access to justice for low-income Illinois residents. Courts have the discretion to award up to 50% of the funds to other organizations that serve the public good as part of a settlement if the court finds good cause to do so, but at least 50% of these funds must go to support legal aid.

Effective date: July 1, 2008

Implementation work and analysis: The Chicago Bar Foundation has developed educational materials and sample language that they distribute to area judges, class action lawyers and other relevant parties (e.g., claims administrators). CBF website provides detailed information.

For more information, please contact: Bob Glaves, Executive Director, Chicago Bar Foundation, bglaves@chicagobar.org, 312/554-1205.

Entry updated: 8/16

Indiana

New language in Rule 23 of the Indiana Rules of Civil Procedure, adopted by the Indiana Supreme Court, reads, in part: "In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its pro bono districts. The court may disburse the balance of any residual funds beyond the minimum percentage to the Indiana Bar Foundation or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class."

Effective date: January 1, 2011

Implementation work and analysis: Completed education campaign. Discussed federal courts local rule. Rule is seen as influencing local federal courts.

For more information, please contact: Marilyn Smith, Director of Civil Justice Programs, Indiana Bar Foundation, msmith@inbf.org, 317/269-7863

Entry updated: 8/16

Kentucky

The Kentucky Supreme Court amended Civil Rule 23.05 to add subsection (6) which states in part "In matters where the claims process has been exhausted and residual funds remain, not less than 25% of residual funds shall be disbursed to the Civil Rule 23 Account maintained by the Kentucky IOLTA Fund Board of Trustees pursuant to Supreme Court Rule 3.830(20)." The funds are allocated to Kentucky legal aid organizations based on the poverty population formula established by the Legal Services Corporation.

Effective date: January 1, 2014

Implementation work and analysis: The new rule was published in the state bar magazine in November, 2013, and judges were advised of the new rule at their annual colleges.

For more information, please contact: Amelia Martin Adams, Executive Director, Kentucky IOLTA Fund, aadams@kybar.org, 800/874-6582.

Entry updated: 8/16

Louisiana

The Louisiana Supreme Court enacted Rule XLIII, which states in part: "In matters where the claims process has been exhausted and Cy Pres Funds remain, such funds may be disbursed by the trial court to one or more non-profit or governmental entities which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, including the Louisiana Bar Foundation for use in its mission to support activities and programs that promote direct access to the justice system."

Effective date: September 24, 2012

Implementation work and analysis: LBF staff provided judges throughout the state with materials regarding the rule when it became effective. LBF Presidents attend annual Judicial College events to advise judges about the rule and the value of using cy pres awards to benefit civil legal aid through gifts to the LBF. Information about the rule is posted on the LBF website.

For more information, please contact: Donna Cuneo, Executive Director, Louisiana Bar Foundation, donna@raisingthebar.org, 504/561-1046, or Laura Sewell, Development Director, Louisiana Bar Foundation, laura@raisingthebar.org, 504/561-1046

Entry updated: 8/16

Maine

The Maine Supreme Judicial Court has amended Civil Rule 23(f)(2) as follows: "The parties may agree that residual funds be paid to an entity whose interests reasonably approximate those being pursued by the class. When it is not clear that there is such a recipient, unless otherwise required by governing law, the settlement agreement should provide that residual fees, if any, be paid to the Maine Bar Foundation to be distributed in the same manner as funds received from interest on lawyers trust accounts….."

Effective date: March 1, 2013

Plans for implementation: MBF and providers to talk about heightening awareness of the new rule.

For more information, please contact: Diane Scully, Executive Director, Maine Bar Foundation, dscullly@mbf.org, 207/622-3477

Entry updated: 7/14

Massachusetts

New language in Rule 23 of the Massachusetts Rules of Civil Procedure, adopted by the Supreme Judicial Court of Massachusetts, reads, in part: "In matters where the claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, or to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts." The rule was revised in 2015 to require in cases with residual funds that the plaintiff provide notice to IOLTA for the purpose of allowing IOLTA to be heard on whether it ought to be a recipient of any or all residual funds.

Effective date: January 1, 2009; revised July 1, 2015

Implementation work and analysis: With the revised rule mandating that the IOLTA Committee receive notice, IOLTA staff sent a letter to most plaintiff attorneys who engage in class actions, placed an article in the Lawyers Weekly, did a press release, updated the cy pres toolkit, and did presentations to the Boston Bar Council, Association of Legal Administrators and other relevant organizations.

For more information, please contact: Jayne Tyrrell, Executive Director, Massachusetts IOLTA Committee, jtyrrell@maiolta.org, 617/723-9093

Entry updated: 8/16

Montana

The Montana Supreme Court amended Rule 23 of the Montana Rules of Civil Procedure to state that "In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to an Access to Justice Organization to support activities and programs that promote access to the Montana civil justice system. The court may disburse the balance of any residual funds beyond the minimum percentage to an Access to Justice Organization or to another non-profit entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class."

Effective date: January 1, 2015

Implementation work and analysis:

For more information, please contact: Niki Zupanic, Executive Director, Montana Justice Foundation, nzupanic@mtjustice.org, 406/523-3920

Entry updated: 12/14

Nebraska

The Nebraska Legislature amended section 30-3839 of Revised Statutes Cumulative supplement, 2012, to provide that: "Prior to the entry of any judgment or order approving settlement in a class action described in section 25-319, the court shall determine the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise to further the purposes of the underlying cause of action, shall direct the defendant to pay the sum of the unpaid residue to the Legal Aid and Services Fund".

Effective date: April, 2014

Implementation work and analysis: None to date.

For more information, please contact: Milo Mumgaard, Executive Director, Nebraska Legal Aid, mmumgaard@legalaidofnebraska.org, 402/504-6444

Entry updated: 8/16

New Mexico

The New Mexico Supreme Court adopted new language in Rule 23 of the New Mexico Rules of Civil Procedure: The new language provides that residual class action funds may be distributed to non-profit organizations that provide legal services to low income persons, the

IOLTA program, the entity administering the pro hac vice rule and/or educational entities that provide training, teaching and legal services that further the goals of the underlying causes of action on which relief was based. Funds also may go to other non-profit organizations that support projects that benefit the class or similarly situated persons consistent with the goals of the underlying causes of action on which relief was based.

Effective date: May 11, 2011

Implementation work and analysis: Held a CLE on cy pres at the 2013 annual bench & bar conference - panelists include judges and private attorneys.

For more information, please contact: Richard Spinello, General Counsel, State Bar of New Mexico, rspinello@nmbar.org, 505/797-6050.

Entry updated: 7/14

North Carolina

Legislature amended Subchapter VIII of Chapter 1 of the General Statutes to add new Article 26B, which reads, in part: "Prior to the entry of any judgment or order approving settlement in a class action established pursuant to Rule 23 of the Rules of Civil Procedure, the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise consistent with its obligations under Rule 23 of the Rules of Civil Procedure, shall direct the defendant to pay the sum of the unpaid residue, to be divided and credited equally, to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents."

Effective date: October 1, 2005

Implementation work and analysis: In 2012, the North Carolina Access to Justice Commission prepared a toolkit, which is accessible on line and has been distributed to judges and attorneys.

For more information, please contact: Evelyn Pursley, Executive Director, North Carolina IOLTA, epursley@ncbar.gov, 919/828-0477

Entry updated: 8/16

Oregon

The legislature amended section 32 of the Oregon Code of Civil Procedure to add a new section O, which provides that, in class action cases where residual funds exist, at least 50 percent of the amount not paid to class members be paid to the Oregon State Bar for the funding

of legal services. The remainder will be paid to any entity for purposes that the court determines are directly related to the class action or directly beneficial to the interests of class members

Effective date: March 4, 2015

Implementation work and analysis: Oregon has not yet taken steps to implement the rule change by educating judges and lawyers. They hope to do so in the near future.

For more information, please contact: Judith Baker, Director of Legal Services Program, Oregon State Bar, jbaker@osbar.org, 503/431-6323

Entry updated: 8/16

Pennsylvania

The Supreme Court of Pennsylvania has revised Chapter 1700 of the Rules of Civil Procedure, directing that at least 50% of residual funds in a given class action shall be disbursed to the Pennsylvania IOLTA Board to support activities and programs which promote the delivery of civil legal assistance. The balance may go to IOLTA, or to another entity for purposes that have a direct or indirect relationship to the objectives of the underlying class action, or which otherwise promote the substantive or procedural interests of the members of the class.

Effective date: July 1, 2012

Implementation work and analysis: IOLTA developed a toolkit that has been distributed to Pennsylvania trial judges. They also are working on an educational plan for the class action bar and the federal and state trial bench.

For more information, please contact: Stephanie Libhart, Executive Director, Lawyer Trust Account Board, stephanie.libhart@pacourts.us, 717/238-2001

Entry updated: 8/16

South Carolina

The Supreme Court of South Carolina has amended the Rules of Civil Procedure to provide that "In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent of residuals must be distributed to the South Carolina Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of South Carolina." The balance may be distributed to any other entities for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive and procedural interests of members of the class.

Effective date: April 27, 2016

Implementation work and analysis: Bar Foundation is planning to do outreach to attorneys in summer, 2016.

For more information, please contact: Megan Seiner, Executive Director, South Carolina Bar Foundation, mseiner@scbar.org, 803/576-3786

Entry updated: 8/16

South Dakota

Legislature approved Section 16-2-57 of its codified laws on the settlement of class action lawsuits to provide that "Any order settling a class action lawsuit that results in the creation of a common fund for the benefit of the class shall provide for the distribution of any residual funds to the Commission on Equal Access to Our Courts. However, up to fifty percent of the residual funds may be distributed to one or more other nonprofit charitable organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of the settlement."

Effective date: 2008

Implementation work and analysis: There are relatively few class action cases in South Dakota.

For more information, please contact: Thomas Barnett, Executive Director and Secretary Treasurer, State Bar of South Dakota, thomas.barnett@sdbar.net, 605/224-7554

Entry updated: 7/14

Tennessee

Legislature amended the Tennessee Code Annotated, Title 16, Chapter 3, Part 8, to create the Tennessee Voluntary Fund for Indigent Civil Representation and authorize it to receive contributions from several sources, including: "The unpaid residuals from settlements or awards in class action litigation in both state and federal courts, provided any such action has been certified as a class action under Rule 23 of the Tennessee Rules of Civil Procedure or Rule 23 of the Federal Rules of Civil Procedure;" In 2009, Rule 23.08 was amended to clarify that judges and parties to class actions may enter into settlement decrees providing for unclaimed class action funds to be paid to the Tennessee Voluntary Fund for Indigent Civil Representation.

Effective date: September 1, 2006

Implementation work and analysis:

For more information, please contact: Ann Pruitt, Executive Director, Tennessee Alliance for Legal Services, apruitt@tals.org, 615/627-0956

Entry updated: 7/14

Washington

New language in Rule 23, adopted by the Washington Supreme Court, reads, in part: "Any order entering a judgment or approving a proposed compromise of a class action certified under

this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of any residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents of Washington State. The court may disburse the balance of any residual funds beyond the minimum percentage to the Legal Foundation of Washington or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class."

Effective date: January 3, 2006

Implementation work and analysis: Staff and volunteers of the Legal Foundation of Washington and LAW Fund continually educate judges and lawyers about the rule and about the value of using cy pres to benefit access to justice through gifts to the Legal Foundation of Washington.

For more information, please contact: Caitlin Davis Carlson, Executive Director, Legal Foundation of Washington, caitlindc@legalfoundation.org, 206/624-2536, ext 288

Entry updated: 11/17

West Virginia

The West Virginia Supreme Court amended Rule 23 of the West Virginia Rules of Civil Procedure to state that, "When the claims process has been exhausted and residual funds remain, then 50% of the amount of residual funds shall be disbursed to Legal Aid of West Virginia. The court may, after notice to counsel of record and a hearing, distribute the remaining 50% to one or more West Virginia nonprofit organizations, schools within West Virginia universities or colleges, or foundations, which support programs that will benefit the class consistent with the objectives and purposes of the underlying causes of action upon which relief was based."

Effective Date: March 8, 2017

Implementation work and analysis:

For more information, please contact: Adrienne Worthy, Executive Director, Legal Aid of West Virginia, aworthy@lawv.net, 304/343-3013, ext. 2128

Entry updated: 5/17

Wisconsin

The Wisconsin Supreme Court amended Wisconsin Statute 803.08 to state that, "In class actions in which residual funds remain, not less than fifty percent of the residual funds shall be disbursed to the Wisconsin Trust Account Foundation to support direct delivery of legal services to persons of limited means in non-criminal matters. The circuit court may disburse the balance

of any residual funds beyond the minimum percentage to WisTAF for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class."

Effective date: January 1, 2017

Implementation work and analysis:

For more information, please contact: Jeff Brown, Staff Coordinator, State Bar of Wisconsin, jbrown@wisbar.org, 608/250-6177

Entry updated: 6/16

*Prepared by Meredith McBurney, Resource Development Consultant for the American Bar Association's Resource Center for Access to Justice Initiatives, a project of the Standing Committee on Legal Aid and Indigent Defendants. Contact Meredith at meredithmcburney@msn.com or 303/329-8091.

Copyright American Bar Association; may not be reprinted without permission.