

Cy Pres Awards

to promote civil legal services for the poor

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Cy Pres Awards

to promote civil legal services for the poor

Introduction to Cy Pres Awards



August 5, 2011

Your Honor:

The Tennessee Alliance for Legal Services (TALS) has assembled this packet of information to share with you, because of our common goal of equal access to justice for all Tennesseans. This packet will introduce you the doctrine of cy pres, which is an innovative way to support access to the legal system by funding legal aid programs that serve the poor. We are asking you to review this packet, familiarize yourself with this concept, and share the cy pres solution with colleagues.

With the economy continuing to struggle, low-income Tennesseans require more legal assistance than ever. Furthermore, revenue challenges and budget cuts in Washington are shrinking funding for Tennessee's legal aid programs. So, while the need for free civil legal assistance increases, funding for lawyers and pro bono programs is dropping. The cy pres doctrine is one solution to raising funds for pro bono programs thereby meeting vulnerable Tennesseans civil legal needs in these hard times.

Several years ago, the General Assembly created a new voluntary fund, called the Tennessee Voluntary Fund for Indigent Civil Representation, or the Cy Pres Fund. This fund, run by the state through the Administrative Office of the Courts, is an opportunity for judges, lawyers, mediators, and others to award various types of litigation funds, including class-action residuals, to the delivery of legal aid in Tennessee. This fund is operated like an endowment and can accept cy pres awards, restitution, settlement funds, penalties, and even direct contributions. Once the fund reaches a \$1 Million balance, interest will be distributed to established legal aid and pro bono programs to support and expand the delivery of civil legal services to low-income and vulnerable people across our state.

As you review this packet, should you desire more information about this innovative method of contributing to equal access to justice in Tennessee, please contact Erik Cole 615.627.0956 ext. 23 or ecole@tals.org.

For more information about local legal services organizations and pro bono programs, you can contact TALS at 615.627.0956 or visit TALS.org.

Sincerely,

Erik Cole
Executive Director



MEMO

To: Chief Justice Janice Holder, Tennessee Supreme Court
Libby Sykes, Director, Administrative Office of the Courts

From: Erik Cole, Executive Director, Tennessee Alliance for Legal Services
Susan Kay, President, Tennessee Alliance for Legal Services Board of Directors

RE: Litigation Funds to Promote Civil Legal Services for the Poor

Date: March 6, 2009

We are writing to inform you of a new way to meet an old need – funding for access to the legal system for poor Tennesseans.

In 2006 the General Assembly created a voluntary fund, called the **Tennessee Voluntary Fund for Indigent Civil Representation**. This fund, run by the state, through the Administrative Office of the Courts is an opportunity for judges, lawyers, mediators, and others to award various types of litigation funds to the delivery of legal aid in Tennessee.

Many people are now talking about the doctrine of cy pres and class-action residuals. This fund, operated like an endowment, will accept cy pres awards, restitution, settlement funds, penalties, and even direct contributions.

Tennessee Voluntary Fund for Indigent Civil Representation

Recognizing the severe shortage of resources to support civil legal services for the poor in Tennessee, the General Assembly created the Tennessee Voluntary Fund for Indigent Civil Representation (Public Chapter 589, 2006) to serve as a supplemental, sustainable, and stable resource for legal services programs. The Fund is a centralized mechanism, administered by the Administrative Office of the Courts, to collect and distribute money voluntarily given to legal aid programs across Tennessee. The State Treasurer invests and manages the fund similar to an endowment, with only the interest funding legal aid programs. The legal aid programs will then use these disbursements to help represent the thousands of low income Tennesseans with unmet legal needs.

The Legal Need

Over 1 million Tennesseans live in poverty. Every year, nearly 75% of those Tennesseans grapple with at least one legal problem. Almost half face three or more legal problems; and those who work and those with children, have more problems than others.¹ Bottom line, Tennessee's low-income and working families have many complex legal needs.

Tennessee is fortunate to have an excellent array of civil legal aid providers. From Memphis to Johnson City, from federally-funded to community-based pro bono programs, the statewide structure exists to meet many of these legal needs.

All that is lacking are resources - resources to fund crucial positions and programs within Tennessee's civil justice system.

¹ *Tennessee Statewide Comprehensive Legal Needs Study for 2003*, University of Tennessee College of Social Work Office of Research and Public Service, January 2004; available at www.tals.org.



In the early 1980s, Tennessee's legal service providers had 175 staff attorneys. In 2005, there were only 76. The pro bono programs around the state work hard to fill some of this gap by utilizing volunteer attorneys to help meet the legal needs, but pro bono programs have seen their basic staffing cut as well.

The federally funded legal aid providers in Tennessee provide civil legal assistance to people whose gross household income is below federal poverty limits (with some exceptions). The clients that legal aid programs serve have a wide range of legal problems from abuse to evictions. These clients effectively have nowhere else to seek legal assistance than a legal aid program.

Examples of Funds Appropriate for This Use

1. Cy Pres Awards

Cy pres commonly refers to residual funds left over from a class action lawsuit. Such funds become residual for many reasons: class members cannot be located; class members fail to submit claims; or the court may determine that awards to individual class members are so small as to provide negligible benefit to those individuals when compared to the cost of distribution. When this happens, the residual funds are put to their next best use in the form of a cy pres award to an outside entity, an organization or group, that the Court and the counsel for the parties agree will serve the interests "as near as possible" of the injured class.

Example: Litigants involved in cases with a nexus to civil injustice should consider allocating any remaining funds to legal aid or pro bono programs. The nexus may be direct and apparent as judgment or penalty against a pharmaceutical company and poor people who spend a disproportionate amount of their income on medications. The nexus might also be that the case considered for a cy pres award involves facts that are just patently unfair or outrageous and funding equal justice for poor people is simply a reasonable way to counter such gross injustice. A violation of the Consumer Protection Act could be an example.

2. Settlement Funds

Some cases settle before being fully litigated. In the resolution of the lawsuit, one party could require the offending party to pay a penalty for such wrongdoing. This penalty should ultimately benefit those people who were injured. As a lawyer or mediator, you can recommend that such penalties be paid to those who seek to prevent and to redress civil injustice, when appropriate.

3. Restitution

When a court orders restitution it orders the defendant to give up his gains to the claimant. Given an appropriate set of facts, the claimant may share such restitution proceeds with legal aid and pro bono programs that represent others similarly aggrieved.

4. Attorney Sanctions

When appropriate, proceeds from attorney sanctions could be directed toward the fund.

Awards in appropriate cases can be made:

- To the Tennessee Voluntary Fund For Indigent Civil Representation;
- Directly to local legal services organizations; or
- Directly to local pro bono programs.

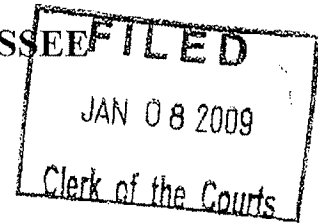
For more information about this innovative method of contributing to equal access to justice in Tennessee, please contact Erik Cole 615.627.0956 ext. 23 or ecole@tals.org.

Cy Pres Awards

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**Tennessee Rules of
Civil Procedure: 23.08**

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE




IN RE: AMENDMENTS TO TENNESSEE
RULES OF CIVIL PROCEDURE

ORDER

The Court adopts the attached amendments effective July 1, 2009, subject to approval by resolutions of the General Assembly. The rules amended are as follows:

RULE 1	SCOPE OF RULES
RULE 8	GENERAL RULES OF PLEADING
RULE 12	DEFENSES AND OBJECTIONS: WHEN AND HOW PRESENTED: BY PLEADING OR MOTION: MOTIONS FOR JUDGMENT ON THE PLEADINGS
RULE 23	CLASS ACTIONS
RULE 34	PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES
RULE 45	SUBPOENA
RULE 51	INSTRUCTIONS TO JURY; OBJECTION
RULE 52	FINDINGS BY THE COURT
RULE 55	DEFAULT
RULE 60	RELIEF FROM JUDGMENTS OR ORDERS
RULE 65	INJUNCTIONS.

FOR THE COURT:


JANICE M. HOLDER
CHIEF JUSTICE

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 23

CLASS ACTIONS

[Add the following new 23.08:]

23.08. Disposition of Residual Funds.—Any order entering a judgment or approving a proposed compromise of a class action certified under this rule may provide for the disbursement of residual funds. Residual funds are funds that remain after the payment of all approved: class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement or order entering a judgment that does not create residual funds.

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. A distribution of residual funds to a program or fund which serves the pro bono legal needs of Tennesseans including, but not limited to, the Tennessee Voluntary Fund for Indigent Civil Representation is permissible but not required.

Upon motion of any party to a settlement or judgment of a class action certified under this rule or upon the court's own initiative, orders may be entered after an approved settlement or judgment to address the disposition and disbursement of residual funds in a manner consistent with this rule.

2009 Advisory Commission Comment

The Tennessee Voluntary Fund for Indigent Civil Representation is established in Tenn. Code Ann. § 16-3-821.

Cy Pres Awards

to promote civil legal services for the poor

Cy Pres Brochures

The Legal Need

Over 1 million Tennesseans live in poverty. Every year, nearly 75% of those Tennesseans grapple with at least one legal problem. Almost half face three or more legal problems. Those employed and those with children have more problems than others. Bottom line, Tennessee's low-income and working families have many complex legal needs. As you know, sometimes there is no substitute for a lawyer.

Tennessee is fortunate to have an excellent array of legal aid providers. From Memphis to Johnson City, from federally-funded to community-based pro bono programs, the statewide structure exists to meet these many legal needs. However, resources needed to fund crucial positions and programs within Tennessee's civil justice system are severely lacking.

Cy Pres Awards
to promote civil legal services for the poor

What you Need to Know

As judges, lawyers, mediators, and others who may be in a position to make *Cy Pres* awards, this information is being provided to:

1. Make you aware of the unmet civil legal needs in Tennessee;
2. Illustrate the appropriateness of local legal aid programs, pro bono programs, or the *Tennessee Voluntary Fund For Indigent Civil Representation* as the recipients of cy pres funds; and
3. Guide you to where you can get more information about such awards.

What is Cy Pres?

Cy Pres is a legal doctrine originally developed to insure the fair distribution of a trust fund. Its original meaning, from the French "as near as possible," refers to using a trust fund for its "next best use" should its original purpose fail. Today, ***Cy Pres* commonly refers to residual funds left over from a class action lawsuit, but can also refer to funds from restitution, settlements, or penalties.** Such funds become residual for many reasons including: class members cannot be located; class members fail to submit claims; or the court may determine that awards to individual class members are so small as to provide negligible benefit to those individuals. When this happens, the residual funds are put to their next best use in the form of a *Cy Pres* award to an outside entity, such as a legal aid program, that the Court and the counsel for the parties agree will serve the interests "as near as possible" of the injured class.

In Our Words ...

"The Memphis Area Legal Services (MALS) turns people away every day," said Harrison McIver, executive director. "We are inundated with requests. It is a challenge we have, that we cannot meet the demand."

Why Fund Civil Legal Services for the Poor with Cy Pres Funds

The federally-funded legal aid programs in Tennessee provide civil legal assistance to people with a gross household income below federal poverty limits (with some exceptions). Legal aid programs serve clients with a wide range of legal problems from abuse to evictions to unemployment issues. These clients have nowhere to seek legal assistance other than a legal aid program.

Certain cases present remaining funds or penalties that are appropriate for allocation to a public purpose under a *Cy Pres* award. The nexus may be direct and apparent such as a judgment or penalty against a pharmaceutical company – where poor people spent a disproportionate amount of their income on medications. The nexus might arise out of a case involving facts that are just patently unfair or outrageous and funding equal justice for poor people (with a *Cy Pres* award) is simply a reasonable way to counter such gross injustice.

Legal aid programs are grossly underfunded and therefore able to serve only a small fraction of eligible people in need. Meeting those needs is a clear public interest as it brings to fruition the initial promise of legal aid — *equal justice for all*. Funding civil legal services for the poor with *Cy Pres* awards will help carry out this promise.

Possible Recipients to Fund Civil Legal Services for the Poor

Cy Pres awards in appropriate cases can be made to the Tennessee Voluntary Fund for Indigent Civil Representation or directly to local legal aid or pro bono programs.

Recognizing the severe shortage of resources to support civil legal services for the poor in Tennessee, the *Tennessee Voluntary Fund for Indigent Civil Representation* is designed to serve as an endowment to help support such services. Created by the Tennessee General Assembly (Public Chapter 589, 2006), this fund, managed by the Administrative Office of the Courts, is a new opportunity for judges, lawyers, mediators, and others to award various types of litigation funds to the delivery of civil legal aid in Tennessee. This fund will accept *Cy Pres* awards, restitution, settlement funds, penalties, and even direct contributions. The Fund is a centralized mechanism to collect and distribute money voluntarily given to legal aid programs in Tennessee. Any resources received from this fund will go directly to help represent low-income Tennesseans.

For more information on the *Tennessee Voluntary Fund for Indigent Civil Representation* or *Cy Pres* awards in general, contact Erik Cole, executive director of the Tennessee Alliance for Legal Services, at (615) 627-0956, ecole@tals.org, or www.tals.org.

Cy Pres awards in appropriate cases can be made directly to local legal aid or pro bono programs. For information on a local legal aid or pro bono program, please visit www.tennlegalaid.com.

The **Tennessee Alliance for Legal Services** (TALS) is a statewide non-profit organization that seeks to build partnerships to support the delivery of effective civil legal services for low-income and elderly Tennesseans. The goal of TALS is to establish a commitment to increased financial and advocate support for Tennessee civil legal aid programs. TALS two-fold mission is:

- Ensure that every low-income Tennessean has timely access to the civil legal justice system; and
- Identify the conditions adversely affecting low-income Tennesseans and implement strategies and develop resources to change those conditions.





Cy Pres Awards: Promoting Civil Legal Services for the Poor

Legal Aid in Tennessee

The federally funded legal aid providers in Tennessee offer civil legal assistance to people whose gross household income is below federal poverty limits (with some exceptions including the elderly and victims of domestic violence.) The clients that legal aid programs serve have a wide range of legal problems including, but not limited to, substantive law surrounding family, landlord/tenant, consumer protection, senior, special education, and health care issues. These clients effectively have nowhere else to seek legal assistance other than a legal aid program.

There are more than 1 million Tennesseans living in poverty (most recent Census data). According to the most recent legal needs study conducted in our state, approximately 68% of low-income Tennesseans had at least one civil legal need in the past year. That means as many as 680,000 people require the services of legal aid in Tennessee annually. Civil legal service programs assist many of our most vulnerable citizens, but they cannot serve everyone due primarily to budget restrictions impacting provision of direct civil legal interventions.

The Legal Aid Funding Crisis

Tennessee legal aid programs are grossly underfunded and therefore are only able to serve a fraction of the people eligible for and in need of civil legal services. Additionally, recently federal funding was reduced 4% for the Legal Services Corporation (LSC), which provides the bulk of Tennessee legal aid programs' budgets. These cuts directly affected our state by resulting in layoffs at local legal aid programs and therefore a reduction in services.

Now, an additional \$104 million in funding cuts are proposed by Congress, which would bring funding down to 1999 levels that are disproportionate with both the national increase in unemployment and poverty rates. At a time when the unmet legal needs of American citizens are greater than ever and continue to grow, our federal funding of legal aid is not there to answer the call to service. Preventing instability in legal aid funding in the future is essential. Meeting the civil legal needs of vulnerable citizens has a clear public interest and is key to fulfilling our national promise of equal justice for all.

The Tennessee Voluntary Fund for Indigent Civil Representation

The Tennessee Voluntary Fund for Indigent Civil Representation (the "Cy Pres Fund") was created in 2006 (Public Chapter 589, 2006; TN Rules of Civil Procedure Rule 23, Amendment 23.08) to support legal aid programs. The Cy Pres Fund is a central repository for voluntary donations, contributions of residual funds from class action settlements or judgments, and grants from across the state.

Once the Fund reaches a \$1 Million balance, interest will be distributed to established legal aid programs. This interest will be distributed by the Administrative Office of the Courts to the legal aid programs pursuant to an established poverty ratio found in §67-4-806 (2). Any overhead/cost created by the Fund shall be paid for out of the proceeds of the Fund.

This approach is important for many reasons. Primarily, it ensures that resources are gathered for legal aid and will go to providing direct services to low-income Tennesseans rather than administrative costs to banks or private investment groups. Additionally, it establishes a solid, centralized mechanism for distributing donations to legal aid programs fairly across the state.

Cy Pres Nexus

There are cases that provide a remainder or penalty that is appropriate for allocation to a public purpose under a Cy Pres award to the Cy Pres Fund. The nexus may be direct and as apparent as a judgment or penalty against a company whose behavior negatively effected a particular group of low-income, elderly, or vulnerable Tennesseans. Alternatively, the nexus might be a more general case in which actions are patently unfair or outrageous and therefore funding equal justice for the poor is a reasonable counter to injustice.

Whether the Cy Pres Fund succeeds to reduce the funding gap for Tennessee's civil legal services will ultimately depend upon lawyers and judges. Without directing contributions of residual funds from class action settlements or judgments to this Fund, this cannot become the self-sustaining funding mechanism it was intended to be.

Cy Pres Awards
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The Next Steps for Cy Pres: What can you do?

The Legal Aid Funding Crisis

Meeting the civil legal needs of vulnerable citizens has a clear public interest and is key to fulfilling our national promise of equal justice for all. Civil legal service programs in Tennessee assist many of our most vulnerable citizens, but they cannot serve everyone due primarily to budget restrictions impacting provision of direct civil legal interventions.

Tennessee legal aid programs are grossly underfunded and therefore are only able to serve a fraction of the more than 600,000 vulnerable Tennesseans eligible for and in need of their services. The additional proposed federal funding cuts, which support legal aid would expand this problem, by bringing Legal Services Corporation funding down to 1999 levels. These funding levels are disproportionate with both national increases in unemployment and poverty rates.

Cy Pres in Tennessee

At a time when the unmet legal needs of American citizens are greater than ever and continue to grow, our federal funding of legal aid is not there to answer the call to service. To preventing instability in legal aid funding in the future is essential, so in 2006 the Tennessee Voluntary Fund for Indigent Civil Representation was developed.

The Tennessee Voluntary Fund for Indigent Civil Representation (the "Cy Pres Fund") was created (Public Chapter 589, 2006; TN Rules of Civil Procedure Rule 23, Amendment 23.08) to support legal aid programs by providing a central repository for voluntary donations, contributions of residual funds from class action settlements or judgments, and grants from across the state.

There are cases that provide a remainder or penalty that is appropriate for allocation to a public purpose under a Cy Pres award to the Cy Pres Fund. The nexus may be direct as a judgment or penalty against a company whose behavior negatively effected a particular group of low-income, elderly, or vulnerable Tennesseans. Alternatively, the nexus might be a more general case in which actions are patently unfair or outrageous and therefore funding equal justice for the poor is a reasonable counter to injustice. Once the Fund reaches a \$1 Million balance, interest will be distributed to established legal aid programs, therefore providing a self-sustaining funding mechanism.

How to Support Cy Pres

Whether the Cy Pres Fund succeeds to reduce the funding gap for Tennessee's civil legal services will ultimately depend upon lawyers and judges. Without directing contributions of residual funds from class action settlements or judgments to the Cy Pres Fund, this Fund cannot become the self-sustaining funding source it's intended to be.

To support the Cy Pres Fund in Tennessee we ask that you:

- 1) Include in any class action settlement agreement, class action settlement order, or class action judgment, a provision which directs that residual class action funds be paid to the Cy Pres Fund.
- 2) Share with colleagues information about Cy Pres and let them know that the Tennessee courts have the authority to award residual class action funds to the Cy Pres Fund.
- 3) Contact the Tennessee Alliance for Legal Services (TALS) if you require assistance drafting language directing residual funds to the Cy Pres Fund or know about class action cases that will go to trial in the next year. We will connect you with the appropriate services to assist you in supporting Cy Pres.

For question, please contact Linnet Overton, the TALS Outreach and Development Director, at loveton@tals.org or 615-627-0956.

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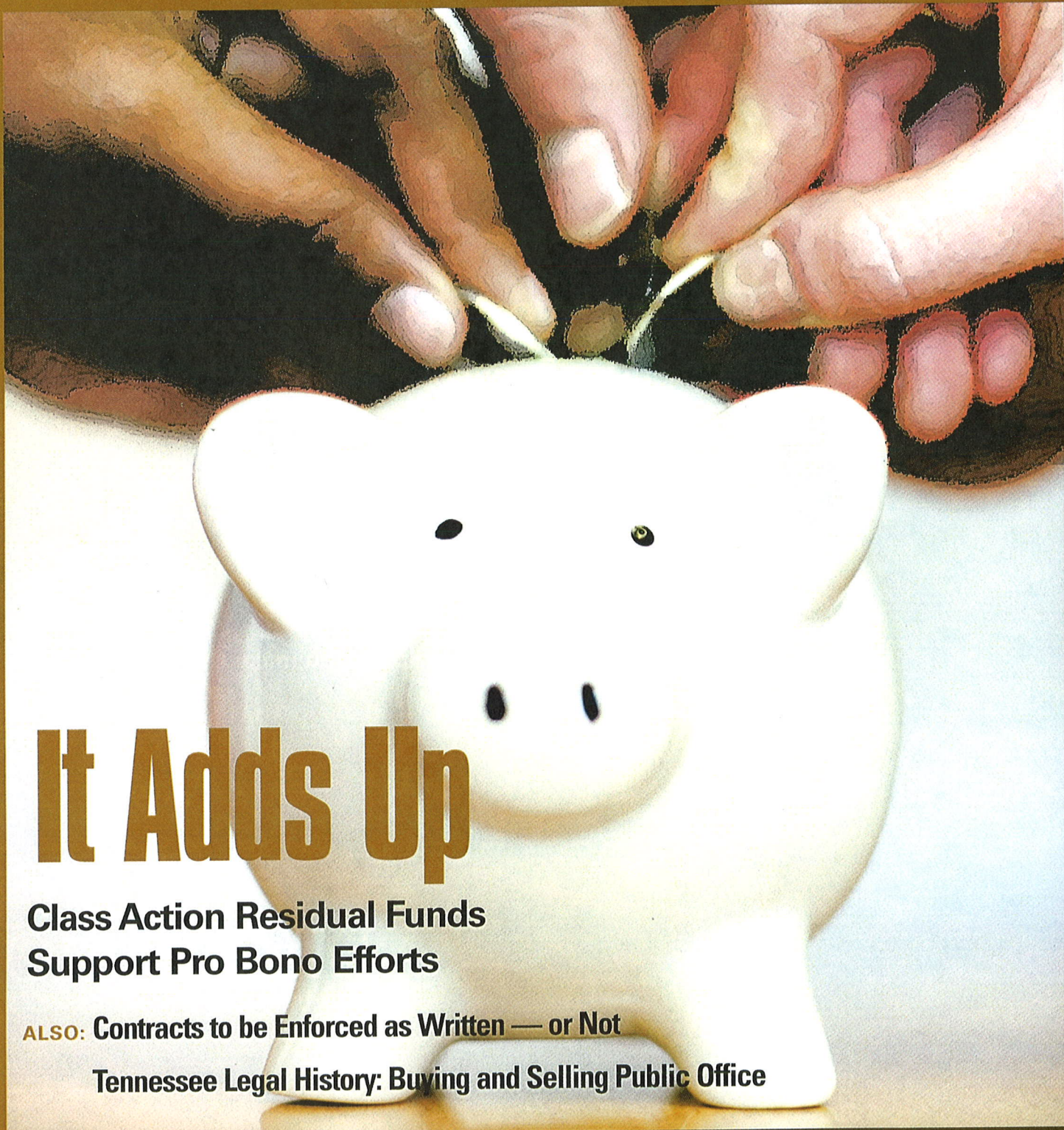
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Cy Pres Articles

TENNESSEE BAR JOURNAL

MARCH 2009 | VOLUME 45, NO. 3

TBA.ORG

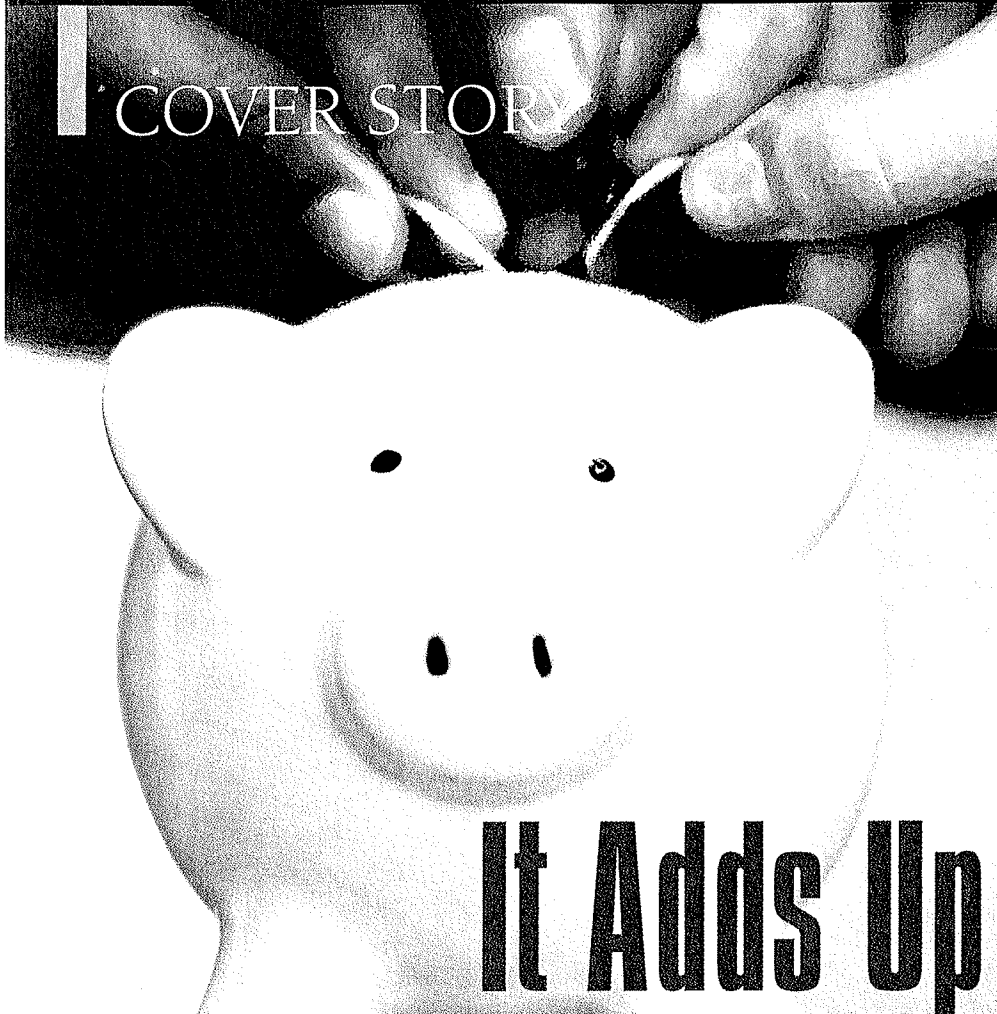


It Adds Up

**Class Action Residual Funds
Support Pro Bono Efforts**

ALSO: Contracts to be Enforced as Written — or Not

Tennessee Legal History: Buying and Selling Public Office



It Adds Up

*By Danny Van Horn and
Daniel Clayton*

Class Action Residual Funds Support Pro Bono Efforts

In addition to more traditional methods of supporting pro bono programs, you can support Tennessee pro bono programs by directing residual funds from class action settlements or class action judgments to the Tennessee Voluntary Fund for Indigent Civil Representation (the "Cy Pres Fund" or the "Fund"). In 2006, the General Assembly established the Cy Pres Fund¹ to act as a central repository for donations for pro bono programs across the state. The fund is designed to support pro bono programs with distributions from interest once the fund reaches a base of at least \$1 million. While the General Assembly had the vision and wisdom to create the fund, resources to seed the fund with the initial investment were unavailable. Thus, the fund has not yet reached the level required by statute to begin issuing interest checks to our state's established pro bono programs. That is where we can make a difference.

Residual Class Action Funds

One possible source of monetary support for the Cy Pres Fund is residual funds set aside in a class action settlement or judgment. Class actions are often settled by setting aside a pool of money to be distributed to class members based on criteria the parties agree upon and the court approves. In some of those cases, not all class members come forward and make a claim or all class members come forward but their claims do not exhaust the pool of funds set aside. These funds exist after the approved attorneys' fees have been paid and the costs of the class have been paid. They are truly residual dollars that can be repurposed for a worthwhile cause: support for pro bono activities.

The General Assembly authorized the Cy Pres Fund to receive donations from:

The unpaid residuals from settlements or awards in class action litigation in both state and federal courts, providing any such action has been certified as a class action under Rule 23 of the Tennessee Rules of Civil Procedure or the Federal Rules of Civil Procedure.²

It logically follows that the General Assembly must have believed that Tennessee courts have the authority to grant such *cy pres* awards and indeed Tennessee Courts do have such authority.

Tennessee Courts Have the Inherent Authority to Approve and Supervise Cy Pres Awards

All class action settlements must be approved by Tennessee Courts.³ In this process of approving class action settlements, Tennessee courts must assure themselves of the basic fairness of the settlement.⁴ Because Tennessee courts must approve the settlements, it necessarily follows that they have the inherent authority to issue such orders regarding the settlement as are necessary to effectuate the court's role in assessing basic fairness including orders regarding the disposition of residual funds left over after all class members who have come forward or who have been located have been paid and the

costs of the class have been paid.

The inherent authority of trial courts to issue orders disbursing residual class funds is supported by the decisions of numerous federal courts under the nearly identical Rule 23(e) of the Federal Rules of Civil Procedure. The Tennessee Supreme Court has found that federal court decisions regarding Rule 23 are persuasive because the Tennessee and federal rules are so similar.⁵

Federal courts have broad discretion to distribute unclaimed class action settlement funds in an equitable manner.⁶ This authority stems from Rule 23 of the Federal Rules of Civil Procedure, which allows the courts to determine if a proposed settlement is "fair, adequate, and reasonable."⁷ Generally, the federal courts will distribute unclaimed funds in a class action settlement by: 1) *cy pres* distribution, 2) escheat to the government, 3) reversion to the defendants, or 4) pro rata distribution.⁸ To determine which distribution scheme to apply, the courts exercise their discretion to award the unclaimed funds in a manner that best complies with the fairness standard of Rule 23.⁹

Generally, the courts prefer *cy pres* awards over pro rata distribution and reversion because neither identified members of a class nor defendants have equitable rights in the excess funds.¹⁰ Further, many courts prefer this distribution scheme because *cy pres* awards more closely parallel the intended use of unclaimed settlement funds.¹¹ The interests of the silent class members, therefore, guide the district courts' choice among distribution options.¹²

Federal courts have held that *cy pres* awards are appropriate when they provide the most equitable means of distribution.¹³ The Eighth Circuit, for example, in *Powell v. Georgia Pacific Corporation*,¹⁴ affirmed the Arkansas district court's *cy pres* distribution of unclaimed funds to a charitable organization because alternative means of distribution would have been inequitable. In its analysis, the court ruled that pro rata distribution to identified class

Continued on page 14

Court adopts rules revisions

The Tennessee Supreme Court has adopted extensive revisions to the state rules of practice procedure and evidence effective July 1, subject to ratification by the Tennessee General Assembly. The amendments to the Rules of Appellate Procedure, Civil Procedure, Criminal Procedure, Juvenile Procedure and Rules of Evidence come as a result of the rules commission process employed by the court in developing and vetting rules proposals.

Among the revisions to the rules are new rules on the discovery of electronically stored information, the so-called "e-discovery amendments."

In addition, a part of the package is a rule amendment recommended by the TBA as part of its 4ALL campaign. This proposal, developed by Danny Van Horn, makes explicit permission for residual funds from class action cases to be granted to the Tennessee Voluntary Fund for Indigent Civil Representation (TVFICR). The TVFICR is known colloquially as the *cy pres* fund.

Review all of the rules revisions at www.tba.org/journal_links

members would over-compensate those individuals because each had already collected their respective damages.¹⁵ Further, the circuit held that reversion back to the defendant was inappropriate because reversion would reimburse the defendant for the initial settlement payment.¹⁶ Because neither the defendant nor the identified class members had any equitable rights in the unclaimed funds, the Eighth Circuit treated the disposition of funds as a discretionary function of the lower court, and affirmed its application of the *cy pres* doctrine pursuant to Rule 23(e).¹⁷

The federal courts have generally held that legal service programs that provide legal aid to low income clients are appropriate *cy pres* recipients because these organizations combat harms similar to the ones of the unidentified members of the aggrieved class.¹⁸ Legal aid programs indirectly serve the interests of the silent class members because the mission of legal aid programs is consistent with the purpose of class action lawsuits and Rule 23.¹⁹ Rule 23 was adopted to protect the legal rights of those who would otherwise be unrepresented. Similarly, legal aid programs were designed to facilitate the legal representation of low-income clients.²⁰ Distributing excess funds to these programs, therefore, is an appropriate distribution scheme because the legal aid programs are designed to protect individuals in similar financial situations as those of the silent class members.

Several federal courts have awarded unclaimed class action settlement funds to legal aid programs because, like class action lawsuits, the programs provide a means to legal representation. In *In re Motorsports Merchandise Antitrust Litigation*,²¹ the Northern District of Georgia awarded unclaimed class action settlement funds to the Atlanta Legal Aid Society and the Georgia Legal Services Program because these programs provided aid for the “next best” class that could receive the funds. In its analysis, the court awarded the excess funds to the

legal centers because this distribution indirectly benefited all of the class members.²² Similarly, the Eastern District of Michigan, in *Lessard v. City of Allen Park*,²³ awarded residual funds to a legal aid fund because the program facilitated legal services to individuals who could not otherwise afford or obtain representation in legal matters. In its analysis, the court acknowledged the recent national trend in awarding unclaimed funds in class action settlements, and held that legal aid programs were an appropriate recipient of such funds.²⁴ In both cases, therefore, the courts found that *cy pres* distributions to legal aid programs were appropriate because they provided an equitable means of distribution.

These federal decisions strongly support the inherent authority of Tennessee courts to award and supervise *cy pres* awards.

Proposed Rule 23.08

To further clarify the authority of Tennessee courts to supervise *cy pres* awards from residual class action settlement funds, the Tennessee Bar Association and the Tennessee Association for Justice jointly petitioned to the Tennessee Rules Commission to amend Tennessee’s Rule 23 to include a new Rule 23.08 that reads as follows:

Disposition of Residual Funds.

Any order entering a judgment or approving a proposed compromise of a class action certified under this rule may provide for the disbursement of residual funds. Residual funds are funds that remain after the payment of all approved: class member claims, expenses, litigation costs, attorneys’ fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement or order entering a judgment that does not create residual funds.

It shall be 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. It is expressly recognized that a distribution of residual funds to a program or fund which serves the pro bono legal needs of Tennesseans including, but not limited to, the Tennessee Voluntary Fund for Indigent Civil Representation is permissible but not required.

Upon motion of any party to a settlement or judgment of a class action certified under this rule or upon the court’s own initiative, orders may be entered after an approved settlement or judgment to address the disposition and disbursement of residual funds in a manner consistent with this Rule.

The Rules Commission unanimously approved the proposed amendment. At the time this article was written, Proposed Rule 23.08 was before the Tennessee Supreme Court awaiting its approval and transmittal to the General Assembly for passage into law in 2009.

Next Steps

Now that you are aware of *Cy Pres* Fund and the authority of Tennessee courts to award residual class action funds to the *Cy Pres* Fund, we ask that you take the following steps:

1. Include in any class action settlement agreement, class action settlement order or class action judgment, a provision which directs that residual class action funds be paid to the *Cy Pres* Fund.
2. Let the Tennessee Bar Association or the Tennessee Association for Justice know about class action cases that will go to trial in the next year. We intend to create a database of cases that are voluntarily reported to us and follow up to encourage all parties and the courts to include residual class action payment provisions.
3. Let us know if you would like assistance with language directing residual funds to the *Cy Pres* Fund. Please let us know how we can help you.

Together we can make a difference

Continued on page 21

It All Adds Up *continued from page 14*

and help fund pro bono programs in Tennessee. Let's not miss the opportunity to put residual class action settlement funds to good use helping the poor and working poor of our state. ^{1A}



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Notes

1. *Tenn. Code Ann.* § 16-3-821.
2. *Tenn. Code Ann.* § 16-3-821(c)(1).
3. See *Tenn. R. Civ. Pro.* 23.05 (West 2008).
4. *Id.*
5. See *Bayberry Associates v. Jones*, 783 S.W.2d 553, 557 (Tenn. 1990).
6. See *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

7. *Fed. R. Civ. P.* 23(e); *Van Gemert v. Boeing Co.*, 739 F.2d 730, 737 (2d Cir. 1984); *In re Lease Oil Antitrust Litigation*, MDL No. 1206, 2007 WL 4377835, at *1, 14 (S.D. Tex. Dec. 12, 2007).

8. *Mexican Workers*, 904 F.2d at 1307.

9. *Oil Antitrust Litigation*, 2007 WL 4377835 at 14.

10. *Wells Fargo*, 991 F.Supp. at 1194.

11. *Id.*

12. *Mexican Workers*, 904 F.2d at 1307.

13. See *Powell v. Ga. Pacific Corp.*, 119 F.3d 703, 707 (8th Cir. 1997); *Wilson v. Southwest Airlines Inc.*, 880 F.2d 807, 816 (5th Cir. 1989).

14. 119 F.3d 703, 707 (8th Cir. 1997)

15. *Id.* at 706.

16. *Id.*

17. *Id.*

18. *In re Motorsports Merchandise Antitrust Litigation*, 160 F.Supp.2d 1392, 1394 (N.D. Ga. 2001).

19. Linda Zazove, *The Cy Pres Doctrine and Legal Services for the Poor: Using Undistributed Class Action Funds to Improve Access to Justice*, American Bar Association Standing Committee for Continuing Legal Education, (Oct. 19, 2001).

20. *Id.* at 8.

21. 160 F.Supp.2d 1392, 1394 (N.D. Ga. 2001).

22. *Id.*

23. 470 F.Supp.2d 781, 783 (E.D. Mich. 2007).

24. *Id.*

What Can a Court Do with Leftover Class Action Funds? Almost Anything!

By Kevin M. Forde

At the conclusion of class action cases it is common to have funds that, for a number of reasons, cannot be distributed to the class members technically entitled to their funds. In some instances, members of the class simply cannot be located. In other instances, eligible class members fail to submit claims as required by the judgment order or settlement. And, on occasion, the court may order that no disbursement be made to certain class members because the amount of recovery due is so small that the cost of disbursement, notice, and administration may exceed the value of the claim.

In some cases, the undistributed funds may be substantial. For example, in *West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971), \$32 million remained undistributed ("unclaimed") from a \$100 million settlement. And, in *Van Gemert v. Boeing*, 739 F.2d 730 (2d Cir. 1984), more than \$2.5 million remained in the fund after all claims were satisfied.

If, in fashioning a decree or negotiating a settlement, the parties do not consider and anticipate this predicament, the responsibility falls on the court to resolve any ensuing dispute or to otherwise direct the distribution of these funds. The scope of a court's discretion in disposing of nondistributable funds has been tested in recent cases. In ordering distribution, courts rely on their general equity power or on the *cy pres* doctrine.

The *cy pres* doctrine originated in the common law as a method of fairly distributing a trust fund, the original purpose of which failed in some respect. The term *cy pres* derived from the Norman French term "*cy pres comme possible*," which means "as near as possible."¹ Under the *cy pres* doctrine, once a trust fund's original purpose fails, the fund is to be distributed to the "next best" use. This remedy now extends to other areas, including the situation where funds remain after distribution in a class action.² The *cy pres* approach in the class action situation puts the unclaimed portion of the fund to its "next best" compensation use, usually by giving it to a third party or agency to use for court-designated purposes.³ It should be

emphasized that courts have claimed broad discretion in determining how to satisfy the "next best" use criteria.

Exercising this broad discretion, some courts have applied *cy pres* to order a future price reduction on sales of the defendant's product applicable until the total reduction equals an amount equivalent to the unclaimed funds.⁴ Other courts and commentators have rejected this approach for reasons including the possibility that the defendant may gain a competitive edge from the lowered price. Further, this method of distributing the excess requires the injured class members in product class actions to make future purchases to collect their refund.⁵

The prospect of excess or undistributed funds raises the possibility that these funds should "escheat" to the state or federal government as unclaimed property. Even if not required, escheat to the state is a method of disposition within the discretion of the court. For example, a California state escheat statute allows a court to escheat unclaimed funds to the government, yet specifically provides that, "nothing in this section shall be construed to change the authority of a court or administrative agency to order equi-





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table remedies.⁷⁶ Similarly, a New York court opined the class action concept has its origin in equity . . . and the courts still retain traditional equity power over the fund which is created until it is disbursed. . . . Although the application of abandoned property statutes to unclaimed class action funds is not required, we cannot say it was an abuse of discretion to dispose of the unclaimed funds in accordance with the scheme created by the Abandoned Property Law.⁷⁷

On the other hand, numerous federal and state courts have distributed such funds to educational institutions or charities, apparently without regard to state or federal escheat statutes. In addition, some courts and commentators have concluded that escheat laws are inapplicable in analogous situations. For example, in *Van Gemert v. Boeing Co.*,⁷⁸ the Second Circuit found that "a court of equity may dispose of funds fairly—without being compelled to utilize [the federal statutes]." The court explained:

We hold that [28 U.S.C.] § 2041 [the federal statute providing for the deposit of unclaimed funds in the U.S. Treasury] does not limit the discretion of the district court to control the unclaimed portion of a class action judgment fund. Whether the money has been paid into court or whether an alternative method of administering payment is used, the money held is subject to the court's order. . . . The statute referred to does not control when a court fashions a plan for distributing unclaimed funds.⁷⁹

The *Van Gemert* court also rejected the argument that the monies should escheat to the state:

The critical determining factor here, however, is that trial courts are given broad discretionary powers in shaping equitable decrees. "[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Leimon v. Kurtzman*, 411 U.S. 192, 200 (1973) (footnotes omitted). Appellate review is narrow. *Id.* We believe that this principle should apply to equitable decrees involving the distribution of any unclaimed class action fund.⁸⁰

Finally, several cases reject government escheat as controlling the nondistributed funds. After referring to a state statute providing for residue to be treated as unclaimed property, which would eventually escheat to the state's general fund, the court noted that in a class action context, "to compel this method [general escheat] would be to cripple the compensatory function

for the private class action."⁸¹ The court also noted, "that [the] statute was not intended to limit the equitable discretion of the courts in managing private consumer class actions."⁸²

For these reasons, the disposition of undistributed funds should not be limited by escheat laws or other state abandoned property statutes.⁸³

One possibility is to order the payment of undistributed funds to the already paid class members, as a supplemental payment. This approach has some obvious inequities and has been rejected by courts where it has been directly challenged.⁸⁴

A further disposition of funds to already paid class members produces a windfall to them, particularly where the case resulted in a judgment, rather than a settlement, because each of the class members who had submitted a proper claim would have already been fully compensated. Further, there is no compelling reason to distribute the unclaimed or otherwise undistributed monies to this group.

Another *cy pres* method of distributing the excess funds involves the establishment of a form of trust fund to which disposition is provided according to the terms of the settlement agreement or, in case of judicial resolution, by application and suggestion to the court by interested persons or parties. This method allows the court to create a flexible, equitable remedy. As one leading commentator has pointed out:

While the use of *cy pres* distribution remains controversial and unsettled in an adjudicated class action context, courts are not in disagreement that *cy pres* distributions are proper in connection with a class settlement, subject to court approval of the particular application of the funds. Thus, even in circuits that have ruled that *cy pres* or fluid class recovery distributions are not valid in contested adjudications, these distributions have obtained a stamp of approval as part of a class settlement.⁸⁵

The Supreme Court of California in *State v. Levi Strauss & Co.*, 715 P.2d 564 (Cal. 1986), discussed the *cy pres* doctrine as a means to distribute litigation benefits to a class. As to residual funds, the court suggested that the best method of distribution would be to establish a consumer trust fund "which would engage in consumer protection projects, including research and litigation."⁸⁶ This method would put the funds to their "next best" use by providing indirect benefits to silent class members while promoting the statute under which

The *cy pres* doctrine allows for practically any charitable, educational, or legally related purpose

the suit was brought. The court did recognize, however, that establishing and administering such a trust fund would be costly and that some courts avoided these costs by distributing residual money to established private organizations.¹⁴

Many courts have approved of this type of distribution of unclaimed funds. In *Nelson v. Greater Gadsden Housing Authority*, 802 F.2d 405, 409 (11th Cir. 1986), the Eleventh Circuit expressly approved the use of fluid recovery to distribute unclaimed class action funds. The California Supreme Court also supports this approach.¹⁵

The saga of the *Folding Carton* litigation¹⁶ is an example of how the views of judges may differ as to the appropriate use of residual funds, and ultimately, the breadth of the discretion afforded courts when determining what the "next best" use of such monies might be. In the *Folding Carton* case, approximately \$6 million was unclaimed following the distribution of more than \$200 million in settlement funds to class members. The district court originally directed that a portion of the fund be used to establish an "Antitrust Development and Research Foundation."¹⁷ The Seventh Circuit disagreed with the disposition, describing the proposal as "carrying coals to Newcastle," because, in the view of that court, there were already sufficient institutions conducting studies of the antitrust laws. Consequently, the court found that creation of such a foundation was "a miscarriage of justice and an abuse of discretion."¹⁸ The Seventh Circuit directed, instead, that the remainder of the reserve fund "escheat" to the United States, under federal law (28 U.S.C. § 2041). (See discussion of *Van Gemert v. Boeing Co.*, *supra*.)

Most of the parties to that appeal, and the district judges who were found to have abused their discretion, sought Supreme Court review. Before those petitions were acted upon, the parties entered into a settlement agreement under which half of the remaining funds would be distributed to all previously paid class members, and the other half would be paid to two or more Chicago-area law schools to fund research projects involving enforcement of the antitrust laws or management of complex litigation, or to assist needy students. The government [the ultimate potential beneficiary of the appeal court's escheat ruling] initially took no position on this proposed settlement. The district court approved the settlement when it was presented, but insisted on further notice to the government. The government did not respond and the settlement was approved. When the government later attempted to intervene in the case to block the proposed distribution, the district court denied the government's untimely peti-

tion. The government appealed and, thus, the Seventh Circuit had a second opportunity to address the appropriate use of the undistributed funds. The appeal was heard by a different panel of judges.

In its opinion, the second panel of the Court of Appeals agreed with the district court that the government's petition to intervene was untimely and inferentially overruled the previous panel's holding that the money "escheat" to the federal government. The court further stated, however, that the prohibition in its earlier opinion "against using the funds for antitrust purposes remains and shall not be circumvented by the parties or the district court."¹⁹ The lower court was directed to collect the monies from the law schools to which they had been disbursed and to "consider entirely different and appropriate uses under the *cy pres* doctrine."²⁰ Significantly, this panel of the Seventh Circuit suggested that the money be given to the Federal Judicial Center Foundation, a use that would have no direct benefit to the class and no direct bearing on the enforcement of the antitrust laws, the subject of the underlying litigation.²¹ The result reached by the Seventh Circuit suggests a policy of giving the trial court almost unlimited discretion in directing the use of the funds. The case was remanded to the district court.

In response to the Seventh Circuit's invitation, eleven public interest and charitable organizations, including the Federal Judicial Center Foundation, filed applications with the district court. In general, these applications were straightforward requests for grants. After a review of the proposals, the district court, Judge Ann Claire Williams, entered an order directing that the entire balance of the fund, approximately two and one-third million dollars, be paid to the National Association for Public Interest Law to be used to finance "a national fellowship program" to give young lawyers the opportunity to work at public interest organizations and provide legal services to the poor.²² Judge Williams' decision was promptly affirmed by the Seventh Circuit, without published opinion.²³

The second *Folding Carton* opinion of the Seventh Circuit Court of Appeals appears to stand for the proposition that in an antitrust class action the *cy pres* doctrine allows for practically any charitable, educational, or legally-related purpose—except the creation of an antitrust foundation barred by its earlier opinion.²⁴

The following list of other reported and unreported cases is consistent with this approach. Some of these cases rely on the *cy pres* doctrine and some on the court's general equity power; others are silent as to their authority and simply order the distribution:

• *Coordinating Committee of Mechanical Specialty*

Contractors Ass'n v. Duncan, Nos. 76 L 12896, 77 CH 6497 (Cir. Ct. Cook County Aug. 1, 1985) (funds distributed to four Chicago area law schools and the Lawyers Trust Fund of Illinois for legal services to the poor).

- *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, CA No. 71774 (E.D. Pa. Feb. 28, 1978) (approximately \$25,000 given to two law schools to establish loan funds for needy students at those institutions).

- *Illinois v. J.W. Petersen Coal & Oil Co.*, No. 71 C 2548 (N.D. Ill. Mar. 15, 1976) (one-half of the residue funds distributed to the Chicago Bar Foundation and one-half distributed to the Chicago Lawyers Committee for Civil Rights).

- *Liebman v. J.W. Petersen Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill. 1974) (unclaimed funds given to the Legal Assistance Foundation and the Lawyers' Committee for Civil Rights Under Law).

- *Boothe v. Recrion*, No. 74 C 1547 (N.D. Ill. 1974) (monies given to the Roger Baldwin Foundation and the Lawyers' Committee for Civil Rights Under Law).

- *Benaron v. Sears Roebuck & Co.*, No. 75 C 4026 (N.D. Ill. 1975) (funds dispersed to the Roger Baldwin Foundation and Lawyers' Committee for Civil Rights Under Law).

- *Seiden v. Nicholson*, No. 74 C 3117 (N.D. Ill. 1974) (funds given to the Chicago Bar Foundation).

- *In re Three Mile Island Litigation*, 557 F.Supp. 96 (M.D. Pa. 1982), later proceeding, 596 F.Supp. 1274 (1985) (payment made to a newly formed foundation to study the biological effects of radiation exposures from a nuclear plant accident).

- *Girsch v. Jenson*, No. 73-652 (E.D. Pa. July 31, 1981) (the unclaimed securities class settlement fund of approximately \$7,100 to be divided equally and distributed to the legal libraries at Temple, University of Pennsylvania, and Villanova law schools).

- *Sanchez v. Lowell Leberman, Inc.*, No. A-77-CA-198 (W.D. Tex. 1979) (undistributed portion of settlement fund to be paid to designated medical center as donation).

- *In re Corrugated Container Antitrust Litigation*, MDL 310, 53 Antitrust & Trade Regulation Reports 711 (S.D. Tex. Oct. 6, 1987) (more than \$1 million to be distributed to six Texas law schools, the law schools at the University of Pennsylvania and Stanford University, the National Association of Attorneys General, the Packaging Education Foundation and the International Corrugated Packaging Foundation).

- *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 728 (S.D.N.Y. 1970), *aff'd*, 440

F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) (settlement agreement approved to distribute unclaimed funds to states for "public health" purposes—funds eventually financed drug addiction treatment, pollution control programs, and a public awareness of environmental pollution laws).

- *Ohio Public Interest Campaign v. Fisher Foods*, 546 F. Supp. 1 (N.D. Ohio 1982) (court approved a settlement agreement providing that unused food certificates be given to organizations that feed the needy).

- *New York v. Dairy Cooperative, Inc.*, 81 Cir. 1891 (R.O.) (S.D.N.Y. 1988) (\$529,438 residue funds paid to the National Association of Attorneys General).

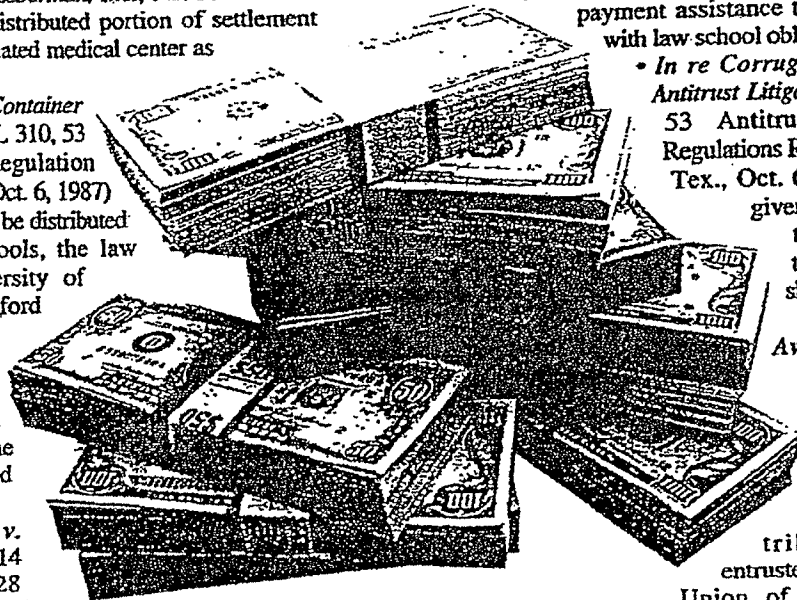
- *New York v. Chas. Pfizer & Co, Inc.*, No. 68 Civ. 845 (M 19-93)(S.D.N.Y. 1972) (two specified medical programs).

- *Superior Beverage Co. v. Owens-Illinois, Inc.*, 89 C 5251 (N.D. Ill., June 22, 1993) (modified Sept. 7, 1993) (more than \$2 million to be distributed to various organizations including Public Interest Law Initiative, University of Chicago Mandel Legal Aid Clinic, Legal Aid Bureau of United Charities, University of Illinois College of Law, Loyola University of Chicago College of Law, Chicago Lawyers Committee For Civil Rights Under the Law, Legal Assistance Foundation of Chicago, Roger Baldwin Foundation of the ACLU of Illinois, Northwestern University Law School, San Jose Museum of Art, AIDS Legal Counsel of Chicago, Chicago Volunteer Legal Services, WTTW public television station, American Jewish Congress, and National Association for Public Interest Law).

- *In re Ocean Shipping Antitrust Litigation*, MDL 395 (S.D.N.Y. July 29, 1991) (more than \$8 million regarding final disposition of settlement fund ordered to be added to the National Association for Public Interest Law, a program that conducts a fellowship program for recent law school graduates to work in the public interest sector by paying all or part of their salaries, plus loan payment assistance to those fellows with law school obligations).

- *In re Corrugated Container Antitrust Litigation*, MDL 310, 53 Antitrust and Trade Regulations Reports 711 (S.D. Tex., Oct. 6, 1987) (money given to law schools to be used to teach advocacy skills and ethics).

- *Vasquez v. Avco Fin. Servs.*, No. NCC 11933 B (Los Angeles Superior Ct., Apr. 24, 1984) (\$1.4 million in undistributed funds entrusted to Consumers Union of United States,



Inc./West Coast Regional Office for use in projects involving the public interest).

• *Evans v. McMorris Downtown Ford, Inc.*, No. 272, 850 (Travis Co., Texas 126th Judicial Dist. Apr. 24, 1980) (half of undistributed funds to nonprofit boys ranch; remainder to defendant).

• *Market St. Ry. Co. v. Railroad Commission*, 171 P.2d 875 (Cal. 1946) (after individual rider refunds paid, remainder of \$700,000 in streetcar overcharges awarded to City and County of San Francisco, for the improvement of street car services, which benefitted those who paid overcharges in the first place).

• *Shapiro v. Barrett*, No. 71 L 5745 (Cir. Ct. of Cook County, Ill., Nov. 3, 1993) (\$200,000 to Cook County Judicial Advisory Council to improve or augment existing programs in the areas of child support enforcement, prevention, and protection of victims of domestic violence, as well as greater protection for abused and neglected children, and drug treatment and drug rehabilitation).

• *Isenstein v. Rosewell*, No. 85 CH 7019 (Cir. Ct. Cook County Jan. 3, 1992) (court distributed unclaimed funds to the Cook County Judicial Advisory Council, Lawyer's Trust Fund of Illinois, Chicago area law schools, the Women's Bar Association of Illinois, and to the American Judicature Society).

Allowing broad discretion as to distribution has many benefits. First, the deterrence goals of the law are met, as the unclaimed funds do not revert to the defendant. Second, the defendant is not unjustly enriched, as the defendant is still required to pay the entire liability regardless of the number of class members who are located or who come forward and claim the amount to which they are entitled. Third, an indirect benefit accrues to those class members who were entitled to the money that constitutes the residual fund, through the benefits provided to society in general.

To expedite the distribution of undistributable or unclaimed funds, the parties can include in their settlement agreement a provision that unclaimed funds will go to a designated charity or to a charitable purpose to be designated later, by the parties or the court. This provision of the agreement should be respected by the courts. In the event that a case is resolved by judgment rather than by settlement, the court should consider requests or applications from interested parties representing various philanthropic causes.

One non-*cy pres* method of distributing unclaimed funds is to return the excess to the defendant. Although some courts have done this, and perhaps it is within the discretion of the court to do so, strong policy reasons and other case law weigh against such distribution. This has been the conclusion of the courts that have considered the question.

In *Friar v. Vanguard Holding Corp.*, 509 N.Y.S. 2d

374 (1986), a settlement agreement resolved a class action against a company alleged to have illegally collected additional mortgage recording taxes from vendors of real property. The defendant sought the return of that portion of the settlement fund that remained unclaimed six months after settlement had been approved by the court. The court stated that, "the defendant does not have a rightful claim, since the deposit of funds into court constituted the payment of a judgment,

and therefore title passed to the plaintiffs, with the property being held for their benefit by the court."²⁹ "Furthermore, permitting reversion of the unclaimed funds to this defendant would be equivalent to awarding it the benefit of its own wrongdoing, a result which should not be sanctioned."³⁰

Similarly, in *Hansen v. United States*, 340 F.2d 142 (8th Cir. 1965), the defendant-landlord who paid judgment for rent over-

charges, made a motion to direct payment to him of undisbursed funds not distributed to tenants. The court ruled that the "[d]efendant has no title or right to any money he paid to satisfy the judgment. A judgment debtor who has paid his judgment is not the rightful owner of unclaimed portions of the judgment deposited in a trust account in the Treasury pursuant to the statute."³¹

Further, "[t]here is nothing in the applicable federal statutory or case law which gives a judgment debtor who has paid a judgment against him for damages based upon his wrongful act a right to recover any portion of the payment made to satisfy the judgment in the event parties entitled to the proceeds of the judgment fail to claim their portion thereof. Moreover, no equitable basis exists for returning to the defendant the alleged illegal rent overcharges he wrongfully exacted. . . ."³²

Also in *Hanson* the court said "The only issue decided by the trial court is that the defendant is not entitled to any of the undisbursed balance of the trust fund arising out of payment of the judgment. The trial court's decision upon such issue is clearly right."³³

The same conclusion was reached in *Wilson v. Bank of American Nat'l Trust & Sav. Ass'n*, No. 643,872 (Cal. Super. Ct. San Francisco County Aug. 16, 1982). That case involved the illegal use of real estate tax escrow funds. The court ordered that no unused portion of the settlement funds would revert to defendant in the event that there was an excess. The court reserved the right to determine its disposition noting that reversion would defeat the deterrence goals of a

(Please turn to page 44)

Courts can disperse undistributed settlement funds in a variety of ways

This year has been challenging and rewarding. It has been a privilege to serve as your Chair. Dave Horowitz and Mike Harrison are going to carry us further than I was able to, and I know that you will be proud of them

and the accomplishments they will make. Thank you for a rewarding year. I am confident that our Conference will continue to grow both in membership and in what we are able to accomplish.

Forde

(Continued from page 23)

defendant found liable.

Finally, in *Securities & Exchange Com'n v. Golconda Mining Co.*, 327 F.Supp. 257 (S.D.N.Y. 1971), pursuant to a consent judgment, the defendant deposited profits he realized as a result of alleged insider trading with a trustee. This trustee could not locate all the persons entitled to share in the funds, and sought a direction by the court as to disposition of the unclaimed balance. The court noted that, "[t]he circumstance that some of the claimants cannot presently be found does not justify turning back to them [defendants] their ill-gotten profits."¹⁴ "To permit the return of the unclaimed funds, a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement of the securities acts is to be achieved."¹⁵

CONCLUSION

Clearly, courts have discretion to disburse undistributed class action settlement funds in a variety of ways. A number of courts have chosen to utilize the power to distribute these funds for the benefit of a variety of charitable purposes, including many devoted to improvements in the administration of justice. Such distributions generally have been approved on review. In class action settlements, a better method is to provide for the ultimate distribution of these funds in the Settlement Agreement. If the court-approved settlement provides for this distribution there can be no question of the court's power to order that the terms of the agreement be carried out.

1. Note, *The Consumer Trust Fund: A cy pres Solution to Undistributed Funds In Consumer Class Actions*, 38 HASTINGS L.J. 729, 730 (1987).

2. H. NEWBERG, NEWBERG ON CLASS ACTIONS § 10.17, (1992).

3. *Supra*, note 1, 38 HASTINGS L.J. 729, at 730.

4. *See, Daar v. Yellow*, 433 P.2d 732 (Cal. 1967) (involving taxi-cab rate reductions); *Colson v. Hilton*, 59 F.R.D. 324 (N.D.Ill. 1972) (involving hotel telephone charge rates).

5. *See, State of California v. Levi Strauss & Co.*, 715 P.2d 564, 572 (Cal. 1986) (price rollback is not appropriate in nonmonopoly markets like the jeans market because it compels consumers to collect their refunds by making further purchases of the defendant's products, to the detriment of the defendant's competitors).

6. Cal. Civ. Proc. Code § 1519.5 (West 1982).

7. *Friar v. Vanguard Holding Corp.*, 509 N.Y.S.2d 374, 376 (1986) (emphasis added).

8. 739 F.2d 730 (2d Cir. 1984).

9. 739 F.2d at 735. *But see* the Seventh Circuit's first opinion in *re Folding Carton Antitrust Litigation*, 744 F.2d 1252 (7th Cir. 1984). [*Folding Carton.*] That court, however, seems to have changed its

position in a later opinion in that case. 881 F.2d 494 (7th Cir., 1989). 10. 739 F.2d at 735-36.

11. 739 F.2d at 737. *See also* H. NEWBERG, NEWBERG ON CLASS ACTIONS § 10.25, at 10-67 (1992):

[I]t would appear that while escheat laws govern the disposition of unclaimed third party funds in private depositories, it is well within the court's discretion to determine the distribution of an unclaimed balance of an aggregate class recovery fund that is within the court's jurisdiction.

12. *State of California v. Levi Strauss & Co.*, 715 P.2d 564, 575 (Cal. 1986).

13. *Levi Strauss & Co.*, 715 P.2d at 574.

14. In addition to general escheat laws, some states have adopted the Uniform Disposition of Unclaimed Property Act which contains a specific reference to utility refunds. Courts have limited this statute to cases involving utility refunds. *See, Bosewell v. Whatly*, 345 So. 2d 1324 (Ala. 1970); *Cory v. Public Utilities Commission*, 658 P. 2d 749 (Cal. 1983); *Lewis v. Public Service Commission*, 463 S. 2d 227 (Fla. 1985); *contra ABATE v. Public Service Commission*, 435 N.W. 2d 766 (Mich. 1989) These utility cases should not influence the distribution of refunds in other nonutility cases.

15. *See, e.g., In re Folding Carton Antitrust Litigation*, 881 F.2d 494, 503 (7th Cir. 1989) (affirming the district court's holding that the already compensated plaintiff class had no further claim to a \$6 million reserve fund created to pay late claimants and administrative costs); *Van Gemert v. Boeing Co.*, 739 F.2d 730, 736 (2d Cir. 1984) (rejecting class members' argument that the unclaimed funds should be used to offset their costs of litigation); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 811-12 (5th Cir. 1989) ("[A]ll class members who presented their claims received the full payment due them, and those who did not present claims waived their legal right to do so.")

16. H. Newberg, *supra* note 2, § 11.20, at 11-26, 11-27 (1992).

17. 715 P.2d at 567.

18. *Id.* at 573.

19. *See Levi Strauss*, 715 P.2d at 576. "The disposition of the residue on remand is a matter within the discretion for the trial court. However, it should be noted that under the criteria set forth here, amici's suggestion that the residue should be used to establish a consumer trust fund has considerable merit. . . ." *See also, Securities & Exchange Com'n v. Golconda Mining*, 327 F. Supp. 257, 259 (S.D.N.Y. 1971), "but as to the balance remaining, the disposition is subject to the Court's discretion."

20. *In re Folding Carton Antitrust Litigation*, 557 F.Supp. (N.D.Ill. 1983), *aff'd in part, rev'd in part*, 744 F.2d 1252 (7th Cir. 1984). [*Folding Carton I*] *on remand*, 687 F.Supp. 1223 (N.D.Ill. 1988), *aff'd in part, rev'd in part*, 881 F.2d 494 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027, (1990).

21. 557 F.Supp. at 1112.

22. 744 F.2d at 1255.

23. 881 F.2d at 502.

24. 881 F.2d at 502.

25. 881 F.2d at 502 n. 8.

26. *In re Folding Carton Antitrust Litigation*, MDL 250 (N.D. Ill., March 6, 1991) 1991 W.L. 32867.

27. 88-2438 & 88-1314, May 29, 1992.

28. Note, however, *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990). The Appeals Court reversed a district court's award to the Inter-American Fund for indirect distribution in Mexico. This fund operates human assistance projects in areas where many of the class members were believed to reside. The court did not earmark the funds for any specific projects. The Ninth Circuit, while supporting the *cy pres* doctrine in general, rejected the district court's application, as the recipient group was far too remote from the plaintiff

class. "The plan does not adequately target the plaintiff class and fails to provide adequate supervision over distribution. We therefore set aside the court's *cy pres* application as an abuse of discretion." *Id.* at 1309.

29. *Friar*, 509 N.Y.S.2d at 376.

30. *Id.*

31. *Id.* 340 F.2d at 143.

32. *Id.* at 144-45.

33. *Id.*

34. *Id.* at 259.

35. *Id.*

Federal

(Continued from page 27)

Not only is the federal judiciary's law making independence being challenged, but it is under pressure in all four categories. As a result, threats should be taken seriously and should cause us to consider carefully what it is we want to defend. That judgment, once made, should influence the nature and intensity of our response.

ABA President Roberta Cooper Ramo has strongly supported federal judicial independence by writing both

President Clinton and Senator Dole on the importance of standing up for an independent federal judiciary. The ABA also has provided informational packets on judicial independence to all state and local bar associations to help develop a grass roots movement on this subject. Other organizations have responded to the challenge, as well. The Federal Judges' Association (FJA) continues to obtain sponsors for Senate Bill 1101 and House Bill 1989 (versions of the Federal Courts Improvement Act with its expanded Rule of 80) and has publicly put forth the position of the ABA respecting statements made by certain members of the other branches of government.

Traffic Court

(Continued from page 36)

On another subject, the 52nd Annual National Traffic Court Seminar will be held this year, October 16-18, 1996, at the Marvin Center, George Washington University, Washington, D.C.

One of the interesting live presentations will be of the EM/I, a new instrument for checking HGN. This is a combined video and computer instrument. It has use in both probation work and at the time of initial charge. If

you have recently visited an ophthalmologist, you might have had an eye refraction using new instruments. No longer do they put the drops in your eye or put the balance scale on the eye to check for glaucoma. They use an instrument with a light and a puff of air. The EM/I is a cousin of these new instruments.

Participants will also have a chance to use a Conrail simulator, which will let us see what it feels like to be in the engineer's seat of a train. This is a true hands-on type of experience.

Information about the seminar can be secured by contacting Teddi Fangon at the Chicago Office, 312/988-5693.

College

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leadership of U.S. Supreme Court Justice Tom C. Clark and members of the National Conference of State Trial Judges, operated as a JAD committee until 1978. It was then organized as a Nevada not-for-profit corporation.

Under the College's bylaws, revised in 1995, nine of the 15 Trustees are chosen from nominations made by the NJC Board, three are selected from nominations made by the JAD Council, and three from nominations by the ABA Board of Governors itself.

Newly elected Trustees, who serve three-year terms beginning in July include: Judge Janet J. Berry, Washoe County District Judge, Reno, Nevada; Judge Judith Billings, Utah Court of Appeals, Salt Lake City, Utah; Ralph Kennedy Frasier, Esquire, Executive Vice President and General Counsel, The Huntington National Bank, Columbus, Ohio; and Charles W. Matthews, Esquire, Vice President and General Counsel, Exxon Corporation, Irving Texas.

Reelected to a second three-year term was Daniel E. Wathen, Chief Justice of the Supreme Court of Maine.

Scholarships. In adopting its omnibus budget bill for

the current fiscal year, the Congress included an earmark of \$1 million to be used to assist The National Judicial College to train judges. The Congressional language was applied to the discretionary funds appropriated for the Bureau of Justice Assistance. Most of the funds will be used as scholarship grants to assist judges attending specific NJC courses related to court management and criminal matters.

Some funds will also be available to conduct faculty development workshops at which current and prospective NJC faculty members will receive advanced training in adult education techniques.

In addition to the federal funds, a permanently endowed scholarship valued at nearly \$200,000 has been received by the College. Louis Wiener, Jr., a distinguished Las Vegas attorney, created a Charitable Remainder Unitrust that included NJC as one of the major beneficiaries. The Louis Wiener, Jr., Scholarship will be available in 1997 and will be a continuing gift from Mr. Wiener to the improvement of justice, a cause which he furthered in 55 years of law practice.

Information concerning scholarships to attend NJC courses is available from Nancy Copfer, State Liaison Officer, at 1/800-25JUDGE.

FLUID RECOVERY AND CY PRES: A FUNDING SOURCE FOR LEGAL SERVICES

By Brad Seligman and Jocelyn Larkin

With cutbacks and restrictions in federal legal services funding a reality, the search for new funding sources for legal services and public interest law becomes even more imperative. One potential funding source has been largely underutilized: class actions. Through a seldom-used device known as fluid recovery or *cy pres*, grants or distribution of unclaimed class action settlement funds may provide a source of funding for public interest and legal services organizations whose work can be said to further the interests of the class.

The Fluid Recovery Doctrine

Fluid recovery is often called "*cy pres*" distribution, because it is a means of distributing unclaimed class funds to their "next best use." Although most cases using fluid recovery have been in the area of consumer protection or anti-trust, the principles governing *cy pres* distributions apply equally in civil rights and poverty law cases.

Typically, fluid recoveries are used in several different situations. Fluid recovery may be appropriate where individual recoveries for all class members are impossible or impractical, such as where a large number of consumers have suffered small monetary losses. It may also be used in situations where a defendant's conduct has made it difficult to identify class members. In these circumstances, outright grants to public interest organizations are made in order to ensure that the defendant does not enjoy a windfall as a result of its own illegal conduct.

Even where class members may be identifiable, fluid recovery may be used as a means of distributing unclaimed funds remaining in a settlement or damage fund. In virtually all class actions, there will be some class members who cannot be located because of stale addresses, who will choose not to make claims, or who will neglect to cash settlement checks. In such cases, the residual may be granted to a public interest organization. To allow left-over funds to revert to a defendant in such situations would not only be a windfall but might also create an incentive for a defendant to be less than totally cooperative in locating and distributing damages.

The Ninth Circuit approved the use of the *cy pres* doctrine in Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990). There, the class members were undocumented workers who successfully proved violations of the Farm Labor Contractor Registration Act by defendant ACG, a non-profit marketing cooperative. The district court awarded \$1.8 million in statutory damages, and adopted a fluid recovery plan for any unclaimed funds. The ACG objected that the class action was unmanageable because many class members could not be located. The court was unsympathetic to this contention, finding that this difficulty was attributable to defendant's own violation of statutory record-keeping requirements.

The Court also rejected defendant's argument that Ninth Circuit law prohibited fluid recovery, holding that "[f]ederal courts have broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds." The Court further held that "the district court's choice among distribution options should be guided by the objectives of the underlying statute and the interests of the silent class members." 904 F.2d at 1307. Ultimately, the Ninth Circuit disagreed with the district court's selection of the *cy pres* recipient, which it concluded was not the "next best" distribution, and remanded. *Id.* at 1308.

In Six Mexican Workers, the Ninth Circuit relied on an earlier decision by the California Supreme Court in State of California v. Levi Strauss & Co., 41 Cal.3d 460 (1986), an exhaustive analysis of the use of *cy pres*. The Levi Strauss Court recognized the important policy concerns favoring the use of *cy pres*:

Fluid recovery may be essential to ensure that the policies of disgorgement or deterrence are realized. [Citation omitted.] Without fluid recovery, defendants may be permitted to retain ill-gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.

41 Cal.3d at 472. The Levi Strauss holding was later codified, and expanded in California Code of Civil Procedure ' 384. Cf. Kraus v. Trinity Management Services, B Cal. 4th B, 96 Cal. Rptr 2d 485 (2000) (fluid recovery not available in Cal. Business & Professions Code '17200 unfair business practice claims where no class has been certified).

Many federal courts have concluded that legal organizations and law schools are the next best alternative for receipt of unclaimed settlement funds. In re Wells Fargo Securities Litigation, 991 F. Supp. 1193 (N.D. Cal. 1998)(approving distribution to law school securities program instead of bar association); Drennan v. Van Ru Credit Corp., 1997 U.S. Dist. LEXIS 7776 (N.D. Ill. 1997)(distribution to Mid-Minnesota Legal Assistance Foundation); In Re Folding Carton Litigation, 934 F.2d 323 (7th Cir. 1991)(over \$2 million to National Association for Public Interest Law); Jones v. National Distillers, 56 F.Supp. 2d 355 (S.D.N.Y. 1999)(allowing distribution to Legal Aid Society Civil Division despite a thin tie to purpose of litigation fund)..

Perhaps the most interesting use of *cy pres* distribution was made in Superior Beverage Co. v. Owens Illinois, 827 F.Supp. 477 (N.D.Ill. 1993), a glass container anti-trust action resulting in a \$2 million fund of unclaimed funds. The district court published a notice inviting grant applications for *cy pres* funds. The district court held a hearing with all applicants and ultimately distributed the money to fourteen non-profit legal groups, law schools and an art museum.

Some federal courts have limited the use of *cy pres* if the alternative of distribution to class members has not been fully exhausted. In re Wells Fargo Securities Litigation, 991 F. Supp. 1193 (N.D. Cal. 1998)(modifying fluid recovery plan to require additional pro rata distribution to class members with shares large enough to justify expense); Weber v. Goodman, 1999 U.S. Dist. LEXIS 22832 (E.D.N.Y. 1998)(fluid recovery premature until damage funds fully distributed); Fogie v. Thorn, 190 F.3d 889 (8th

Cir. 1999)(same). See also In re Matzo Food Products Litigation, 156 F.R.D. 600 (D.N.J. 1994)(refusing to approve class settlement with only *cy pres* distribution).

Finally, while a few federal courts have rejected the use of *cy pres* in class actions, these precedents involved in an entirely different and distinguishable use of the doctrine. Specifically, courts have refused to allow the use of the *cy pres* doctrine as a means of overcoming manageability concerns or the difficulty of proving individual damages raised at class certification. Windham v. American Brands, 565 F.2d 59, 72 (4th Cir. 1977); In re Hotel Telephone Charges, 500 F.2d 86, 89-90 (9th Cir. 1974); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d. Cir. 1972). These cases do not, however, undermine the use of *cy pres* in the more typical circumstances of unclaimed settlement funds.

LSC Grantee Use

Because some legal services organizations face restrictions on class action litigation, they may have limited ability to use a *cy pres* remedy except in settlements of non-class cases. Parties negotiating a private settlement (not subject to court approval) may fashion whatever relief they consider appropriate. So, for example, in the settlement of an action where the underlying statute includes deterrent and prophylactic remedies such as injunctive relief and potential punitive damages, the settlement could include the requirement of grants to appropriate agencies as part of the remedy.

Moreover, legal services organizations may still be the *recipients* of such grants in class action cases brought by private litigants and groups not subject to the class action limitations.

Practice Pointers

Successful class representatives should be able to make a strong argument for fluid recovery grants in appropriate circumstances. In non-class cases where court approval is not required, there is, of course, maximum flexibility in fashioning such relief, provided the defendant agrees.

If done in the settlement context in a class action, the application for approval of the settlement should include information about the purposes and goals of the proposed grantee, and an explanation of how a grant would further the interests of the class. Generally, a grant broadly consistent with the statute, rather than a very narrow and geographically limited grant, is acceptable. Thus, in sex discrimination cases involving blue collar jobs, grants have been approved to nonprofit organizations who represent the interests of women in the trades generally; in housing litigation, grants to groups advocating for housing rights in Northern California have been approved in cases where the class is limited to a single city.

In selecting recipients, plaintiffs should take care that there is no conflict or appearance of a conflict of interest with the class. If, for example, the named plaintiff or its counsel is an organization, it should not name itself as a recipient of the unclaimed settlement funds. This circumstance might create an incentive for the named plaintiff to deter the filing of claims by class members and has the appearance of self-dealing. An alternative to specifying the *cy pres* beneficiary in the settlement is to establish a procedure for selecting the beneficiaries. Such procedures would include a notice mechanism for requesting proposals, criteria for selection, and ultimate judicial approval of the selection.