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)
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.”

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.”

---

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.”

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.

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 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.”\textsuperscript{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.\textsuperscript{7} Nine of these courts and legislatures have mandated a minimum baseline distribution (usually 25% to 50%) to the pre-approved category of recipients.\textsuperscript{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.

\textbf{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

\begin{itemize}
    \item \textsuperscript{6} ALI PRINCIPLES, supra note 3, § 3.07 cmt. b.
    \item \textsuperscript{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.
    \item \textsuperscript{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 10\textsuperscript{th} state.
\end{itemize}
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
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Legal Aid and Indigent Defendants
Submitted By: Jacquelynne J. Bowman, Committee Member

1. Summary of Resolution(s).

This resolution urges jurisdictions to 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. It states that that before residual funds are awarded to such organizations, all reasonable efforts should be made to fully compensate members of the class, or it should be determined that such payments are not feasible.

2. Approval by Submitting Entity.

April 2016

3. Has this or a similar resolution been submitted to the House or Board previously?

This resolution has not been previously submitted.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

This resolution is consistent with prior policy that urges adequate funding for civil legal aid organizations.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.
6. **Status of Legislation.** (If applicable.)

N/A

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The resolution will be circulated to advocates for civil legal aid funding in the states.

8. **Cost to the Association.** (Both direct and indirect costs.)

None

9. **Disclosure of Interest.** (If applicable.)

N/A

10. **Referrals.**

    Section of Litigation
    Section of Business Law
    Section of Tort Trial and Insurance Practice
    Section of Civil Rights and Social Justice
    Section of Taxation
    Judicial Division
    Young Lawyers Division
    Standing Committee on the Delivery of Legal Services
    Standing Committee on Pro Bono and Public Service
    Commission on Domestic and Sexual Violence
    Commission on Homelessness and Poverty
    Commission on Immigration
    Commission on Disability Rights
    Commission on Interest on Lawyers’ Trust Accounts
    Commission on Law and Aging
    Commission on Youth at Risk
    Commission on Women in the Profession
    Commission on Hispanic Legal Rights and Responsibilities
    Center for Racial and Ethnic Diversity
    Commission on Racial and Ethnic Diversity in the Profession
Coalition on Racial and Ethnic Justice
Commission on Sexual Orientation and Gender Identity
National Legal Aid and Defender Association
National Association of Women Judges

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

Hon. Lora Livingston, Chair
Standing Committee on Legal Aid and Indigent Defendants
261st Judicial District Court
PO Box 1748
Austin, TX  78767-1748
(512) 854-9481
lora.livingston@co.travis.tx.us

Jacquelynne Bowman, Member
Standing Committee on Legal Aid and Indigent Defendants
Greater Boston Legal Services
197 Friend St
Boston, MA  02114
(617) 603-1602
jbowman@gbls.org

Terry Brooks, Counsel
Standing Committee on Legal Aid and Indigent Defendants
American Bar Association
321 N Clark St, Fl 19
Chicago, IL 60654
312-988-5747
Terry.brooks@americanbar.org

12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Hon. Lora Livingston, Chair
Standing Committee on Legal Aid and Indigent Defendants
261st Judicial District Court
PO Box 1748
Austin, TX  78767-1748
(512) 854-9481 – Office
(512) 940-0448 – Mobile
lora.livingston@co.travis.tx.us
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges jurisdictions to 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. It states that before residual funds are awarded to such organizations, all reasonable efforts should be made to fully compensate members of the class, or it should be determined that such payments are not feasible.

2. Summary of the issue which the Resolution Addresses

Access to justice organizations should always be considered to be appropriate recipients of class action residual awards. It is not always clear, absent specific authorizing rules or statutes, that such awards are permissible.

3. Please Explain How the Proposed Policy Position will address the issue

The resolution clarifies that access to justice organizations are appropriate recipients of class action residual awards.

4. Summary of Minority Views

No opposing views have been expressed by other ABA entities or organizations as of the preparation of this summary.