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Ed Smith
CLERK OF THE SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 07-1057

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE MATTER OF PROPOSED REVISIONS)	
)	COMMENTS OF
TO THE MONTANA RULES)	THE MONTANA
)	TRIAL LAWYERS
OF CIVIL PROCEDURE)	ASSOCIATION

INTRODUCTION

The Montana Trial Lawyers Association (“MTLA”) respectfully submits these comments to the Proposed Revisions to the Montana Rules of Civil Procedure, specifically the proposed amendment to Rule 23 regarding the disposition of residual funds in class action cases. The MTLA strongly supports a rule that helps provide guidance to district courts as they consider the distribution of residual funds.

COMMENTS

The MTLA recognizes that in some instances district courts have expressed a reluctance to agree to a dispersal of residual funds from class actions to non-profit entities. The proposal addresses this by requiring a process for “disbursement of residual funds,” and by allowing that those funds may be disbursed to a “non-profit entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the

substantive or procedural interests of members of the certified class.”

These provisions of the proposed Rule acknowledge the importance of dispersing residual funds to entities that have a relationship to the underlying litigation. That is the essence of *cy pres* awards – the relationship of the recipient organization's purpose and work to the purposes of the underlying litigation. Recipients of residual funds should have a purpose such that their work will as near as possible be used to benefit the class harmed by the wrongdoing in the underlying litigation. Public Justice gives an excellent example on their website of this: in a case that challenges predatory lending practices that result in many people losing their homes, for example, it might be appropriate for residual funds to be distributed to organizations that address housing problems.

The other major concern for the MTLA is that in no case should residual funds be returned to, or in any other way be used for the benefit of the defendant. In at least one instance there was an attempt to disburse residual funds to a defendant's own charitable foundation. Such a prohibition may have the added benefit of helping to discourage those rare but unscrupulous settlements that benefit class counsel and the defendant more than the class.

The only disagreement amongst our members is whether it is appropriate to mandate a specific percentage (50%) of residual funds to a specific entity - the

Montana Justice Foundation. There is universal agreement amongst our members that the Montana Justice Foundation does great work to help provide greater access to our state's civil justice system. Many of our members are financial contributors to the Foundation, and some have served or are serving on the Foundation's board of directors. There is no disagreement that the Foundation may well be an appropriate entity to receive residual funds. The Foundation gives grants to many worthwhile organizations including, but not limited to Montana Legal Services, CASA groups across the state, community mediation centers, the Montana Innocence Project, domestic violence prevention organizations, and housing organizations.

There are some members, however, that have the opinion that mandating a specific percentage for a specific entity is not appropriate. These members acknowledge that there will be cases where the Foundation is an appropriate recipient organization. These members are concerned that there will also be cases where there is another entity whose purpose and work will more directly benefit the class harmed by the wrongdoing in the underlying litigation. The disbursement of more than fifty percent of the residual funds to such an entity may more appropriately serve the underlying purpose of *cy pres* awards than would the proposed Rule's mandate that fifty percent be given to the Foundation, or another

“Access to Justice” organization.

OTHER STATES

As the Court looks at this proposal, it may be helpful to see what other states have done with regards to specific rules or statutes regarding residual funds. The below information on how other states handle the dispersal of residual funds is taken from “Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions.” *Virginia Journal of Social Policy and the Law*, Volume 21:2, page 267 (2014) [http://www.vjspl.org/wp-content/uploads/2014/03/3.25.14-Cy-Pres-Awards_STE_PP.pdf]. These provisions for dispersing residual funds range from mandating a certain percentage to a specific organization to more generally allowing disbursement to certain types or organizations.

States Mandating A Specific Percentage to Specific Organizations

South Dakota (requires at least 50% of residual funds be distributed to the Commission on Equal Access to Our Courts). S.D. Codified Laws § 16-2-57.

Pennsylvania (directing distribution of at least 50% of residual class action funds to the Pennsylvania IOLTA Board to support activities and programs which promote the delivery of civil legal assistance, permitting distribution of the balance to an entity that promotes either the substantive or procedural interests of the class members). Pa. R. Civ. P. Ch. 1700.

North Carolina (requiring equal distribution of residual class action funds between the Indigent Person's Attorney Fund and the North Carolina State Bar for the provision of civil services for indigents). N.C. Gen. Stat. § 1-267.10

Indiana (requiring distribution of at least 25% of residual class action funds to the Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its pro bono districts). Ind. R. Trial P. 23(F)(2)

Kentucky (requiring distribution of at least twenty-five percent of residual funds to the Kentucky IOLTA Fund Board of Trustees to support activities and programs that promote access to civil justice for low-income Kentucky residents). KY. R. CIV. P. 23.05(6).

Washington (requiring distribution of at least 25% of residual class action funds to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents. Wash. CR 23(f).

States Mandating Specific Percentage to Types of Organizations

Illinois (requiring distribution of at least 50% of residual class action funds to organizations that improve access to justice for low-income Illinois residents). 735 ILCS 5/2-807 (2008).

States Allowing Payment to Types of Organizations

California (permitting payment of residual class action funds to nonprofit organizations in California that provide civil legal services to low-income individuals). Cal. Code Civ. Proc. § 384.

Hawaii (granting a court discretion to approve distribution of residual class action funds, specifically to nonprofit organizations in Hawaii that provide legal assistance to indigent individuals). Haw. R. Civ. P. Rule 23(f).

Massachusetts (permitting distribution of residual class action funds to nonprofit organizations in Massachusetts that provide legal services to low income individuals consistent with the objectives of the underlying causes of action on which relief was based). Mass. R. Civ. P. 23(e) .

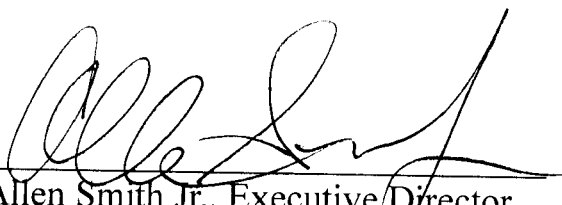
New Mexico (permitting payment of residual class action funds to nonprofit organizations in New Mexico that provide civil legal services to low income individuals). N.M. Dist. Ct. R. C.P. 1-023(G)(2).

Tennessee (creating the Tennessee Voluntary Fund for Indigent Civil Representation and authorizing the fund as one entity eligible, but not required, to receive contributions of unpaid residuals from settlements or awards in class action litigation in both federal and state courts). Tenn. Code Ann. § 16-3-821.

CONCLUSION

As stated at the outset, the MTLA strongly supports a rule that helps provide guidance to district courts as they consider the distribution of residual funds in class actions. Recipients of residual funds should have a purpose such that their work will as near as possible be used to benefit the class harmed by the wrongdoing in the underlying litigation. The MTLA supports a provision that provides that in no case should residual funds be returned to or in any other way be used for the benefit of the defendant.

RESPECTFULLY SUBMITTED this 1st day of September, 2014.



Allen Smith Jr., Executive Director
Montana Trial Lawyers Association