A Toolkit for Legal Services Providers

Expanding Access to Justice Through Class Action Residuals and Other Court Awards

How to use the SJC's amendment to Mass. R. Civ. P. 23

IOLTA Massachusetts Interest on Lawyers' Trust Accounts

Message to Legal Services Providers

Lisa C. Wood

As a deliverer of civil legal services to the poor, you know all too well how tremendous the need for assistance is in Massachusetts. The Supreme Judicial Court recently amended Mass. R. Civ. P. 23, and in doing so clarified that the IOLTA Committee and non-profit organizations, including legal services programs, are appropriate designees for residual funds in class action lawsuits. We value our partnership with you and hope that the SJC's clarification will increase the total funding available for Massachusetts civil legal aid programs.

In an effort to encourage more court awards for your organizations and for distribution via the IOLTA Committee, we are developing resources for a wide legal audience, including judges and litigators, and asking for your help.

As a legal services provider, you are in a unique position to generate residual awards for legal services. You can:

- Review these materials about class action residuals and legal services.
- Talk with trial and defense lawyers; enlist help from your Board members and pro bono lawyers in those conversations.
- Look for opportunities to have information about class action residuals published in local and special purpose legal publications (see the sample mailing insert on page 6).
- Review business and legal press for notice of relevant cases and contact lawyers early to introduce the concept of designating residual funds to legal services programs or the IOLTA Committee.
- Contact the IOLTA Committee if you have any questions.

Thank you for doing the work that you do.

Lisa C. Wood, Chair
Massachusetts IOLTA Committee

Expanding Access to Justice

Through

Class Action Residuals

and Other Court Awards

— A Toolkit for Legal Services Providers —

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Class Action Residuals

When class action lawsuits result in an award for the plaintiffs, there are nearly always funds that go unclaimed by the class. These funds are often not distributed as additional funds to the members of the class who filed claims. Instead, they become a residual fund that is available for another use. Broadly speaking, *cy pres* is the term for finding another "next best" use for the funds that will serve the interests of missing class members. The decision as to such use is usually jointly arrived at by counsel and the court, most typically in the context of a settlement agreement. ***Class action residual awards are an ideal way to advance the goal of ensuring equal access to justice*** and serve the interests that the class action was designed to address.

SJC Amendment

Mass. R. Civ. P. 23 outlines the requirements for bringing and maintaining a class action lawsuit. Although class action matters often result in the disposition of residual funds, Rule 23 did not provide explicit direction with respect to how such funds should be disbursed until November 25, 2008, when the Supreme Judicial Court Rules Committee adopted an amendment to Rule 23 directing the payment of residual funds in class actions to either a) one or more nonprofit organizations (including legal services programs) that benefit the class, or b) to the Massachusetts IOLTA Committee, which provides funds to legal services programs statewide.

This amendment creates a new tool for attorneys and judges to support funding for legal aid and expand access to justice for all.

Amended language on residual funds

"In matters where the claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based or to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts."

The SJC determined that legal services or IOLTA programs are appropriate recipients of residual class action funds. Proponents of the amendment had argued that:

"Legal services programs are often the next best use of unclaimed funds because of their ability to directly benefit the members of a class for whom funds have been set aside and then not distributed. These programs provide systemic advocacy in support of low-income groups. As the states' experts on the legal issues of low-income people, legal services attorneys and paralegals are highly effective advocates at the legislative, administrative, and judicial levels, bringing about substantial positive changes for individuals and communities.

"The underlying mission of these programs is consistent with the purpose of Rule 23, which recognizes the need to protect the legal rights of those who, because of their economic position, would otherwise be unrepresented."

Court Award Strategies

The plan for increasing resources for legal aid calls for leadership roles for the Massachusetts courts. While much time is spent addressing immediate funding needs, the efforts can obscure the necessity to develop plans that will lead to long-term, stable and enduring infrastructures of financial support.

As court award strategies are implemented in Massachusetts, they will have a substantial effect on the capacity of legal aid programs to maintain and increase their current levels of funding and services.

An important goal for Massachusetts is to have financial support of legal aid become an accepted cultural value within the legal and judicial community generally, but more specifically within the class action bar and the judges who most often oversee such matters.

Relationship Building

Court award strategies should be pursued not just for the funds needed to support the existing infrastructure for the delivery of civil legal aid to the poor in Massachusetts, but also to:

- Help strengthen legal aids' ties to the bar and judiciary
- Open up avenues of communication with new and existing supporters
- Stimulate creative thinking on the part of attorneys and judges
- Promote greater awareness of clients and their issues

Spreading the Word

Legal aid providers are in a unique position to generate support for class action residuals and other court awards for funding legal aid.

Please reach out to your local and county bar associations, civil litigators and board members to ask for their help.

Ask your local and specialty bar associations to help spread the word and to include an insert such as the one on the right in their membership mailings.

This amendment creates a new tool for attorneys and judges to support funding for legal aid and expand access to justice for all.

Class Action Residuals to Support Legal Aid

In 2008, the Supreme Judicial Court amended Mass. R. Civ. P. 23. The amendment directs payment of residual funds in any class action to appropriate nonprofit organizations, including legal services programs, *or to the Massachusetts IOLTA Committee.*

In the event residual funds are dispersed to the IOLTA Committee, the Committee would distribute the funds to the Boston Bar Foundation, Massachusetts Bar Foundation and Massachusetts Legal Assistance Corporation to provide legal aid to the poor and improve the administration of justice.

As you draw up settlements for class action suits, please consider including a donation to legal services programs or to the IOLTA Committee as a solution for undistributed funds.

Doing so is a simple answer to a complex problem and will help us continue to expand access to civil legal services for our state's low-income residents.

For information on how to easily designate cy pres awards to the IOLTA Committee, please contact Jayne Tyrrell, Executive Director, at 617-723-9093, or email *jtyrrell@maiolta.org*.

Examples of Class Action Residual Awards

Across the country, class action residuals have been successfully used to fund civil legal services for the poor.

- **Texas:** An Austin attorney was instrumental in designating more than $2.6 million in court awards to the Texas Access to Justice Foundation and five of its grantees to support civil legal services to persons with disabilities.
- **Washington, DC:** One legal aid program and three law school clinical programs received more than $10 million from court awards resulting from a single lawsuit.
- **Georgia:** Georgia Legal Services Program and Atlanta Legal Aid Society have collectively received more than $3 million from court awards in three lawsuits.
- **Maryland:** Maryland's only LSC-funded program has received three court awards totaling more than $280,000.
- **Minnesota:** Minnesota Legal Aid Foundation received $3,250,000 in two court awards.
- **Illinois:** Legal Aid Foundation of Metro Chicago and Land of Lincoln Legal Assistance Foundation collectively received $824,000 from 19 court awards.

There have also been recent class action residual awards made to legal aid programs in Atlanta, Cincinnati and Tallahassee.

In Massachusetts, the potential of the SJC's amendment for preserving access to justice is just beginning to be recognized. However, there is some history of directing awards to legal services even before the amendment.

For example, in January 2006 the Massachusetts Superior Court approved a class action settlement agreement awarding $100,000 in residuals to the National Consumer Law Center.

In another class action settlement a Medford attorney was instrumental in designating more than $3 million in class action residuals to 18 different non-profit organizations in 2010, including $150,000 to Greater Boston Legal Services.

Civil legal services programs are well situated to make effective use of class action residual awards.

Greater Boston Legal Services executive director Bob Sable accepts a $150,000 check from Medford attorney Robert J. Bonsignore. The check represented a portion of the cy pres award in a smokeless tobacco price fixing case.

Practice Points and Tips

Counsel should always consider whether there are funds that can be made available for court awards to legal aid.

1. Raise the topic of residual provisions early

Raising the issue of a class action residual provision relatively early in settlement negotiations can have a positive impact on the process. Some defendants may find the prospect of paying money to settle a case more palatable when they consider that some of the money may benefit a good cause.

2. Always consider whether there are funds that can be made available

Counsel should always consider whether there are funds that can be made available for court awards to legal aid. The decision to make a court award in a class action settlement most often comes during the settlement process.

3. Consider setting aside a fixed amount or percentage for charitable purposes

The most common use of class action residuals is the case where a settlement provides that unclaimed or leftover funds will be used for the awards. However, you may negotiate to set aside a fixed percentage of the settlement fund or a certain amount for charitable purposes, including legal aid, even where settlement funds are to be distributed to identifiable plaintiffs.

4. Consider the publicity angle

The driving force for class action residual awards to legal aid programs is often the plaintiffs' counsel, but defense counsel frequently welcome the award as a way for their client to resolve a case and obtain some positive publicity from the settlement.

Sample Settlement Provisions Regarding Cy Pres

As a general rule, class action settlements should provide for a cy pres distribution of settlement funds that cannot be distributed to the class even when counsel is not certain at the time of negotiations whether a cy pres distribution will be needed. Counsel may negotiate a provision that reserves the right of the plaintiff to approach the court to designate a cy pres recipient or recipients at such time as it may become appropriate. Below are some sample settlement provisions.

Unclaimed Funds/*Cy Pres*

a) The Parties recognize there is likely to be some amount of residual funds after disbursement of the Settlement Fund for the payment of valid claims, payment of costs and expenses of administration and payment of costs and expenses of litigation. The Parties agree the unclaimed funds resulting from the failure to file claims and from the denial of claims filed by Class members shall be distributed to *Cy Pres* recipients as set forth hereinafter.

b) The portion of the Settlement Fund distributed to *Cy Pres* recipients (hereinafter "Recipient") shall be referred to as "Recipient's Share." The parties have agreed the unclaimed funds available for *Cy Pres* recipients shall be divided among the following organizations enumerated below:

Name(s) of Recipient Organizations:

Sample Language for Final Approval Orders for Class Action Settlements
(Residual Funds)

Distribution of Residual Funds. Pursuant to the parties' Settlement Agreement and Mass. R. Civ. P. 23, any Residual Funds from the Settlement shall be distributed as follows:

The Court finds that the X Legal Services Organization is an eligible organization and the Court directs that x percentage of any Residual Funds from the Settlement shall be distributed to X Legal Services Organization.

The Court further finds that the Massachusetts IOLTA Committee is an eligible organization and directs that x percentage of any Residual Funds from the Settlement shall be distributed to the Massachusetts IOLTA Committee.

These distributions shall be made in a timely manner and in any event no later than ____ calendar days from the date of this Order without further Order of the Court.

Sample Federal Order

Approving Settlement Agreement

IN THE UNITED STATES DISTRICT COURT

FOR THE _____ DISTRICT OF MASSACHUSETTS

_____ DIVISION

PLAINTIFFS
VS. CASE NO. _____
DEFENDANT

ORDER

Upon consideration of the parties' Joint Motion and Order to Create Qualified Settlement Fund, it is ordered, judged, and decreed that:

1. The payment set out in paragraph __ of the Master Release Agreement will be made to the Settlement Administrator designated in the Master Release Agreements, _____, and that the account created by _____ for receipt of these funds will be deemed a Qualified Settlement Fund in accordance with Section 468B of the United States Internal Revenue Code (26 U.S.C. § 468B) and the regulations promulgated thereunder (26 C.F.R. § 1.468B-1).

2. The Settlement Administrator agrees to act strictly in accordance with its obligations as described in the Master Release Agreement.

3. The Qualified Settlement Fund created by this Order will be subject to the continuing jurisdiction of this Court.

Signed this _____ of _____, 20___

_____

a. Each Authorized Claimant receiving a Settlement shall receive a letter stating the amount of their Settlement, the date and specific form it was distributed in, and explaining that this relief was the result of this litigation (which letter shall be agreed to by the Parties or with Court approval).

b. Net Settlement Fund Distribution Schedule. Subject to Court approval, distribution of the Net Settlement Fund shall be made on or around a single date (or in as short a period as possible), which date or days shall be determined by the Parties in the future with the goal of distributing the funds as soon as practicable, with a goal of approximately 14 days after the effective date of the Settlement.

c. Undistributed Settlement Funds. The Parties agree that insofar as unanticipated circumstances arise whereby certain Authorized Claimants' payments are returned or some residue remains in the Escrow Account after distribution of the Settlement funds by the Administrator, Lead Class Counsel shall apply to the Court for approval for the Administrator to distribute any undistributed funds in the Settlement Fund to one or more non-profit organizations agreed to by the Parties. None of the Settlement Fund shall revert to the Parties after the Effective Date of the Settlement.

For more information about
Expanding Access to Justice Through Class Action Residuals
contact:

Massachusetts IOLTA Committee
Jayne Tyrrell, Executive Director
7 Winthrop Square, 3rd floor
Boston, MA 02110
617-723-9093

jtyrrell@MAIOLTA.org
www.MAIOLTA.org

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