Order

Michigan Supreme Court
Lansing, Michigan

March 4, 2020

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

ADM File No. 2018-02

Amendment of Rule 3.501 of the Michigan Court Rules

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On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.501 of the Michigan Court Rules is adopted, effective May 1, 2020.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 3.501 Class Actions

(A)-(C) [Unchanged.]

(D) Judgment.

(1)-(5) [Unchanged.]

(6) Residual Funds.

(a) "Residual Funds" are funds that remain after the payment of approved class member claims, expenses, litigation costs, attorney's fees, and other court-approved disbursements made to implement the relief granted in the judgment approving a proposed settlement of a class action.

(b) Nothing in this rule is intended to limit the parties to a class action from proposing a settlement, or the court from entering a judgment approving a settlement, that does not create Residual Funds.

(c) Any judgment approving a proposed settlement of a class action certified under this rule that may result in the existence of Residual Funds shall provide for the disbursement of any such Residual Funds upon the stipulation of the parties and subject to the approval of the court. In matters where the claims process has been exhausted and

> Residual Funds remain, unless the judgment provides otherwise, the Residual Funds shall be disbursed to the Michigan State Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of Michigan.

(E)-(I) [Unchanged.]

Staff Comment: The amendment of MCR 3.501 establishes procedures for residual funds by adding a definition, clarifying that a settlement need not create residual funds, that a proposed settlement order provide for the disbursement of residual funds, and requiring that all unclaimed class action funds be disbursed to the Michigan State Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of Michigan. The amendment applies the new language to situations in which the court approves a proposed settlement.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

MARKMAN, J. (*dissenting*). Today, the Court amends MCR 3.501 by adding a provision addressing the disbursement of unclaimed class action settlement funds. In short, the amendment provides that, if the parties to a class action settlement do not themselves provide for the disbursement of unclaimed funds, the trial court shall disburse the full amount of the unclaimed funds to the Michigan State Bar Foundation. Although the amendment represents a considerable improvement over the language originally published for comment by divesting trial courts of discretion concerning how to disburse unclaimed funds, the following reasons nonetheless impel me to dissent.

First, in adjudicating class actions, courts must assume the singular supervisory role of protecting the interests of unidentified and anonymous class members who will never come before the court. See MCR 3.501(A)(2), (B)(3), and (C)(3). In this regard, class action practice has been subject to much scrutiny, with "one of the most heavily criticized class action abuses [being] the use of class action settlements to generate huge fees for lawyers and little or nothing for the allegedly injured [class members]." Beisner, Shors, & Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan L Rev 1441, 1445 (2005). This Court must, in this regard, employ a carefully measured and disciplined approach to amending court rules governing class actions, particularly where such amendments affect the disbursement of funds that are (a) specifically intended for class members, and (b) specifically predicated upon economic losses incurred by those same class members. At the time these amendments were initially published, I raised a number of inquiries for public comment. Common threads in those inquiries included: (a) whether the judicial disbursement of funds to nonparties is a fundamentally "legislative" exercise, the judicial definition and administration of which is an inappropriate object of

our state's judicial power; and (b) whether specifically this Court's adoption of a *cy pres* procedure in which unclaimed funds will be disbursed to a charitable organization will lend an appearance problem to the trial court's disinterested review of a settlement likely to result in substantial amounts of unclaimed funds going to such an organization. In particular, concerning (b), even where there is no conflict of interest, or even an appearance of conflict, on the part of the trial court, will subtle disincentives arise to identifying difficult-to-locate class members by what may be perceived as the "greater" or "higher" charitable or philanthropic interest? Similarly, will some larger business defendants come to be similarly disincentivized as a result of the perception that substantial *cy pres* payments constitute a preferable "public relations" alternative to lesser payments being paid to a larger number of difficult-to-locate class members? The purpose of the civil justice process is to resolve disputes and to provide remedies for harms suffered, not to facilitate philanthropic and public-interest financial contributions.

Second, while some may view the instant amendment as generally maintaining the status quo, I do not share this view. By establishing an explicit procedure for the disbursement of unclaimed class action funds, the present amendment formalizes, and institutionalizes, this Court's approval of *cy pres* practice. Absent this amendment, the disbursement of such funds to nonparties was but one of four options available to trial courts. See 4 Newberg, Class Actions (5th ed), § 12:28, p 210 (identifying four options for disbursing unclaimed funds: reversion to the defendant; pro rata disbursement to class members who filed claims; escheat to the government, and *cy pres* awards); see also *Wilson v Southwest Airlines, Inc*, 880 F2d 807, 813 (CA 5, 1989) (concluding that the defendants themselves have a strong equitable argument for the return of unclaimed funds); *Gerken v Sherman*, 484 SW3d 95, 105 (Mo Ct App, 2015) ("When courts are faced with distributing unclaimed funds from a class action, they have four options: a pro rata distribution to the class members who have already made claims; escheat to the government; reversion to the defendant; or *cy pres* distribution."); *In re Motorsports Merchandise Antitrust Litigation*, 160 F Supp 2d 1392, 1393-1394 (ND Ga, 2001) (identifying the same four options). By limiting the trial court's range of options for disbursing unclaimed funds, as this Court has now done in the exercise of an quasi-legislative exercise of power, we effectively select "winners and losers" from among a large number of possible beneficiaries of unclaimed funds. And the amendment's preclusion of the trial court's authority to order the reversion of unclaimed funds to the defendant itself is especially troubling, in particular where the class action defendant is a political subdivision of the state. In such a circumstance, unclaimed class action funds may alternatively be characterized as "taxpayer funds," more fairly returned to the taxpayers themselves than disbursed to the State Bar Foundation, regardless of how exemplary and estimable the work of the Foundation may be. Indeed, in such circumstances, it might further be presumed that a large number of such taxpayers were *also* among the class action members to whom economic harm had been done and who were thus directly *entitled* to such funds. No matter, as we specifically declined, as the city of Detroit proposed, even to exempt from the present amendment class action awards against political subdivisions.

Third, for the above reasons, how a court should disburse unclaimed funds is a matter that affects the *substantive* rights of litigants-- to what are they entitled as a matter of public policy? Thus, how this judiciary should disburse unclaimed funds is a matter properly left to the Legislature and does not, in my judgment, constitute a proper aspect of the "judicial power"-- the power to resolve certain types of cases and controversies and the only power belonging to the judiciary under either the Michigan or the United States Constitution. See also Goodlander, *Cy Pres Settlements: Problems Associated with the Judiciary's Role and Suggested Solutions*, 56 BC L Rev 733, 757 (2015) ("Another way to shield judges from the potential for appearances of impropriety inherent in an unstructured cy pres distribution framework could originate in the legislative branch."). Legislatures in other states have enacted statutes governing the disbursement of unclaimed funds. See, e.g., Wis Stat 803.08(10) (2017); Neb Rev Stat 25-319.01 (2014); 735 Ill Comp Stat 5/2-807 (2008); SD Codified Laws 16-2-57 (2008); NC Gen Stat 1-267.10 (2005). In contrast, this Court now: (a) enacts the entirety of state public policy governing the disbursement of unclaimed funds, (b) expressly ratifies class action settlements likely to result in unclaimed funds, and (c) affirmatively and explicitly approves the disbursal of unclaimed funds. By doing these things, we discourage legislative action, and we do so at an especially inapt time. Given the national attention *cy pres* practice in the class action context has recently received, it seems a particularly poor moment at which to diminish the Legislature's incentives to act on their own. See, e.g., *Marek v Lane*, 571 US 1003, 1006 (2013) (statement of Roberts, C.J., respecting denial of certiorari) (identifying "fundamental concerns" with *cy pres* practice and suggesting need to "clarify the limits" of the practice); see also *Frank v Gaos*, 586 US ___, ___; 139 S Ct 1041, 1047-1048 (2019) (Thomas, J., dissenting) (questioning fairness of class settlements when a majority of funds are disbursed via *cy pres* and suggesting attorney-fee awards should be decreased because *cy pres* disbursements do not provide relief to class members); *Klier v Elf Atochem North America, Inc*, 658 F3d 468, 481-482 (CA 5, 2011) (Jones, C.J., concurring) (noting perception of impropriety often attached to *cy pres* disbursements and concluding that "[o]ur adversarial system should not effectuate transfers of funds from defendants beyond what they owe *to the parties* in judgments or settlements"). It would have been far better for this Court to have surveyed the *cy pres* experiences of other jurisdictions at this time of flux and debate.

Finally, not only are courts constitutional institutions designed principally to adjudicate cases and controversies between parties and to afford relief to aggrieved parties, but *lawyers*, as custodians of our justice system, must also carry out their responsibilities within the context of that system. In particular, they are governed by rules of ethics and professional standards of conduct to pursue cases on *behalf* of their clients, and not on behalf of charitable, philanthropic, or public-interest organizations, however admirable the purposes of such organizations may be. See MRPC 1.7(b). But settlements resulting in large *cy pres* disbursements may well transform these basic ground rules. The attorney for

plaintiffs in a class action represents the class as a whole, including difficult-to-locate class members. However, once a court approves a class action settlement and the attorney's fees have been set, there remains little incentive for attorneys on either side to expend significant additional resources and efforts reaching difficult-to-locate class members. This is particularly true where: (a) the unclaimed funds are designated for distribution to an organization-- the State Bar Foundation-- that most in the legal profession would view as a worthy recipient, and (b) in some situations, the attorney for the plaintiffs' class may hope later to persuade the Foundation to distribute monies to a legal organization that represents class litigants. As a result, one must ask whether the *cy pres* process adopted here introduces a strain, or a tension, affecting plaintiffs' attorney's ability to act with undivided loyalty on behalf of the clients' interests.

For these reasons, I respectfully dissent from this Court's adoption of the present amendments to MCR 3.501 and further encourage the Legislature to consider how, in its own judgment, these matters should best be addressed.