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MEMORANDUM

TO: Michigan Supreme Court

FROM: Eric Doster, Doster Law Offices, PLLC

DATE: August 29, 2019

RE: Comments submitted on behalf of the Michigan Chamber of Commerce with respect to the Proposed Amendment of Rule 3.501 of the Michigan Court Rules (the "Proposal"); ADM File No. 2018-02

By Order dated May 10, 2019, the Court afforded interested persons the opportunity to comment on the Proposal. The Michigan Chamber of Commerce (the "Chamber") respectfully submits for the Court's consideration these comments on the Proposal. For the reasons set forth below, the Chamber submits that the Court should reject the Proposal.

DISCUSSION

I. THE PROPOSAL IS ONLY APPROPRIATE FOR LEGISLATIVE ENACTMENT BECAUSE IT IS A MATTER OF SUBSTANTIVE LAW.

Residual or unclaimed class action funds are monies that belong to someone else who, for a variety of reasons, did not or could not claim it. And few things are as legally substantive as conferring upon a trial court the power—discretionary or otherwise—to dispose of other people's money, even if it is for the purpose of advancing the underlying policy of the class action whereby those funds were obtained. Because only the Legislature can enact substantive law, see *McDougall v Schanz*, 461 Mich 15 (1999), only the Legislature can empower trial courts to dispose of unclaimed class-action funds.

In *McDougall v Schanz*, 461 Mich 15, 26 (1999), this Court indicated that Const 1963, art 6, § 5, endowed it with rulemaking authority over matters involving "practice and procedure" but not substantive law, and that this was consistent with the separation of powers set forth in Const 1963,

art 3, § 2. This Court held that MCL 600.2169, which imposed certain requirements for the admission of expert testimony in medical malpractice cases, did not usurp the Supreme Court's rule making authority over matters of practice and procedure. This Court concluded that it was an enactment of substantive law because it reflected:

> "a careful legislative balancing of policy considerations about the importance of the medical profession to the people of Michigan, the economic viability of medical specialists, the social costs of "defensive medicine, " the availability and affordability of medical care and health insurance, the allocation of risks, the costs of malpractice insurance, and manifold other factors, including, no doubt, political factors—all matters well beyond the competence of the judiciary to reevaluate as justiciable issues." [461 Mich at 35, quoting *McDougall v Eliuk*, 218 Mich App 501, 518 (1996) (Taylor, P.J., dissenting).]

The Proposal contains the following policy-driven requirement:

> "In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of 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. Notwithstanding this requirement, the court may order the disbursement of all residual funds to a foundation or for any other purpose that has a direct or indirect relationship to the underlying litigation or otherwise promotes the interests of the members of the certified class."

The foregoing requirement reflects certain policy considerations to "support activities and programs that promote access to the civil justice system for low income residents of Michigan." Assisting low income individuals is a worthy goal, but how was this policy chosen as the best expenditure of funds? Why not providing food and shelter for the poor, lowering taxes, or promoting a more favorable business climate? The answers to these questions are irrelevant; the only relevant matter here is that the Proposal improperly reflects a balancing of policy considerations that fall within the exclusive purview of the Legislature.

Article III, Section 2 of the Michigan Constitution provides that:

> "The powers of government are divided into three branches: legislative, executive, and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

The Michigan Constitution vests the legislative power of the State of Michigan - i.e., the power to enact substantive law - in the Legislature. Const 1963, art 4, § 1. According to this Court:

> ""Substantive law" is defined as " [t]he part of law that creates, defines, and regulates the rights, duties, and powers of parties," Black's Law Dictionary (8th ed); whereas, "procedural law" is defined as " [t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights and duties themselves." *Id*." *People v Jones*, 497 Mich 155, 179 (2014).

The Proposal epitomizes what substantive law is: it fixes and declares the rights of class-action members with respect to their class-action settlement funds. The Proposal substantively affects the rights of the class members who, for a variety of reasons, did not claim their money. By redistributing residual (*i.e*., unclaimed) funds of the class action, it affects the rights of class action members regarding their money. And by allowing for the donation of that money to the Michigan State Bar Foundation or any other non-party to the proceedings, the Proposal would deprive those persons of the right to (or at a minimum, dictate how or to whom to redistribute) their money. Because the Proposal affects property rights of parties, the Proposal is substantive law. Court rules cannot establish, abrogate, or modify the substantive law. *Shannon v Ottawa Circuit Judge*, 245 Mich 220, 222-223 (1928).

It is not relevant that various federal courts have, for decades, approved the redistribution of unclaimed funds in the matter contemplated by the Proposal. See, e.g., *Van Gemert v Boeing Co.*, 739 F2d 730, 737 (2d Cir 1984) (noting that the district court's choice among distribution options should be guided by the objectives of the underlying litigation and the interests of the silent class members); *Nelson v Greater Gadsden Hous. Auth.*, 802 F2d 405, 409 (11th Cir 1986) (approving the use of *cy pres* to distribute unclaimed class action funds). While it may be sound policy to donate the unclaimed funds to a legal aid organization that advances similar objectives as those of the underlying class action, it is a substantive law that no court should usurp from the legislative branch of government.

We do not believe that the Proposal is procedural. The Proposal would not be an example of a general rule to "modify, amend and simplify the practice and procedure in all courts of this state." Const 1963, art 6, § 5. To the contrary, it would be an example of the product of "practice and procedure", for it addresses the ultimate disposition of the money recovered by plaintiffs in a class action. In the absence of legislation on point, only the parties to the underlying litigation should have a say as to its disposition. Other states have enacted legislation that have adopted similar policy goals to redistribute and appropriate residual class action funds, as reflected in the Proposal. See, for example, Tenn Code Ann § 23.08; SD Codified Laws § 16-2-57; Cal Code Civ Proc § 384; NC Gen Stat § 1-267.10.

Accordingly, the Proposal constitutes substantive legislation. Pursuant to Article III, Section 2 of the Michigan Constitution, therefore, the Court should adhere to its long-standing respect for the separation of powers and abstain from advancing the Proposal unless and until the Legislature enacts legislation on the topic.

II. THE PROPOSAL RAISES SIGNIFICANT STANDING CONCERNS

In Michigan, Const 1963, art 6, § 1 vests the state "judicial power" in the courts. Const 1963, art 3, § 2 expressly directs that the powers of the legislature, the executive, and the judiciary be separate. Concern with maintaining the separation of powers has caused this Court over the years to be vigilant in preventing the judiciary from usurping the powers of the political branches. Early on, the great constitutional scholar Justice Thomas M. Cooley discussed the concept of separation of powers in the context of declining to issue a mandamus against the Governor in *Sutherland v Governor*, 29 Mich 320, 324 (1874):

> "Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties."

Absent standing, the result would be to have the judicial branch of government—the least politically accountable of the branches—deciding public policy, not in response to a real dispute in which a plaintiff had suffered a distinct and personal harm, but in response to a lawsuit from a citizen who had simply not prevailed in the representative processes of government. To allow the judiciary to carry out its responsibilities in this manner is to misperceive the "judicial power," and to establish the judicial branch as a forum for giving parties who were unsuccessful in the legislative and executive processes simply another chance to prevail. To allow this authority in the judiciary would also be to establish the judicial branch as first among equals, being permitted to monitor and supervise the other branches, and effectively possessing a generalized commission to evaluate and second-guess the wisdom of their policies. As the United States Supreme Court observed in *Massachusetts v Mellon*, 262 US 447, 487-489 (1923):

> "The administration of any statute ... is essentially a matter of public and not of individual concern.... The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with the people generally.... To [allow standing under a different understanding] would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which we plainly do not possess."

Accordingly, absent standing, a court simply lacks the judicial power granted to it under the Michigan Constitution.

The Proposal does not involve the exercise of the judicial power on behalf of the class action members because making appropriations to the Michigan State Bar Foundation or other foundations provides no relief to a litigant. Nor will the *cy pres* recipients of residual class action funds have a personal stake in the outcome of the litigation because they were not even parties to it and had alleged no injury. Therefore, to provide relief to an entity that clearly lacks standing, exceeds the judicial power granted to a court under the Michigan Constitution.

In addition, as Judge Edith Jones has noted, because *cy pres* award distributions "likely violate Article III's standing requirements," the courts "should be troubled that *cy pres* distribution to an outsider uninvolved in the original litigation may confer standing to intervene in the subsequent proceedings should distribution somehow go awry." *Klier v Elf Atochem North America, Inc.*, 658 F3d 468, 480 (5th Cir 2011)(Jones J, concurring). In other words, these *cy pres* award settlements

violate the adversarial model of adjudication and the requirements of our judicial system by granting relief to nonparties who have suffered no injury. As Northwestern University Law Professor Martin Redish has correctly observed, the distribution of the *cy pres* awards to nonparties transforms the "judicial process from a bilateral private rights adjudicatory model into a trilateral process." Martin H. Redish, *et al, Cy Pres & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla L Rev, 617, 641 (2010).

Accordingly, because the judicial power granted to the judiciary cannot reasonably include the power to make appropriations to non-litigants, the Proposal is not an appropriate exercise of the judicial power granted to a court under the Michigan Constitution.

III. THE PROPOSAL UNNECESSARILY RAISES DUE PROCESS CONCERNS

Because the Proposal forces a judge to designate *cy pres* award recipients where residual class action funds remain, class members are deprived of a neutral adjudicator—a core requirement of due process. See, e.g., *In re Murchison*, 349 US 133, 136 (1955); see also Henry J. Friendly, "*Some Kind of Hearing*," 123 Univ Penn L Rev 1267, 1279 (1975). "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v A.T. Massey Coal Co*., 556 US 868, 876 (2009) (quoting *In re Murchison*, 349 US 133, 136 (1955)). For there to be a fair tribunal, the judge must be neutral, for "'no man can be a judge in his own case,' and 'no man is permitted to try cases where he has an interest in the outcome." *Caperton*, 556 US at 876 (quoting *Murchison*, 349 US at 136).

A news account from the New York Times about a decade ago highlights the problem. "Judges all over the country have gotten into the business of doling out leftover class-action settlement money," the Times reported, "sometimes to an organization only tangentially related to the subject of the lawsuit." Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES, A14 (Nov 26, 2007). Available at http://www.nytimes.com/2007/11/26/washing-ton/26bar.html. For example, there was $6 million of unclaimed settlement funds left from an anti-trust class action lawsuit brought by a group of models against their modeling agencies. *Id*. The federal judge overseeing the case interviewed applicants for the excess funds and gave such funds to organizations only "tangentially related to the subject of the lawsuit." *Id*. There has also been a case of "a newly created charity where the judges who approved the settlement and three of the plaintiff's attorneys sat as board members, each receiving tens of thousands of dollars for their services." Ted Frank, *Cy Pres Settlements*, Center for Class Action Fairness LLC, (D-15). Available at https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016_sac/writ-ten_materials/6_cy-pres_settlement.authcheckdam.pdf. In yet another case, a judge refused to recuse herself even though her husband was on the board of the Legal Aid Foundation of Los Angeles, one of the recipient charities included in the proposed class action settlement. See Ninth Circuit Appeal Over Cy Pres: *Nachsin v AOL*, Center for Class Action Fairness Blog, July 21, 2010, available at http://centerforclassactionfairness.blogspot.com/2010/07/ninth-circuit-appeal-over-cy-pres.html. "[W]hile courts and the parties may act with the best intentions, the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety". *Securities & Exchange Comm'n v Bear, Stearns & Co. Inc*., 626 F Supp 2d 402, 415 (S.D.N.Y. 2009). And if the Proposal is adopted, there is now a significant risk that the supposedly neutral adjudicator will be tempted to appropriate class action

residual funds that benefit his or her preferred charities, to the detriment of the interests of class members who receive nothing from the appropriation that the judge approves.

Even assuming that a judge does not appropriate class action residual funds that benefit his or her preferred charities, in what the New York Times described as an "unseemly" development, various charities organizations now lobby judges in order to get funds from class settlements. *Litpak, supra*. If the Proposal is adopted, organizations will have every incentive to attempt to lobby judges, threatening the neutral and independent position of judges and distorting their traditional judicial function. As recognized in In *re Compact Disc Minimum Advertised Price Antitrust Litigation*, 236 FRD 48, 53 (D Me 2006):

> "Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more " deserving" of limited funds than others; and we do not have the institutional resources and competencies to monitor that " grantees" abide by the conditions we or the settlement agreements set."

Put simply: "allowing judges to choose how to spend other people's money 'is not a true judicial function and can lead to abuses.'" *Litpak, supra*. If the Proposal is adopted, the process of identifying the recipients of such funds will create a judicial circus, where judges and attorneys are lobbied by interest groups thereby threatening the Due Process rights of the plaintiffs, and creating at least the appearance of impropriety.

CONCLUSION

For the reasons set forth above, the Proposal should not be adopted by this Court. For the protection of the Judiciary and the parties in litigation, the Chamber therefore respectfully submits that the Proposal should not be adopted by this Court.

On behalf of the Chamber, thank you for your consideration of these comments.

ED/LMM