Order

Michigan Supreme Court
Lansing, Michigan

May 10, 2019

ADM File No. 2018-02

Proposed Amendment of
Rule 3.501 of the Michigan
Court Rules

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On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.501 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[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) Any order entering a judgment or approving a proposed settlement of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of any residual funds. 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.

(E)-(I) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.501 would require 50 percent of unclaimed class action funds be disbursed to the Michigan State Bar Foundation or other distribution as deemed appropriate by the court. This proposal is a slightly modified version of a proposal submitted to the Court by the Michigan State Planning Body and Legal Services Association of Michigan.

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.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-02. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

MARKMAN, J. (*concurring*). I agree with the Court's decision to invite public comment concerning the proposed rule. In that regard, and against the backdrop of what I view as a reasonable and responsible class action system in Michigan, I write to invite comment concerning the following matters in particular:

First, whether it constitutes an appropriate exercise of this Court's rulemaking authority to expand the purpose of the class action process from the compensation of specific victims of misconduct to the funding of public and charitable programs and activities that may have no relationship to the parties or the issue in the case, however worthy and meritorious those programs and activities might be.

Second, whether it constitutes an appropriate exercise of a court's "judicial power" under the Constitution-- the authority to adjudicate particular cases and controversies-- for that court to determine which public and charitable programs and activities will become the recipients of such funds.

Third, whether there is a basis for concern that the process of identifying the recipients of such funds may become an increasingly politicized exercise, one in which the personal perspectives, loyalties, and interests of the judge or attorney become determinative and in which various forms of lobbying activities come to be undertaken by interested groups and organizations.

Fourth, whether the trial court's authority to undertake such funding determinations may have an adverse impact, or an appearance of an adverse impact, upon that court's exercise of judgment in deciding the underlying class action or the amount of damages to be awarded in such lawsuit.

Fifth, whether there can be any effective review or appellate oversight of such judicial funding decisions and, if so, by what procedures and standards.

Sixth, whether the proposed rule may disincentivize judges or lawyers from undertaking what might be more diligent, time-consuming, and costly efforts to identify unidentified claimants for class action awards.

Seventh, whether any meaningful limitation is imposed upon the funding discretion of judges who must determine that some "purpose" bears a "direct or indirect relationship to the underlying litigation or otherwise promotes the interests of the members of the certified class."

Eighth, whether there is an effective reordering of the attorney's relationship with his or her clients, beyond what is already inherent in the class action process, if substantial class action awards go not to these clients but to the funding needs of specific public and charitable programs and activities, the determination of which may have been made by the trial court with the assistance of such attorney.

Ninth, whether it is redefining of the lawyer-client relationship, or otherwise inconsistent with the Rules of Professional Conduct of this state, for an attorney in a class action to negotiate an element of a settlement of that action that is exclusively beneficial to a nonclaimant group or organization.

Tenth, whether specifically in class actions, additional procedures are necessary to ensure that the interests of claimants are fully and fairly protected rather than placed in competition with the interests of nonclaimants seeking to use the proposed rule to fund public and charitable programs and activities.

Eleventh, whatever the disposition of unclaimed funds in a class action, if claimants cannot be identified, whether that fact should have any effect on the calculation of attorney's fees.

Twelfth, however unsympathetic the losing defendant in a class action may be, whether it constitutes an appropriate sanction that such defendant be held responsible, not merely for compensating its victims, but also for the funding of public or charitable programs or activities that have been deemed to have a "direct or indirect relationship to the underlying litigation or otherwise promote[] the interests of the members of the certified class." See *Grigg v Mich Nat'l Bank*, 405 Mich 148, 219-220 (1979) (LEVIN, J., dissenting) (including as an appendix the Uniform Class Actions Rule, which provides in § 15(c)(5) that "the court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they could not be identified or located or because they did not claim or prove the right to money apportioned to them. The court[,] after [a] hearing[,] shall distribute that amount, in whole or in part, to one or more states as unclaimed property or to the *defendant*") (emphasis added).

Thirteenth, whether there is cause for concern that some losing class action defendants will view awards made to public and charitable programs and activities as a preferable "public relations" alternative to these same funds being paid to private claimants and therefore make it more likely that such defendants will prefer to negotiate in favor of these types of dispositions rather than identifying actual claimants. See., e.g, *Frank v Gaos*, 586 US ___; 139 S Ct 1041 (2019).

Fourteenth, to what extent, if any, the proposed rule will affect the prevalence or the breadth of class actions brought in Michigan, including but not limited to the incentivization of so-called "noninjury" lawsuits in which the administrative costs of identifying large numbers of small claimants may outweigh the benefits of relatively small class action recoveries.

Fifteenth, how appropriately to respond to United States Supreme Court Chief Justice John Roberts' inquiry "when, *if ever*, [a cy pres class action settlement] should be considered [and] how to assess its fairness as a general matter . . . ." *Marek v Lane*, 571 US 1003, 1006 (2013) (statement of Roberts, C.J.) (emphasis added).

Sixteenth, whether the disposition of unclaimed class action awards should be a matter determined, as here, by the court rule process-- in which public comment comes largely from the bench and bar-- or by the legislative process, in which public comment derives more broadly from its representative nature.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 10, 2019

Clerk