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Thomas A. Doyle, *Futterman Howard Ashley & Weltman, P.C.*, Chicago
(312) 427-3600

Residual Funds and the Administration of Settlements in Illinois Class Actions

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Most often when a class action settles under the Illinois Code of Civil Procedure, 735 ILCS 5/101, *et seq.*, the class members will file claim forms to participate in the settlement, those claims will be reviewed, and the fund will be disbursed accordingly. See 735 ILCS 5/2-806. But what happens if there are funds left over? For example, what if there are not enough claims to exhaust the fund? What if some claimants do not ever cash their checks? That is, despite the best efforts to distribute the settlement fund, what if there is still money remaining? The problem is especially acute when the remaining fund is not large enough to allow a second distribution to all of the claimants. An Illinois statute provides a solution to this problem and, in fact, specifies procedures that the settling parties must follow in Illinois state court class actions.

The Residual Funds Problem

The following example helps illustrate the problem that can arise. Suppose that a consumer class action led to a settlement after several years of litigation. The class was composed of 150,000 Illinois residents who had been account holders at a company. Under the order approving the settlement, \$6 million was available for distribution to class members who filed claims and each claimant would receive a check (for \$90 per claimant, or a lesser pro rata amount if enough class members filed claims). After a robust notice campaign and after a year-long claims period, 30 percent of the class (45,000 people) filed claims and received checks. As a result of a targeted follow-up notice, another 10 percent of the class (15,000 people) submitted claims and received checks. Unfortunately, many of the claimants never cashed their checks, and in the meantime, the settlement fund accrued interest. After months of follow-ups, the claims administrator and counsel were at a dead end: What to do with the remaining \$600,000 from the fund?

Around the country, courts have struggled with this same problem in class action settlements. Using the doctrine of *cy pres*, which was originally used in the law of testamentary trusts, some litigants have proposed using the residual funds from class action settlements to support worthy not-for-profit entities. The doctrine of *cy pres* has long empowered a court of equity to carry out a bequest “as nearly as it can,” according to the original purpose of the bequest, when a literal execution of a bequest becomes inexpedient or impracticable. *Kemmerer v. Kemmerer*, 233 Ill. 327, 84 N.E. 256, 261 (1908). The doctrine finds its origins in the Norman French phrase “*cy pres comme possible*,” which is literally translated to mean “as close as possible.” [Emphasis in original.] *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 588 F.3d 24, 34 (1st Cir. 2009). See also *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 707 (8th Cir. 1997); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 641 – 642 (S.D.Cal. 2011); and *Superior Beverage Company, Inc. v. Owens-Illinois, Inc.*, 827 F.Supp. 477, 478 – 480 (N.D.Ill. 1993).

Does the law require that such a *cy pres* recipient must be engaged in projects that are connected to the subject matter of the claims from the class action lawsuit? A few federal courts have adopted a narrow view of what type of entity can receive a *cy pres* award from a class action settlement. See, e.g., *In re Airline Ticket Commission Antitrust Litigation*, 307 F.3d 679, 683 – 684 (8th Cir. 2002), and *In re Lupron® Marketing & Sales Practices Litigation*, 729 F.Supp.2d 492, 494 n.5 (D.Mass. 2010). Other courts have

taken a broader view of whether the work of the cy pres recipient must be closely related to the underlying claims that led to the class action settlement. See, e.g., *In re MetLife Demutualization Litigation*, 689 F.Supp.2d 297 (E.D.N.Y. 2010); *In re San Juan DuPont Hotel Fire Litigation*, 687 F.Supp.2d 1, 3 (D.P.R. 2010); *Bachman v. A.G. Edwards Inc.*, 344 S.W.3d 260, 267 (Mo.App. 2011); and *Bettendorf v. Microsoft Corp.*, 323 Wis.2d 137, 779 N.W.2d 34, 49 – 50 (App. 2009). In federal court litigation, the Federal Rules of Civil Procedure do not contain a clear answer but a consensus seems to be emerging among the federal courts that cy pres awards from residual funds can be used for projects that improve the functioning of the justice system, even without a close connection to the underlying lawsuit. For an overview of the law as it has developed under Rule 23 of the Federal Rules of Civil Procedure, see Thomas A. Doyle, *Residual Funds in Class Actions Settlements: Using Cy Pres Awards to Promote Access to Justice*, Fed.Law., Vol. 27, pp. 26-29 (July 2010).

Illinois Law Is Clear

In Illinois, there are no reported opinions that deal with how to handle the funds that remain after a class action settlement has been fully administered. However in 2008, the Illinois Code of Civil Procedure was amended to provide guidance on this question. See 735 ILCS 5/2-807. In §2-807, “residual funds” are defined as “all unclaimed funds, including uncashed checks or other unclaimed payments” that remain in a common fund created in a class action after court-approved payments are made for class member claims, attorneys’ fees and costs, and after any reversions to a defendant that were agreed upon by the parties in the settlement. 735 ILCS 5/2-807(a). An order approving a class action settlement must provide for handling residual funds, as follows:

An order approving a proposed settlement of a class action that results in the creation of a common fund for the benefit of the class shall, consistent with the other Sections of this Part, establish a process for the administration of the settlement and shall provide for the distribution of any residual funds to one or more eligible organizations, except that up to 50% of the residual funds may be distributed to one or more other nonprofit charitable organizations or other organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of a settlement. 735 ILCS 5/2-807(b).

In §2-807, the term “eligible organization” refers to any tax-exempt entity that has existed for at least three years, that is in compliance with charitable filing requirements in Illinois, and that has “a principal purpose of promoting or providing services that would be eligible for funding under the Illinois Equal Justice Act.” 735 ILCS 5/2-807(a). The Illinois Equal Justice Act, 30 ILCS 765/1, *et seq.*, supports civil legal services (including representation and advice) in noncriminal matters to individuals with incomes that do not exceed 150 percent of the prevailing poverty guidelines. See 30 ILCS 765/10.

Thus, §2-807 provides that a trial court judge should address the residual funds problem in any order approving a class action settlement. That order should identify which not-for-profit organizations would receive a cy pres award from any residual funds. Those organizations must promote or provide access to justice to civil litigants in financial need. Section 2-807 also applies outside the context of settlements: if a plaintiff wins a judgment on the merits in a class action, the trial court judge is to address which eligible organizations will receive cy pres awards from any residual funds after the recovery has been distributed to class members. 735 ILCS 5/2-807(c).

Caveats to §2-807

There are several notable limitations on the Illinois statute.

First, the statute deals only with cy pres awards from residual funds. Section 2-807 does not deal with situations in which a cy pres award is proposed in lieu of a distribution to class members. That situation

presents its own set of issues. See, e.g., *In re Mexican Money Transfer Litigation*, 267 F.3d 743, 746 (7th Cir. 2001), and *Grimes v. Rave Motion Pictures Birmingham L.L.C.*, 264 F.R.D. 659, 666 (N.D.Ala. 2010).

Second, the statute does not require that every class action settlement must include a cy pres award for residual funds. In their settlement, parties may still agree that residual funds will revert to the defendant. See 735 ILCS 5/2-807.

Third, a trial court judge has some ability to approve a cy pres award to an entity that is not an “eligible organization” under §2-807. Up to one half of the residual funds can be awarded to an ineligible entity upon good cause shown. 735 ILCS 5/2-807(b).

Fourth, §2-807 expressly excludes any class actions against the State of Illinois or any of its political subdivisions. 735 ILCS 5/2-807(d).

And finally, while §2-807 plainly applies to class actions under the Illinois Code of Civil Procedure, some federal courts may look to the statute as proof that Illinois has a public policy favoring cy pres uses of residual funds. See *All Plaintiffs v. All Defendants*, 645 F.3d 329, 334 – 335 (5th Cir. 2011) (law of the forum state may help a federal court resolve a residual funds issue in a class action under Fed.R.Civ.P. 23).

Applications

Since its adoption, §2-807 has not been the subject of reported decisions. However, according to Bob Glaves the Executive Director of the Chicago Bar Foundation, §2-807 “has encouraged more *cy pres* awards that have made possible a number of innovative projects that help the state and federal courts, including a number of legal advice desks for different areas of the court and several court-based pro bono projects.”

Section 2-807 provides guidance that makes settlement administration simpler in Illinois class actions. As a practice guide, counsel should discuss the residual fund problem as part of their settlement negotiations. When practitioners present a settlement for court approval, they should be prepared to discuss the issue with the court. Section 2-807 provides clear provisions on what is permissible in such a provision in a settlement. Trial judges should be prepared to ask any questions necessary to ensure that a proposed settlement deals with the residual funds problem in a manner that complies with §2-807. And, as a matter of Illinois public policy, §2-807 plainly states a preference under Illinois that residual funds from class action settlements should be used to improve access to justice for all in the Illinois courts. Practical information about §2-807 (including a list of eligible organizations and sample language for settlement agreements and judgments) is available at www.chicagobarfoundation.org/cy-pres-awards/federal-court-cases.