

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

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

Expanding Access to Justice Through Class Action Residuals and Other Court Awards — A Toolkit for Litigators —

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Message to Massachusetts Litigators



Lisa C. Wood

As you know, there is a tremendous need for civil legal services for low-income people in Massachusetts. Between 2007 and 2009, the number of people whose incomes qualified them for legal services grew by 91,000. At the same time, funding for legal services has dropped dramatically, with funds from the Interest on Lawyers' Trust Accounts (IOLTA) program falling by 66% over the past three years and other sources of funding also declining.

Using the cy pres doctrine to award undistributed class action funds could go a long way toward helping the Commonwealth meet the need for legal services. Directing class action residuals to the IOLTA committee or individual civil legal aid programs is consistent with the purpose of class action lawsuits. Unnamed members of the class in a class action lawsuit generally have the same characteristics as legal aid clients — they are unrepresented and unable to assert their rights. It is therefore particularly appropriate to direct residual funds to an organization whose mission is to protect a similar class of persons. ***The SJC has determined that legal services and Massachusetts IOLTA program are appropriate recipients of class action funds under Mass. R. Civ. P. 23.***

As a litigator, you are in a unique position to direct class action residuals to IOLTA or legal services programs. You can:

- Review these materials about the cy pres doctrine and legal services.
- Look for opportunities in your class action cases to apply this doctrine to benefit civil legal aid.
- Talk with opposing counsel and your colleagues about class action residuals and their application to civil legal aid organizations.
- Look for opportunities to have information about cy pres published in local and special purpose legal publications.
- Contact the IOLTA Committee if you have any questions.

Thank you for your support.



Lisa C. Wood, Chair
Massachusetts IOLTA Committee

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.

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.”

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.”



Civil legal aid is a necessity for low-income families and individuals facing critical legal problems. Assistance with housing, family law, consumer, individual rights and other non-criminal issues helps to stabilize struggling families, secure public benefits, bring federal dollars into the Commonwealth and avoid the costs of homelessness, hunger and lack of health care. Most important, it helps keep the fundamental promise of justice for all.

In 2007, the Legal Services Corporation (LSC) completed a national study of the

civil legal needs of low-income Americans and issued a report, “Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans.” The study found that the vast majority of low-income Americans’ needs for civil legal assistance are not being met. Massachusetts legal services programs cannot provide services to almost half of eligible residents who seek assistance with serious civil legal problems. Many more are unaware of the existence of legal aid.

Massachusetts is fortunate to have a number of legal aid programs with full-time staff, including attorneys. These programs also leverage the talent and generosity of the private bar. They provide critical services that benefit poor individuals and non-profit organizations serving local communities.

However, there is a profound justice gap. The major access to justice concerns in the Commonwealth are limited resources, scarcity of legal services outside the greater Boston area and a rapidly increasing poverty population. The number of Massachusetts residents below 125% of the federal poverty line, which is the income cap for legal services eligibility, grew by 91,000 between 2007 and 2009. With close to a million Massachusetts residents eligible for free legal services, there is a huge unmet need for the kind of services that civil legal aid programs provide. Advocates are continually challenged to find resources to help people in need who otherwise would go without legal assistance.

The primary funding streams for civil legal aid in Massachusetts do not come close to meeting the need. As a result, programs are required to perform legal triage, helping those in the most dire circumstances first and doing what they can to provide brief services to others. Only a small fraction of those seeking help can be provided with full representation. The need for additional revenue for legal aid is clear.

In Massachusetts

To be eligible for legal aid, an individual must earn no more than \$13,612 a year; a family of four, \$27,937.

There are 966,000 Massachusetts residents who qualify for legal aid.

There is one legal aid lawyer for every 3,715 low-income residents.

Eastern Region

Community Legal Services And Counseling Center — www.CLSACC.org

Greater Boston Legal Services — www.GBLS.org

Legal Advocacy and Resource Center — www.LARCMA.org

MetroWest Legal Services — www.MWlegal.org

Volunteer Lawyers Project — www.VLPnet.org

Central/Western Region

Legal Assistance Corporation of Central Massachusetts — www.LACCM.org

Massachusetts Justice Project — www.MJP.org

Northeast Region

Children's Law Center of Massachusetts — www.CLCM.org

Merrimack Valley-North Shore Legal Services — www.MVlegal.org

Neighborhood Legal Services — www.neighborhoodlaw.org

Southeast Region

South Coastal Counties Legal Services — www.SCCLS.org

Statewide Programs

Center for Law and Education — www.CLEweb.org

Center for Public Representation — www.CenterforPublicRep.org

Disability Law Center — www.DLC-MA.org

Massachusetts Advocates for Children — www.MassAdvocates.org

Massachusetts Law Reform Institute — www.MLRI.org

National Consumer Law Center — www.NCLC.org

Prisoners' Legal Services — www.MCLS.net

Massachusetts IOLTA Program

A Deserving Beneficiary of Court Award Funds



The Massachusetts IOLTA Committee, created by the Supreme Judicial Court of Massachusetts in 1985, is the largest funding source for civil legal aid programs in the Commonwealth. The Committee distributes funds to the Massachusetts Legal Assistance Corporation, the Massachusetts Bar Foundation and the Boston Bar Foundation, which in turn make grants to non-profit organizations that provide legal aid to approximately 100,000 Massachusetts residents and family members each year.

- Under the Interest on Lawyers' Trust Accounts (IOLTA) program, attorneys hold short term or modest client funds in pooled IOLTA accounts. Interest from these accounts is used to fund access to justice initiatives and civil legal services programs in Massachusetts.
- The Committee has been entrusted with administering these funds by the Supreme Judicial Court and, since 1985, has distributed more than \$253 million to Massachusetts non-profit organizations providing civil legal services.
- IOLTA funds support nearly 100 independent non-profit legal aid providers throughout the state. Their clients include victims of domestic violence, homeless families, persons denied access to necessary health care services, victims of discrimination, children in need of special education, families and individuals who are targets of consumer fraud and the elderly.
- The Massachusetts IOLTA Committee is a leader in the national IOLTA community and has an impeccable reputation among the Massachusetts legal community, including state, local and minority bar associations.
- The Massachusetts IOLTA Committee does not file lawsuits or represent parties in court, and thus is free of any potential conflict that otherwise might arise for the court or the defendant in a class action.
- With support from the Supreme Judicial Court, and with the continued selfless contributions of our thousands of lawyers and two hundred participating financial institutions, the IOLTA Committee will continue to play an important role in the critical struggle for justice.



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



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.

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 a 2010 case, including Greater Boston Legal Services and Suffolk University Law School. 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.

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 that there likely will be some amount of unclaimed 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:

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

DEFENDANT

CASE NO. _____

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____

Massachusetts Settlement Agreement

Excerpts from Sample Agreement

- 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
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