

RE: **Proposed Amendment to Rule 23
of the Hawai'i Rules of Civil Procedure**

The Supreme Court of Hawai'i seeks public comment regarding a proposal to add a new subsection (f) to Rule 23 of the Hawai'i Rules of Civil Procedure (HRCPP). The proposal would establish a presumption that organizations eligible to receive funds from the Indigent Legal Assistance Fund would be appropriate beneficiaries of residual funds in class action suits. The proposed new subsection (f) to HRCPP Rule 23, including an explanatory memo, are attached hereto.

Comments about the proposed rule should be submitted, in writing, **no later than Wednesday, September 8, 2010**, to the Judiciary Public Affairs Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 539-4801, or via the Judiciary's website at www.courts.state.hi.us.

Attachment

**PROPOSED AMENDMENT TO
HAWAI‘I RULES OF CIVIL PROCEDURE**
(New material is underlined)

Rule 23. CLASS ACTIONS.

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(f) Distribution. Prior to the entry of any judgment under subdivision (c)(3) or the approval of any compromise under subdivision (e), the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to judgment. The court shall set a date when the parties shall report to the court the total amount that was actually paid to class members. After the report is received, the court shall direct the defendant, by order entered on the record, to distribute the sum of the unpaid residue that remains after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Unless governing law otherwise requires, it shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds, but there shall be a presumption that the residual funds shall be distributed to one or more nonprofit organizations eligible to receive assistance from the indigent legal assistance fund under HRS section 607-5.7 (or any successor provision) or the Hawai'i Justice Foundation for distribution to one or more of such organizations.

**Proposed Amendment to Rule 23 of the Hawai‘i Rules of Civil Procedure to provide for
distribution of class action residual fund to legal aid providers.
(5/4/10)**

A. Proposal Summary

The Access to Justice Commission proposes an amendment to Rule 23 of the Hawai‘i Rules of Civil Procedure (HRCP) to provide direction to parties and judges regarding the distribution of residual funds in class action proceedings. The proposed Rule 23 amendment would create a presumption that organizations that are eligible to receive funds from the Indigent Legal Assistance Fund (ILAF) would be appropriate beneficiaries of the residual funds in cases where such a distribution would not be contrary to law.

B. Definition of Cy Pres

Cy Pres, meaning “as near as possible,” was originally developed as a means of distributing a trust fund whose primary purpose could not be fulfilled. The *cy pres* doctrine enables funds to be distributed to their “next best” use. Today, the *cy pres* doctrine more commonly allows for the reallocation of class action residual funds where not all funds can be distributed to class claims. The funds become residual where members cannot be located, class members fail to submit claims, distribution is not economically feasible, or the court determines that the benefit of the award to individual class members is so small that it will provide merely a negligible benefit to such members. Under the *cy pres* doctrine, the court may reallocate the residual funds to appropriate charitable causes, for purposes similar to the interests of the class.

C. Proposed Rule

Add new subsection (f) entitled “Distribution” to Rule 23 of the Hawai‘i Rules of Civil Procedure

(f) Distribution. Prior to the entry of any judgment under subdivision (c)(3) or the approval of any compromise under subdivision (e), the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to judgment. The court shall set a date when the parties shall report to the court the total amount that was actually paid to class members. After the report is received, the court shall amend the judgment to direct the defendant to distribute the sum of the unpaid residue that remains after the payment of all approved class member claims, expenses, litigation costs, attorneys’ fees, and other court-approved disbursements to implement the relief granted. Unless governing law otherwise requires, it shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds, but there shall be a presumption that the residual funds shall be distributed to one or more nonprofit organizations eligible to receive assistance from the indigent legal assistance fund under HRS section 607-5.7 (or any successor provision) or the Hawaii Justice Foundation for distribution to one or more of such organizations.

D. Implementation of Rule.

The new section of Rule 23 establishes a presumption that any residual funds in class action settlements or judgments shall be directed to organizations that improve access to justice, unless such a direction would be inconsistent with applicable law. It is important to note that this is a presumption which may be rebutted in a particular case if the “next best” use of the funds is to distribute them to another organization or purpose. In addition, this is a procedural rule which would not override any provision of substantive law that would require a contrary disposition of such residual funds.

E. Policy / Purpose Supporting Amendment

Currently, HRCP Rule 23 is silent as to distribution of residual funds in the event that the recovery cannot be fully distributed to class members under a class action settlement. Therefore, in the event that the parties fail to address the *cy pres* issue and there are residual funds that cannot be distributed to the intended recipients, the court must determine how to distribute such residual funds. If unaddressed or overlooked, the residual funds can be retained by the defendant, resulting in an unintended windfall for the defendant.

The Supreme Court should provide direction as to the distribution of residual funds in class action proceedings to avoid such a windfall for the defendant. The proposed amendment to Rule 23 requires the defendant to, upon a date certain, distribute any residual funds to nonprofit organizations that provide civil legal services, unless such a distribution is contrary to applicable law. Distribution of residual funds to nonprofit organizations that are eligible to receive ILAF funding is consistent with the underlying purpose of class actions and such recipients are appropriate beneficiaries of *cy pres* awards. There is no requirement that there be a substantive nexus between the interests of the class and the interests served through the distribution. Regardless of the basis for the class action, one underlying premise for class actions is to make access to justice a reality for those who would otherwise be unable to obtain the protections of the court system, such as those with claims of negligible value to an individual claimant but of substantial value in the aggregate. Without Rule 23, class members would be unable to assert their claims or secure any form of judicial relief. Likewise, providing legal assistance to individuals through non-profit legal service providers allows such individuals increased opportunities for access to justice in much the same way Rule 23 enables class members the opportunity to pursue their cause of action.

There is a need to ensure access to justice for individuals with civil needs that would likely otherwise go unmet. Nonprofit organizations providing access to justice have been presented with financial challenges, with severely reduced State, City, federal and private contributions, while needs continue to grow for those they serve. Providing increased funding to support the efforts of these organizations will serve a compelling public purpose.

F. Contrary Laws

There may be instances where applicable substantive law provisions limit or prohibit the distribution of funds in accordance with the presumption to be created by this amendment to Rule 23, which is a procedural rule that does not override applicable provisions of substantive law. For example, HRS § 480-13 provides that, in class actions brought under HRS Chapter 480, remedies may be granted under HRS § 480-13(a) and (b), provided that, under HRS § 480-13(c)(8), “in the event damages in a class action or de facto class action remain unclaimed by the direct or indirect purchasers, the class representative or the attorney general shall apply to the court and such funds shall escheat to the State upon showing that reasonable efforts made by the State to distribute the funds have been unsuccessful.”

G. Other State Rules

State	Rule Brief Summary of Rule	Effective Date	Amt received to Date	Notes/ Implementation
IL	<p><i>Illinois Compiled Statutes Annotated, § 735 ILCS 5/2-807</i></p> <p>Adopted by the IL legislature Establishes a presumption that residual funds in class actions will go towards organizations that improve access to justice for low-income Illinois residents. Courts have the discretion to award up to 50% of the fund to other organizations that serve the public good as part of a settlement if the court finds good cause to do so, but at least 50% of these funds must go to support legal aid.</p> <p>*Note: <i>Requires</i> a portion of residual funds to go to legal aid</p>	7.1.08	Over 1 million	Educational materials and sample language being distributed to judges, class action lawyers and other relevant parties
MA	<p><i>Rule 23 of the Massachusetts Rules of Civil Procedure</i></p> <p><i>Adopted by MA Sup. Ct.</i></p> <p>Provides for disbursement of residual funds to nonprofit organizations 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 MA IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of MA.</p>	1.1.09	None yet	Brochure for attorneys
NC	<p><i>General Statutes of North Caroline, §1-267.10</i></p> <p><i>Adopted by the NC legislature</i></p> <p>§1-267.10 Requires the court to determine the total amount to be payable to class members, if all class members are paid the amount to which they are entitled, prior to entering a judgment or</p>	10.1.05	\$18,077	Serious effort to educate judges and/or lawyers remains to be forthcoming in the near future

	<p>order approving settlement in a (Rule 23) class action.</p> <p>Also requires the court to set a date when the parties are to report the total amount that was actually paid to the members. After the report is received, the court directs the defendant to pay the residual amount to the Indigent Person's Attorney Fund and to the NC State Bar for the provision of civil legal services for indigents, unless it orders otherwise consistent with its obligations under Rule 23 of the NCRCP.</p>			
TN	<p><i>Tennessee Code Annotated, §16-3-821, adopted by the Tennessee legislature</i></p> <p>§16-3-821 creates the TN Voluntary Fund for Indigent Civil Representation, which fund is authorized to receive the unpaid residuals from settlements or awards in class actions in state and federal courts, if certified as a class action under TNRCF or FRCP Rule 23.</p>	9.1.06	None to date	A campaign to implement the program is in process.
WA	<p><i>Rule 23 of the WA Rules of Civ Pro</i></p> <p><i>Adopted by the Supreme Ct of WA</i></p> <p>Requires orders entering a judgment or approving a settlement of class action certified under Rule 23 to provide for the disbursement of any residual funds.</p> <p>Where the claims process has been exhausted and residual funds remain, at least twenty-five percent (25%) of the residual funds shall be disbursed to the Legal Foundation of WA ("LFW") to support programs that promote access to the civil justice system for low income residents of WA.</p> <p>The court may disburse the balance of any residual funds beyond the minimum 25% to the LFW or any other entity for purposes that have a relationship to the objectives of the underlying litigation or</p>	1.3.06	<p>\$218,443 between 1/1/08 and 6/6/09 (out of total cy pres receipts of \$511,363).</p> <p>Disbursements have ranged from \$12 to \$93,836.</p>	<p>Work to educate judges and lawyers about new rule</p> <p>The first few checks came in well over a year after the rule was effective.</p>

	<p>promote the substantive or procedural interests of members of the class.</p> <p>*Note: <i>Requires</i> a portion of residual funds to go to legal aid</p>			
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IL: 735 ILCS 5/2-807

See Public Act 085-0479

MA

Rule 23 of the Massachusetts Rules of Civil Procedure

- “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.”

NC: Subchapter VIII of Chapter 1 of the General Statutes to add new Article 26B, which reads, in part:

- “Prior to the entry of any judgment or order approving settlement in a class action established pursuant to Rule 23 of the Rules of Civil Procedure, the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise consistent with its obligations under Rule 23 of the Rules of Civil Procedure, shall direct the defendant to pay the sum of the unpaid residue, to be divided and credited equally, to the Indigent Person’s Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents.”

TN: Tennessee Code Annotated, Title 16, Chapter 3, Part 8

- Tennessee Voluntary Fund for Indigent Civil Representation authorized to receive contributions from several sources, including: “The unpaid residuals from settlements or awards in class action litigation in both state and federal courts, provided any such action has been certified as a class action under Rule 23 of the Tennessee Rules of Civil Procedure or Rule 23 of the Federal Rules of Civil Procedure;”

WA

Rule 23

- “Any order entering a judgment or approving a proposed compromise 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 twenty-five percent (25%) of the residual funds shall be disbursed to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents of Washington State. The court may disburse the balance of any residual funds beyond the minimum percentage to the Legal Foundation of Washington or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.”