
IN THE SUPREME COURT OF MISSOURI

No. SC84213

**IN RE ANCILLARY ADVERSARY PROCEEDING QUESTIONS:
STATE TREASURER, NANCY FARMER,**

Appellant,

v.

**SHARON MORGAN, RECEIVER,
DEBORAH CHESHIRE, CIRCUIT CLERK AND THE COUNTY OF COLE,**

Respondents.

**BRIEF OF AMICUS CURIAE NATIONAL CONSUMER LAW CENTER IN
SUPPORT OF RESPONDENT'S SUGGESTIONS FOR DISTRIBUTION OF
PROPERTY***

**NATIONAL CONSUMER LAW CENTER
BY ITS ATTORNEY,**

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* Pursuant to Rule 84.05(f) of the Rules of the Missouri Supreme Court, all parties to this appeal have consented to the National Consumer Law Center's filing of this brief. Amicus has prepared a certificate of consent that is signed by its counsel and submitted with the certificate of service that accompanies this brief.

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INTRODUCTION

Respondent Judge Thomas J. Brown has filed Suggestions Relating to The Application of Receivership Funds for Legal Services and Other Purposes in the above referenced action. The National Consumer Law Center files this brief of *amicus curiae* in support of the use of the *cypres* method of distribution of residual class action or receivership funds as the most effective and appropriate means to accomplish the primary purposes of the applicable consumer protection laws. Such a result is consistent both with the public policy embodied in said laws, as well as with the legal and equitable requirements of Missouri practice and procedure.

INTEREST OF AMICUS CURIAE

The National Consumer Law Center (“NCLC”) is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. For over 30 years the NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support.

The NCLC staff provides a wide range of direct assistance to consumer law attorneys, including consultation on legal issues, co-counseling, expert testimony, legal research, continuing legal education, widely respected treatises, and technical

support. NCLC gives priority to providing case assistance and training targeted at legal aid and pro bono attorneys representing low-income clients.

NCLC is a nonprofit corporation founded in 1969 at Boston College School of Law. Under IRS laws, the Center is a 501(c)(3) and legal aid organization. Our staff of 16 attorneys combines over 160 cumulative years of specialized consumer law expertise. We address the legal problems faced daily by low-income and financially distressed families ranging from illicit contract terms and charges, home improvement frauds, repossessions, debt collection abuses, usury, mortgage equity scams, and bankruptcy to utility terminations, fuel assistance benefit programs, and utility rate structures, as well as many subjects in between.

NCLC is author of the widely praised sixteen-volume Consumer Credit and Sales Legal Practice Series. These treatises on consumer law are sent to most legal aid offices throughout the country, are widely used by the private bar, and are available by subscription. They are supplemented by NCLC Reports, issued twenty-four times each year in four separate editions.

NCLC was the Federal Trade Commission's designated consumer representative in promulgating its Trade Regulation Rules on Creditor Remedies, 16 C.F.R. 444, and Preservation of Consumers' Claims and Defenses, 16 C.F.R. 433. The Center's Model Consumer Credit Code was the foundation for the federal Fair Debt Collections Practices Act, 15 U.S.C. § 1692 *et seq.*

NCLC staff has served on a number of committees of the National Conference of Commissioners on Uniform State Laws, the American Bar Association Business Law Section, and on the Energy and Transportation Task

Force of the President's Council on Sustainable Development. More NCLC staff has been appointed by the Board of Governors of the Federal Reserve System to their statutory Consumer-Industry Advisory Committee than any two other organizations combined. Present and former NCLC Staff have held or hold public, appointed positions of authority.

NCLC is recognized nationally as a preeminent expert in consumer credit legal analysis, and has drawn on this expertise to provide information, analysis and market insights to federal and state legislatures, administrative agencies and the courts for over 30 years. In view of its widely recognized expertise, NCLC frequently is asked to appear as *amicus curiae* in consumer law cases before trial and appellate courts and does so in appropriate circumstances.

NCLC files this *amicus* brief solely in support of the general proposition that the purposes of Missouri's consumer protection laws, including state utility regulation, are best served when unclaimed funds collected pursuant to the enforcement of said laws are dispersed to the appropriate legal service and other public interest agencies and organizations in Missouri according to *cy pres* principles, and that the Court has the equitable authority to do so consistent with the Uniform Disposition of Unclaimed Property Act ("the Unclaimed Property Act"), R.S. Mo. § 447.500 et. seq, and the Judicial Escheats Act, R.S. Mo. § 470.270 et seq. NCLC disavows any financial interest in the residual receivership funds specifically at issue in these proceedings.

ARGUMENT

I. THE PURPOSES OF CONSUMER PROTECTION STATUTES ARE BEST SERVED BY DISTRIBUTION OF UNCLAIMED CLASS ACTION FUNDS UNDER THE *CY PRES* DOCTRINE.

When deciding which method to use to distribute funds collected pursuant to the enforcement of applicable consumer protection laws, a court should consider whether the ultimate allocation plan is consistent with the policies reflected by the underlying statute. Consumer protection laws are meant to ensure that the choices given to consumers in the marketplace are unimpaired by fraud or withholding of material information, and that the power differential between consumers and commercial enterprises is equalized. See Averitt & Lande, *Article: Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 *Antitrust L.J.* 713 (1997). They seek to improve the functioning of the marketplace by making it unprofitable to operate dishonestly. *Id.* Thus, when attempting to vindicate rights set forth in a consumer protection statute, like those at issue in the present case, a court should focus on the policies of fundamental fairness in the marketplace, deterrence of fraud, and disgorgement of illegally obtained profits.

The class action method of litigation often has been used in order to fully effectuate the above objectives, as well as to compensate all injured parties. Class actions ensure that consumers will be protected even when many, if not most, injured parties will not actively participate in the court proceedings, whether because they cannot be located, or because their injury is too small to make

participation desirable. As the National Association of Consumer Advocates has stated in the introduction to its Standards and Guidelines for Litigating and Settling Consumer Class Actions, 176 F.R.D. 375, 377 (1997):

Consumer class actions serve an important function in our judicial system and can be a major force for economic justice. They often provide the only effective means for challenging wrongful business conduct, stopping that conduct, and obtaining recovery of damages caused to the individual consumers in the class. Frequently, many consumers are harmed by the same wrongful practice, yet individual actions are usually impracticable because the individual recovery would be insufficient to justify the expense of bringing a separate lawsuit. Without class actions, wrongdoing businesses would be able to profit from their misconduct and retain their ill-gotten gains. Class actions by consumers aggregate their power, enable them to take on economically powerful institutions, and make wrongful conduct less profitable.

Fulfillment of these policy goals means that damage awards should not be confined to the claiming class members. There are often significant funds remaining after the class certification and election process has been completed, but it is often not possible or practically feasible to locate the remaining members of the class. Yet, these absent class members have a superior equitable claim to the residual funds, and should be the “focal point for deliberations with respect to [the

funds'] proper disposition.” *In re Folding Carton Antitrust Litigation*, 557 F.Supp. 1091, 1107 (N.D.Ill. 1983); See also *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481-82 (1980).

The four options usually considered for distribution of residual funds in consumer class action cases are: (i) reversion to the defendant, (ii) distribution to existing claimants, (iii) escheat to the state, and (iv) *cy pres* distribution. See H. Newberg, 2 Newberg on Class Actions §§ 10.13 – 10.25; also Kevin Forde, *What Can a Court Do with Leftover Class Action Funds? Almost Anything!*, *The Judges' Journal*, Summer 1996, p. 20 (Appendix A to this brief). Although any one of the alternate methods may be most appropriate in special limited circumstances, the *cy pres* distribution most frequently and directly satisfies the deterrence and disgorgement goals of consumer protection statutes, as well as the goal of benefiting the absent class members and consumers as a whole.

Reversion to the defendant does not satisfy any of the consumer protection goals nor does it compensate class members. Rather, it allows the defendant to keep the fruits of its wrongdoing. It may also create an incentive for the defendant to make the process of locating class members and distributing damages a difficult one. See Brad Seligman and Jocelyn Larkin, *Fluid Recovery and Cy Pres: A Funding Source for Legal Services*, <http://www.impactfund.org/CyPres2000FED.html> (visited April 2002) (Appendix B). Reversion, therefore, is only appropriate in limited cases where the defendant acted in good faith, and/or when punitive damages are disallowed pursuant to statute. See, e.g. *Wilson v.*

Southwest Airlines, Inc., 880 F.2d 807 (5th Cir. 1989) [an example of appropriate reversion in a Title VII action].

Similarly, distribution to existing claimants satisfies the goals of deterrence and disgorgement, but does not benefit absent class members or consumers as a group. Courts have considered this option fundamentally unfair, as it provides a windfall to class members who have already been fully compensated. See *Wilson*, 880 F.2d at 811-12; *Folding Carton*, 557 F.Supp at 1107. The courts also express concern that the interests of the claiming class members will be at odds with the absent class members, whom they are supposed to represent, and that such a method may encourage bringing class actions particularly likely to result in uncollected damages. *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815 (2nd Cir. 1977).

Distribution to existing claimants has been found to be appropriate only in special circumstances, such as where claimants with non-economic damages had originally accepted overly conservative awards due to the court's uncertainty regarding the number of economic claims. See *In re Miamisburg Train Derailment Litigation*, 92 Ohio App. 3d 304 (1993).

The third option, escheat, or deliverance of abandoned property to the state, can be broken into two categories: earmarked and general. Earmarked escheat refers to an award of the funds toward a specific government agency in a position to assist citizens similar to the injured class. If used properly, this option can benefit consumers greatly, and satisfy the deterrence and disgorgement goals, with low administrative costs. It has been looked on favorably, but has rarely been applied. See, e.g. *Market St. Ry Co. v. Railroad Commission*, 28 Cal.2d 363 (1946), [an

example of earmarked escheat]. The reluctance of courts to rely upon earmarked escheats apparently stems from concerns that the funds will be used for agency purposes unrelated to the subject of the lawsuit and, therefore, not benefit class members or members of the public similar to them at all. See McCall, Sturdevant, Kaplan and Hillebrand, *Greater Representation for California Consumers – Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 Hastings L.J. 797, 809 (1995).

The California Supreme Court has described general escheat, meaning application of the funds to the general treasury, as “the least focused compensation to the class”. *State of California v. Levi Strauss & Co.*, 41 Cal.3d 460, 475 (1986).¹ This option holds little promise of benefiting the absent class members or people similar to them, as the funds may be used for virtually any governmental purpose, with no attempt to realize the objectives of the underlying substantive law. *Id.* “The only advantage of general escheat is ease of administration...[and, it] is usually regarded as a last resort.” *Id.* General escheat is also considered lacking in deterrent power. Seligman and Larkin, *supra*.

The final option, *cy pres* distribution, originated in the field of trusts, as a way of preventing the failure of a testamentary charitable gift by allowing “the next best use of the funds to satisfy the testator’s intent as near as possible.” *Democratic Central Comm. v. Washington Metro. Area Transit Comm’n*, 84 F.3d 451, 455 n.1

¹ *State of California* provides an exhaustive analysis of the various forms of “fluid recovery” distribution, their pros and cons, and the circumstances in which each would be appropriate.

(D.C.Cir. 1996). In the context of a class action, the courts are, in essence, holding the residual funds in trust for the non-claiming class members.

The application of *cy pres* thus permits distribution to charitable or public service organizations that will use the funds to “[combat] harms similar to those that injured the class members.” *Jones v. National Distillers*, 56 F.Supp.2d 355, 358 (S.D.N.Y. 1999); See also *In re Motorsports Merchandise Antitrust Litigation*, 160 F.Supp.2d 1392, 1394 (N.D.Ga. 2001). The court in *Pray v. Lockheed Aircraft Corp.*, 644 F.Supp. 1289, 1302 (D.C. 1986), went further with this idea, and stated that punitive damages arising from a class action would be more appropriately disbursed to charitable organizations rather than class members, as these organizations would benefit the public “on whose behalf [the wrongdoer] is punished” (internal quotation omitted).

Cy pres has gained in popularity throughout the years to become the preferred method of distribution by federal courts. Although the goal of deterrence can be achieved simply through a punitive damage award, the distribution of funds to charitable or public service organizations serving consumers goes one step further by assisting in the *prevention* of future harm of a similar nature. The objectives of the consumer protection statute are fulfilled to the best extent possible, as these organizations will continue to strengthen consumer power and keep the market honest. Thus, the ultimate goals of compensation are fulfilled, and the objectives of the substantive law are given greater force.

Several federal courts have broadened the range of acceptable recipients, and concluded that legal organizations and law schools are particularly

attractive recipients of *cy pres*. See Jones, 56 F.Supp.2d 355; *In re Wells Fargo Securities Litigation*, 991 F.Supp. 1193 (N.D.Cal. 1998); *Drennan v. Van Ru Credit Corp*, 1997 U.S. Dist. LEXIS 7776 (N.D.Ill. 1997). Legal services organizations are ideal recipients, as they serve to protect the rights of members of the public lacking the resources to acquire private representation. In the case of consumer abuses, including violations of state utility regulations, this same sector of the public is particularly vulnerable, and thus, an appropriate focus for the distribution of residual receivership funds. *Superior Beverage Co. Inc. v. Owens-Illinois, Inc.*, 827 F.Supp. 477 (N.D.Ill. 1993), is an excellent example of the flexibility of the *cy pres* doctrine, allowing the court to award funds to a diverse group of public interest recipients, including the University of Chicago’s Mandel Legal Aid Clinic, the ACLU of Illinois and the San Jose Museum of Art.² Distribution that is “broadly consistent with the [underlying] statute, rather than very narrow and geographically limited” is considered suitable. Seligman and Larkin, *supra*.³

² The decision also lists several other pertinent examples of federal *cy pres* distribution: *In re Ocean Shipping Antitrust Litigation*, MDL No. 395 (S.D.N.Y. July 29, 1991); *In re Corrugated Container Antitrust Litigation*, MDL #310, 53 Antitrust & Trade Regulation Reports 711 (S.D.Tex. Oct. 6, 1987); *Vasquez v. Avco Financial Services*, No. NCC 11933 B (Los Angeles Super. Ct. April 24, 1984); *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, CA No. 41774 SC (E.D.Pa. Feb. 28, 1978); *State of Illinois v. J.W.Petersen Coal & Oil Co.*, No. 71 C 2548 (N.D.Ill. March 15, 1976).

³ See also *In re Motorsports*, 160 F.Supp.2d at 1396-99 (Court distributed funds among 10 public service organizations, including the American Red Cross and the Atlanta Legal Aid Society, attempting to indirectly benefit class of NASCAR racing fans); *Gilleland v. Blue Cross & Blue Shield of Maryland*, Baltimore County Circuit Court, Case No. 03-C-95-011918 (Order provided for distribution to Legal Aid Bureau, University of Maryland Public Interest Law Project, Greenebaum Cancer Center and John Hopkins Oncology Center).

Various state bar associations also have thrown their support behind *cy pres* distribution of residual funds. The Philadelphia Bar Association encouraged the use of *cy pres* distribution in an online memo in 1994, and stated that the Philadelphia Bar Foundation, which provides legal services funding, should be considered an appropriate beneficiary. *Memorandum Regarding Residual Settlements in Class Action Cases*, <http://www.philabar.org/member/bar/memo.asp> (October 6, 1994) (Appendix C). The State Bar of Michigan also recently approved this method, citing to the Michigan Appeals Court case of *Cicelski v. Sears, Roebuck & Co.*, 132 Mich. App. 298 (1984), and suggested their Access to Justice Development Fund as beneficiary. Bradley Vauter, *The Next Best Thing*, Michigan Bar Journal (July 2001) (Appendix D).⁴

By compelling general escheat, the Unclaimed Property Act and the Judicial Escheats Act would not contribute to the purposes of consumer protection laws, as no effort is made to ensure that the spirit of the trial court's judgment (much like the intent of the testator) is followed when applying the funds. The Court would satisfy the objectives of consumer protection laws by following the lead of the federal courts and other state courts in permitting the distribution of the receivership funds in question at the informed discretion of the trial court judge who is most familiar

⁴ The State of Texas currently is considering an amendment to their civil procedure code, supported by the State Bar of Texas's Access to Justice Commission ("TATJC"). The TATJC proposed amendment would require courts to issue findings of fact as to whether residual (or "undistributable") funds in any class action should be used to fund legal services for the poor, and if so, to remit such funds to the Texas Equal Access to Justice Foundation. If the Court wishes to keep updated on the status of this proposed amendment, it may visit the TATJC website at <http://www.texasatj.org>.

with the facts of the case. The policy goals of deterrence and disgorgement of funds would be achieved, as well as serving the needs of consumers similarly situated to those represented in the present action.

II. THE BROAD EQUITABLE POWERS OF THE COURT ARE NOT OVERCOME BY THE UNCLAIMED PROPERTY ACT.

The cases at issue involve complex matters of state and federal constitutional law. NCLC is not an expert on Missouri law, and relies upon other interested local parties to make the relevant arguments. NCLC asserts, however, that trial court judges are the best evaluators of the proper use of residual class action or receivership funds. Of particular relevance to the current proceedings, and the analysis of the Unclaimed Property Act, is a New York court's discussion of the propriety of that state's Abandoned Property Law's application to class action settlement funds in *Friar v. Vanguard Holding Corp.* 509 N.Y.S.2d 374, 376 (1986). The Court found that application of abandoned property statutes in the class action context, though not an abuse of discretion, was not required. *Id.* A decision by the original trial court judges in the present action to distribute the residual class action funds to appropriate legal service and other public interest organizations able to effectuate the purposes of the underlying consumer protection laws would also be within this discretionary power, and would provide a just and equitable end result to the proceedings.

CONCLUSION

Consumer protection laws, including utility rate regulations, require flexibility and broad-mindedness in the application of damage awards if consumers are to truly benefit from them. Legal services organizations are particularly appropriate recipients in consumer class action cases, where many class members remain unrepresented. Legal services work to protect the rights of people who would normally go without legal representation and might therefore never assert their rights. Regardless, trial court judges are in the best position to determine who has a superior equitable claim on the funds, and which recipients can best carry out the intent of their judgment.

The federal courts are well settled that *cy pres* distribution is the most appropriate use of residual funds, and state courts, when they have the opportunity, have followed their lead. We urge the Supreme Court of Missouri to do the same, and allow the respondent judges to distribute the residual receivership funds in question to Missouri legal service agencies and other organizations as they see fit.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that on this day, May 22nd, 2002, I caused one copy of the foregoing National Consumer Law Center amicus curiae brief, and one disk containing the foregoing brief, to be served upon the following counsel of record as indicated:

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I hereby further certify that the foregoing brief complies with the limitation contained in Rule 84.06(b) and contains 3,052 words and that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

I hereby also certify that all parties to this appeal, through their counsel, have consented to the National Consumer Law Center's filing of this amicus brief.

Stuart T. Rossman