IN THE
SUPREME COURT OF MISSOURI

No. SC84212

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

Appellant,

v.

JACKIE BLACKWELL, RECEIVER,
DEBORAH CHESHIRE, CIRCUIT CLERK AND THE COUNTY OF COLE,

Respondents.

BRIEF OF *AMICI CURIAE* LEGAL SERVICES OF EASTERN MISSOURI, LEGAL SERVICES OF SOUTHERN MISSOURI AND MID MISSOURI LEGAL SERVICES

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STATEMENT OF FACTS

The funds at issue in this lawsuit were created in the litigation styled *Southwestern Bell v. Public Service*, CV189-0808CC and *Office of Public Counsel v. Public Servic*e, CV 189-0809CC.

On June 20, 1989, the Public Service Commission ("PSC") ordered Southwestern Bell ("Bell") to reduce its rates by $101, 232,000 annually. Bell and the Office of Public Counsel filed separate petitions in the Circuit Court of Cole County for a writ of review of the PSC order pursuant to § 386.510 RSMo and for a stay under §386.520. RSMo Both actions were immediately consolidated. L.F. 32.

On September 5, 1989, Judge Thomas J. Brown, III, upon the basis of petitions for review filed by Bell and the Office of Public Counsel, entered a stay of a decision of the PSC rate reduction order. L.F. 18-21. He then ordered Bell to pay into the registry of the court that portion of the telephone charges collected that would be in excess of rates that would have been collected but for the stay. L.F. 40-41. On September 26, 1989, Judge Brown dismissed the petitions for reviews with prejudice pursuant to the terms of a settlement agreement reached by Bell, the Office of Public Counsel and PSC. L.F. 48-49. However, following a motion filed by intervenors MCI, AT&T and Comptel, Judge Brown entered another order 29 days later, which among other things clarified that his September

26, 1989 order did not approve the settlement agreement, did not set aside the stay order and did not dispose of the requirement that Bell pay into the registry of the court the excess telephone charges collected by Bell between July 1, 1989 and September 26, 1989. L.F. 54-55. Bell immediately sought a writ of prohibition. It argued that §386.520 gives the circuit court jurisdiction over a stay only during the pendency of the writ of review and allows distribution of the proceeds from a stay only upon the affirmation of the underlying PSC order. A preliminary rule in prohibition was issued by the Court of Appeals but then quashed. The court found that the dismissal of the writs of review by Bell and Public Counsel did not preempt the continuing and inherent jurisdiction of the circuit court over the fund impounded "in custodia legis."

The jurisdiction of the circuit court over the person of the utility as well as the subject matter of the stay … continues after final decision of the legality of the rate order. It is a jurisdiction to adjudicate, moreover, both inherent and in this case also invested by statute. It is a power inherent in every court of justice, as long as it retains control of the subject-matter and of the parties, to restore what has been paid under the compulsion of legal process when the order has been set aside and justice requires restitution. *United States v. Morgan*, 307 U.S. at 197; *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 225 (8th Cir 1970), cert. denied 402 U.S. 999 (1971). It is a power inherent in every court of justice, as well 'to make an order which because of the nature of the case may be essential to effectively exercise whatever jurisdiction of the court may be…'

limited or plenary. *State ex. rel. Kansas City v. Public Service Comm'n.*, 244 S.W.2d [110] at 115 [Mo. 1951]"

State ex rel. Southwestern Bell Telephone v. Brown, 1990 Mo. App. Lexis 19 at 4 (Mo. App. W.D. 1990)

A dissenting judge certified the case to this Court citing a conflict with *State ex. rel Mcmullin v. Satz*, 759 S.W.2d 839 (Mo. banc 1988). This Court, however, like the court below, quashed the preliminary rule in prohibition. *State Ex. Rel Southwestern Bell v. Brown* 795 S.W.2d 385, 386-87 (Mo. banc 1990). It pointed out that its decision in *State ex. rel Mcmullin v. Satz* - that an appellate court lost all jurisdiction when the appellant voluntarily dismissed his appeal and the appellate court dismissed the case - turned upon an interpretation of Rule 84.09 applicable to appellants. Bell, however, was not an appellant but an applicant for a writ of certiorari. Hence, Rule 84.09 was not applicable. This Court ruled that Judge Brown had jurisdiction to issue his October 24, 1989 order because it came 29 days after the order dismissing the writ with prejudice and within the time during which the trial court retains control over its judgments.

On April 18, 1991, Judge Brown entered an order approving a settlement between the parties and directing distribution of the stay fund. L.F. 57-72. In the meantime, Judge Brown had appointed a Receiver to administer the funds in question. L.F. 46. When Judge Brown approved the settlement, he ordered that the funds held in the previously created receivership be transferred to a successor receivership so that refunds could be made to utility customers. L.F. 85-90.

On July 16, 2001, the Attorney General notified the Receiver that he was preparing on behalf of the Treasurer, a lawsuit to recover the fund at issue. L.F. 117-18. On July 20, 2001, the Receiver filed a "Motion and Petition for Joinder of Additional Parties and for Relief in Ancillary Adversary Proceeding in the Nature of Interpleader and for other Relief" which Judge Brown sustained. L.F. 102-118. Judge Brown ordered a separate trial and proceeding with regard to the "Ancillary Adversary Proceeding Questions" in which the only issues for determination would be those defined in the Receiver's Motion and Petition for Interpleader. (The "Interpleader Action"). He ordered the State Treasurer ("Treasurer") added as a party and ordered that the Treasurer assert any claims to the fund which she as Treasurer had under UDUP. He also ordered the Cole County Circuit Clerk and Cole County to assert any claims that they may have to the fund or the interest in the fund. L.F. 119-122.

Judge Brown voluntarily recused himself from hearing the Interpleader Action but retained jurisdiction "with respect to all other issues and matters in the case, including…the determination of the holding or disposition of any funds which are determined in the Ancillary Adversary Proceedings to not be required to be disbursed to the State Treasurer by reason of [UDUP]." L.F. 121-22.

The Interpleader Action was assigned to the Honorable Ward B. Stuckey. L.F. 9. On October 12, 2001 the Receiver filed a motion for judgment on the pleadings which Judge Stuckey sustained on November 27, 2001 over the objections of the State Treasurer. L.F. 185-191, 195-308, 316-318. He also

overruled the Treasurer's Motion to Vacate the Interpleader Action for lack of personal jurisdiction, lack of subject matter jurisdiction, lack of standing by the receiver to file the Interpleader motion and Judge Brown's alleged disqualification under Supreme Court Rule 51.07). L.F. 124-161, 318. L.F. 124-161, 185-191, 195-308, L.F. 185-191. Judge Stuckey ruled that: (i) the Circuit Court of Cole County continued to have jurisdiction over funds in question in the Consolidated Case and over the Receiver who administered the funds under the Court's supervision in the Court registry; (ii) the Receiver lacked authority to pay funds over to the Treasurer because he had not been specifically authorized to do so by court order; (iii) any person, including the Treasurer, who had a claim against the funds must assert those claims against the Receiver in proceedings in the Consolidated case; (iv) the Treasurer had no standing or right to assert claims against the funds because her duties were limited under Article IV & 15 of the Missouri Constitution "to the receipt, investment, custody and disbursement of state funds and funds received from the United States Government" and that the funds in question did not qualify as such;. (v) the funds were residual funds in the nature of a class action and were "subject to disposition as determined by the Circuit Court of Cole County in [the] consolidated case and were not required to be disbursed to the Treasurer pursuant to [UDAP] and (vi) interest on the funds could be disbursed and used as provided in §483.310.2 R.S.Mo with the balance of such interest to be paid to Cole County. L.F. 316-318.

On or about December 14, 2001, Amici Legal Services of Eastern Missouri, Inc., Legal Aid of Western Missouri, Inc., Mid-Missouri Legal Services and Legal Services of Southern Missouri (the "Missouri Legal Services Programs") filed a Joint Application for a Cy Pres Distribution of the Residual Funds. Judge Brown entered an order on December 18, 2001 designating the Missouri Legal Services Programs as nonexclusive cy pres beneficiaries of the residuary funds. However, he stayed the cy pres distributions until the decision in the Ancillary Adversary Proceedings Questions case is final. At that point, the Missouri Legal Services Programs are to inform the Court as to their then current legal aid funding situation and their position concerning the routing of some of the cy pres distributions through a Missouri legal aid foundation. S.L.F. 636-38

POINTS RELIED ON AND AUTHORITIES

I. THE TRIAL COURT PROPERLY FOUND THAT THE CIRCUIT COURT OF COLE COUNTY HAS JURISDICTION OVER THE FUNDS IN QUESTION AND IS NOT REQUIRED TO DISBURSE THE FUNDS TO THE TREASURER PURSUANT TO THE PROVISIONS OF THE UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, SECTIONS 447.500 TO 447.595 RSMo ("UDUP") BECAUSE CIRCUIT COURTS RETAIN THEIR TRADITIONAL EQUITY JURISDICTION TO ISSUE APPROPRIATE ORDERS FOR THE DISPOSITION OF RESIDUAL FUNDS UNTIL THE FUND MONIES ARE DISTRIBUTED AND THE REPORT AND TURNOVER PROVISIONS OF UDUP - SECTION S 447.539 AND 447.543 - DO NOT APPLY TO COURTS.

A. The Circuit Court Retains Jurisdiction to Distribute the Residual Funds

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Van Gemert v. Boeing Co., 739 F.2d 730, 737 (2d Cir. 1984)

Xerox Corporation v. Travers, 529 S.W.2d 418, 422 (Mo. 1975)

C. **Distribution Under Cy Pres Principles is Appropriate for the Residual Funds in Question**

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Democratic Central. Comm. v. Washington Metro. Area Transit Comm'n, 84 F.3d 451, 456 (D.C. Cir. 1996)

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In re Motorsports Merchandise Antitrust Litigation, 160 F. Supp.2d 1392 (N.D. Ga. 2001)

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Superior Beverage Co. v. Owens-Illinois, 827 F.Supp. 477, 478-79 (N. D. Ill. 1993)

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West Virginia v. Chas Pfister & Co., 314 F. Supp. 710 (S.D. N.Y 1970)

INTEREST OF *AMICI CURIAE*

On or about December 18, 2001, Judge Brown entered an order in this consolidated action designating Legal Services of Eastern Missouri, Inc., Legal Aid of Western Missouri, Legal Services of Southern Missouri and Mid-Missouri Legal Services (the "Missouri Legal Services Programs") as nonexclusive cy pres beneficiaries of the residuary funds at issue.

The Missouri Legal Services Programs seek to provide equal access to justice to the more than 800,000 Missouri residents who are unable to afford legal representation in civil matters. The four legal aid organizations are able to provide their services *pro bono* through a combination of federal, state, and local government funding and private charitable contributions. At this time, however, continued funding for the legal services programs remains uncertain.

Last year the four legal services programs handled more than 30,000 cases assisting clients with critical legal needs ranging from domestic violence, evictions and homelessness, access to health care and public assistance benefits, and consumer problems. In addition, the programs each year provide assistance to thousands of other individuals and families in the state through community education presentations and the preparation of handbooks, pamphlets, and brochures on legal issues relevant to low-income households. They operate a number of special projects, including the Childrens' Legal Alliance and similar efforts which focus on the unmet educational and mental health needs of low-income children; Medicaid Managed Care Advocacy projects to assist families in

navigating the managed care system and obtaining health care services; homeless advocacy and housing preservation efforts; Immigration Law projects providing representation at naturalization, temporary protective status, family reunification, and deportation and exclusion proceedings; elder law projects; and the AIDS Project which helps clients with health care directives, wills, durable powers of attorney, employment and insurance discrimination, and other problems.

Consumer and public utility issues comprise a significant portion of the caseload handled by Missouri's legal services programs. Yet, each year legal services programs must turn down numerous consumer/utility cases because of lack of funding. Other than family and housing cases, consumer matters were the largest category of cases undertaken by the organizations last year. In addition to providing representation in thousands of individual consumer cases, the legal aid programs have advocated on behalf of low-income households regarding utility policies and procedures. For instance, Legal Aid of Western Missouri recently provided testimony in support of emergency amendments to Missouri's "cold weather" rule for utility shut-offs. Over the past several years, Legal Services of Eastern Missouri represented medically indigent Missourians as *amici curiae* in seeking to enforce the charitable trust obligations of Blue Cross and Blue Shield of Missouri and challenging its attempt to divert more than $500 million in charitable assets to private, for-profit purposes. That effort led to formation of the Missouri Foundation for Health and will result in the transfer of an estimated $891.4 million

in charitable assets to that nonprofit foundation to help meet the health care needs of Missouri residents unable to afford health insurance.

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT THE CIRCUIT COURT OF COLE COUNTY HAS JURISDICTION OVER THE FUNDS IN QUESTION AND IS NOT REQUIRED TO DISBURSE THE FUNDS TO THE TREASURER PURSUANT TO THE PROVISIONS OF THE UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, SECTION 447.500 TO 447.595 RSMo ("UDUP") BECAUSE CIRCUIT COURTS RETAIN THEIR TRADITIONAL EQUITY JURISDICTION TO ISSUE APPROPRIATE ORDERS FOR THE DISPOSITION OF RESIDUAL FUNDS UNTIL THE FUND MONIES ARE DISTRIBUTED AND THE REPORT AND TURNOVER PROVISIONS OF UDUP – SECTIONS 447.539 AND 447.543 - DO NOT APPLY TO COURTS.

This lawsuit presents the question whether a circuit court administering funds that it has impounded pursuant to §386.520.2 R.S.Mo. must file a report with the treasurer and automatically turn over such funds as abandoned property pursuant to the Uniform Diposition of Unclaimed Property Act §447.500 to 447.595 RSMo ("UDAP") when the funds have remained unclaimed more than 5 years. Although this case presents an issue of first impression in Missouri state courts, an extensive body of case law on the subject of the appropriate disposition of residual funds has developed in federal courts in Missouri as well as in state and

federal courts in other jurisdictions. While these decisions have identified a variety of methods to distribute remaining class damages or settlement funds, they uniformly recognize that the determination as to which of those methods is appropriate in a given case– in other words, the issue at the heart of this litigation – remains in the discretion of the court where the class action is pending.

A. The Circuit Court Retains Jurisdiction to Distribute the Residual Funds

As noted by the Appellate Court in *State ex rel. Southwestern Bell Telephone v. Brown*, 1990 Mo. App. Lexis 19 (Mo. App. W.D. 1990), the jurisdiction of the Circuit Court of Cole County over the funds in question is both inherent and invested by statute. *Id*. at 4. Where a fund exists, a court may have inherent judicial power to protect the fund for the benefit of those rightfully entitled thereto. *United States v. Morgan*, 307 U.S.183 (1937); *State ex rel Kansas City v. Public Service Commission,* 244 S.W.2d 110, 115, 116 (Mo. 1951); *State ex rel. North British & Mercantile Ins. Co. Ltd. v. Thompson*, 52 S.W. 2d 472 (Mo. 1932). In *Morgan*, the Supreme Court indicated that a lower court which had impounded funds in a rate proceeding:

> "…acted as a court of equity charged both with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use *broad discretion* in the exercise of its power and in such manner as to avoid an unjust or unlawful result." *Morgan*, 307 U.S. at 193-94 (emphasis added).

Indeed, numerous courts have held that courts retain their traditional equity jurisdiction to issue appropriate orders for the disposition of residual funds until all of the funds are distributed. See *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *Zients v. Lamorte*, 459 F.2d 628, 630 (2d Cir. 1972); *In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1396, 1402 (E.D. N.Y. 1985); *Grantham v. J.L. Mason Co.*, No. 80-359 C (4) (E.D. Mo. July 31, 1993), at 4. See also *Powell v. Georgia-Pacific Corp.*, 843 F. Supp 491, 495 (W.D. Ark. 1994), on appeal, 119 F. 3d 703 (8th Cir. 1997); *In Re: Airline Ticket Commission Antitrust Litigation*, 2001 U.S. App Lexis 22343 (8th Cir. 2001), *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 812 (5th Cir. 1989); *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1254 (7th Cir. 1984), cert. dismissed, 106 S.Ct. 11 (1985); *In re Motorsports Merchandise Antitrust Litigation*, 160 F. Supp 2d. 1392 (N.D. Ga. 2001); *Brewer v. Southern Union Company*, 1987 U.S. Dist. LEXIS 15940 (D. Colo. 1987); *Van Gemert v. Boeing Co.*, 739 F.2d 730, 737 (2d Cir. 1984).

In exercising its discretion to determine disposition of residual funds, the reference point for the court must be the intended use of the class funds in the judgment or settlement. *In re Agent Orange*, 611 F.Supp. at 1403; *In re Folding Carton Antitrust Litigation*, 557 F. Supp. 1091, 1108-09 (N.D. Ill. 1983), *aff'd in pertinent part*, 744 F.2d 1252, 1254 (7th Cir. 1984). Absent an abuse of discretion in tailoring disposition based on consideration of the original purpose of the fund, the court's determination as to how the residual fund is to be distributed is final

and binding. *In re Equity Funding Corp of America Securities Litigation,* 603 F. 2d. 1353, 1362, 1365 (9th Cir. 1979); *Grantham*, slip op. at 4.

The Circuit Court of Cole County also has jurisdiction over the residual funds at issue pursuant to § 386.520.5 RSMo which authorized the creation and impoundment of the funds in custodia legis. It provides that upon the decision of the circuit court affirming or setting aside the public service commission order, all monies collected on appeal in excess of those authorized by the decision "shall be promptly paid to the corporations or persons entitled thereto, *in such manner and through such methods of distribution as may be prescribed by the court*, unless an appeal be granted such corporation, person or public utility…" § 386.520.5 RSMo (emphasis added).

Hence, the Circuit Court of Cole County has continuing jurisdiction over the residual funds that is both inherent and invested by statute.

B. **The Reporting and Turnover Provisions of UDUP Do Not Apply to Circuit Courts and Do Not Oust or Override Circuit Courts' Continuing Jurisdiction Over Residual Funds**

Various courts and commentators have concluded that the existence of an escheat or unclaimed property statute does not oust or override the court's equitable power to determine appropriate disposition of residual funds under its

jurisdiction.[1] In *Van Gemert*, defendant Boeing was found liable to a class of debenture holders. The court ordered Boeing to deposit the amount of the damages plus post-judgment interest into a bank account and appointed a special master to administer the fund and to pass on the validity of individual claims of debenture holders. More than 5 years later, Boeing moved for an order releasing the unclaimed funds to it. The motion was granted upon the condition that Boeing publish notice of the availability of the fund and that it stand ready to pay valid claims against the fund in perpetuity. Class members and the State of New York (as proposed intervenor) appealed. They argued that 28 U.S.C. §§ 2041 and 2042 (the federal escheat statute) required that the funds be deposited into the United States Treasury. *Van Gemert*, 739 F.2d at 732-34

The Federal Escheat Statute, 28 U.S.C. § 2041, provides in relevant part that all moneys paid into any court of the United States "shall be forthwith deposited with the Treasurer of the United States…in the name and to the credit of the court." Section 2042 provides in relevant part that "In every case in which the right to withdraw money deposited in court has been adjudicated or is not in dispute and such money has remained deposited for at least 5 years unclaimed by the person entitled thereto, *such court shall cause such money to be deposited in*

[1] *Amicus* use the term "escheat' here to include the situation where a government acquires title to abandoned personal property. 27A Am. Jur. 2d *Escheat* §1.

the Treasury in the name and to the credit of the United States." 28 U.S.C § 2042 (emphasis added).

The Second Circuit rejected Appellants' argument and affirmed the district court's order. It found that "a court of equity may dispose of funds fairly – without being compelled to utilize [the federal escheat statutes]." 739 F. 2d at 735. The Court explained:

> We hold that [28 U.S.C.] §2041 does not limit the discretion of the district court to control the unclaimed portion of a class action judgment fund. Whether the money has been paid into court or whether an alternative method of administering payment is used, the money held is subject to the court's order. . . . The statute referred to does not control when a court fashions a plan for distributing unclaimed funds.

Id. at 735-36. The *Van Gemert* court also rejected the argument that the monies should escheat to the state:

> The critical determining factor here…is that trial courts are given broad discretionary powers in shaping equitable decrees. "[E]quitable remedies are a special blend of what is necessary, what is fair and what is workable." *Lemon v Kurtzman*, 411 U.S. 192, 200

> (1973) (footnotes omitted). Appellate review is narrow. . . . We believe that this principle should apply to equitable decrees involving the distribution of any unclaimed class action fund.

Id. at 737. The California Supreme Court in *State of California v. Levi Strauss & Co*., 715 P.2d 564, 575 (Cal. 1986) similarly held that the state escheat statute did not control the undistributed funds, noting that "to compel this method [general escheat] would be to cripple the compensatory function for the private class action." *Id*. The court further instructed "that the statute was not intended to limit the equitable discretion of the courts in managing private consumer class actions. *Id*. at 574. See also 2 Newberg on Class Actions § 10.25, at 10-67 ("it would appear that while escheat laws govern the disposition of unclaimed third party funds in private depositories, it is well within the court's discretion to determine the distribution of an unclaimed balance of an aggregate class recovery fund that is within the court's jurisdiction").

The Missouri statutory scheme also suggests that neither UDUP nor the Missouri Escheat Statute - §§ 470.270 through 470.350 RSMo – divests the circuit court of its continuing equitable jurisdiction to determine the distribution of unclaimed funds in *custodia legis*. UDUP and §§ 470.270, 470.280, 470.290 and 470.340 of the Missouri Escheat Statute are *in pari materia* because they relate to funds in the custody of courts that remain unclaimed for more than 5 years. See

State ex. rel. Rothermich v. Gallagher, 816 S.W. 2d 194, 200 (Mo. banc 1991) (statutes are *in pari materia* when they relate to the same matter or subject).

Escheat is a procedure with ancient origins whereby a sovereign may acquire title to property that has been abandoned for a number of years. See *State of Texas v. State of New Jersey*, 379 U.S. 674, 85 S.Ct. 626, 627 (1965). Sections 470.270 through 470.350 RSMo titled "FUNDS IN CUSTODY OF COURTS," sets forth specific judicial procedures to be followed before unclaimed moneys (including "refund of rates") in the custody of Missouri or federal courts may escheat to the state of Missouri. §470.270 RSMo. Pursuant to the Missouri Escheat Statute, these unclaimed funds do not automatically escheat to the state after five years. Instead, the Missouri Attorney General must bring a legal proceeding in the name and at the relation of the state of Missouri in either the circuit court of the county where the court having custody or control of the funds is located or in the circuit court of Cole County naming the clerk, custodian or other officer of the court having custody of the money as defendant. See §§470.270, 470.280, 470.290 RSMo.

Under the express provisions of §470.280 RSMo, these circuit courts have jurisdiction "to ascertain if an escheat has occurred, and to enter a judgment or decree for escheat in favor of the state of Missouri." *Id.* After such "a decree for escheat" has been entered in favor of the state, the attorney general is required to take action in the court where such moneys are held "as may be required to cause

it to be delivered to the state treasurer" who is required to keep the moneys in a separate fund "known an designated as Escheats." §470.290 RSMo.

Sections 470.300, 470.310, and 470.320 RSMo. prescribe the form of notice to be given to the custodian of the funds, and the manner and method for service of process, including proceeding against a defendant class where those having an ownership interest in the funds are too numerous to serve with personal process. In lieu of or in addition to this procedure, the Missouri Attorney General may file a "motion, petition or other proper pleading" in the court in which the funds are deposited or whose jurisdiction same are being held *"praying for an order or judgment of said court directing the payment of such funds to the state treasurer."* § 470.340 RSMo *(*Emphasis added). *"If said order is made*," then the Treasurer is to receive the funds and keep them in a separate fund to be designated "Escheats." *Id*. (emphasis added).

Under the Missouri Escheat Statute, therefore, the Circuit Court retains jurisdiction to determine whether the funds are escheatable to the state and to direct payment to the state treasurer. Even after the funds are received by the State Treasurer pursuant to a judicial decree of escheat, § 470.330 RSMo provides that the court which entered the decree has jurisdiction to rule on claims to the funds (which must be filed within 2 years from the date of transfer).

Although §470.270 RSMo provides that the state may elect to take custody of unclaimed funds in the custody of courts by "instituting a proceeding pursuant

to Section 447.575 RSMo," this UDUP provision is silent about the mechanics of such a proceeding. It simply states:

> "If any person refuses to deliver property to the state as required under sections §447.500 to 447.595, the treasurer shall bring an action in a court of appropriate jurisdiction to enforce such delivery." §447.575 R.S. Mo.

Unlike the Missouri Escheat Statute, UDUP does not define a court of appropriate jurisdiction, or the manner and method of service of process. Nor does UDUP say anything specific about the recovery of unclaimed funds in the custody of courts other than § 447.532 which states in relevant part:

> 1. All intangible property held for the owner by any court, public corporation, public authority, or public officer of this state, or a political subdivision thereof, that has remained unclaimed by the owner or more than seven years or five years as provided in section 447.536 is presumed abandoned.

Courts are obliged to reconcile and harmonize statutes dealing with the same subject if it is reasonably possible. If it is not, and one statute must prevail over another, a statute having a general application will be subordinated to one having a more specific application. *State ex. rel Fort Zumwalt School District v. Dickherber,* 576 S.W. 2d 532, 536-37 (Mo banc 1979). Here, when UDUP is read *in para materia* with the specific provisions in the Missouri escheat statute

regarding unclaimed funds in the custody of the courts, the only reasonable construction is that both the Circuit Court having custody of the unclaimed funds and the Circuit Court of Cole County have jurisdiction to determine whether property should be distributed to the state Treasurer as abandoned (or escheatable) property.

The Treasurer's contrary interpretation of UDUP – namely, that courts are obligated to immediately turn over to the Treasurer all funds in their custody remaining unclaimed more than 5 years - flies in the face of the separation of powers doctrine and is inherently contradictory. She necessarily relies on the definition of "person" set forth in §447.503(8) and the fact that §447.539 requires "[e]very person holding property deemed abandoned to file a report with the treasurer and §447.543 RSMo requires "[e]very person who has filed"[such a report] to immediately pay over the funds to the treasurer.

UDUP defines "person" as

> "any individual, business, association, government or political subdivision, public corporation, public authority, estate, trust except a trust defined in section 456.500 R.S.Mo, two or more persons having a joint or common interest, or any other legal or commercial entity. §447.503(8).

Despite the express reference to "courts" in another section of UDUP - §447.532 - this term is conspicuously absent from the UDUP definition of

"person." Moreover, UDUP specifies that its statutory definitions apply "unless the context otherwise requires." §447.503 RSMo. If "person" in §447.539 RSMo is interpreted to include courts, the result is nonsensical and unconstitutional.

Section 447.539 requires every person to file "verified" reports of all unclaimed funds in the persons' custody with the treasurer containing information specified in Section 447.539 and such other information as the Treasurer "*prescribes by rule.*" See §447.539.2 (4) (emphasis added). If a person intentionally fails to comply with this reporting provision, then the person may be assessed a penalty of five percent of the total value of the property at issue. §447.577 RSMo.

Courts, however, do not verify reports, and if the separation of powers doctrine means anything, courts do not answer to administrative rules promulgated by the Treasurer. Instead, Article V, § 4 of the Missouri Constitution provides that the Missouri Supreme Court has "general superintending control over all courts and tribunals." It grants to the Missouri Supreme Court "[s]upervisory authority" over all courts, and allows the Court to make "appropriate delegations of power." Id.

To enforce UDUP's sanctions and reporting and turnover provisions, the Treasurer must "bring an action in a court of appropriate jurisdiction." § 447.575 RSMo. As noted above, UDUP (unlike the escheat statute) does not define such a court. If the specific jurisdictional provisions of the Missouri Escheat Statute supplant UDUP – and they should under the normal rules of statutory

construction mentioned above - then the circuit court having custody of the funds has jurisdiction over such a UDUP proceeding. See § 470.280 RSMo. In other words, the circuit court rules upon its own alleged UDUP violation. This is nonsense.

The law favors construction of statutes which harmonize with reason and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression. *Xerox Corporation v. Travers,* 529 S.W.2d 418, 422 (Mo. 1975) . Interpreting UDUP's reporting provision, § 447.539, to exclude courts avoids absurd and unreasonable results. It also harmonizes UDUP with the Missouri Escheat Statute. A court is not a "person" within the meaning of the reporting provision of UDUP and therefore it is not required to automatically turnover unclaimed funds in its custody to the Treasurer. Just as circuit courts have jurisdiction to determine whether unclaimed funds are escheatable to the State under Section 470.280 R.S. Mo., they also have jurisdiction to determine whether unclaimed funds should escheat to the Treasurer as abandoned property under UDUP.

Remarkably, the Treasurer's brief does not mention the Missouri Escheat Statute. Yet, she clearly recognizes that §§ 470.270 through 470.350 RSMo are problematic for her interpretation of UDUP. On March 12, 2002, House Bill No. 2146 was introduced. It seeks to repeal the specific judicial procedures for the escheat of the unclaimed funds in the custody of courts set forth in §§ 470.280-470.350 RSMo and to amend §470.270 RSMo by providing that all unclaimed

funds in the custody of courts after five years constitute unclaimed property under UDUP (A copy of the Bill is attached as an Appendix.) However, even if this Bill passes, the reporting provisions in § 447.539 RSMo must still be interpreted to exclude courts to avoid the unreasonable and unconstitutional result described above.

C. Distribution Under Cy Pres Principles is Appropriate for the Residual Funds in Question

The circuit court's continuing jurisdiction over residual funds means that while the court may in its discretion determine that delivering residual monies to the government through escheat or abandoned property provisions is proper in light of the funds particular intended use, it is not compelled to do so. See *Friar v. Vanguard Holding Corp.*, 509 N.Y.S.2d 374, 376 (1986).

Courts and commentators have identified four principal methods for distributing residual funds. Those methods are (1) escheat or delivery of abandoned property to the government; (2) reversion to the defendant; (3) distribution to previous claimants; and (4) cy pres distribution. See generally 2 Newburg on Class Actions §§ 10.13-10.25. In this case, distribution pursuant to the cy pres doctrine is most consistent with the purposes of the litigation that gave rise to the funds at issue here.

The first method of disposition – delivery of residual funds to the state and its general revenues through escheat -- would be inappropriate in this case because that distribution would not bear a sufficiently close relationship to the intended use

of the funds. See *Democratic Central. Comm. v. Washington Metro. Area Transit Comm'n,* 84 F.3d 451, 456 (D.C. Cir. 1996). "Under the general escheat, the funds are unconditionally deposited into the treasury of a governmental body for the benefit of the public at large. Because this approach provides the least focused compensation to the injured class, it is used only when a more precise method cannot be found").[2] Here, the residual funds were originally intended to benefit a class of utilities and insurance consumers – a group much more limited than all residents of the state of Missouri who would benefit from monies added to general revenue.

Two other distribution options are also inappropriate here in light of the intended use of the class funds. Reversion to the defendants in the underlying cases is a possible method of distributing residual funds, but it would be improper in this case. Such a disposition would confer a reward on the defendants for their unfair practices. Reversion is least appropriate in cases where disgorgement and deterrence are among the policy objectives of the regulatory scheme. See *Brewer v. Southern Union Company*, 1987 U.S. Dist. LEXIS 15940 (D.C. Colo 1987). Another disposition alternative is pro rata distribution of the remaining funds to

[2] Although the Missouri unclaimed property statute does not appear to contemplate it, some states have a specified or 'earmarked' escheat provision in which funds are disbursed to a particular governmental agency for the purpose of benefiting a group of persons who approximate the injured class and the details of the distribution are left to the agency.

those class members who received earlier distributions. This method, however, provides no benefit to non-claiming class members who arguably have superior equitable interests in the remaining settlement fund. *In re Folding Carton Antitrust Litigation,* 557 F. Supp. at 1107.

The final option considered by courts holding residual funds is a cy pres distribution. "The term 'cy pres' is derived from the Norman French expression cy pres comme possible, which means 'as near as possible.' *Democratic Central Comm.,* 84 F.3d at 455 n.1. The doctrine originated as a rule of construction to save a testamentary charitable gift that would otherwise fail, allowing the "next best use of the funds to satisfy the testator's intent as near as possible." *Id*. (internal quotation omitted). See also *Thatcher v. Lewis*, 76 S.W. 2d 677 (Mo. 1934). ('Cy pres' is rule of equity, literally meaning "as near to" and reason for rule is to permit main purpose of donor of charitable trust to be carried out as nearly as possible where it cannot be literally done).

Courts have also applied the equitable doctrine of cy pres to undistributed damage or settlement funds. Using the cy pres doctrine permits funds to be distributed to the 'next best' class when the plaintiffs cannot be compensated individually. "The object of applying the funds to the 'next best' class is to parallel the intended use of the funds as nearly as possible by maximizing the number of plaintiffs compensated." *Democratic Central. Comm*., 84 F. 3d at 455, quoting Natalie A. Dejarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions,* 38 Hastings L.J. 729 at 740.

Accordingly, courts have invoked the "cy pres principle of indirectly benefiting all class members" to distribute residual funds as charitable donations to organizations engaged in "combating 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 (N.D. Ga. 2001); West Virginia v. Chas Pfister & Co.,* 314 F. Supp. 710 (S.D. N.Y 1970).

While the best cy pres application is to use funds for purposes closely related to their origin, the doctrine of cy pres and the courts' broad equitable powers permit disposition of residual funds to charitable, public service, or educational organizations that can use the funds in a manner that will provide indirect benefits to the class members consistent with the purpose of the litigation. In a number of cases, including one resolved by the federal district in eastern Missouri, the courts have included legal aid organizations among the recipients of distributed residual funds. See *Grantham v. J.L. Mason Group* No. 80-359 C (4) (E.D. Mo 1993) (approving cy pres distribution to Legal Services of Eastern Missouri, Inc., American Red Cross, Salvation Army, Christian Service Center, Community in Partnership Family Center, and Habitat for Humanity International); *Superior Beverage Co. v. Owens-Illinois,* 827 F.Supp. 477, 478-79 (N. D. Ill. 1993) (approving cy pres distribution in excess of $2 million to various organizations including Public Interest Law Initiative, University of Chicago Mandel Legal Aid Clinic, Legal Aid Bureau of United Charities, Legal Assistance

Foundation of Chicago, and others); *In re Motorsports Merchandise Antitrust Litigation* 160 F. Supp. 2d 1392 (N.D. Ga. 2001) (approving cy pres distribution of approximately $2.4 million among Atlanta Legal Aid Society, Georgia Legal Services Program, Make–A-Wish Foundation, American Red Cross, and others). In this instance, a distribution to the Missouri legal aid organizations from the residual funds at issue will confer indirect benefit on the intended beneficiaries of the underlying cases because of the extensive consumer representation and advocacy provided by those programs, including advocacy on public utilities and insurance matters.

CONCLUSION

This court should affirm the judgment of dismissal entered by the trial court and hold that the Circuit Court of Cole County retains its traditional equitable jurisdiction to issue collateral orders necessary to administer the residual funds until they have been completely distributed including disposition under the cy pres doctrine.

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CERTIFICATE OF SERVICE AND OF COMPLIANCE WITH RULE 84.06(b) AND (c)

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The undersigned further certifies that the foregoing brief complies with the limitation contained in Rule 84.06(b) and contains 7878 words and that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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APPENDIX

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