

STATE OF WISCONSIN
SUPREME COURT

In re:

PROPOSED AMENDMENT TO
WIS. STAT. § 803.08 ALLOCATING A
PORTION OF UNCLAIMED CLASS
ACTION AWARDS TO SUPPORT THE
PROVISION OF LEGAL SERVICES TO
LOW-INCOME AND INDIGENT
PERSONS

RECEIVED
OCT 09 2015
CLERK OF SUPREME COURT
OF WISCONSIN

**MEMORANDUM IN SUPPORT OF
PETITION OF WISCONSIN ACCESS TO JUSTICE COMMISSION
FOR AN ORDER AMENDING
WIS. STAT. § 803.08**

ON BEHALF OF WISCONSIN ACCESS TO JUSTICE COMMISSION
David J. Harth, WI State Bar No. 1010417
Melody K. Glazer, WI State Bar No. 1054204
Perkins Coie LLP
1 East Main Street, Suite 201
Madison, WI 53703

TABLE OF CONTENTS

	Page
INTRODUCTION	1
DISCUSSION	1
I. PROPOSED AMENDMENT TO WIS. STAT. § 803.08	1
II. WISCONSIN’S JUSTICE GAP CONTINUES TO GROW	2
III. CY PRES AWARDS ARE AN APPROPRIATE MEANS TO FUND LEGAL AID SERVICES.....	4
A. The Seventh Circuit and federal lower courts in its jurisdiction have found cy pres awards to be appropriate in the correct circumstances.	5
B. Many other states have adopted procedures for distributing cy pres awards to legal aid services.	7
IV. PROPOSED PROCEDURE FOR CY PRES AWARDS IN WISCONSIN.....	10
A. Cy pres awards in Wisconsin will need to be mandatory	10
B. The proposed amendment provides for the disbursement of residual funds by WisTAF.....	10
CONCLUSION.....	11

INTRODUCTION

Wisconsin Access to Justice Commission (WATJ) respectfully petitions the Wisconsin Supreme Court to amend WIS. STAT. § 803.08 on class actions to require that a portion of unclaimed class action awards be used to support the provision of legal services to low-income and indigent persons. WATJ makes this request pursuant to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

Funding for legal services to low-income and indigent Wisconsinites continues to dwindle as the need for these services continues to rise. Cy pres awards are an appropriate source of revenue to reduce this shortfall. In order to tap into this revenue source, the Supreme Court should authorize an appropriate amendment to the Wisconsin rule of civil procedure governing class actions.

DISCUSSION

I. PROPOSED AMENDMENT TO WIS. STAT. § 803.08

WIS. STAT. § 803.08 provides currently as follows:

803.08 Class actions. When the question before the court is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole, except that no claim may be maintained against the state or any other party under this section if the relief sought includes the refund of or damages associated with a tax administered by the state.

WATJ proposes that WIS. STAT. § 803.08 be amended such that the current section be designated subsection (a), and that subsection (b) be created as follows¹:

(b) Disposition of Residual Funds.

(1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees and other court-approved disbursements. This rule does not prohibit the trial court from approving a settlement that does not create residual funds.

¹ See Appendix 1.

(2) “WisTAF” means the Wisconsin Trust Account Foundation, Inc.

(3) 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 disbursement of any residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to WisTAF to support activities and programs that promote access to the Wisconsin civil justice system. The court may disburse the balance of any residual funds beyond the minimum percentage to WisTAF 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.

II. WISCONSIN’S JUSTICE GAP CONTINUES TO GROW

In 2005, the State Bar of Wisconsin created the Wisconsin Access to Justice Study Committee to conduct a comprehensive legal needs study of low-income residents. In 2007, the committee, comprised of experienced lawyers and judges, issued its landmark findings in the report *Bridging the Justice Gap: Wisconsin’s Unmet Legal Needs*.² The committee found that more than 500,000 of the state’s residents face significant civil legal problems without the assistance of an attorney or other legal professional. These include the elderly, veterans, children, disabled citizens, low-wage workers, and the unemployed. The 2007 report found that “[s]ome legal aid organizations are able to help only about 20% of those who qualify. At other programs, for every client who is served, another is turned away due to a lack of funding. Most of the families [] surveyed sought help but could not obtain it.”³

In 2009, in part spurred by the State Bar study, this Court created WATJ “to aid the courts in improving the administration of justice by supporting civil legal services to those who

² *Bridging the Justice Gap: Wisconsin’s Unmet Legal Needs, Final Report*, Access to Justice Study Committee, State Bar of Wisconsin, March 2007, adopted by the State Bar of Governors on May 8, 2007 (March 2007 State Bar Report).

³ *Id.* at 1.

cannot afford them.”⁴ This Court directed WATJ “to develop and encourage means of expanding access to the civil justice system for unrepresented low-income Wisconsin residents.”⁵ To fulfill its mission, WATJ seeks “increased funding from a range of sources” in order to “create and sustain a statewide civil legal aid delivery system that is comprehensive, integrated, efficient, accessible, and fair in achieving just outcomes.”⁶

Since the 2007 State Bar report, the need for civil legal services for the unrepresented has only continued to grow. In 2012, WATJ held a series of public hearings across the state, in part, to assess the need for civil legal services for Wisconsin’s low-income residents.⁷ Those who testified were from a wide range of backgrounds and experiences, and included judges, court commissioners, court employees, attorneys in private practice, members of the public, and attorney and nonattorney representatives of public service, nonprofit, charitable, and religious organizations. What emerged from those hearings was that the need for services is significantly greater than it was in 2007. The legal areas of greatest need are those that affect basic human needs: domestic violence and elder abuse, evictions and other landlord/tenant issues, foreclosures, family law, and governmental benefit programs.

Instead of increasing funding for legal services for low-income residents, however, Wisconsin has gone in the opposite direction. Total funding for civil legal services to the poor has dropped from almost \$9 million in 2010 to about \$5.5 million in 2013.⁸ In 2011, Wisconsin eliminated its state appropriation for civil legal services, about \$2 million in 2010.⁹ Efforts to restore that funding continue to be unsuccessful. Wisconsin is now one of just three states with

⁴ S.C.R. Chapter 14, Access to Justice Commission, enacted June 5, 2009.

⁵ *Id.*

⁶ Wisconsin Access to Justice Commission Mission/Values, available at <http://wisatj.org/missionvalues> (last accessed on February 2, 2015).

⁷ The State of Equal Justice in Wisconsin, A Report from The Wisconsin Access to Justice Commission, Sept. 2013 (Sept. 2013 WATJ Report).

⁸ *Id.* at 3.

⁹ *Id.* at 3.

this unenviable distinction.¹⁰ This contrasts with Wisconsin’s neighboring states, which budget an average of \$7.6 million a year for civil legal aid to the poor.¹¹

Funding from the remaining sources has either not kept pace with inflation or has diminished over the last several years. The largest single funding source for Wisconsin legal services is the federal Legal Services Corporation (LSC), but Congressional funding of LSC is at its lowest levels.¹² Income from the Interest on Lawyers Trust Accounts (“IOLTA”) has also fallen.¹³ And while, the legal profession in Wisconsin contributes more than \$1 million and more than 40,000 hours of free legal services every year, we in the state of Wisconsin are not coming close to meeting the need for legal services.

In 2014, this Court recognized “the importance of supporting programs that improve access to civil legal services for unrepresented low-income Wisconsin residents.”¹⁴ Consequently, the Court approved a rule allocating a portion of the fees paid in connection with *pro hac vice* admissions to help support the provision of legal services to low-income and indigent persons.¹⁵ Although the estimates are that this rule will provide in the neighborhood of \$80,000, it will only go a little way to closing the deficit caused by the Legislature’s defunding. If the WATJ is to fulfill its directive from this Court, additional revenue sources must be located.

III. CY PRES AWARDS ARE AN APPROPRIATE MEANS TO FUND LEGAL AID SERVICES

One potential source of funding for legal services for low-income and indigent residents is the use of cy pres awards. Cy pres means “next best use,” and refers to the residual funds from

¹⁰ *Id.* at 15.

¹¹ March 2007 State Bar Report at 2.

¹² Sept. 2013 WATJ Report at 3.

¹³ *Id.* at 3.

¹⁴ *In the Matter of the Petition for Amendment to Supreme Court Rule 10.03(4)(b)2 Relating to Pro Hac Vice Applications*, No. 13-11 (2014).

¹⁵ *Id.*

class action settlements or awards. Funds from class action settlements or awards can become residual for several reasons. Sometimes class members cannot be located, or class members fail to submit claims, or the court may decide not to distribute funds to individual class members because the amount is too small to be meaningful. When this happens, courts determine what the “next best use” of the funds is, and this can mean a cy pres award to an organization that will serve the interests of class members or to legal services programs.

A. The Seventh Circuit and federal lower courts in its jurisdiction have found cy pres awards to be appropriate in the correct circumstances.

Although this Court has not addressed the appropriateness of cy pres awards for the public good, the Seventh Circuit and federal lower courts under its jurisdiction have approved such awards under appropriate conditions.

The Seventh Circuit held in *Hughes v. Kore of Indiana Enterprise, Incorporated*, that in certain circumstances “the cy pres remedy may be the only one that makes sense [],” including when to distribute the funds to individual class members is not feasible.¹⁶ In that case, the class action dealt with the failure to post a notice on an ATM of a per transaction fee of \$3.¹⁷ While Judge Posner recognized that “[o]rdinarily of course class action damages go to the class. But in a case like this, the award of damages to the class members . . . would do less for consumer protection than if the money is given to a consumer protection charity.”¹⁸ Judge Posner reasoned:

Payment of \$10,000 to a charity whose mission coincided with, or at least overlapped, the interest of the class (such as a foundation concerned with consumer protection) would amplify the effect of the modest damages in protecting consumers. A foundation that receives \$10,000 can use the money to

¹⁶ 731 F.3d 672, 678 (7th Cir. 2009).

¹⁷ *See id.* at 674-75.

¹⁸ *Id.* at 675, 678.

do something to minimize violations of the Electronic Funds Transfer Act; as a practical matter, class members each given \$3.57 cannot.¹⁹

The Seventh Circuit recognized, in *Mace v. Van Ru Credit Corporation*, that “[c]y pres recovery is used where the individuals injured are not likely to come forward and prove their claims or cannot be given notice of the case.”²⁰ In that case, the district court had denied class certification brought under the Fair Debt Collection Practices Act and under the Wisconsin Consumer Act. The plaintiff offered the availability of a cy pres remedy as an alternative ground for class certification. The Seventh Circuit certified the class, noting that a cy pres fund is “ideal for circumstances in which it is difficult or impossible to identify the persons to whom damages should be assigned or distributed.”²¹

District courts within the Seventh Circuit’s jurisdiction regularly approve of settlement agreements containing cy pres awards to dispose of residual settlement funds that cannot, as a practical matter, be distributed to class members.²² For example, in *Heekin v. Anthem, Incorporated*, the Southern District of Indiana found the use of a cy pres award to be “a fair, reasonable, and adequate way to distribute” a residual fund estimated at \$60,000.00, where a third round of distributions to class members would be “impractical.”²³ The district court also found the charity selected as the award recipient appropriate because it had a successful history of supporting programs and services for the most vulnerable and “would advance the same health care goals and philosophy to which the [class members] subscribed in deciding to purchase and maintain health coverage from [defendants].”²⁴ The *Heekin* court also recognized that courts

¹⁹ *Id.* at 675 (citations omitted).

²⁰ 109 F.3d 338, 345 (7th Cir. 1997).

²¹ *Id.*

²² See *Heekin v. Anthem, Inc.*, No. 1:05-cv-01908-TWP-TAB, 2012 WL 5472087, at * 3-4 (S.D. Ind. Nov. 9, 2012) (collecting cases).

²³ *Id.* at * 3.

²⁴ *Id.* at * 5.

consider “factors such as the nominee’s history of sound fiscal management, the strength of its governance and leadership, and the extent of services performed and number of people served, as well as any red flags such as adverse publicity or governmental investigations.”²⁵

In *Superior Beverage Company v. Owens–Illinois, Incorporated*, the Northern District of Illinois determined that “broad equitable powers now permit the use of funds for other public interest purposes by education, charitable, and other public service organizations.”²⁶ The Eastern District of Wisconsin has held that cy pres awards are “proper and acceptable in class action settlements, particularly when locating and ascertaining the status of all individual class members is prohibitively difficult or expensive.”²⁷ In *McKinnie*, the court upheld a class action settlement agreement where 35% was to be contributed to a cy pres charity and the other 65% would be returned to the defendant.²⁸

The WATJ recognizes that the cy pres distribution of residual class action settlement funds has not been without controversy in certain federal courts of appeals in recent years.²⁹ Even then, in the right circumstances, these courts have found that cy pres distributions to civil legal aid services makes sense.³⁰

B. Many other states have adopted procedures for distributing cy pres awards to legal aid services.

According to a survey conducted by the ABA Resource Center for Access to Justice Initiatives, at least 14 states amended their rules of civil procedure or enacted statutes so that

²⁵ *Id.* at * 4.

²⁶ 827 F.Supp. 477, 479 (N.D. Ill. 1993). The court approved grants for a variety of organizations, including Public Interest Law Initiative, which operates a summer internship program under which law students come to Chicago to work for one of 30 public interest law agencies, and other legal aid organizations. *See id.* at 480-86.

²⁷ *McKinnie v. JP Morgan Chase Bank N.A.*, 678 F. Supp. 2d 806, 813 (E.D. Wis. 2009).

²⁸ *Id.* at 810.

²⁹ *In re BankAmerica Corp. Securities Litigation*, --- F.3d ----, 2015 WL 110334, * 1-2 (8th Cir. Jan. 8, 2015).

³⁰ *Id.*

some or all of residual class action funds revert to legal service providers for low-income residents.³¹ These states are, in alphabetical order: California, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, New Mexico, North Carolina, Pennsylvania, South Dakota, Tennessee, and Washington. California was the first state to adopt such a rule 20 years ago. States that have amended their procedures in the past two or three years include: Kentucky (January 2014), Louisiana (September 2012), Maine (March 2013), and Pennsylvania (July 2012).

What follows are examples of the legislative and court rules from some of these states, including the amounts distributed through this procedure.³² Some of these initiatives have resulted in substantial payments to legal aid providers, while other states have yet to see any payments.

The Indiana Supreme Court adopted its version, effective January 1, 2011, that reads, in part:

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 Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its *pro bono* districts. The court may disburse the balance of any residual funds beyond the minimum percentage to the Indiana Bar Foundation 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.³³

In Illinois, since July 1, 2008, there is 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 funds to other organizations that serve the

³¹ Legislation and Court Rules Providing for Legal Services to Receive Cy Pres Residuals, ABA Resource Center for Access to Justice Initiatives, originally prepared Oct. 29, 2007, most recent update prepared Feb. 14, 2014 (ABA Court Rules for Cy Pres Residuals).

³² Appendix 2 to this memorandum lists the jurisdictions that have adopted procedures for distributing class action cy pres awards.

³³ *Id.* at 2.

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.”³⁴ The ABA estimates Illinois has distributed approximately \$3.5 million in fiscal year 2012, including legislative and other awards.³⁵

In Massachusetts, the Supreme Judicial Court of Massachusetts amended its civil procedure to provide, as of January 1, 2009:

In matters where the claims process has been exhausted and residual funds remains, 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.³⁶

The ABA reports that in Massachusetts “[s]ince June 2011, \$1,605,000 has been received; \$343,000 to IOLTA and the balance to individual legal aid programs.”³⁷

The Supreme Court of Pennsylvania amended its Rules of Civil Procedure:

[D]irecting that at least 50% of residual funds in a given class action shall be disbursed to the Pennsylvania IOLTA Board to support activities and programs which promote the delivery of civil legal assistance. The balance may go to IOLTA, or to another entity for purposes that have a direct or indirect relationship to the objectives of the underlying class action, or which otherwise promote the substantive or procedural interest of the members of the class.³⁸

Pennsylvania IOLTA has received \$45,729 to date.³⁹

What is clear from these many provisions by states across the country is that “legal aid [] organizations are always appropriate recipients of cy pres or residual fund awards in class actions

³⁴ *Id.* at 2.

³⁵ *Id.*

³⁶ *Id.* at 4, quoting the new language in Rule 23 of the Massachusetts Rules of Civil Procedure, adopted by the Supreme Judicial Court of Massachusetts, effective Jan. 1, 2009.

³⁷ *Id.*

³⁸ *Id.* at 6.

³⁹ *Id.*

because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system.”⁴⁰

IV. PROPOSED PROCEDURE FOR CY PRES AWARDS IN WISCONSIN

A. Cy pres awards in Wisconsin will need to be mandatory.

In the past, efforts to educate and encourage Wisconsin attorneys to designate legal service providers as cy pres beneficiaries voluntarily have met with limited success due to the variety of law firms who handle these types of cases and who may not have been educated about cy pres awards. WATJ believes that in order to generate the sought-after level of funding, the designation of legal service providers as cy pres beneficiaries needs to be mandatory.

B. The proposed amendment provides for the disbursement of residual funds by WisTAF.

WTAJ’s proposed amendment to section 803.03 provides that “the residual funds shall be disbursed to WisTAF to support activities and programs that promote access to the Wisconsin civil justice system.” This Court created the Wisconsin Trust Account Foundation (WisTAF) in 1986. “WisTAF brings Wisconsin’s legal and financial communities together to generate funds which are used to make grants to agencies providing civil legal services to Wisconsin’s most vulnerable residents.”⁴¹ Presently, WisTAF administers IOLTA, the Public Interest Legal Services Fund (PILSF), State of Wisconsin Low-Income Civil Legal Services Appropriation. Over the past 25 years, WisTAF has granted or distributed over \$40 million to agencies

⁴⁰ Bob Glaves & Meredith McBurney, *Cy Pres Awards, Legal Aid and Access to Justice: Key Issues in 2013 and Beyond*, 27 *Mgmt. Info. Exch. J.*, 24, 25 (2013); *see also* Thomas A. Doyle, *Residual Funds in Class Action Settlements: Using “Cy Pres” Awards to Promote Access to Justice*, *Fed. Law.*, July 2010, at 27 (stating that the state statutes and rules enacted to “require residual funds to be distributed, at least in part, to legal aid projects . . . provide[s] evidence of a public policy favoring cy pres awards that serve the justice system”).

⁴¹ WisTAF homepage, available at <https://www.wistaf.org/> (last accessed on February 3, 2015).

committed to increasing access to civil legal services for those who cannot afford it. WisTAF is the natural entity to administer cy pres funds as well.


CONCLUSION

WATJ urges the Court to adopt an amendment to the class actions rule that will permit the allocation of a portion of unclaimed class action awards to support the provision of legal services to low-income and indigent persons. The amendment will further this Court's mission for WATJ to create and sustain a civil legal aid system for those unable to afford access.

Respectfully submitted this 9th day of
October, 2015.

WISCONSIN ACCESS TO JUSTICE
COMMISSION

By:



David J. Harth, WI State Bar No. 1010417
Melody K. Glazer, WI State Bar No. 1054204
Perkins Coie LLP
1 East Main Street, Suite 201
Madison, WI 53703

Appendix 1

COMPARISON OF CURRENT WIS. STAT. § 803.08 AND PROPOSED AMENDMENT

803.08 Class actions. (a) When the question before the court is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole, except that no claim may be maintained against the state or any other party under this section if the relief sought includes the refund of or damages associated with a tax administered by the state.

(b) Disposition of Residual Funds.

(1) “Residual Funds” are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys’ fees and other court-approved disbursements. This rule does not prohibit the trial court from approving a settlement that does not create residual funds.

(2) “WisTAF” means the Wisconsin Trust Account Foundation, Inc.

(3) 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 disbursement of any residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to WisTAF to support activities and programs that promote access to the Wisconsin civil justice system. The court may disburse the balance of any residual funds beyond the minimum percentage to WisTAF 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.

Appendix 2

JURISDICTIONS WHERE PROCEDURES FOR DISTRIBUTING CY PRES AWARDS TO LEGAL AID SERVICES HAVE BEEN ADOPTED

Jurisdiction	Effective Date	Statutory Citation
California	January 1, 1994	Cal. Code Civ. Proc. § 384
Hawaii	July 1, 2011	Haw. Civ. Proc. R. 23(f)
Illinois	July 1, 2008	Ill. Comp. Stat. 5/2-807
Indiana	January 1, 2011	Ind. Civ. Proc. R. 23(f)
Kentucky	January 1, 2014	Ky. Civ. R. 23.05(6)
Louisiana	September 24, 2012	La. Sup. Ct. R. XLIII
Maine	March 1, 2013	Me. Civ. Proc. R. 23(f)(2)
Massachusetts	January 1, 2009	Mass. Civ. Proc. R. 23(e)
New Mexico	May 11, 2011	N.M. R. 1-023
North Carolina	October 1, 2005	N.C. Gen. Stat. § 1-267.10
Pennsylvania	July 1, 2012	Pa. Civ. R. 1716
South Dakota	2008	S.D. Codified Laws § 16-2-57
Tennessee	September 1, 2006	Tenn. Code Ann. § 23.08
Washington	January 3, 2006	Wash. Civ. R. 23(f)