



Cy Pres Rule Can Boost Legal Aid Funding





The cy pres rule earmarks unspent funds from class action settlements for legal aid organizations, including half to the Wisconsin Trust Account Foundation. But these residual funds can go unawarded if lawyers and judges don't know about the rule.

BY ED FINKEL

The state of Wisconsin has not provided direct funding for legal aid organizations since 2010, when it funded around \$5 million. But for the past several years, a statutory “cy pres rule” has generated more than \$1 million in legal aid indirectly. Created in 2016 by the Wisconsin Supreme Court, the rule directs unclaimed portions of class-action judgment or settlement funds to legal aid organizations. However, if lawyers and judges are unaware of the rule, such residual funds can go unawarded.

Cy pres, by common law, is an “equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor’s intention as possible, so that the gift does not fail.”¹ The doctrine is also used “to distribute unclaimed portions of a class action judgment or settlement funds that will advance the interests of the class.”²

In 2016, at the request of the Wisconsin Access to Justice Commission and with the support of the State Bar of Wisconsin, the Wisconsin Supreme Court amended Wis. Stat. section 803.08, effective in 2017, to require disbursement of not less than 50% of “residual funds” remaining in class actions to the Wisconsin Trust Account Foundation (WisTAF) “to support direct delivery of legal services to persons of limited means in non-criminal matters.” The term “residual funds,” under section 803.08(2), means “funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorney fees and other court-approved disbursements in an action” under section 808.03 (class actions). Whether all judges and litigants know of the rule, and are using it, is unclear.

“We don’t know what judges are doing because there’s no mechanism for reporting it,” says the Hon. Richard Sankovitz, a mediator, arbitrator, and special master with Resolution Systems LLC and a member of the Wisconsin Access to Justice Commission, who is retired from the bench. “In cases where there’s cash left over to pay the members and they don’t redeem all of it, in my experience, sometimes the parties foresee that, and have a plan [such as]: ‘This class action involves a consumer product; if there’s leftover money, why don’t we donate to a worthy cause in the same field that may benefit consumers?’”

Robert Welcenbach of Welcenbach Law Offices SC, a personal-injury firm based in Milwaukee, believes the rule mostly has worked as intended. “Primarily it’s meant so the person who’s ... done wrongdoing is not benefiting and allowed to retain that money” if it goes unclaimed, he says. “The [defendant] is reimbursing the class for something they did wrong. Rather than incentivize them, that money does not go back to them, it goes to the residual funds. It meets the purposes, which is what tort law and consumer law are meant to do: to remedy a wrong and to deter future behavior.”

Justification for Awarding Funds to Legal Services Organizations

Lawyers in Wisconsin already address the needs of low- and moderate-income clients in several ways, by doing pro bono work or paying into the public interest legal services fund, says Becky Murray, president of WisTAF, a civil legal aid administrator established by the Wisconsin Supreme Court. Under state law, WisTAF receives at least half of such funding. “They’re contributing



financially, or with their time and expertise,” she says. “They can’t do it all. There aren’t enough legal aid lawyers. This type of unique funding source is important if we’re looking at trying to address that gap in justice.”

The cy pres rule allows lawyers and judges to carry forward goals of verdicts and settlements in a different way, Murray says. “Ultimately, every class action is about access to justice for a group of people who wouldn’t necessarily have been able to obtain legal services on their own,” she says. “That’s the base rationale for why states have implemented these rules.”

The Hon. Laura Gramling Perez, a circuit court judge in Milwaukee County, believes the rule strikes a reasonable balance. “The requirement that at least 50% of the residual fund goes to WisTAF is intended to provide support for WisTAF, while also allowing parties some discretion in negotiating their settlement agreement [and] deciding what organizations they’d really like to benefit,” she says.

Sankovitz says the rule was created to guard against defendants with an ulterior motive, who hope that members of the class will not end up collecting so the defendants can swoop in and grab the unclaimed funds.

“Maybe the judge can say what that public good is,” he says. “It’s fascinating what judges have decided to spend the money on. It says a lot about the public spirit of judges, and the role that judges play as leaders in their communities. This rule is created to give some guidance. By and large, people agree that WisTAF is a good place for that money to go.”



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Without Wisconsin’s cy pres rule, class defendants would have the incentive to provide inaccurate or dated class lists and to suppress the participation of the class with respect to getting benefits, agrees Robert Murphy of the Murphy Law Firm in Charlottesville, Va. Murphy has served as co-counsel for plaintiffs in three class actions that resulted in funds being awarded to legal services organizations in Wisconsin.

“The residuals, the checks not cashed, that money can’t just sit in the administrators’ account,” he says. “It needs to be distributed. ... If [the defendant] bargained for a \$1 million settlement, that’s the bargain they cut. It shouldn’t make any difference who the money goes to, as long as it benefits the class.”

History of Wisconsin’s Cy Pres Rule

The Wisconsin Supreme Court created the statutory cy pres rule, at the request of the Wisconsin Access to Justice Commission’s petition, under its authority to “regulate pleading, practice, and procedure in judicial proceedings in all courts.”³

The petition noted that a 2007 State Bar study titled “Bridging the Justice Gap: Wisconsin’s Unmet Legal Needs” had found that more than 500,000 state residents had faced significant civil legal problems with no assistance from an attorney, leading in part to the creation of the Wisconsin Access to Justice Commission in 2009.

But the state’s decision to stop funding legal aid organizations, along with reduced funding from other sources, such as interest on lawyers’ trust accounts (IOLTA) programs, meant that total funding fell from nearly \$9 million in 2010 to \$5.5 million in 2013, the petition noted. Statewide hearings held by the commission found that potential clients’ needs had increased, especially in cases involving domestic violence and child abuse, eviction and other landlord-tenant issues, foreclosures, family law, and governmental benefits programs.

The petition noted that the U.S. Court

of Appeals for the Seventh Circuit and lower federal courts had encouraged the use of cy pres remedies in the past, but efforts to educate and encourage lawyers in Wisconsin to designate legal services providers had experienced limited success. Therefore, the petition said, this should become mandatory, as it was in “at least 14 other states” at some level.

Wisconsin Statutes section 803.08 was thus amended to read, in part: “In class actions in which residual funds remain, not less than 50% of the residual funds will be dispersed to WisTAF for delivery of legal services to persons of limited means in non-criminal matters. The circuit 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 and procedural interests of members of the certified class.”

However, the statute amendment also read: “This subsection does not prohibit the trial court from approving a settlement that does not create residual funds.” The cy pres rule took effect on Jan. 1, 2017.

How WisTAF and Agencies Have Benefited

Overall, Murray is pleased with the results over the past seven years. “We’ve been very grateful,” she says. “We’ve been the beneficiary of these efforts. We do what we do best: create and administer grants programming to fund civil legal aid.”

Murray estimates that half the states in the U.S. have similar provisions at this point, and “they all look a little different,” she says. In practice, at times, WisTAF has received notifications when a class-action award is made or a settlement is finalized. At other times, the foundation simply receives a check that it didn’t know would be coming.

WisTAF has received a total of about \$1 million from class-action verdicts and settlement funds over the last five

years, more than two-thirds of which – \$685,000 – came in 2021, thanks to a massive settlement in Milwaukee County. Aside from that outlier, WisTAF has received an average of \$80,000-90,000 per year, Murray says, “from counties all over the state, from Milwaukee to small counties way up north, or in western Wisconsin.”

The foundation receives funds from other sources such as IOLTA, although the 2021 boost made possible by the cy pres rule occurred at a very serendipitous time because IOLTA funding had fallen off dramatically. As of mid-November 2023, WisTAF had received \$153,000 from class-action settlements for the year, funding not quite 10% of a total budget of \$1.6 million.

The grants made possible by the cy pres rule go to “a pretty stable civil legal aid organization grantee pool” of about 15-20 groups that WisTAF funds annually, Murray says. “One of our grant-making goals is to keep consistent,” she says. But episodic sources such as those made possible by the cy pres rule and the IOLTA program provide “no way to budget. That’s why we want to expand and diversify our funding, so we’re not as reliant on sources that have peaks and valleys.”

In 2024, WisTAF’s grant budget is increasing to \$1.8 million overall, “of which cy pres funds play an important role, but certainly not the largest chunk,” Murray says. “In Wisconsin, there are relatively few cy pres cases, [compared] to California, Florida, or Illinois. There just aren’t a ton of these class actions that are filed in state court.” Class actions in federal court, which have provided a total of \$100,000, are not covered under the state statute, she adds. While the rule requires that no less than half of awards go to WisTAF, the amounts can be more than that, Murray notes.

The organizations that have received WisTAF funds are located all over the state and serve diverse needs, Murray says. “They serve clients in every

county. It’s a group that are like apples, to oranges, to meatloaf. They’re diverse in terms of size, resources, staffing levels, funding levels, the sources of their funds, and the client populations they serve.”

Some of these organizations are generalists, working in many areas of law, with large numbers of employees, Murray says. The largest grantee, Legal Action of Wisconsin, handles many areas of the law on behalf of clients across the southern half of the state. Others, such as Disability Rights Wisconsin, focus on more specific client populations. “Those 15 to 20 organizations are providing a really broad level and type of services to help people,” Murray said.

The individuals served must meet income-eligibility guidelines, with household incomes at 125% or below the

federal poverty rate. Overall, Murray said, WisTAF direct legal services grants have aided more than 7,000 people in Wisconsin. “These are people who wouldn’t otherwise have access to professional legal advice and representation,” she says. “We’re talking about veterans, or families who are facing housing instability, low-wage workers, people experiencing abuse or victims of crime, and the elderly.”

The Judicial Experience

Judge Gramling Perez oversaw a class-action settlement in 2022 that resulted in more than \$30,000 in residual funds awarded to WisTAF, the only such case with which she has been involved.

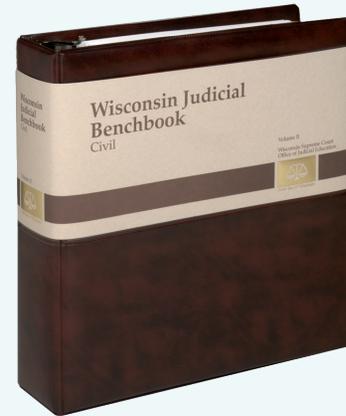
The case was based on allegations filed in 2020 that a credit union provided insufficient notice to auto loan

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borrowers about the disposal of cars repossessed to pay those loans, meaning they had insufficient opportunity to object to the prices the cars sold for. That resulted in fees and arrearages on those loans, leaving many with significant debts that were forgiven as part of the settlement, separate from the payout.

Many of the amounts paid out were quite small, as little as \$5, and some class members likely tossed the checks, either because they didn't seem worth cashing or people thought they were junk mail, Judge Gramling Perez says. A deadline had been imposed for class members to cash them, and after that deadline, the money went into a residual fund, with one-half given to WisTAF and the other one-half split between Legal Action of Wisconsin and the Legal Aid Society of Milwaukee, she says.

"My guess is, the settlement in this case involved an attempt to change the defendant's behavior moving forward, as a lot of class actions do," Judge Gramling Perez says. "It's a particularly valuable tool in cases like this, where a large number of relatively small payments made to class members may well go uncashed."

Any class-action settlement has a

process for the court to approve that settlement, Judge Gramling Perez says. That starts with a preliminary approval "where parties come and say, 'Here's the settlement we've reached; here's how we've proposed to compensate class members; here's the organization we've set up to organize those payments and class-member compensation,'" she says.

Once the money has been paid out, and class members have had the chance to opt in or out, the parties come back and ask for final judicial approval, Judge Gramling Perez says. They indicate how many class members have opted in or out and which class members, if any, objected to the settlements. The judge can "urge" that more than 50% of the settlement goes to WisTAF or decline to approve a payout to other organizations that don't seem to fit the interests of class members.

"Judges typically don't take an active role in negotiations toward the settlement between the parties," she says. "The judge's role is to look at the agreement and decide whether, overall, it's a fair agreement for the class members. That's what the judge has in mind when the parties resolve a class action and come to the court for approval."

Sankovitz, who has written a chapter about class actions for the State Bar of Wisconsin's *Wisconsin Judicial Benchbook: Civil*, says he's seen an increase overall in class actions, in large measure due to litigation in which plaintiffs are alleging that healthcare systems are overcharging for medical records. "Class action procedures are not something a lot of judges have spent time learning," he says. "There are an unusual number of reversals at the court of appeals level."

When a class action concludes, "typically, the judge is not judging things," Sankovitz says. "In the settlement agreement, or the order to administer the class, the judge is looking for language that says what happens with the money left over. Hopefully, the parties will propose something consistent with the rule. If they don't, that's the judge's entrée to say, 'You know, there's this rule, and this is my suggestion.' ... If the parties and lawyers are unable to agree, the judge might say, 'I can work this out for you – can't we all agree on this?'"

Attorneys' Viewpoint

Welcenbach, whose practice is about 80% personal injury and 20% class action and consumer cases, has handled some medical-records-overcharging class actions. Welcenbach, who represents individuals who in turn represent the class, also has represented plaintiffs in class actions that are consumer-oriented, typically related to student loans or credit card issues.

"I don't know that class actions have been that well utilized in Wisconsin," he says. "It's becoming more and more common. It's mandated by the statute that there has to be a cy pres recipient. However, there is nothing in the statute that requires that there be a residual fund. ... It is sort of voluntary, from that standpoint."

In consumer cases, Welcenbach has often nominated the Consumer Law Clinic at the University of Wisconsin Law School as the beneficiary of the

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50% that does not go to WisTAF. “We’ve chosen recipients who are in line with class members’ interests to deter future anti-consumer behavior,” he says.

Welcenbach has sometimes wondered whether there might be a way for attorneys to direct what WisTAF can do with the money it receives. “If a consumer case goes to WisTAF, they can use it for low-income housing or rental issues or those types of things, which don’t have to do with consumer cases,” he says. But he’s glad that WisTAF is receiving half the funds in general. “That meets a good purpose.”

Murphy has handled about 225 class actions that span nationwide automobile and truck defects, unlawful telemarketing, and claims under the Credit Service Organizations Act, “anything that addresses the misconduct of businesses and its effects on little guys,” Murphy says.

The cases Murphy has worked on

in Wisconsin, alongside Hayward attorney Matthew Lein of Lein Law Offices and Milwaukee attorney Nathan DeLadurantey of DeLadurantey Law Firm, have pertained to finance companies that repossess vehicles and then do not properly follow the processes in liquidating the property. “There are serious penalties when it’s not done properly,” he says. “We were fortunate that we were able to recover money for the class members and also get money that went on to fund legal services.”

Where that money went, aside from WisTAF, has depended on the nature of the case, including the location, says Murphy, who’s also a member of the Florida Bar Foundation Board. “I’m very sensitive to the grantees’ needs,” he says. “I’m mindful of what the rule requires. With respect to other agencies, nonprofits that would be beneficiaries, it’s a matter of negotiations with the class defendant. Everything is subject to

court approval by a state or federal court judge. With that said, we usually don’t have much in the way of pushback from anyone.”

Raising Awareness

Murray thinks that although lawyers who are active in class-action litigation are almost certainly aware of settlement requirements under Wis. Stat. section 803.08(10), other attorneys might not be. “Ultimately, it’s our goal to provide education and raise awareness, so that those who are just occasionally involved in these have good information,” she says. “There’s a real opportunity here – or a missed opportunity to not educate folks about the discretionary piece of it.”

Judge Gramling Perez hopes lawyers are always thinking about the possibility of creating a residual fund, leading to more cy pres awards. “And thinking about what might happen with

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the unclaimed settlement funds, and making sure they're used in a way that's constructive and furthers the members of the class, and the settlement," she says.

Judge Sankovitz thinks that some judges are probably following the law closely, while others don't know it exists or are relying on the parties to suggest where funds should end up. "And there might be judges who say, 'That sounds like a good idea to me,'" he says. "Not all class actions have money left over. If all that's left is coupons, there's not a lot the judge can do to order that any cash be put in the hands of WisTAF."

Given the dearth of legal aid resources in northern and western Wisconsin, Judge Sankovitz thinks judges in these areas might be more aware of the cy pres rule and WisTAF's services. "The role WisTAF plays is not as well understood or felt by judges in the largest counties, particularly in the southern

and southeastern parts of the state, just because the access to justice crisis is not as acute in those places," he says. "It's getting there. It's an ironic and sad thing: the worse the problem gets, the more we get judges on board as leaders to solve the problem."

But awareness is low partly because there aren't that many class actions in the first place, Judge Sankovitz says. "Most judges don't know a lot about class actions," he says. "They know they exist. They receive postcards in the mail saying they're a member of a class. They might remember spending half a day in class in law school [learning about class actions]."

Judge Sankovitz does not think that judges or attorneys are resistant to applying the cy pres rule. "That's why the education thing is really important," he says. "The smart [attorneys] have figured it out by the time the case is settled, but most of the time, parties don't think about it. After six months, a

year, a year and a half, they say, 'Judge, we got a report from the class action administrator, and we still have \$100,000. Now what?'"

Welcenbach thinks that attorneys who handle class actions are familiar with cy pres rules, in part because the concept has been on the rise nationwide – and used in federal class actions, as well. "With more published cases out there, it's getting to be more recognized," he says. "There are more articles about it in publications."

Murphy agrees that attorneys active in class-action litigation likely know about cy pres rules, but he's less certain about judges, some of whom suggest residual money go toward a completely unrelated cause. "Cy pres should have something to do with some indirect benefit to the class," he says.

Because representing plaintiffs in class actions is a relatively specialized area of practice, the number of lawyers in the field is decreasing, concentrating knowledge and experience, Judge Sankovitz says. That makes it less likely that lawyers will overlook the issue, although from time to time attorneys handling class actions come from out of state and might not know about the Wisconsin rule.

"Those lawyers might need a little bit of education about what our role is," he says. "They're used to doing it how it's done in their state. Well-meaning lawyers might say, 'There's leftover funds, and because this class action involved medical devices, if we've got any money left over, it should go to the Mayo Clinic, or the University of Wisconsin hospital system.' Then it's up to a lawyer or a judge to say, 'I think I read something about this in *Wisconsin Lawyer*. Doesn't part of this have to go to WisTAF?'" **WL**

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ENDNOTES

¹Cy pres, *Black's Law Dictionary* (8th ed. 2004).

²*Id.*

³Wis. Stat. § 751.12. **WL**