The Supreme Court of Texas

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August 1, 2022

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Parental Notification Rules and Forms. HB 1280, passed by the 87th Legislature, prohibits abortions, except in certain circumstances. HB 1280 does not expressly repeal or amend Chapter 33 of the Family Code, which governs parental notice of an abortion for an unemancipated minor. In 1999, following the enactment of Chapter 33, the Court promulgated rules governing proceedings to obtain a court order and forms for use in these proceedings. Those rules and forms were amended in 2015 to reflect amendments to Chapter 33. The Court ask the Committee to consider whether to repeal or amend the rules and forms in response to HB 1280 and to draft any recommended amendments. The Committee should conclude its work on this matter at the August 19, 2022 meeting.

Texas Rule of Civil Procedure 7. On May 18, 2020, in response to statutory probate court policies that prohibit executors from proceeding pro se, the Court asked the Committee to consider whether an executor has a right to proceed pro se and whether those policies impermissibly restrict that right. The Committee discussed this matter at its November 6, 2020 meeting and voted 18-3 in favor of the 1-14c subcommittee's assessment that executors have the right to proceed pro se. The Court now asks the Committee to draft amendments or a comment to Rule of Civil Procedure 7 in light of that vote. In drafting the amendments or comment, the Committee should also consider other types of pro se appearances those policies restrict, like pro se appearances by guardians and administrators.

Texas Rule of Civil Procedure 42. At least eleven states have rules or statutes that expressly address distribution of residual class action funds to legal aid. Five of those states (Indiana, Kentucky, North Carolina, Pennsylvania, and South Dakota) require a minimum distribution to legal aid. Massachusetts requires notice to legal aid before the court enters judgment or approves a settlement—similar to a 2002 proposal from the Texas Access to Justice Commission. The Court now asks the Committee to consider whether to amend Rule of Civil Procedure 42 in line with other states and to draft any recommended amendments. The Committee's discussion at its September 21-22, 2002 meeting and *Highland Homes, Ltd. v. State*, 448 S.W.3d 403 (Tex. 2014) may inform its work.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

West's Ann.Cal.C.C.P. § 384

§ 384. Distribution of unpaid cash residue and unclaimed or abandoned funds in class action litigation

Effective: January 1, 2019
Currentness

(a) It is the policy of the State of California to ensure that the unpaid cash residue and unclaimed or abandoned funds in class action litigation are distributed, to the fullest extent possible, in a manner designed either to further the purposes of the underlying class action or causes of action, or to promote justice for all Californians. The Legislature finds that the use of funds for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.

(b) Except as provided in subdivision (c), before the entry of a judgment in a class action established pursuant to Section 382 that provides for the payment of money to members of the class, the court shall determine the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus any interest that has accrued thereon, to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent. The court shall ensure that the distribution of any unpaid residue or unclaimed or abandoned class member funds derived from multistate or national cases brought under California law shall provide substantial or commensurate benefit to California consumers. For purposes of this subdivision, “judgment” includes a consent judgment, decree, or settlement agreement that has been approved by the court.

(c) This section shall not apply to any class action brought against any public entity, as defined in Section 811.2 of the Government Code, or against any public employee, as defined in Section 811.4 of the Government Code. However, this section shall not be construed to abrogate any equitable cy pres remedy that may be available in any class action with regard to all or part of the cash residue or unclaimed or abandoned class member funds.

Credits

(Formerly § 383, added by Stats.1993, c. 863 (S.B.536), § 2. Renumbered § 384 and amended by Stats.1994, c. 146 (A.B.3601), § 19. Amended by Stats.1994, c. 237 (S.B.2105), § 1, eff. July 18, 1994; Stats.2001, c. 96 (S.B.1218), § 2; Stats.2017, c. 17 (A.B.103), § 4, eff. June 27, 2017; Stats.2018, c. 45 (S.B.847), § 2, eff. June 27, 2018; Stats.2018, c. 776 (A.B.3250), § 6, eff. Jan. 1, 2019.)

Sections 378 to 381 appear in this volume

Notes of Decisions (20)

West's Ann. Cal. C.C.P. § 384, CA CIV PRO § 384
Current with urgency legislation through Ch. 16 of 2022 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Hawai'i Revised Statutes Annotated
Hawai'i Court Rules
Hawaii Rules of Civil Procedure
IV. Parties

Hawai‘i Rules of Civil Procedure, Rule 23

Rule 23. Class Actions

Currentness

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

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

Credits

[Amended effective January 1, 2000; July 1, 2011.]

Rules Civ. Proc., Rule 23, HI R RCP Rule 23

Current with amendments received through May 1, 2022. Some rules may be more current, see credits for details.

End of Document

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 735. Civil Procedure
Act 5. Code of Civil Procedure (Refs & Annos)
Article II. Civil Practice (Refs & Annos)
Part 8. Class Action (Refs & Annos)

735 ILCS 5/2-807

5/2-807. Residual funds in a common fund created in a class action

Effective: July 1, 2008
Currentness

§ 2-807. Residual funds in a common fund created in a class action.

(a) Definitions. As used in this Section:

“Eligible organization” means a not-for-profit organization that:

(i) has been in existence for no less than 3 years;

(ii) has been tax exempt for no less than 3 years from the payment of federal taxes under Section 501(c)(3) of the Internal Revenue Code;

(iii) is in compliance with registration and filing requirements applicable pursuant to the Charitable Trust Act and the Solicitation for Charity Act; and

(iv) has a principal purpose of promoting or providing services that would be eligible for funding under the Illinois Equal Justice Act.

“Residual funds” means all unclaimed funds, including uncashed checks or other unclaimed payments, that remain in a common fund created in a class action after court-approved payments are made for the following:

(i) class member claims;

(ii) attorney's fees and costs; and

(iii) any reversions to a defendant agreed upon by the parties.

(b) Settlement. An order approving a proposed settlement of a class action that results in the creation of a common fund for the benefit of the class shall, consistent with the other Sections of this Part, establish a process for the administration of the settlement and shall provide for the distribution of any residual funds to one or more eligible organizations, except that up to 50% of the residual funds may be distributed to one or more other nonprofit charitable organizations or other organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of a settlement.

(c) Judgment. A judgment in favor of the plaintiff in a class action that results in the creation of a common fund for the benefit of the class shall provide for the distribution of any residual funds to one or more eligible organizations.

(d) State and its political subdivisions. This Section does not apply to any class action lawsuit against the State of Illinois or any of its political subdivisions.

(e) Application. This Section applies to all actions commenced on or after the effective date of this amendatory Act of the 95th General Assembly and to all actions pending on the effective date of this amendatory Act of the 95th General Assembly for which no court order has been entered preliminarily approving a proposed settlement for a class of plaintiffs.

Credits

P.A. 82-280, § 2-807, added by P.A. 95-479, § 5, eff. July 1, 2008.

Notes of Decisions (1)

735 I.L.C.S. 5/2-807, IL ST CH 735 § 5/2-807

Current through P.A. 102-730 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated Indiana Code
Title 34 Court Rules (Civil)
State Court Rules (Civil)
Rules of Trial Procedure
IV. Parties

Trial Procedure Rule 23

Rule 23. Class Actions

Currentness

(A) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(B) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(d) the difficulties likely to be encountered in the management of a class action.

(C) Determination by Order Whether Class Action to be Maintained--Notice--Judgment--Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court, upon hearing or waiver of hearing, shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

(a) the court will exclude him from the class if he so requests by a specified date;

(b) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (B)(1) or (B)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (B)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (C)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate:

(a) an action may be brought or maintained as a class action with respect to particular issues; or

(b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(D) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters.

The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time. The court shall allow reasonable attorney's fees and reasonable expenses incurred from a fund recovered for the benefit of a class under this section and the court may apportion such recovery among different attorneys.

(E) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(F) 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 to implement the relief granted. Nothing in this rule is intended to limit the trial court from approving a settlement that does not create residual funds.

(2) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds, unless otherwise agreed. 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 Coalition for Court Access 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.

Credits
Amended effective January 1, 2011; September 21, 2018.

Notes of Decisions (311)

Trial Procedure Rule 23, IN ST TRIAL P Rule 23
Current with amendments received through May 15, 2022. Some rules may be more current, see credits for details.

End of Document

Baldwin's Kentucky Revised Statutes Annotated
Rules of Civil Procedure
IV Parties
CR 23. Class Actions (Refs & Annos)

Kentucky Rules of Civil Procedure (CR) Rule 23.05

CR 23.05 Dismissal or compromise

Currentness

The claims, issues, or defenses of a certified class may be settled, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under CR 23.02(c), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (5); the objection may be withdrawn only with the court's approval upon a showing of good cause.

(6) Disposition of residual funds.

(a) “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 to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from agreeing to, or the trial court from approving, a settlement that does not create residual funds.

(b) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Civil Rule 23 Account maintained by the Kentucky IOLTA Fund Board of Trustees pursuant to Supreme Court Rule 3.830(20). Such funds are to be allocated to the Kentucky Civil Legal Aid Organizations based upon the

current poverty formula established by the Legal Services Corporation to support activities and programs that promote access to the civil justice system for low-income residents of Kentucky.

Credits

HISTORY: Amended by Order 2013-14, eff. 3-6-14; prior amendments eff. 1-1-14 (Order 2013-14); 1-1-11 (Order 2010-09); adopted eff. 7-1-69

Notes of Decisions (10)

Rules Civ. Proc., Rule 23.05, KY ST RCP Rule 23.05
Current with amendments received through April 15, 2022. Some sections may be more current, see credits for details.

End of Document

Massachusetts General Laws Annotated
Massachusetts Rules of Civil Procedure
IV. Parties (Refs & Annos)

Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), Rule 23

Rule 23. Class Actions

Currentness

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. The court may require notice of such proposed dismissal or compromise to be given in such manner as the court directs. The court shall require notice to the Massachusetts IOLTA Committee for the purpose set forth in subdivision (e)(3) of this rule.

(d) Orders to Insure Adequate Representation. The court at any stage of an action under this rule may require such security and impose such terms as shall fairly and adequately protect the interests of the class in whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. Whenever the representation appears to the court inadequate fairly to protect the interests of absent parties who may be bound by the judgment, the court may at any time prior to judgment order an amendment of the pleadings, eliminating therefrom all reference to representation of absent persons, and the court shall order entry of judgment in such form as to affect only the parties to the action and those adequately represented.

(e) 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 to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order, judgment or approved compromise in a class action certified under this rule that establishes a process for identifying and compensating members of the class may provide for the disbursement of residual funds. In matters where the

claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, or to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts.

(3) Where residual funds may remain, no judgment may enter or compromise be approved unless the plaintiff has given notice to the Massachusetts IOLTA Committee for the limited purpose of allowing the committee to be heard on whether it ought to be a recipient of any or all residual funds.

Credits

Amended November 25, 2008, effective January 1, 2009; April 24, 2015, effective July 1, 2015.

Editors' Notes

REPORTER'S NOTES--1973

Prior Massachusetts practice in the area of class suits was governed entirely by case law. The requirements for maintaining a class suit in Massachusetts were set out as follows:

> "Class bills may be maintained where a few individuals are fairly representative of the legal and equitable rights of a *large number* who cannot readily be joined as parties. The persons suing as representatives of a class must show by the allegations of their bill that all the persons whom they profess to represent have a common interest in the subject matter of the suit *and a right and interest to ask for the same relief against the defendants.* It is not essential that the interest of each member of the class be identical in all aspects with that of the plaintiffs. The interest must arise out of a common relationship to a definite wrong. There must be a joint prejudice to all the class whom the plaintiff seeks to represent. The wrong suffered must be subject to redress by some common relief beneficial to all. The plaintiffs must be fairly representative in all essential particulars of the class for which they seek to act.... Mere community of interest in the questions of law or of fact at issue in a controversy or in the kind of relief to be afforded does not go far enough to warrant a class suit. Avoidance of multiplicity of suits is not enough." Spear v. H.V. Greene Co., 246 Mass. 259, 266-267, 140 N.E. 795, 797-798 (1923). (emphasis supplied)

This rule likewise applies where the action was brought *against* a class. Thus in Thorn v. Foy, 328 Mass. 337, 338, 103 N.E.2d 416, 417 (1952) a suit was held properly brought against the officers of a labor union, individually and as representatives of the members of the union, because it was found that the members were too numerous to be sued individually and the named defendants adequately represented the entire membership.

Rule 23(a) sets out four prerequisites to a class action. These prerequisites, which are also contained in Federal Rule 23(a) as amended in 1966, closely parallel prior Massachusetts practice as stated in Spear v. H.V. Greene Co., supra.

> *"(1) the class is so numerous that joinder of all members is impracticable."*

Federal courts have drawn very few lines with respect to how large a class must be in order to allow the class action. Most courts would agree that mere numbers should not be the sole test of practicability of joinder.

"But courts should not be so rigid as to depend upon mere numbers as a guideline on the practicability of joinder; a determination of practicability should depend upon all the circumstances surrounding a case." Demarco v. Edens, 390 F.2d 836, 845 (2d Cir.1968).

The Supreme Judicial Court has never attempted to set any minimum number which would be necessary for a class suit. The opinions use such language as "large number who cannot readily be joined as parties," Spear v. H.V. Greene Co., 246 Mass. at 266, 140 N.E. at 797; "When the parties interested are very numerous, so that it would be difficult and expensive to bring them all before the court ... the court will not require a strict adherence to the [general] rule [that all interested persons be made parties]." Stevenson v. Austin, 44 Mass. (3 Metc.) 474, 480 (1842).

Rule 23(a)(1) will have little effect on prior Massachusetts practice.

"(2) there are questions of law or fact common to all."

The requirement of common questions of law or fact is the same as that established for joinder under Rule 20 and intervention under Rule 24. It should, however, be noted that Rule 23(a)(2), unlike Rules 20 and 24, does not also require a single transaction or series of transactions or a single occurrence or series of occurrences. However, the language of Rule 23(b) concerning the predominance of the questions of law or fact over questions affecting individual members would imply the need for a single transaction or occurrence or a series of transactions or occurrences.

Rule 23(a)(2) should have little effect on prior Massachusetts law. "The persons suing as representatives of a class must show by the allegations of their bill that all the persons whom they profess to represent have a common interest in the subject matter of the suit and a right and interest to ask for the same relief against the defendants." Spear v. H.V. Greene Co., 246 Mass. at 266, 140 N.E. at 797.

"(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will adequately protect the interests of the class."

Prerequisite (3) was written into Federal Rule 23 when it was amended in 1966. It should be read with prerequisite (4). Both requirements state the need for the ability of the representatives of the class to protect its interests. The word "typical" does not require that all members of the class be identically situated. Siegel v. Chicken Delight, Inc., 271 F.Supp. 722, 726-727 (N.D.Cal.1967). This is similar to the language of the Supreme Judicial Court in the *Spear* case: "It is not essential that the interest of each member of the class be identical in all respects with that of the plaintiffs. The interest must arise out of a common relationship to a definite wrong." Spear v. H.V. Greene Co., 246 Mass. at 266, 140 N.E. at 797.

Rule 23(a)(3) and (4) should have little effect on prior Massachusetts law.

Rule 23(b) deletes substantial portions of Federal Rule 23(b) which are unnecessary to state practice. Beyond the four requirements set out in Rule 23(a) for maintaining a class action the only further requirements set out in Rule 23(b) are findings by the Court: (1) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Rule 23(c) and (d) are designed to afford protection to absent members of the class.

Unlike Federal Rule 23, the Massachusetts class action rule does not *require* the giving of notice to members of the class; nor does it provide to members of the class the opportunity to exclude themselves. Instead Rule 23(d) provides that the court may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. No doubt the trial judge will order the giving of appropriate notice to members of the class, of the commencement of the action where fairness and justice so require, particularly where the failure to give notice may raise subsequent problems of res judicata.

REPORTER'S NOTES--1996

With the merger of the District Court civil rules into the Mass.R.Civ.P., Rule 23 of the Mass.R.Civ.P. governing class actions is made applicable to District Court proceedings.

REPORTER'S NOTES--2008

The 2008 amendment, effective January 1, 2009, added Rule 23(e) concerning residual funds in class action proceedings. This amendment was recommended to the Supreme Judicial Court by the Massachusetts IOLTA Committee.

Notes of Decisions (114)

Rules Civ. Proc., Rule 23, MA ST RCP Rule 23

Current with amendments received through April 15, 2022. Some rules may be more current; see credits for details.

N.C. Gen. Stat. § 1-267.10

Current through Session Law 2022-6

Section 1-267.10 - Distribution of unpaid residuals in class action litigation

(a) It is the intent of the General Assembly to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action or to promote justice for all citizens of this State. The General Assembly finds that the

use of funds collected by the State courts pursuant to this section for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.

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

N.C. Gen. Stat. § 1-267.10

Added by 2005 N.C. Sess. Laws 420, s. 1, eff. 10/1/2005.

West's New Mexico Statutes Annotated
State Court Rules
1. Rules of Civil Procedure for the District Courts
Article 4. Parties

NMRA, Rule 1-023

RULE 1-023. CLASS ACTIONS

Currentness

A. Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

B. Class actions maintainable. An action may be maintained as a class action if the prerequisites of Paragraph A of this rule are satisfied, and in addition

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(d) the difficulties likely to be encountered in the management of a class action.

C. Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subparagraph may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under Paragraph (B)(3) of this rule, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that

(a) the court will exclude the member from the class if the member so requests by a specified date;

(b) the judgment whether favorable or not, will include all members who do not request exclusion; and

(c) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under Paragraph (B)(1) or (B)(2) of this rule, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Paragraph (B)(3) of this rule, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Paragraph (C)(2) of this rule was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate

(a) an action may be brought or maintained as a class action with respect to particular issues; or

(b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

D. Orders in conduct of actions. In the conduct of actions to which this rule applies, the court may make appropriate orders

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in the manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters. The orders may be combined with an order under Rule 1-016 NMRA, and may be altered or amended as may be desirable from time to time.

E. Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in the manner as the court directs.

F. Appeals. The Court of Appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within fifteen (15) days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the Court of Appeals so orders.

G. Residual funds to named organization.

(1) For purposes of Paragraph (G)(2) of this rule, “residual funds” are

(a) unclaimed funds, including uncashed checks and other unclaimed payments, that remain after payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements or dispositions to implement the relief granted, whether the payments are drawn from a common fund or directly from the judgment debtor's own funds; or

(b) if it is impossible or economically impractical to distribute the common fund to the class at all, the entire common fund after payment of all approved expenses, litigation costs, attorneys' fees, and other court-approved disbursements or dispositions to implement the relief granted, whether the payments are drawn from a common fund or directly from the judgment debtor's own funds.

(2) Either in its order entering a judgment or approving a proposed settlement of a class action certified under this rule that establishes a process for identifying and compensating members of the class or by a subsequent order entered when residual funds are determined to exist, the court shall provide for the disbursement of residual funds, if any, to one or more of the following entities:

(a) nonprofit organizations that support projects that benefit the class or similarly situated persons consistent with the goals of the underlying causes of action on which relief was based;

(b) educational entities that provide training, teaching and legal services that further the goals of the underlying causes of action on which relief was based;

(c) nonprofit organizations that provide legal services to low income persons;

(d) the entity administering the IOLTA fund under Rule 24-109 NMRA, to support activities and programs that promote access to the civil justice system for low income residents of New Mexico; and

(e) the entity administering the pro hac vice fund under Rule 24-106 NMRA, to support activities and programs that promote access to the civil justice system for low income residents of New Mexico.

(3) Nothing in this paragraph is intended to prevent the parties to a class action from proposing, or the trial court from approving, a settlement that does not create residual funds.

Credits
[Amended effective July 1, 1995; Dec. 4, 2000; May 11, 2011; Dec. 31, 2016.]

Notes of Decisions (226)

NMRA, Rule 1-023, NM R DIST CT RCP Rule 1-023
Current with amendments received through April 15, 2022.

Purdon's Pennsylvania Statutes and Consolidated Statutes
Pennsylvania Rules of Civil Procedure (Refs & Annos)
Class Actions (Refs & Annos)

Pa.R.C.P. 1716

Rule 1716. Residual Funds

Currentness

(a) Any order entering a judgment or approving a proposed compromise or settlement of a class action that establishes a process for the identification and compensation of members of the class shall provide for the disbursement of residual funds.

(b) Not less than fifty percent (50%) of residual funds in a given class action shall be disbursed to the Pennsylvania Interest on Lawyers Trust Account Board to support activities and programs which promote the delivery of civil legal assistance to the indigent in Pennsylvania by non-profit corporations described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. The order may provide for disbursement of the balance of any residual funds in excess of those payable to the Pennsylvania Interest on Lawyers Trust Account Board to the Pennsylvania Interest on Lawyers Trust Account Board, 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 interests of the members of the class.

Credits
Adopted May 11, 2012, effective July 1, 2012.

Rules Civ. Proc., Rule 1716, 42 Pa.C.S.A., PA ST RCP Rule 1716
Current with amendments received through May 1, 2022. Some rules may be more current; see credits for details.

End of Document

South Dakota Codified Laws
Title 16. Courts and Judiciary
Chapter 16-2. The Unified Judicial System

SDCL § 16-2-57

16-2-57. Settlement of class action lawsuit

Currentness

Any order settling a class action lawsuit that results in the creation of a common fund for the benefit of the class shall provide for the distribution of any residual funds to the Commission on Equal Access to Our Courts. However, up to fifty percent of the residual funds may be distributed to one or more other nonprofit charitable organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of the settlement. For the purposes of this section, residual funds are any funds left over after payment of class member claims, attorney fees and costs, and any reversions to a defendant agreed upon by the parties and approved by the court. This section does not apply to any class action lawsuit against the State of South Dakota or any of its political subdivisions.

Credits
Source: SL 2008, ch 104, § 3.

S D C L § 16-2-57, SD ST § 16-2-57
Current through laws of the 2022 Regular Session effective March 18, 2022 and Supreme Court Rule 22-10

End of Document

T. C. A. § 16-3-821

§ 16-3-821. Tennessee voluntary fund for indigent civil representation

Effective: August 11, 2009
Currentness

(a) This section shall be known and may be cited as the "Tennessee voluntary fund for indigent civil representation."

(b)(1) There is established in the state treasury a separate account known as the Tennessee voluntary fund for indigent civil representation. It is the intent of the general assembly that this fund be used to provide supplemental funding for the provision of civil legal representation for indigents. Distribution of the fund as provided in this section shall be administered by the administrative office of the courts (AOC).

(2) Contributions to the Tennessee voluntary fund for indigent civil representation are voluntary and this section shall not be construed to require an appropriation from the general fund to establish, maintain, operate, or disburse money from the fund, if done in accordance with this section.

(c) The Tennessee voluntary fund for indigent civil representation is authorized to receive contributions from the following sources:

(1) The unpaid residuals from settlements or awards in class action litigation in both state and federal courts; provided, that the litigation has been certified as a class action under Tenn. R. Civ. P. 23 or Rule 23 of the federal rules of civil procedure;

(2) Awards from other actions in a state or federal court, when specifically designated by the judges in those actions;

(3) Monetary settlements, whether through mediation, arbitration or otherwise, when so designated by a party authorized to do so;

(4) Gifts, contributions, bequests, donations, devises and grants from any legal and appropriate source to effectuate the purpose of the fund. If these contributions to the fund are not in the form of money or other negotiable instrument, any income, rents or proceeds generated from the items contributed shall be deposited into the fund; and

(5) Any other legitimate funding source that is now available or may in the future become available.

(d) Amounts remaining in the fund at the end of the fiscal year shall not revert to the general fund, but shall remain available for use as provided in this section. Moneys in the fund shall be invested by the state treasurer pursuant to title 9, chapter 4, part 6, for the sole benefit of the fund.

(e) Any cost associated with the Tennessee voluntary fund for indigent civil representation shall be paid for by the proceeds of this fund.

(f) When the corpus of the Tennessee voluntary fund for indigent civil representation reaches or exceeds one million dollars ($1,000,000), the interest on the corpus shall be distributed in accordance with § 67-4-806(2).

(g)(1) The AOC and the Tennessee Alliance for Legal Services may make the judiciary and legal profession aware of and promote the existence and purpose of this fund.

(2) The Tennessee Alliance for Legal Services may also make any materials explaining and promoting the fund available to charitable or philanthropic foundations and other groups or persons who might be interested in contributing to the fund.

(h) Nothing in this section shall be construed to repeal or affect the operation of the civil legal representation of indigents fund created in § 16-3-808. It is the intent of the general assembly that the two (2) funds remain distinct and separate methods to achieve the same goal of providing quality legal representation to indigents in civil actions.

Credits

2006 Pub.Acts, c. 589, § 1.

T. C. A. § 16-3-821, TN ST § 16-3-821

Current with laws from the 2022 Second Regular Sess. of the 112th Tennessee General Assembly, eff. through April 28, 2022. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

End of Document

TEXAS ACCESS TO JUSTICE COMMISSION

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MEMORANDUM

TO: **Supreme Court Rules Advisory Committee**

FROM: John R. Jones, Chair, Texas Access to Justice Commission

DATE: September 12, 2002

RE: **Texas Access to Justice Commission Recommendations on Rule 42**

Enclosed please find a proposed amendment to Rule 42 designed to improve access to justice for the 3.1 million Texans who fall below federal poverty guidelines.

The rule change would affect the settlement process in class action lawsuits so as to encourage the parties and the courts to consider whether funds that cannot be distributed directly to class members may be instead used to expand access to the courts. While the rule requires the *consideration* of such awards when *cy pres* funds may be available, it does not obligate the parties nor the court to ultimately order that funds be awarded to civil justice programs.

The Joint Texas Access to Justice Commission/Texas Equal Access to Justice Foundation Resource Committee, working with the staff of Texas Legal Services Center, developed the draft rule and supporting materials. Several other state planning commissions have developed similar recommendations, although Texas is now in the lead in formally requesting the Court to implement the rule change. As noted in background materials, a statutory requirement already exists in California that is similar in scope.

Texas is facing a crises situation with recent drops in interest rates that have heavily impacted IOLTA revenue. Staff at the Texas Equal Access to Justice Foundation are now expecting a total revenue drop in excess of $1.2 million that will likely result in sharp grant reductions to legal aid and pro bono organizations. In addition, federal funding for Texas programs will be reduced as a result of census adjustments. On behalf of the members of the Texas Access to Justice Commission, I respectfully request that your Committee assist us on an expedited basis in placing this rule change before the Court for their consideration early this fall.

Please contact me if you have any questions about the proposed rule change or the supporting materials. Thank you for your assistance and courtesy.

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September 12, 2002

Honorable Andrew Weber
Clerk of the Supreme Court of Texas
201 W. 14th, Room 104
Austin, Texas 78701

Re: TATJC Policy Recommendation No. 3: Amendment to Texas Rules of Civil Procedure 42

Dear Mr. Weber:

The purpose of this letter is to file with and forward to the Supreme Court of Texas Policy Recommendations No. 3 of the Texas Access to Justice Commission ("TATJC") proposing an amendment to Rule 42 of the Texas Rules of Civil Procedure governing class actions. In cases involving class action settlements, there may be funds available for which there is no primary designated beneficiary. Using the *cy pres* doctrine, the parties, subject to court approval, normally designate a substitute beneficiary for funds that may not be economically distributed to class members. This amendment establishes a standard procedure whereby courts will consider whether or not orders approving settlements will provide for the distribution of funds to assist in the delivery of civil legal services to the poor.

Background

1. ***Why is such an amendment needed?*** Without such an amendment, trial courts may not realize that such distribution is permissible, and they may believe that undistributable funds should revert back to the party(ies) found liable in the class action. Such an amendment would be another step toward meeting the civil legal needs of poor persons in Texas. On January 27, 2000, the State Bar of Texas presented to the Texas Supreme Court a Status Report on Civil Legal Services to the

Poor (Appendix A to this letter). In that report, the State Bar made clear that existing resources are vastly inadequate to meet the needs for civil legal services for low-income Texans. Current resources include funds from the Legal Services Corporation (LSC), the Interest on Lawyers Trust Accounts (IOLTA), a civil court filing fee add-on (which generates the Basic Civil Legal Services fund, known as BCLS), state funding for crime victims assistance, and even license plates ("And Justice for All"). Despite these multiple resources, the State Bar informed the Supreme Court, in its report, that "[F]or approximately 70% [of identified legal problems of low-income Texans] no legal advice or assistance was available." Status Report on Civil Legal Services to the Poor in Texas, p. 6, submitted by the State Bar of Texas to the Supreme Court of Texas on January 27, 2000 (Appendix A). More recently, the IOLTA funds available for civil legal services have been cut from record levels of approximately $10 million to the 2003 projected level of $4.9 million due to interest rate cuts and increases in bank service charges. Voluntary contributions, and other Bar sponsored measures have helped to somewhat ameliorate the revenue drops, but the fact remains that large shortfalls remain and applicants for civil legal assistance continue to be denied help on a daily basis.

2. ***How has this matter been dealt with up to now?*** Court after court has had to grapple with the problem of distributing funds recovered in class actions, when it has not been feasible and economical to make distribution to each absent class member. They have had to answer the question: What can a Court do with Leftover Class Action Funds? As one expert has responded: "Almost Anything!" Article by Kevin M. Forde, What Can a Court Do with Leftover Class Action Funds? Almost Anything!, The Judges' Journal, Summer, 1996, pp. 19 - 22, 44-45 (Appendix B). (With extensive citations to court cases.) In the *federal* court system, there is precedent for distributing otherwise undistributable class action awards to law-related entities. For instance, in *In re Corrugated Container Antitrust Litigation*, MDL 310, 53 Antitrust & Trade Regulation Reports, 711 (S.D. Tex. Oct. 6, 1987), six Texas law schools shared in a distribution of over $1 million. In *In re Folding Carton Antitrust Litigation*, 687 F.Supp. 1223 (N.D.Ill. 1988), aff'd in part, rev'd in part 881 F.2d. 494 (7th Cir. 1989), cert. denied, 494 U.S. 1027 (1990), undistributable funds were used to establish a fellowship fund to support lawyers serving low-income persons. Appendix C has pertinent excerpts from the Orders of the Hon. Ann Claire Williams, then a District Court Judge, and now a Judge on the U.S. Court of Appeals for the 7th Circuit. California has dealt with the matter of undistributed class recoveries by means of its Code of Civil Procedure. Section 384 of the California Code of Civil Procedure, Appendix D, provides for the "Distribution of unpaid residuals in class action litigation." Nonprofit organizations providing civil legal services to the indigent are included among the permissible distributees. Section 384 (b), California Code of Civil Procedure (Appendix D).

The proposed amendment is a recognition that in many duly certified class actions, the monetary recovery cannot be feasibly and economically distributed to the absent class members. Likewise, in some instances, known as "entrepreneurial class actions," the relief provided to class members who can be located is limited to a discount coupon while the cash portion of the

settlement ends up elsewhere or is not distributed. This is unfortunate and thwarts the courageous efforts of trial judges who have properly determined that a recovery is due from the defendant(s), but cannot feasibly distribute that recovery in cash to the absent class members.

Class actions require the use of the legal system for resolution and often involve substantial amounts of judicial resources for which the general public receives no benefits. When these class actions generate monetary recoveries that cannot be distributed economically to absent class members, it is equitable for the legal system to receive recognition for its role in creating the recoveries. Thus, the TATJC believes it would be appropriate, in cases where distribution to absent class members is not feasible and economical, for the trial court to determine whether undistributable funds should be used to support and/or expand access to civil legal services for the poor. To this end, we propose that the Supreme Court of Texas enter an order amending the class action rule, T.R.C.P. 42, adding to present paragraph (c) a new subparagraph (4), namely:

Proposed Texas Rule of Civil Procedure 42 (c) (4):

> In any action certified pursuant to T.R.C.P. 42 in which the settlement or judgment includes a monetary award (by way of damages, equitable restitution, or other payment due from the defendant(s) to the class(es)), each party must serve on the Texas Equal Access to Justice Foundation notice of any hearing for preliminary approval of the settlement or judgment and notice of any final hearing to approve the settlement or judgment, and such notice must be served concurrent with notice to any other party of any such hearing. In any such action in which actual distribution to each affected class member is not reasonably and economically feasible, or in which there may be unclaimed funds by virtue checks that are not cashed or proofs of claim not submitted, the court shall have the discretion to issue a finding of fact as to whether those funds should be used to support access to civil legal services to the poor. If the court makes a finding of fact that those funds should be used to support access to civil legal services for the poor, the court shall direct the appropriate party to remit such undistributable funds to the Texas Equal Access to Justice Foundation. The Foundation shall use the remitted funds to support increased access to civil legal services for the poor.

The proposed rule change only has effect *after* the trial court has certified a case as a class action, and *after* any monetary award has already been determined. Thus, the proposal does not affect whether a case should be certified as a class action, nor does it affect the amount of any recovery. The proposal does not interfere with distributions to absent class members, when such distributions are feasible and economical. Even then, the proposal does not require that the trial court make any distribution for civil legal services for the poor. Rather, the trial court would make a finding of fact as to whether such a distribution for civil legal services for the poor should occur. If and only if the trial court rules in the affirmative, are the undistributable funds remitted to the Texas Equal Access to Justice Foundation. The funds would then be administered by the Texas Equal Access to Justice Foundation pursuant to existing, time-tested standards. This would enhance resources for civil legal services for the poor and address the current and expected additional shortages in IOLTA funding.

Respectfully submitted,

John R. Jones

John R. Jones, Chair
Texas Access to Justice Commission

Hon. Thomas R. Phillips, Chief Justice
Hon. Nathan L. Hecht, Justice
Hon. Craig T. Enoch, Justice
Hon. Priscilla R. Owen, Justice
Hon. Mike Schneider, Justice
Chris Greisel, Rules Attorney

Hon. Deborah G. Hankinson, Justice
Hon. Harriet O'Neill, Justice
Hon. Wallace B. Jefferson, Justice
Hon. Xavier Rodriguez, Justice

briefly, about the cy pres rules, because Stephen, I think, you still -- you have to leave early, don't you?

MR. YELONOSKY: Well, I have a meeting that starts at 10:00. I'd like to get to it before it's over -- different meeting, but if you can take it up, I'd appreciate it.

CHAIRMAN BABCOCK: Yeah. That's the last item on the agenda, but there's no reason we can't bump it up here in light of the fact that Stephen is co-chair of the Access to Justice Committee, which is a Supreme Court created body that people have been appointed to. And Justice Hankinson is very interested in this issue. The rule -- it would be Rule 42, and that's been referred to Richard Orsinger's subcommittee, but just recently. And I don't know, Richard, if you or Stephen want to talk about it.

MR. ORSINGER: I think it would be good to have Steve lay the background.

MR. YELONOSKY: Well, that's scary.

MR. ORSINGER: Are you willing to?

MR. YELONOSKY: Let me correct the record. First, I think you've overstated my position, Chip. I'm co-chair of the subcommittee of the

committee of the Equal Access to Justice Commission. It's like four levels down, and as you know, you're the co-chair of that subcommittee as well, Chip.

CHAIRMAN BABCOCK: I thought we were bigger deals than you just said.

(Laughter)

MR. YELONOSKY: I thought we were, too, until I followed all that --

CHAIRMAN BABCOCK: You looked at the flow chart.

(Laughter)

MR. YELONOSKY: And the reason it's scary for me to give the background on this is because until, I think, maybe a month ago, I didn't know what cy pres meant. Now I know that it is Old French for "the next best thing."

And this has been proposed -- I think, really, the champion of this -- and Chris could speak to this probably better than I could, was Randy Chapman with Texas Legal Services Center, and I don't know whether -- Chris, was there some impetus prior to that or was it Randy who --

MR. GRIESEL: No. There was some impetus with Randy's intervention in the lawsuit down in the valley on a class action in which the Legal

Services group received a cy pres award that otherwise would have lapsed to a different fund.

MR. YELONOSKY: Okay. Well, Chris, I hope you'll fill in on this, but, basically, the proposal -- and there's a suggested rule here. The goal here is to see if some of the funds that are available and are distributed pursuant to the cy pres doctrine, that, in those instances, the judges might be encouraged to consider whether an appropriate recipient of those funds would be legal services for the poor in the form of an award to the Equal Access to Justice Foundation.

There's a lot of background material here. In California, it was done by statute, I believe. The proposal here is to do by rule, and since it is by rule, it isn't as compulsory, I guess, as it is by statute in California, but, basically, the idea is to give notice to the Equal Access to Justice Foundation that there is a cy pres award under consideration and for the judge acting within his or her discretion to decide if that would be an appropriate recipient.

And, Chris, please pick up from there.

MR. GRIESEL: No. I think that outlines the basis -- It's got, I think, three prongs, one of

which is a requirement that the parties serve notice on the commission of any hearing for preliminary approval of the settlement of judgment and notice of any final hearing to approve settlement or judgment. And then it allows the court to make a finding that the funds should be used to support access to the civil legal services to the poor and it allows the court to direct the appropriate party to remit the undistributable funds to the foundation, with the restriction that it can only be used for legal services. I think that's the three major components of the rule.

MR. YELONOSKY: I think it's worth pointing out that the subcommittee that redrafted the proposed rule as you see it here included Chip, myself, a number of people connected with Legal Services, and also Judge Jake Patterson from Dallas and Mack Kidd from the Third Court of Appeals.

And subsequent to our last meeting, Chris Griesel asked me a question that I think this committee will have the answer and is not answered by this rule, which -- the proposed rule, which is, "What happens if the judge doesn't do what it says here the judge should do?" And since that really wasn't discussed in the meeting, as far as I remember it,

unless Chip knows the answer to that, it may have purposely been left unsaid, largely -- as originally drafted, the rule was even -- didn't even require the judge to give notice, I don't think, to Equal Access to Justice Foundation, just to consider whether an award to the foundation would be appropriate. So there really was no way of telling whether the judge had considered it or not.

The way this rule is proposed, there's a requirement of notice, and, obviously, there would be a way of telling whether that had happened or not, but there's no consequence stated if it's not done.

MR. EDWARDS: Just as a point of information, could we get a show of hands of those here who have been through a fairness hearing on a settlement of a class action?

(Show of hands)

MR. EDWARDS: Because if you haven't been through one, you won't understand what this proposal means -- been through one that is contested in any way. I would assume that the foundation could show up and do something at the hearing. Is that the thrust of it?

MR. YELONOSKY: I don't -- I mean, my understanding, now, of the cy pres doctrine is that

it's really separate from the considerations that are made in a fairness hearing, because the fairness hearing -- and somebody here will correct me if I'm wrong, but the fairness hearing, I would think, is to determine whether or not the interest of the class members have been served, and the predicate for a cy pres award is that there's money that can't be given to either the class members or the intended beneficiary for some reason.

MR. EDWARDS: Yeah. The reason that I raise the issue is that any class actions I've been involved in, the settlement proposal itself determines what happens to excess funds. They go to some specified place. They go to the state. They go back to the person who's putting up the money.

These things are negotiated and they're not -- most people are not very happy with either side with the way they come down. And sometimes, if the class is spread and you're not sure you're going to get all of them and somebody is willing to pay X dollars a head and if you can't find them all, what's not found goes back to the payor. It's not like they're admitting doing anything wrong -- giving up that they did something wrong or anything, but it's just, how the funds are moved, they're usually taken

care of in the settlement. And if you limit this rule to where there's no provision for leftover funds made as a part of the settlement, I don't have any problem with it; although the state might, because you have the escheat statute.

CHAIRMAN BABCOCK: Harvey had his hand up a minute ago, and then Ralph.

HON. BROWN: I was going to say that point, and, additionally, I think giving notice is totally separate from requiring a judge to make a fact-finding about it. I do think there are cases where the leftover money gets distributed to some charity that at least has some connection directly to the case, and that can be a negotiated point over what charity it is. I don't think the judge should have to make a fact-finding, "I think this charity is more appropriate than the Texas Equal Access Foundation in this particular case." I think notice, if they can come in and argue if they want, that's fine, but requiring a fact-finding, I think that's a bit much.

CHAIRMAN BABCOCK: Okay. Ralph had his hand up, and then --

MR. DUGGINS: I'm not sure that notice is not going to make the commission a party to every class action, kind of like TECA did when they said,

"The DOE is going to be a party in every overcharge suit," and it just created a real problem.

I think the concept is great, but it concerns me that you're going to make this commission that -- the commission will be able to inject itself in every class action settlement, and I don't know if that's appropriate.

CHAIRMAN BABCOCK: Frank, and then Richard. And then Stephen.

MR. GILSTRAP: Is it correct that we're just talking about notice? We're not trying to pass the rule that says that the judge, under the cy pres doctrine, has the power to give funds to Equal Access for Justice. Am I correct?

PROFESSOR ALBRIGHT: To make a finding.

MR. YELONOSKY: I think the brief answer is "Yes." And I guess it's "yes" in part because the court, as I understand the cy pres doctrine, already has that power.

MR. GILSTRAP: I think there's got to be some relation between the purpose -- I mean, under the cy pres doctrine, there had to be -- the trust had to be for a purpose. For example, it was to educate Joe Blow's kids and Joe Blow didn't have any kids, so we educated his nieces and nephews. So it was related.

But I think when you come in and you say -- you get to the point that you mandate it, then I think you have some real problems with the doctrine of escheat, and, you know, who distributes the state's money. It seems to me, at some point, that decision goes across the street to the legislature.

If we're not saying that the court has the power, I don't have a problem with it. I mean, if we're just letting people get notice and they can come in and make their case as to why they think Equal Access for Justice should get this money, I don't have a problem with that.

MR. ORSINGER: I'd like to respond to several things that have accumulated. First, to Bill's point, the supporting information for this proposal, which, there's a piece of paper over here that's entitled "Background for Amendments to Rule 42" -- I don't know who authored it, but it's offered up as an explanation for this --

MR. YELONOSKY: I think Randy did. I think Randy Chapman.

MR. ORSINGER: All right. On the second page, the backside, in the middle of the page is the question, "Why will the parties be required to notify the foundation prior to approval of a settlement?"

And this explanation sheet goes on to say, "In class actions, there is a hearing on a settlement in which affected parties may question the fairness of the agreement. With advance notice, advocates for civil justice may work with attorneys in settling cases to recommend how settlements may be structured to meet priority civil justice needs. Conversely, if settlements appear to provide no material benefits to class members (and only benefit plaintiff's counsel), those advocates could appear at a fairness hearing to question whether the agreement should be approved and recommend alternatives to the court."

I'm not a class action lawyer, but that says, to me, that this rule is giving standing to advocates for this foundation to appear and object to a settlement, even though they are not a party to the settlement, in order to get the settlement rejected if they're not satisfied with what's happening to the unclaimed funds.

Another thing I would like to point out is that the California statute, if you look at it, and it's in a packet of materials that I have, and, I don't know if, frankly, if it's over there, but the California statute, I think, probably is a little broader in terms of what it tells the court it could

do with the unclaimed funds than this proposed Rule 42, because the California statute says that the court can consider the money going to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying class action to child advocacy programs or to nonprofit organizations providing civil legal service to the indigent.

So the California legislature -- and the sequence of the wording, maybe, is not that significant, but the first two factors they list is more consistent with the traditional cy pres doctrine, that you would try to find a charity that has the same purpose as the original designated beneficiary of the trustee. And I think what's happening, both with this statute and with this rule, is that we are also engrafting on a concept, "Well, even if the intent of the donor was to benefit a certain individual -- certain type of individual, that's no longer possible. We're now going to consider a gift that's for an entirely different purpose that was never manifested as the charitable intent for the person who set the trust aside."

And then thirdly -- and I don't have

authority to read this into the record, so let me just speak generally that we only had time to poll my subcommittee by e-mail. One member of my subcommittee, up until yesterday, was Judge Scott McCown, and he sent an e-mail saying that his wife works for the state comptroller's office and that the comptroller's official position was that unclaimed funds belong to the state. And he said, in so many words, "I'm not taking a position whether this is a good public policy or a bad public policy," but he did refer us to the legislation on unclaimed funds escheating to the state and said, "Take into account the fact that the state may take the position that they control these funds and that we don't have the freedom to do whatever we want with it."

MR. YELONOSKY: On a couple of those points -- on that last point -- and it may be here in the background material, I think there was some attempt to address that particular question, whether the state had a right to the funds, but the examples that I've heard of were that, at least up until now, typically those funds were being distributed by agreement between counsel, and, you know, they may agree on a charity or whatever. So if they're able to do that, then, evidently, the state has been taking

the position that it's entitled to those funds.

An earlier point you made -- I'm actually less familiar about the state's class action than federal class actions, but in the federal context, you know, a fairness hearing, anybody who is a member of the class can come in and object, and entities that have a membership that fall within the class or represent people who fall in the class can come in and object even though they're not named parties to the suit. That's always been true.

And if I understand it correctly, there's a recent US Supreme Court decision saying, "Not only can these individuals do what they've always been able to do and come in and object, but an objector, at a fairness hearing, has a right of appeal." It may be limited, but in any event, in the federal context, it wouldn't be creating any new rights upon people who fall within the definition of the class than we have now in people who represent them.

For example, Advocacy, Inc., has stopped more than one settlement recently on behalf of people with disability. We were not involved in the lawsuit until the point where we got notice of a class settlement that seemed inadequate for people with

disabilities -- or seemed an attempt to settle something nationwide that was beneficial to the plaintiff's counsel and the defendant but not to people with disabilities across the country, and so that, at least in the federal context, happens now.

MR. EDWARDS: Yeah, but that's only with regard to members of punitive class who intervene after the class approval, they can do all sorts of things, according to the US Supreme Court.

MR. YELONOSKY: Right.

MR. EDWARDS: But they still must be members of the punitive class in order to have those rights.

MR. YELONOSKY: Right. That certainly is true, and that's a point well taken. I guess in some of these cases the thought was that if you're talking about injury to consumers, that maybe they are a member of the punitive class, but you're right.

MR. EDWARDS: If they're not members of the punitive class, they don't have standing.

MR. ORSINGER: Well, now, if you look at the logic of it, the logic behind the rule change is to give the Equal Access to Justice Foundation the right to speak because it has a stake in unclaimed funds, but the rationale to support the notice

requirement gives them the right to actually appear and oppose the settlement, insofar as the benefits to the members of the class are concerned.

So their stake is in the unclaimed funds, but at least in the conception of somebody involved in the process, they have the standing to challenge the settlement itself, meaning not just the unclaimed funds, but what's actually being paid to the class members. And so without speaking to whether we should be doing that, I think we should be aware that at least some people who are proposing the rule feel like there will be an expanded role on the part of the foundation to say, "Nobody is being enriched here but the plaintiffs' lawyers. You get some sort of trivial coupon for everybody in the class, and, in reality, it ought to be structured in a different way and there ought to be $1.5 million in unclaimed funds and we ought to get it."

MR. YELONOSKY: I think that's a good point.

Chip, though -- you know, from the meetings that we've had, I guess -- and if you look at the actual language of the rule, other than the notice provision applying, once -- beyond that, it talks about the foundation being involved in which the

actual distribution to each affected class member is not reasonably and economically feasible, which is a subset, obviously, of all class actions, and that's what the discussion of the subcommittee was about, and, frankly, the part that you're talking about really may not have been what everybody on the subcommittee had in mind, because you're talking about an objection to the settlement with respect to the class.

MR. ORSINGER: By the way, the rule doesn't say that, but the interpretation given in support of the rule says that, which means that somebody must intend it, which means that it will be advocated and it may well happen.

CHAIRMAN BABCOCK: Bill?

MR. EDWARDS: Is the problem solved by requiring the court to give notice to the commission if there are unclaimed funds before signing an order distributing the unclaimed funds?

MR. YELONOSKY: It may be.

MR. EDWARDS: I mean, if you limit it to that, I don't have a problem.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, I think what I'm going to say is not going to be very popular, but I'm having

trouble with the basic concept here. I understand that we're lawyers and we have an obligation to fund legal services for people who can't afford it, but I'm not sure that that gives us a mandate to give special privileges to organizations that do that as opposed to other organizations that serve equally beneficial purposes in fighting disease or hunger or all of the other needs that are out there, and this whole concept, I'm having trouble just buying into -- I don't agree with it.

CHAIRMAN BABCOCK: That's obviously a threshold issue. Anybody else share that view?

(Show of hands)

MR. DUGGINS: What's the question?

CHAIRMAN BABCOCK: I said, did anybody else share the view that Pam just --

(Show of hands)

CHAIRMAN BABCOCK: So out of the people here, maybe 60 percent share Pam's thinking about that.

MR. GILSTRAP: Chip, I mean, I share the concern, but as I understand, the purpose of the rule is not to say that the judge has power. I mean, the judge may not have the power under the doctrine of cy pres. And I know he has broad power, but, you know,

he may not be able, for example, to give a settlement that benefits people who's had their phone slammed -- long distance phone slammed to schoolteachers. I mean, he just may not have the power, and I don't think that by this rule we're saying that the judge has the power to give to legal services. Legal services just has -- excuse me, Equal Access just has the power to come in and make its case.

CHAIRMAN BABCOCK: Sarah.

HON. DUNCAN: Right. We're being very selective about who's going to get the notice, and having the notice goes a long way towards being able to make an appearance and make a case. And as I understood Pam's point, it was not so much that the foundation would get the money but that the foundation, alone, is singled out to receive this notice.

MS. BARON: Right.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: Well, in addition, there has to be a finding -- "The court shall issue a finding of fact as to whether those funds should be used to support access to civil legal services." That means in every order there has to be a finding that justifies whether it's going to this group or some

place else, and that really gives a leg up to giving it to this group as opposed to some other group.

CHAIRMAN BABCOCK: Stephen.

MR. YELONOSKY: Well, I can see, on the surface, those concerns, and, in fact, we talked about the ongoing litigation that is now again at the US Supreme Court about funding for the Equal Access to Justice Foundation, which largely comes from compulsory IOLTA. And the question as to whether or not compulsory IOLTA will continue is being handled by the US Supreme Court on the basis of the property rights or not of the clients, but there hasn't really been any question about the Supreme Court's authority to require the lawyers to provide funds for legal services to the poor through that system, and particularly to go into that entity.

So we're here. We're not talking about property rights of any individual. The funds have been determined to be no longer, I guess, the property of the defendant, and the only question is where they go. You don't have that property interest question and you have the same entity that the Texas Supreme Court has identified as the one that it, ultimately, administers and through which it largely, if not exclusively, dispenses with the profession's

obligation to provide legal service to the poor. I mean, the Equal Access to Justice Foundation is under -- and I'm not sure of the legal relationship. Maybe Chris can say that, but, essentially, under the control of the Texas Supreme Court. Other funds that the Attorney General's Office -- victim of crimes funds that the Attorney General's Office distributes have been delegated to the Texas Supreme Court who then delegated them to the Equal Access to Justice Foundation to distribute. So it's not just "an organization among many."

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: One of the differences between this proposed rule and the California statute is that the California statute lists their equivalent of Services to the Poor Foundation as one of the possible beneficiaries, and not the first in the list. The earlier part of the list are charities who are more in line with the trust, or, if you will, the class that's being protected. But there is no notice requirement in the version of the California statute that I have. There is a notice requirement in this rule, and I think it implies that there's some standing on the part of the Texas Equal to Access to Justice Foundation, because if you have a right to

notice, presumably, you have a right to show up at the hearing and to speak.

And so we're inferentially giving them standing. But what are we giving them standing to do? Are we giving them standing to argue to the court that instead of a charity for people who have, you know, been injured as a result of a dangerous product or something of that nature or an educational operation to public service announcements for people who are in similar danger -- whatever, are they entitled to say, "We don't believe there's enough in this settlement that's going into the unclaimed fund. We want to oppose what the plaintiff and defendant have agreed on. We have a different structure proposed on the settlement which will result in more money coming"?

If we're going to do this -- and maybe we won't do this, but if we're going to do this, I think we ought to make it clear what they have the standing to do. And then if they do have the standing to come in and fight over more than just the unclaimed funds, I think we have to ask the question, "Well, are other charities entitled to that notice, too, so that they can come in and fight over the class settlement or fight over the unclaimed funds?" And maybe what we should do is, we ought to set up a repository of

notice of settlement of all class actions that all charities could sign on a Web site and monitor closely so that if there's going to be a settlement, maybe they want to send somebody over there and say, "You know, blind children ought to get this money instead of poor people." And is there an equal protection problem?

You know, a lot of questions, but the rule as drafted, I think, creates a lot of unanswered questions for me that should be explicitly discussed and then written into the rule so we know the parameters of what we're implementing rather than just guessing.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I agree with Richard. There's a difference between -- and I think it's fine to say, "This is an option for the court to consider, along with many other options." There's a difference between that and then providing some special notice only to one option in a long list. And then when we cross that line, we're showing a preference for one service over another kind of service, and I don't know that that really reflects what our job is. I think that's, maybe, more a legislative function, would be my view.

Also, I'm concerned, like Richard, too, that this does occur to give them a roving commission to come in and generally object to settlements in which they would otherwise have no interest. And it's one thing if you're there on behalf of a class member who has some interest in the litigation and then just to have a third party who wants to get their hands on unclaimed funds. You know, we could have lines from here to Dallas of people who would want to do that.

CHAIRMAN BABCOCK: Harvey. Then Nina. And then Ralph.

HON. BROWN: Well, the more I've heard, the more I'm convinced that the notice isn't a good idea. It's just too unclear. But I do think listening to the possibilities that the judge could consider in the rule is probably a good idea. It sounds like California does something like that.

Frankly, I had one of these, and we had to figure out where to go to charity and I never even thought about this group.

MR. YELONOSKY: Exactly.

HON. BROWN: Now reflecting on it, they may have been perfectly appropriate to receive some of that money when the parties hadn't worked it out in advance, and, frankly, we were kind of negotiating in

the courtroom what to do with any left over money, what charity should get it. So it wouldn't be bad to list them, I think, but maybe not give notice so that we don't have to go through all of the standing issues of who gets the notice, et cetera.

MS. BARON: I also think that the foundations that are in a particularly good position essentially go out and lobby with class action counsel, people who do this work routinely to say, "Put us on your list. Keep us in mind. We're trying to fund very useful projects." So there is the ability to do that, or speak with trial judges at CLE conferences to give your pitch, whatever.

I think that, actually, the foundations that are in a particularly good position make that request of the people who are engaging in the settlement negotiating process, and so they've got that ability right now. And then reminding them that this is an option would also help that goal of trying to get settlements to include this kind of contribution to that organization, but to give them some special privilege, I just thinks goes too far.

CHAIRMAN BABCOCK: Nina, do you still want to say something?

MS. CORTELL: Well, basically, I agree

with what's being said. It seems to me that a rule is not a proper vehicle, but that the objective is a good one. And I hate, if we do vote down the rule, that -- I don't want to throw out the baby with the bath water, and I would like to see us encourage some process; albeit, not -- my own opinion, not through a rule, whereby notice is given across the board to any charities that want to avail themselves of these funds so that they can make their pitch. I think it's an educational process. I think there is a notice issue, but I don't think it belongs in the rule.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: Just to add to what Pam said, the problem with the rule as written is that it requires this cause to be considered in every situation. It singles it out. And I don't think that's appropriate for a rule or for us to decide. But I do think that the concept of a notice -- follow up on your comment, is good, but so that you don't single out an individual cause, maybe the thing to do is to require some advance notice of any settlement where you've got this trigger on the Supreme Court Web site so that anybody can check it on an ongoing basis and make a determination on whether or not they should make a pitch for the unclaimed funds.

CHAIRMAN BABCOCK: You know, we seem to be having trouble with putting this entity first in line, giving them preferential treatment. Is there an argument to be made that because of the nexus between the work that this group does and our legal system, our judicial system, that it's perfectly appropriate to put them first in line and to give them preferential treatment? I mean, is that something we ought to just, you know, embrace and say, "Yeah. We are about providing equal access to justice, and that's something we ought to embrace and we ought to, frankly, favor?"

Sarah.

HON. DUNCAN: I don't think it's appropriate for us to use the rulemaking process to make that linkage.

CHAIRMAN BABCOCK: You think it's a legislative function.

PROFESSOR ALBRIGHT: Even less than that, I think there are -- people who are on this group can go to talk to judges in groups and say, "Hey, don't forget about this group. It's part of the judicial system. We have this obligation as lawyers and judges to think about these people," and do it, like Pam was saying, educational process, but to stick

it in a rule, it just doesn't make any sense to me.

CHAIRMAN BABCOCK: Well, the argument, I guess, would be that the Supreme Court, as the leaders of our judicial system, feel an obligation to encourage access to justice for people who can't afford it.

PROFESSOR ALBRIGHT: And they have lots of bully pulpits other than the rules.

CHAIRMAN BABCOCK: Yeah. I mean, that's true. They have a bully pulpit -- if that's the right word, but this is one mechanism that they could use, perhaps. I mean, that would be the argument in favor of it, I would guess.

Yeah, Richard.

MR. ORSINGER: Another suggestion that might not meet as much resistance would be for the Supreme Court to issue a comment to this rule in which they point out the special obligation that the law system feels to provide legal services for the poor and that courts should consider that in exercising their cy pres powers, whatever they may be, and that may not be as disturbing to us as having a rule requirement that there be a finding in every settlement that "I have considered your special charity and have decided not to give money to it."

CHAIRMAN BABCOCK: Yeah. Stephen Tipps.

MR. TIPPS: I think that's a far preferable approach to the one that's in the proposed rule. And one thing I like about it is that it explicitly recognizes that the expectation is that the judge, in deciding where these funds go, will follow basic rules of cy pres, which I don't think is clear from this language in the rule. I mean, the language in the rule simply says that the court shall have discretion to make a finding. I'm not sure whether that is intended to modify the basic cy pres rules or not. I mean, I think you could read this to say, "Well, normally, under cy pres, I couldn't direct the funds to go to the poor, but because of this rule, I can." And I don't think that's what we're trying to accomplish, but I'm not sure that the rule is clear in that regard. But I think a comment that simply reminds judges that this organization exists would be an appropriate thing to do.

CHAIRMAN BABCOCK: Carlyle.

MR. CHAPMAN: I think the comment -- the concept is a good one. I would lobby to tie it to the kind of comment or suggestion that Richard has said comes out of the California experience; that is to say, to remind the court that it would be appropriate

to give to charity -- give that to charities and to the foundation, but, also, I think that the comment needs to make it clear that that consideration only comes once the fund has been created and that there are excess funds -- undistributed funds.

The other problem that I see with the proposed rule is that there's some real problems in terms of giving notice before the fund determination has been made as to whether there are excess funds available. That gives some -- this entity an opportunity to appear, and as Richard has suggested, make comments or even give them standing to comment on the settlement itself. I think the comment, if we proceed with a comment or recommend a comment, needs to make it clear that none of these considerations come into play until the fund -- excess undistributed fund is created and is available -- exists.

CHAIRMAN BABCOCK: Okay. Stephen.

MR. YELONOSKY: Well, Chip, I don't know how you want to proceed. I guess from the -- wearing my hat from this Access to Justice Subcommittee, I guess what I'd want to do is call our committee back together with this excerpt of our transcript from this meeting and have the committee meet and discuss what's been said here, which I'm sure they'll take very

seriously and take into account, talk with Richard, whose subcommittee has now been assigned this issue, and take it from there.

CHAIRMAN BABCOCK: Yeah. Let me get a sense of our group. How many people are in favor of a comment as opposed to a rule?

(Show of hands)

MS. CORTELL: What would the comment sound like?

CHAIRMAN BABCOCK: Well, we don't know. In keeping with our protocol yesterday, we don't know.

(Laughter)

CHAIRMAN BABCOCK: Let me get your hands up on that again, on the comment as opposed to rule.

(Show of hands)

CHAIRMAN BABCOCK: How many people would prefer a rule as opposed to a comment?

(Show of hands)

PROFESSOR ALBRIGHT: How about "nothing"? Is that an option?

MR. EDWARDS: I'd like to know what the comment is going to be before I vote.

MR. ORSINGER: That's the way I felt yesterday about a statewide rule on cameras in the courtroom.

(Laughter)

MR. CHAPMAN: Well, if the comment comes back and it's not something that's palatable, we can always vote --

CHAIRMAN BABCOCK: Yeah. You can vote the comment down.

MR. EDWARDS: I would vote for -- if we want to talk concept -- comment or a rule, I vote -- add my vote to comment.

CHAIRMAN BABCOCK: Okay. So that would be 15 to 1 in favor of comment as --

PROFESSOR ALBRIGHT: But nothing is not an option?

CHAIRMAN BABCOCK: How many people want to do nothing.

(Show of hands)

CHAIRMAN BABCOCK: Five people want to do nothing. How many people want to do something?

(Laughter)

CHAIRMAN BABCOCK: Pam doesn't want anymore votes.

(Simultaneous discussion)

MR. CHAPMAN: Is that the same as the call for the comment vote?

(Laughter)

CHAIRMAN BABCOCK: Okay. If we do anything, the preference of the committee of the people assembled here today, by a vote of 15 to 2, is that -- the Chair not voting, is that we have a comment as opposed to a rule. That's the concept today.

Now, as always, if the court wants a rule, then we'll try to do a rule, but, Stephen, I think your method of proceeding is a wise one. Let's get the transcript. Let's go back to the Access to Justice Subcommittee, tell them what the thinking of this group is.

In addition, I think I need to talk to Justice Hankinson who has called me about this, and tell her what our feeling is, what our sense is, and see what the court's thinking is.

MR. ORSINGER: Can I also make a request that if the your committee, Steve, is interested in pursuing a rule route, that I would certainly feel more comfortable if we would define who has what standing to do what rather than leave that ambiguous, because if we more clearly understand who's getting what role, it allows us to make a better decision on whether to recommend it or not.

This has a lot of unanswered questions

that it raises, and you have a lot of fine minds on your committee and they may come up with some solutions that would make people like this better.

CHAIRMAN BABCOCK: Okay. Well, that --

MR. EDWARDS: One other thing. I have a little trouble understanding how there would be anything left over if you're dealing with equitable restitution. You might see if you can come up with a notion on that.

MR. YELONOSKY: As usual, you're way above me, and I'll have to get you to explain that to me.

(Laughter)

MR. EDWARDS: Well, I don't -- I can't explain it. That's why I asked the question.

CHAIRMAN BABCOCK: Okay. Here's what I have that we have left to do today. The Rule 21 amendment to include discovery; that's Richard. The Rule 13 visiting judge peer review; that's Justice Duncan. The Rule 202 issue, which is Bobby Meadows, who just left. And the Rule 76A, which is Alex and Richard Orsinger.

Does that comport with what everybody else thinks?

(No response)

448 S.W.3d 403
Supreme Court of Texas.

HIGHLAND HOMES LTD., Petitioner,

v.

The STATE of Texas, Respondent.

No. 12–0604.
|
Argued Nov. 7, 2013.
|
Decided Aug. 29, 2014.
|
Rehearing Denied Dec. 19, 2014.

Synopsis

Background: Subcontractors brought class action against general contractor for improper deductions from paychecks based on contractor's alleged misrepresentation that deductions were used to obtain liability insurance for subcontractor. Contractor reached settlement with class representatives. State intervened and argued that cy pres provision of agreement regarding unclaimed settlement funds violated Unclaimed Property Act. The 166th District Court, Bexar County, Martha Tanner, J., approved settlement agreement, and then denied State's motions for partial new trial and to modify judgment. State appealed. The El Paso Court of Appeals, 417 S.W.3d 478, reversed and remanded with instructions. Contractor's petition for review was granted.

[Holding:] The Supreme Court, Hecht, C.J., held that Unclaimed Property Act did not apply to cy pres provision of class action settlement agreement, disapproving *State v. Snell,* 950 S.W.2d 108 and *All Plaintiffs v. All Defendants,* 645 F.3d 329.

Judgment of the Court of Appeals reversed; judgment of the District Court affirmed.

Devine, J., filed dissenting opinion in which Johnson, Willett, and Boyd, JJ., joined.

West Headnotes (5)

[1] **Judgment** Form and requisites of judgment

A final judgment which is founded upon a settlement agreement reached by the parties must be in strict or literal compliance with that agreement.

1 Cases that cite this headnote

[2] **Appeal and Error** Who are "aggrieved" in general

When a party agrees to one judgment and a materially different one is rendered, the party is personally aggrieved and has standing to complain.

[3] **Abandoned and Lost Property** Constitutional and statutory provisions

The Unclaimed Property Act defines property that is presumed abandoned and prescribes a process for reporting and delivering it to the Comptroller to be held perpetually for the owner. V.T.C.A., Property Code § 71.001 et seq.

1 Cases that cite this headnote

[4] **Compromise, Settlement, and Release** Distribution to third parties; cy pres

Abandoned and Lost Property Property subject

Provisions of Unclaimed Property Act that property held on behalf of owner was not presumed abandoned unless owner failed to claim or exercise control over property for period of three years, and which prohibited private escheat agreements, did not apply to cy pres provision of class action settlement agreement that settlement proceed checks not negotiated within 90 days would be void, and that unallocated funds would be then

donated to agreed-upon charitable organization, in class action by subcontractors against general contractor for improper deductions from paychecks; disapproving *State v. Snell,* 950 S.W.2d 108 and *All Plaintiffs v. All Defendants,* 645 F.3d 329. V.T.C.A., Property Code §§ 74.308, 74.309.

3 Cases that cite this headnote

[5] Res Judicata Class actions

Class representatives' actions are those of class members, and are therefore binding on class members, including absent class members, so long as the requirements of due process are met. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

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Opinion

Chief Justice HECHT delivered the opinion of the Court, in which Justice GREEN, Justice GUZMAN, Justice LEHRMANN, and Justice BROWN joined.

Rule 42(a) of the Texas Rules of Civil Procedure provides that when its requirements are met, "[o]ne or more members of a class may sue ... as representative parties on behalf of all".[1] It often happens that many class members do not personally appear in the action in any way,[2] and Rule 42 prescribes procedures to ensure that those whose claims are settled or adjudicated *in absentia* are afforded due process. Such procedures include court approval of class representatives and class counsel, notice to class members, and court approval of a proposed settlement after an opportunity to be heard.[3] When the rule is followed, class representatives may assert —and agree to disposition of—claims on behalf of the class, including claims on behalf of absent members.[4]

Under the Texas Unclaimed Property Act ("the Act"),[5] as we shall explain more fully, property that goes unclaimed for three years may be presumed abandoned and must then be delivered to the Comptroller to hold for the owner. The issue in this case is whether damages and settlement proceeds claimed by class representatives on behalf of absent members are nevertheless unclaimed property, presumed abandoned, and therefore subject to the Act. In other words, does the Act ***406** prohibit what Rule 42 permits—the disposition of absent class members' claims by their representatives with court approval? We hold that the Act, by its own terms, does not apply. Accordingly, we reverse the judgment of the court of appeals[6] and affirm the judgment of the trial court.

I

Petitioner, Highland Homes, Ltd., a homebuilder in the Austin, Dallas–Fort Worth, Houston, and San Antonio areas, employs hundreds of subcontractors. In 2003, Highland Homes began docking subcontractors' pay if they did not furnish proof of adequate general liability insurance coverage. Highland Homes contends that the deductions were to cover its own increased exposure from working with uninsured subcontractors. But in 2006, one subcontractor, Benny & Benny Construction Company, sued, alleging that Highland Homes had represented it would use the paycheck deductions

to obtain liability insurance covering the subcontractor. Highland Homes denied Benny & Benny's claim but clarified its policy for the future.

In 2009, Benny & Benny amended its pleadings to add another subcontractor, Richard Polendo, and together they asserted claims on behalf of a class of more than 1,800 other subcontractors from whose pay Highland Homes had deducted amounts for insurance before clarifying its policy. The trial court certified the class under Rule 42(b)(3),[7] found Benny & Benny and Polendo to be adequate class representatives, appointed their lawyers as class counsel, and adopted a trial plan. Highland Homes appealed, but while the appeal was pending, the parties settled, subject to notice to the class and the trial court's review and approval.

The proposed terms were as follows. Highland Homes agreed to pay Benny & Benny $28,000 and to refund to the settlement class—members who did not opt out[8]—the total amounts withheld, plus each member's pro rata share of the difference between that total and $3,672,000 (less the amount for opt-outs). Highland Homes was to prepare from its records a list of class members with last known addresses and the amounts withheld from each. An administrator designated by the parties would then use computer software and other means to update the addresses. With the trial court's approval, formal notice would be sent to class members at the addresses thus determined, describing the claims being made on their behalf in the action, setting out the settlement terms, informing members of their rights, offering them the opportunity to opt out of the class, and setting a hearing for final approval of the settlement. If the settlement was finally approved, Highland Homes would issue refunds checks, sending them to existing subcontractors as it would their paychecks or by mailing checks to former subcontractors last known addresses.

The parties recognized that despite these efforts, some class members would not be located, and that others might refuse refunds. The class representatives agreed, on behalf of the settlement class members, that refund checks not negotiated within 90 days of issuance would be void, and that those and other undistributed refunds—referred to in the settlement as "unclaimed funds"—would be given to The Nature Conservancy ("the ***407** Conservancy") as a *cy pres* award.[9] The Conservancy is a well-known, nonprofit, charitable organization operating worldwide and in Texas, whose stated mission is "to conserve the lands and waters on which all life depends."[10] According to Highland Homes, the Conservancy was chosen because it "share[s] Highland Homes' vision of green building and commitment to the environment." The State points out another connection—that Highland Homes' president was on the Conservancy's Texas volunteer board of trustees. In any event, Highland Homes received no tax deduction or other benefit from the award,[11] and the appropriateness of the Conservancy as the beneficiary of the award is not at issue.

Class representatives—again, on behalf of settlement class members—acknowledged that Highland Homes denied all liability in the action and agreed to a global release of Highland Homes and its affiliates[12] from liability on all claims either brought or that could have been brought. The parties agreed to use their best efforts to obtain judicial approval of their agreement, and that if it was substantively altered, a party adversely affected could terminate the agreement.

In 2010, the parties presented their agreement to the trial court, which ordered that a detailed notice of the proposed settlement be mailed to class members at the addresses determined by the administrator. Of the 1,849 notices sent, 346 were returned as undeliverable, and 121 were re-mailed to different or forwarding addresses. After a final hearing, the trial court found that this notice was "the best ... practicable under the circumstances", was "reasonable ... fair, adequate, and sufficient", and "fully complie[d]" with Rule 42. The court also ***408** found that the settlement was "reasonable, fair, just, ... adequate, [and] in the best interest of the Settlement Class Members, and that it satisfie[d] [Rule 42] and other applicable law". Finally, the court determined "that Plaintiffs and Class Counsel ... have adequately represented the interests of the Settlement Class".[13]

Only eight class members requested exclusion. One explained that it had "suffered no losses from Highland Homes", and another stated that it did not "wish to participate in this legal matter." The trial court approved the settlement and rendered final judgment accordingly, "binding on all parties to the Settlement Agreement and on all Settlement Class Members ... includ[ing] all ... who did not timely request exclusion from the Settlement Class".

Aware that the State had once challenged a *cy pres* award as violative of the Unclaimed Property Act,[14] the parties notified the Attorney General of their proposed award of undistributed refunds to the Conservancy. Shortly after judgment was

rendered but before it became final, the State intervened to object to the award, arguing that the undistributed residue should be retained for three years and then paid to the Comptroller to hold for any owners who eventually surfaced. The trial court refused to modify the judgment, and the State appealed.

The court of appeals agreed with the State that Section 74.308 of the Act prohibits the imposition of a 90–day deadline for negotiating settlement checks, and that Section 74.309 prohibits the *cy pres* award.[15] The court reversed and remanded the case to the trial court with instructions to strike those provisions from the settlement, and to order the claims administrator to hold undistributed refunds—totaling $465,557, according to the State—for three years and then remit them to the Comptroller.[16]

[1] **[2]** We granted Highland Homes' petition for review.[17]

II

[3] The Unclaimed Property Act defines property that is presumed abandoned and prescribes a process for reporting and delivering it to the Comptroller to be held perpetually for the owner. Two provisions, Sections 74.308 and 74.309, are aimed at preventing evasion of the Act. Under Section 74.308, a recovery of property ***409** cannot be barred before the statutorily prescribed time passes for the property to be presumed abandoned—three years. The section states:

> § 74.308. Period of Limitation Not a Bar
>
> The expiration, on or after September 1, 1987, of any period specified by contract, statute, or court order, during which an action or proceeding may be initiated or enforced to obtain payment of a claim for money or recovery of property, does not prevent the money or property from being presumed abandoned property and does not affect any duty to file a report required by this chapter or to pay or deliver abandoned property to the comptroller.[18]

Section 74.309 broadly prohibits any method of circumventing the Act. It states:

> § 74.309. Private Escheat Agreements Prohibited
>
> An individual, corporation, business association, or other organization may not act through amendment of articles of incorporation, amendment of bylaws, private agreement, or any other means to take or divert funds or personal property into income, divide funds or personal property among locatable patrons or stockholders, or divert funds or personal property by any other method for the purpose of circumventing the unclaimed property process.[19]

The State argues that these provisions prohibit the *cy pres* award in this case. Specifically, under Section 74.308, the 90–day period for negotiating settlement checks does not preclude a presumption that amounts not paid to class members are abandoned, and Section 74.309 prohibits the diversion of settlement funds to the Conservancy.

[4] But under the Act's express terms, neither provision applies in the circumstances before us. Chapter 74 of the Property Code, where the provisions are found, "applies to a holder of property that is presumed abandoned under Chapter 72, Chapter 73, or Chapter 75."[20] Under Chapter 72—of the three, the only one involved in this case[21]—a "holder" is a person "in possession of property that belongs ***410** to another" or "indebted to another"[22] and tangible or intangible personal property is presumed abandoned

> if, for longer than three years:
>
> (1) the existence and location of the owner of the property is unknown to the holder of the property; and
>
> (2) according to the knowledge and records of the holder of the property, a claim to the property has not been asserted or an act of ownership of the property has not been exercised.[23]

Thus, Sections 74.308 and 74.309 apply only to a person who has property that the owner has not claimed or exercised ownership over for more than three years. In this case, the State asserts that the settlement administrator is holding payments owned by settlement class members.

[5] The State's argument assumes that absent class members have neither asserted claims nor exercised acts of ownership in the litigation. But they have—through the class representatives. On behalf of all class members, including absent members, the class representatives asserted claims for refunds in the litigation, controlled the prosecution of those claims as owners, negotiated the terms for settling the claims, asserted claims for payments under the settlement agreement, and then released all claims. Class representatives' actions

are those of class members, and are therefore binding on class members, including absent class members, so long as the requirements of due process are met. The United States Supreme Court has explained those requirements as follows:

> If [a] State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.[24]

The judgment approving the settlement agreement in this case met all these conditions, and the State does not contend otherwise. The judgment approving that settlement is binding on all settlement class members.

Section 74.308 provides that a limitation on the time for initiating or enforcing a claim does not prevent property from being presumed abandoned. But that provision is inconsequential here. The property—settlement payments on refund claims—cannot be presumed abandoned, not because of the 90–day limitation on negotiating settlement checks, but because ***411** the property was not unclaimed. To the contrary, this property was claimed by the owners—all settlement class members—through their representatives. For the same reason, Section 74.309 does not apply in these circumstances. Chapter 74 does not apply when a claim to property has been asserted or an act of ownership exercised. It is of no consequence that several owners have not *collected* their property within the time period to which they agreed through class representatives. An owner need not actually *collect* his property to rebut the presumption of abandonment and render the Act inapplicable; he need only *claim* it. Nor is the settlement's labeling of undistributed refunds as "unclaimed funds" determinative; the refunds were, in fact, claimed.

The following example illustrates the flaw in the State's argument. Suppose Benny & Benny had never asserted class claims, had settled its own claims on the same terms, and then had decided to tear up the $28,000 settlement check in hopes of getting more business from Highland Homes. Surely the State could not insist that Highland Homes was nevertheless obligated to pay the $28,000 to the Comptroller until Benny & Benny broke down and took it. Suppose Benny & Benny made the same decision for Polendo, acting as his attorney-in-fact. The Act would not apply in either instance because Benny & Benny and Polendo claimed the property, and thus it could not be presumed abandoned. The example is not far-fetched. One class member requested exclusion from the class because it had not been injured and another because it did not want to participate. Under Rule 42, the absent settlement class members participated in the litigation and settlement through their representatives as fully as the representatives did in person. The absent members agreed to the 90–day limitation on taking property they claimed, just as the class representatives individually did, and are as fully bound.

Furthermore, the settlement administrator no longer has property belonging to the settlement class members and is not indebted to them because they have agreed, through class representatives, to exercise their right to payment under the settlement agreement within 90 days. With court approval, class representatives were no less authorized to negotiate and agree to the terms of settlement than they were to agree to the amounts paid. Thus, the settlement administrator is no longer a "holder" to which Chapter 74 applies.

The State concedes that the Act would not apply to class settlement payments made only on application of class members, rather than mailed to last known addresses. "Because the unallocated funds are not owned by any identified individual," the State explains, "the Act would not apply...."[25] We agree with the State's conclusion but not its reason. As noted above, one requirement for property to be presumed abandoned under the Act is that "the existence and location of the owner of the property is unknown to the holder of the property".[26] Class members in the situation the State posits certainly meet this requirement and are thus those for whom the Act's protections are intended. They own property in the same sense as the class members in this case, and most importantly, they ordinarily agree, through class representatives, to release all claims against the settling parties. If anything, the opposite of the State's argument should be true: the better the identification of class members, the fewer instances in which the Act applies. But class

members who are hard to identify ***412** are no less owners of claims that class representatives are authorized to prosecute, settle, and release than are those class members who are easy to identify. Whether settlement payments are mailed to class members or must be applied for, the Act is inapplicable for the same reason: absent class members have asserted claims and exercised ownership through their class representatives. In both situations, there is no holder of abandoned property.

In support of its position the State cites several cases involving other states' laws in which the courts rejected a holder's efforts to retain property, pending the owner's compliance with specified conditions, rather than deliver it to the state as unclaimed.[27] In each of these cases, a potential future holder of property attempted to limit the conditions under which a potential future claimant to that property would be able to obtain it, an attempt held to be in derogation of the jurisdiction's unclaimed property law. Here, the settlement agreement does not purport to govern future claims to as-yet unidentified property—rather, it itself establishes the class's claim to reimbursement. The State also relies on a prior decision of the court of appeals[28] and a recent decision of the Fifth Circuit,[29] both of which concluded that *cy pres* awards in class actions violate the Unclaimed Property Act. In neither case did the court appear to consider the arguments we find persuasive here. To the extent the two cases conflict with our decision today, they are disapproved.

The State's argument for the application of the Unclaimed Property Act in these circumstances cannot succeed unless class representatives' authority to act for class members under Rule 42 is disregarded. For that reason, the argument fails. The State warns that *cy pres* awards can be abused when they are nothing more than a judicial giveaway of private property, while Highland Homes and its *amici curiae* plead that *cy pres* awards benefit deserving, charitable causes. We need not take sides on this disagreement today. Though the State seems to consider the award to the Conservancy inappropriate, it does not make that challenge, assuming that it could. We agree with the State, however, that trial courts must be careful in class actions to protect class interests and scrutinize settlements. No one suggests that the trial court in this case failed in that responsibility.

* * * * * *

Accordingly, the judgment of the court of appeals is reversed and the judgment of the trial court is affirmed.

Justice DEVINE filed a dissenting opinion, in which Justice JOHNSON, Justice WILLETT, and Justice BOYD joined.

Justice DEVINE, joined by Justice JOHNSON, Justice WILLETT, and Justice BOYD, dissenting.

The Unclaimed Property Act (UPA) protects the property rights of identifiable ***413** owners whose property cannot be delivered or returned because the owner cannot be found. *Melton v. State,* 993 S.W.2d 95, 97–98 (Tex.1999). Generally, when those circumstances persist for three years, the property in the possession of another is presumed abandoned by its owner and must be turned over to the State for safekeeping under the UPA. Tex. Prop.Code § 72.101. The State then assumes responsibility for holding the property until the rightful owner can be located. *Id.* § 74.304.

Texas Rule of Civil Procedure 42, on the other hand, "is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment." *Sw. Refining Co. v. Bernal,* 22 S.W.3d 425, 437 (Tex.2000). As a mere procedural device, the class-action rule is not intended "to enlarge or diminish any substantive rights or obligations of any parties to a civil action" but to facilitate the efficient adjudication of such rights and obligations. *Id.* Here, however, the Court uses our class-action rule to diminish the substantive property rights of the missing property owners and in so doing also marginalizes the UPA's public policy concerns. Because the Court's application of Rule 42 conflicts with the UPA's explicit language, I respectfully dissent.

As the Court acknowledges, the UPA prohibits private limitation and escheat agreements that seek to evade the process for reporting and delivering abandoned property to the State. *See* 448 S.W.3d at 410 (quoting Tex. Prop.Code §§ 74.308–.309). Section 74.308 states that a contractual limitation period cannot be used to defeat the abandoned-property presumption and thus circumvent the UPA:

> The expiration [ ] of any period specified by contract, statute, or court order, during which an action or proceeding may be initiated or enforced to obtain payment of a claim for money or recovery of property, does not prevent the money or property from being presumed abandoned property and does not affect any duty to file a report required by this chapter or to pay or deliver abandoned property to the comptroller.

Tex. Prop.Code § 74.308. Section 74.309 prohibits private escheat agreements that seek to divide funds among locatable interest holders, while disenfranchising owners who cannot be found, and generally prohibits the circumvention of the unclaimed property process through the diversion of funds by any method:

> An individual, corporation, business association, or other organization may not act through amendment of articles of incorporation, amendment of bylaws, private agreement, or any other means to take or divert funds or personal property into income, divide funds or personal property among locatable patrons or stockholders, or divert funds or personal property by any other method for the purpose of circumventing the unclaimed property process.

Id. § 74.309. Highland and the class representative negotiated a settlement of the class claims that included the following *cy pres* provision for the disposition of any class members unclaimed share of the settlement fund:

> The parties agree to a *cy pres* distribution of unclaimed funds owed to class members that cannot be located or who fail to negotiate the settlement check within ninety (90) days of its issuance. The amount of these unclaimed funds will not be paid to individual Class Members. Such *cy pres* distribution shall be made to the Nature Conservancy, a non-profit, charitable organization operating in Texas.

***414** In my view, the above provision includes both a limitation period and private escheat agreement prohibited under the UPA.

The Court apparently agrees that the UPA would invalidate the settlement agreement's 90–day limitation period and private escheat provision, if it applied to the agreement. The Court concludes, however, that Highland is no longer a "holder" of any identified class member's property and that the settlement agreement does not concern abandoned property, and thus, the UPA does not apply. The Court reasons that unclaimed settlement funds have not been abandoned because the class representative has exercised ownership over the property on the class members' behalf by entering into the agreement with Highland. Such reasoning renders the statutory prohibitions against private escheat agreements and contractual time limits meaningless. Section 74.308 expressly prohibits prospectively setting contractual time limits on when property can be claimed, and section 74.309 expressly prohibits private agreements that divert prospective property interests to someone other than the true owner.

While I agree that the class representative exercised authority over the class claims and was authorized to settle, its authority did not extend to the subsequent disposition of the settlement checks, which are the individual class members' property rights created under the settlement agreement. Quite simply, the class representative lacked authority to claim, spend, or give away any other class member's settlement check. The Court mistakenly conflates the representative's authority over the class claims with the settlement proceeds it negotiated on behalf of the individual class members. Because the class representative could not assert any missing class member's ownership interest in the fund or cash their individual checks, in my view, it did not exercise ownership over such property. When the property went unclaimed, it was abandoned within the UPA's meaning, notwithstanding the *cy pres* provision. Remarkably, the Court's explanation is that the " 'unclaimed funds' ... were, in fact, claimed," 448 S.W.3d at 411, even though the class representative lacked authority to endorse the checks or otherwise claim the funds belonging to another class member.

The Property Code provides that property is presumed abandoned (and thus subject to the UPA) if "for longer than three years," no claim has been asserted or act of ownership exercised. Tex. Prop.Code § 72.101(a). Because the property interest here is represented by a check, the question is when does the three-year period begin to run on a check. For purposes of the UPA and the three-year period, at least, a check represents a property right that is distinct from the underlying obligation or transaction it represents. Property Code section 73.102 specifically addresses the commencement question, stating that the period begins running on the date (1) "the check was payable," (2) "the issuer or payor of the check last received documented communication from the payee," or (3) "the check was issued." At the earliest then, the three-year period commenced when the checks were issued.

Now the Court argues that Chapter 73 of the Property Code does not apply in this case because it applies only to "holders" that are "depositories," such as a bank, credit union or the like, *see* 448 S.W.3d at 409 n. 21, but Chapter 73 does not say that. Although parts of Chapter 73 specifically address depositories as holders, section 73.102 does not. It discusses checks—and the abandonment of checks—in terms of the conduct and knowledge of the "issuer" or "payor," rather ***415** than the conduct or knowledge of the depository on which the checks are drawn. That only makes sense, of course, because for purposes of unclaimed property, the bank has no

way of knowing whether a customer has written a check and if so, to whom, until the payee presents the check for payment. Section 73.102 can only apply to (and therefore define the three-year period for) scenarios in which the issuer/payor is the "holder," not the depository.

The Court ultimately concludes that the unclaimed checks are not abandoned property because the class representative has asserted a claim or exercised a right of ownership over the class members' claims by negotiating the class settlement. *See* 448 S.W.3d at 411 (noting that "the class representatives asserted claims for refunds in the litigation, controlled the prosecution of those claims as owners, negotiated the terms for settling the claims, asserted claims for payments under the settlement agreement, and then released all claims"). But that all occurred before the three-year period for determining abandonment of the checks even commenced. The assertion of a claim or the exercise of an act of ownership occurring *before* the three-year period begins is, I submit, meaningless. Because the class representative asserted a claim or exercised ownership, if at all, before the checks were issued, and because the class representative cannot assert a claim or exercise ownership over the checks *after* they were issued, the checks must be presumed abandoned under section 72.101(a), if not cashed within three years.

The UPA prevents individuals or entities that hold property belonging to others from prospectively contracting for the disposition of such property, if unclaimed by the rightful owner. Thus, for example, landlords, banks, utilities, and insurance companies cannot contract for the future disposition of unclaimed funds owed to their respective tenants, customers, or policyholders in circumvention of the UPA. The Court here, however, imbues the class representative in class-action litigation with special power to make such disposition. The UPA does not permit this exceptional treatment.

The Act clearly prohibits parties from making an agreement that prevents "money or property from being presumed abandoned." Tex. Prop.Code § 74.308. But the Court reasons that this case does not concern abandoned property and thus does not implicate the UPA because the parties have previously agreed to the disposition of unclaimed property. The UPA's prohibitions against contractual time limits and private escheat agreements are meaningless, however, if they can be manipulated so easily. It makes no sense to hold that the UPA, which prohibits contractual limitations on unclaimed property and the presumption of abandonment, does not apply when the parties have agreed to the future disposition of unclaimed property. Contrary to the Court's analysis, such an agreement is not an exercise of ownership over the unclaimed property and does not prevent a presumption of abandonment.

No other court has taken such a fanciful approach to private escheat agreements. *See Conn. Mut. Life Ins. Co. v. Moore,* 333 U.S. 541, 546, 68 S.Ct. 682, 92 L.Ed. 863 (1948) (rejecting forfeiture of life insurance proceeds in favor of New York's unclaimed property law); *People ex rel. Callahan v. Marshall,* 83 Ill.App.3d 811, 38 Ill.Dec. 944, 404 N.E.2d 368, 373 (1980) (rejecting contractual time limitations on gift cards and credit memoranda in favor of Illinois' unclaimed property law); *Div. of Unclaimed Prop. v. McKay Dee Credit Union,* 958 P.2d 234, 240 (Utah 1998) (finding that Utah's unclaimed property law takes ***416** precedence over statute allowing businesses to purge debt records). For example, a California appellate court struck down a provision in a contract between a health insurer and its subscribers, requiring the subscribers to cash their claim checks within six months or forfeit their right to the funds. *Blue Cross of N. Cal. v. Cory,* 120 Cal.App.3d 723, 739–40, 174 Cal.Rptr. 901 (1981). The court reasoned that "[California's UPA], as a law established for a public reason, cannot be contravened by a private agreement." *Id.* at 740, 174 Cal.Rptr. 901. Similarly, the court reasoned that a union representative, acting on behalf of union members, could not agree to divert the value of individual members' royalty checks into an account for the union's general benefit, if the checks were not cashed within a designated time. *Screen Actors Guild, Inc. v. Cory,* 91 Cal.App.3d 111, 115–16, 154 Cal.Rptr. 77 (Cal.Ct.App.1979). And despite the approval of a majority of shareholders, the New Jersey Supreme Court struck down an amendment to a corporation's charter that allowed the corporation to retain stock dividends if they went unclaimed for three years. *State by Furman v. Jefferson Lake Sulphur Co.,* 36 N.J. 577, 178 A.2d 329, 338–39 (1962), *cert. denied,* 370 U.S. 158, 82 S.Ct. 1253, 8 L.Ed.2d 402 (1962). The court reasoned that even with the assent of shareholders, the amendment violated New Jersey's UPA, because a corporation cannot alter its charter to give itself powers that are "obnoxious to any applicable general law or to public policy." *Id.* at 335–36.

The Court attempts to distinguish these cases by suggesting that the class members' property interests here were conditional and thus subject to forfeiture under the settlement agreement, unlike the shareholder's right to a dividend check, the union member's right to the royalty check, or the insured's

right to a benefits check. 448 S.W.3d at 412 & n. 27. I fail to see how the class members' property interests here are any different or why they are entitled to any less protection under our UPA. Highland acknowledged in the settlement agreement that it "owed" the identified class members the funds represented by the checks and that, if a check were "not negotiated within ninety (90) days of its issuance, the funds owed to that class member [would] be considered 'unclaimed funds.' " The agreement provided further for "a *cy pres* distribution of unclaimed funds owed to class members that cannot be located or who fail to negotiate within ninety (90) days of [the check's] issuance." The agreement thus acknowledges the members' property interests and seeks to redirect those interests under the *cy pres* provision. Although parties generally have the right to contract as they see fit, they do not have the right to make agreements that violate the law or public policy. *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 129 & n. 11 (Tex.2004). This agreement violates the law because the parties have substantively agreed to the redisposition of future, unclaimed property—a private escheat agreement prohibited by the UPA.

Finally, the Court argues that the UPA should not apply because it intrudes on the class representative's authority to act for class members under Rule 42. 448 S.W.3d at 409. Again, I disagree. As already discussed, the class representative's authority extends to the settlement of the class claims but not to the disposition or forfeiture of the individual class member's vested property rights. The class action rule may authorize the representative to settle the class member's claim, but it does not authorize the representative to take away the member's share of that settlement once it has vested.

***417** I question whether the Court would be so favorably disposed to the class representative's power to redistribute unclaimed settlement proceeds if such proceeds were payable to the representative rather than a charity. I suspect that the Court's analysis is influenced more by where the unclaimed funds end up than by how they got there. Why should money escheat to the State, if a charity can benefit from unclaimed settlement proceeds? The problem, as I see it, is two fold. First, and foremost, under the terms of this settlement agreement, the money belongs to the missing class members, not to Highland or the class representative. The missing parties' property rights can only be preserved if the State is permitted to act as their custodian under the UPA. Second, even if this were an appropriate case for a *cy pres* distribution (and I do not believe it is), the *cy pres* distribution here is contrary to existing law on the subject.

As to this latter point, the Court acknowledges the State's warning that *cy pres* awards "can be ... nothing more than a judicial giveaway of private property" but suggests that the State either lacked standing to challenge the appropriateness of the award in this case or waived the complaint. 448 S.W.3d at 412. Again, I disagree. The State has standing to, and did in fact, challenge the *cy pres* distribution to The Nature Conservancy in both the court of appeals and this Court. *See In re Lease Oil Antitrust Litig.,* 570 F.3d 244, 250–51 (5th Cir.2009) (determining that State of Texas had "direct, substantial, legally protectable interest" to challenge *cy pres* distribution in class action suit); *see also* Brief for Respondent at 40 ("The requisite nexus between the mission of the *cy pres* recipient and the purpose of the class action is absent here.").

Cy pres distributions in class actions are appropriate when there is money remaining in a settlement fund after identifiable class members have been compensated. *Klier v. Elf Atochem N. Am., Inc.,* 658 F.3d 468, 474–75 (5th Cir.2011). Typically, this might occur when a defendant does not have sufficient information or resources to determine the precise size of the class or the identity of its members and thus relies on a claims-form process to qualify membership. In that situation, any unallocated surplus in the settlement fund might appropriately be disposed of under a cy pres provision. *See, e.g., Wilson v. Sw. Airlines, Inc.,* 880 F.2d 807, 813 (5th Cir.1989) (allocating remainder of settlement fund where 500 potential class members were notified, but only 228 proved their right to the fund by filling out a claim form and all 228 were fully compensated). In this case, however, all of the identifiable class members were not compensated.

Highland used its business records to precisely tailor the size of the settlement fund, reserving the right to reduce the fund by the amounts attributable to class members who opted-out. Highland then used these same records to issue checks to each settling class member, who under the settlement agreement were designated as the owners of their particular share of the fund and were issued checks representing that share. The *cy pres* provision then subsequently forfeited that property interest if the class member did not cash the issued check within 90 days. Highland did not require, nor need, the class members to prove their right to the fund as Highland possessed all the relevant information in its own business records. It therefore allocated the entire fund to identifiable class members by issuing each of them a check for the specific amount owed. There accordingly was no unclaimed surplus to which an appropriate *cy pres* distribution could attach.

***418** Even had there been a surplus, the *cy pres* provision in this agreement was clearly inappropriate for yet another reason. In class actions, the doctrine of *cy pres* is supposed to distribute funds "for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *Klier,* 658 F.3d at 474. At the very least, the *cy pres* distribution should "reasonably approximate" the class members' interests. *In re Lupron Mktg. & Sales Practices Litig.,* 677 F.3d 21, 33 (1st Cir.2012). Whether the *cy pres* distribution reasonably approximates the class members' interests is determined by analyzing a number of factors such as the purposes of the underlying statutes violated, the nature of the class members' injury, the class members' characteristics and interests, the geographical scope of the class, the reasons why the settlement funds have yet to be claimed, and the relationship of the *cy pres* recipient to the class. *Id.* at 33.

The Court acknowledges that The Nature Conservancy was chosen as the *cy pres* recipient because it "share[s] Highland Homes' vision of green building and commitment to the environment." 448 S.W.3d at 407 (alteration in original). But Highland's vision or preferences are irrelevant because the settlement fund does not belong to Highland. It belongs to the class members whose claims created the fund. *See Klier,* 658 F.3d at 474 ("The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.") (citing *Principles of the Law of Aggregate Litigation,* 2010 A.L.I. § 3.07 cmt. b). As much as I respect and admire the mission of The Nature Conservancy, I fail to see its connection to the subcontractors' suit, which alleged that Highland misrepresented that liability insurance would be provided for uninsured subcontractors through payroll deductions.

The UPA provides that property is presumed abandoned if ownership is not exercised for a period of three years. It requires that such property be turned over to the State. The UPA further prohibits contracts that seek to limit the presumptive period or otherwise dispose of unclaimed property through private escheat agreements. In this regard, the Act prohibits agreements that "divert funds" or "divide funds ... among locatable" persons or use "any other method for the purpose of circumventing the unclaimed property process." Tex. Prop.Code § 74.309. Highland and the class representative agreed "to a cy pres distribution of unclaimed funds owed to class members" who, although known, could not be found to cash their settlement checks within 90 days of issuance. I agree with the court of appeals that this *cy pres* provision is essentially a private escheat agreement prohibited by the UPA. 417 S.W.3d 478, 486–87 (Tex.App.–El Paso 2012). I accordingly would affirm the court of appeals' judgment. Because the Court does not, I respectfully dissent.

All Citations

448 S.W.3d 403, 57 Tex. Sup. Ct. J. 1315

Footnotes

1 Tex.R. Civ. P. 42(a). The rule is similar to Rule 23 of the Federal Rules of Civil Procedure.

2 *See* Ethan D. Millar & John L. Coalson, Jr., *The Pot of Gold at the End of the Class Action Lawsuit: Can States Claim It as Unclaimed Property?,* 70 U. Pitt. L.Rev.. 511, 514 (2009) ("It is not uncommon in class action settlements for a significant amount of the settlement checks to never be cashed.").

3 Tex.R. Civ. P. 42(a)(4) (class representatives), 42(c)(2) (notice to certified class), 42(e) (approval of settlement, after the requisite notice, hearing, and findings), 42(e)(4)(A) (class members' right to object to settlement), 42(g) (appointment of class counsel).

4 *Taylor v. Sturgell,* 553 U.S. 880, 894, 904, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008) (recognizing that "[r]epresentative suits with preclusive effect on nonparties include properly conducted class actions," but refusing to extend nonparty preclusion); *Martin v. Wilks,* 490 U.S. 755, 762 n. 2, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (noting a recognized, limited exception—to the general rule that a judgment "does not conclude the rights of strangers to [the] proceedings"—in "class" or "representative" suits, but refusing to extend nonparty preclusion to white firefighters challenging employment decisions made under a consent decree in a civil rights action), *superseded by statute,* Civil Rights Act of 1991, Pub.L. No. 102–166, § 108, 105 Stat. 1074, 1076–1077, codified at 42 U.S.C. § 2000e–2(n); *Hansberry v. Lee,* 311 U.S. 32, 41–44, 61 S.Ct. 115, 85 L.Ed. 22 (1940) (noting a recognized, albeit imprecisely defined exception allowing judgments

in "class" or "representative" suits to "bind members of the class or those represented who were not made parties" but refusing to extend nonparty preclusion to an injunctive decree enforcing a restrictive covenant agreement); *Citizens Ins. Co. of Am. v. Daccach,* 217 S.W.3d 430, 450 (Tex.2007) ("Basic principles of res judicata apply to class actions just as they do to any other form of litigation.") (citations omitted).

5 Tex. Prop.Code §§ 71.001–76.704.

6 417 S.W.3d 478 (Tex.App.–El Paso 2012).

7 Tex.R. Civ. P. 42(b)(3).

8 Also excluded were persons with whom Highland Homes had already settled, its employees, and class counsel.

9 The phrase, *cy pres,* "derives from the Norman–French phrase, *cy pres comme possible,* meaning 'as near as possible.' " Wilbur H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and* Cy Pres *Awards: Emerging Problems and Practical Solutions,* 21 Va. J. Soc. Pol'y & L. 267, 269 (2014). The Restatement (Third) of Trusts explains the *cy pres* doctrine as follows: "Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose, the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose." Restatement (Third) of Trusts § 67 (2003). In the class action context, *cy pres* refers to awards "to an entity that resembles, in either composition or purpose, the class members or their interests" when "direct distributions to class members are not feasible—either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable." Principles of the Law of Aggregate Litigation § 3.07, cmt. b (2010). Despite the *Principles'* endorsement of such awards, *id.* § 3.07, issues regarding their legality and propriety have been raised. *See Marek v. Lane,* —— U.S. ——, 134 S.Ct. 8, 9, 187 L.Ed.2d 392 (2013) (Roberts, C.J., statement respecting denial of certiorari). We have not had occasion to address such issues, and none is raised in this case.

10 *About Us: Vision and Mission,* The Nature Conservancy, http:// www.nature.org/about-us/vision-mission/-index.htm (last visited August 22, 2014).

11 Highland Homes was authorized to deduct from the award any administration expenses that exceeded $30,000. It has made no such claim.

12 Those affiliates were Horizon Homes, Ltd., Sanders Custom Builder, Ltd., Highland Homes–Houston, Ltd., Sanders Custom Builder–Houston, Ltd., Highland Homes–San Antonio, Ltd., and Highland Homes–Austin, Ltd.

13 Highland Homes paid class counsel's fee, set by the trial court at $1.8 million, over and above the $3,672,000 it paid the settlement class.

14 *State v. Snell,* 950 S.W.2d 108 (Tex.App.–El Paso 1997, no writ).

15 417 S.W.3d 478, 488 (Tex.App.–El Paso 2012).

16 *Id.* at 488.

17 56 Tex. Sup.Ct. J. 864, —— S.W.3d —— (Aug. 23, 2013). The plaintiffs did not participate in the proceedings in the court of appeals. The State argues that because Highland Homes has now disclaimed any interest in settlement funds, it lacks standing to complain of the court of appeals' modification of the settlement and the judgment predicated on it. But "[a] final judgment which is founded upon a settlement agreement reached by the parties must be in strict or literal compliance with that agreement". *Vickrey v. Am. Youth Camps, Inc.,* 532 S.W.2d 292, 292 (Tex.1976) (per curiam) (citations omitted). It should go without saying that when a party agrees to one judgment and a materially different one is rendered, the party is personally aggrieved and has standing to complain. *See DaimlerChrysler Corp. v. Inman,* 252 S.W.3d 299, 304

(Tex.2008) ("For standing, a plaintiff must be personally aggrieved...."). The *cy pres* award was a significant part of the settlement, and we cannot assume that Highland Homes would have reached the same agreement without it.

18 Tex. Prop.Code § 74.308.

19 *Id.* § 74.309.

20 *Id.* § 74.001(a); *accord id.* § 72.001(d) ("A holder of property presumed abandoned under this chapter is subject to the procedures of Chapter 74.").

21 Chapter 75 "applies to mineral proceeds". *Id.* § 75.001(b). No mineral proceeds or depositories are involved in this case. Chapter 73 applies to "property held by financial institutions", the title of the chapter, and defines a "holder" as "a depository", *id.* § 73.001(a)(4)—that is, "a bank, savings and loan association, credit union, or other banking organization", *id.* § 73.002. The dissent argues that Section 73.102 in the chapter, defining when a check is presumed to be abandoned, nevertheless applies to all holders of checks. *Id.* § 73.102 ("A check is presumed to be abandoned on the latest of: (1) the third anniversary of the date the check was payable; (2) the third anniversary of the date the issuer or payor of the check last received documented communication from the payee of the check; or (3) the third anniversary of the date the check was issued if, according to the knowledge and records of the issuer or payor of the check, during that period, a claim to the check has not been asserted or an act of ownership by the payee has not been exercised."). We think the application of that section is limited along with the rest of the chapter. *See* Tex. Gov't Code § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the ... title (caption)...."). Moreover, even if Section 73.102 applied, it would not nullify the class representative's authority. Having the authority on behalf of the class to arrange for payments of claims by check in the first place, the class representative also had the authority to prescribe the terms under which the checks would be paid.

22 Tex. Prop.Code § 72.001(e)(1), (3).

23 *Id.* § 72.101(a). In *Melton v. State,* 993 S.W.2d 95, 98 (Tex.1999), we stated that " 'unknown,' as used in section 72.101(a) of the Property Code, does not mean completely unidentified."

24 *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811–812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (footnote and citations omitted).

25 State of Texas Brief on the Merits at 45.

26 Tex. Prop.Code § 72.101(a)(1).

27 *See Connecticut Mut. Life Ins. Co. v. Moore,* 333 U.S. 541, 546, 68 S.Ct. 682, 92 L.Ed. 863 (1948) (insurer sought to retain life insurance benefits until proof of entitlement made); *State by Furman v. Jefferson Lake Sulphur Co.,* 36 N.J. 577, 178 A.2d 329, 333–339 (1962) (corporation sought to retain dividends until claimed); *Screen Actors Guild, Inc. v. Cory,* 91 Cal.App.3d 111, 154 Cal.Rptr. 77, 79–80 (1979) (union sought to retain unclaimed royalty checks); *People ex rel. Callahan v. Marshall Field & Co.,* 83 Ill.App.3d 811, 38 Ill.Dec. 944, 404 N.E.2d 368, 371–374 (1980) (merchant sought to retain gift cards).

28 *State v. Snell,* 950 S.W.2d 108, 113 (Tex.App.–El Paso 1997, no writ).

29 *All Plaintiffs v. All Defendants,* 645 F.3d 329, 331–332 (5th Cir.2011).