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## **SCOKY Amends CR 23 to Direct Some Residual Class Action Proceeds to Legal Aid for Low-Income Kentuckians**

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In Order 2013-14 ([http://courts.ky.gov/courts/supreme/Rules\\_Procedures/201314.pdf](http://courts.ky.gov/courts/supreme/Rules_Procedures/201314.pdf)) (eff. 1/1/2014), the Kentucky Supreme Court adopted a new section of Civil Rule 23 governing class actions providing that not less than 25% of any residual funds remaining after payment of claims to class members be paid to the Kentucky IOLTA Fund for distribution to legal aid programs for low-income Kentuckians. The rest of the residual proceeds may be used for a *cy pres* trust, subject to the trial court's discretion. The new Rule was patterned after similar rules adopted by a number of other jurisdictions that apportion excess or residual class action funds to legal aid programs. In so directing the disposition of a portion of excess class funds, some states in essence treat part of the excess funds in the same manner as abandoned or unclaimed property that is subject to escheat.

Residual funds from class action litigation have traditionally been used to establish *cy pres* trusts, which are intended to serve a charitable or beneficent purpose similar to the point of the underlying class action. The *cy pres* doctrine originated in the law of trusts and estates, where it has been applied to give comparable effect to the charitable intention of the grantor or testator (or to make "the next best use" of the property or funds) when the court determines it would be impossible or illegal to give literal effect to the donor's original intent.

In the context of class actions, situations in which courts have approved establishment of *cy pres* charitable trusts or other *cy pres* settlements have included the following: (1) when class members have received full compensation for their damages, and excess funds remain (such as when the defendant has been compelled to disgorge excessive profits as a deterrent, and the disgorged funds exceed the total amount of the damages, fees and costs of the class); (2) when proof of individual class members' claims would be overly burdensome or distribution of damages to individual class members would be too costly; or (3) when the class of persons who might otherwise qualify as class members is difficult to identify or evolves over time (a so-called "fluid class") such that measuring or awarding damages would be impracticable or impossible, and the court determines that providing indirect or prospective benefit serves the interests of justice.

The new Rule, in enhancing the availability of legal services to low-income residents, will promote improved access to the civil justice system that allowed the class action to achieve recovery.

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