

**STATE OF VERMONT
VERMONT SUPREME COURT
JUNE TERM, 2019**

Order Promulgating Rule 23(g) of the Vermont Rules of Civil Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 23(g) of the Vermont Rules of Civil Procedure be added to read as follows:

(g) 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 prevent 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 shall provide that, in matters where the claims process has been exhausted and residual funds remain,

(A) at least fifty percent of the residual funds shall be disbursed to Vermont Legal Aid to support direct delivery of legal services to indigent persons, and

(B) the balance of remaining residual funds shall be disbursed to the Vermont Bar Foundation to support activities and programs that promote access to the civil justice system for indigent persons, or shall be disbursed to one or more nonprofit organizations or foundations 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.

Reporter’s Notes—2019 Amendment

Rule 23(g) is added to provide for the disbursement of residual funds that remain after satisfaction of all claims under a class action judgment or settlement.

With the new rule, Vermont now joins 23 states and Puerto Rico that, as of July 2018, had adopted similar provisions by court rule or statute—most since 2011. See ABA Res. Ctr. for Access to Justice Initiatives, Legislation and Court Rules Providing for Legal Aid to Receive Class Action Residuals (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/lr_sclaid_atj_cypres.pdf [https://perma.cc/CV3T-995K].

In support of this effort, the American Bar Association at its August 2016 annual meeting resolved that states should adopt measures “authorizing the award of class action residual funds to nonprofit organizations that improve access to civil justice for persons living in poverty” after reasonable efforts to compensate class members, unless such efforts are not feasible. ABA Resolution/Report 104 (August 2016) [hereinafter ABA Rep. 104], https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls_atj_cypres.pdf [<https://perma.cc/EXN4-AVDE>].

Rule 23(g)(1) defines “residual funds” as those remaining under an order or judgment after payment of all approved claims, expenses, and disbursements. As ABA Rep. 104 states, “Residual funds are often a result of the inability to locate class members or class members failing or declining to file claims or cash settlement checks. Such funds are also generated when it is ‘economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed,’ ” (quoting *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013)). The final sentence of paragraph (1) makes clear that a settlement need not create residual funds—for example, because the total settlement amount is allocated in specific sums payable to identified class members and for other identified disbursements.

Nothing in Rule 23(g) is intended to affect the obligations of any party to a class action under the State’s unclaimed property statutes, set forth in 27 V.S.A. ch.14. See 27 V.S.A. §§ 1241(13) (Definitions), 1242(a) (Presumptions of abandonment), and 1259(a) (Periods of limitation). Accordingly, “residual funds” subject to this rule do not include any unclaimed property that must be reported to the State Treasurer under 27 V.S.A. ch. 14.

Rule 23(g)(2) provides a formula for the distribution of residual funds. As ABA Rep. 104 notes, “The fundamental purpose of every class action is to offer access to justice for a group of people who on their own would not realistically be able to obtain the protections of the justice system.” ABA Report 104 further notes that courts have used the equitable cy pres doctrine as a basis for making allocations of class action residual funds in ways consistent with the claims or interests involved in the action, citing Principles of the Law of Aggregate Litigation § 3.07 (Am. Law Inst.). Thus, cy pres decisions have included “recognized organizations that provide access to justice for low-income, underserved, and disadvantaged people,” and recently adopted state residual class action rules and statutes have codified those principles. ABA Rep. 104.

Rule 23(g)(2)(A) provides that when there are residual funds, the judgment or other appropriate order or agreement must require

that “at least fifty percent” of those funds will be disbursed to Vermont Legal Aid (VLA) for provision of legal services to the indigent. Subparagraph (2)(A) further would permit a disbursement to VLA of more than fifty percent of the residual funds in the discretion of the court or parties. It is appropriate to make VLA the primary beneficiary of the rule because it is the sole statewide provider of legal services and is entirely dependent on politically vulnerable state and federal appropriations, the annually variable results of IOLTA proceeds, and annual giving through the Vermont Bar Foundation (VBF).

Rule 23(g)(2)(B) is also mandatory but gives the court or parties discretion to provide in the judgment or other instrument that any remaining balance may be distributed either to the VBF for its access-to-justice programs or to a nonprofit or nonprofits with programs beneficial to the class or others that are consistent with “the underlying causes of action.” Presumably, appropriate VBF programs would be those included in its noncompetitive grants program, as well as grantees awarded competitive grants with access-to-justice goals. Disbursement to other nonprofits would require a nexus with the underlying claim—for example, awards to one or more humane societies in an action against a meat-processing company brought by a class of domestic animal owners claiming inhumane treatment in the corralling and slaughtering of animals.

2. That this rule as added is prescribed and promulgated effective August 15, 2019. The Reporter’s Notes are advisory.

3. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 13th day of June, 2019.



Signed by the Vermont Supreme Court

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice