

Alternatives

TO THE HIGH COST OF LITIGATION

DIGEST

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Show Me the Money: A Proposal for Distributing Unclaimed Settlement Funds

BY LINDA STAMATO AND SANFORD M. JAFFE

What should happen to unclaimed funds generated by class-action suits?

As it is now, judges handling the matters are distributing leftover settlement money to charities they favor—hospitals or law schools or legal aid societies, for example, or, to those charities that bear a connection, however tenuous, to the litigation subject that generated the funds.

There needs to be a better way.

When sums remain after claimants are paid—say, in tort cases alleging harm from products, or employment-related matters that allege harassment or discrimination—judges attempt to find creative uses of the money, in some cases applying the doctrine of “cy-pres,” a French phrase meaning “as near as possible.”

This concept follows from the law of charitable trusts that declares that similar uses for funds may be acceptable when the intended recipient—for example, a designated charitable purpose in a will—no longer exists. So, courts reason that a close approximation to the intended beneficiary is an acceptable solution.

The *New York Times* reported that U.S. District Court Judge Harold Baer, of New York, gave \$6 million remaining from a

settlement after claimants had been paid to several charities that combat eating disorders and drug abuse. Adam Liptak, “Sidebar: Doling Out Other People’s Money” *New York Times* (Nov. 26, 2007)(available at www.nytimes.com). The plaintiffs were fashion models who alleged that model agencies had violated laws against price-fixing. Evidently, fewer than 5% of the models eligible for settlement money put in claims against the \$22 million settlement.

The *Times* recounted a sampling of other cases: After claims were paid from an antitrust settlement concerning chemical prices, \$5 million was awarded to George Washington University; from a settlement involving a diabetes drug in Illinois, \$5 million was paid to both the Illinois Institute of Technology and a Chicago hospital, while an additional \$2 million went to a Hasidic group, the Lubavitch Chabad of Illinois. Meantime, in Alaska, an undisclosed amount from the settlement of an environmental class action suit financed a high school science program.

This practice raises several questions. Do the responsibilities of grant maker or grant administrator fit within the judicial role? Are judges in a position to know the universe of potential charities, to analyze their financial status, to determine recipients’ capacity to use the money wisely and for the purpose the court articulates? Can judges monitor the implementation of a given grant on a continuing basis, particularly where large sums of money are involved?

CLASS ACTIONS

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Examining Apology

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idence Code § 1152 makes discussions and offers made in the course of settlement discussions inadmissible as evidence. Evidence Code § 1115, et seq., is a comprehensive statutory scheme designed to keep conversations and evidence presented in a mediation confidential and inadmissible. The California Legislature went as far as to make the mediator incompetent as a witness (Evidence Code § 1121).

In 2000, California's Legislature enacted Evidence Code § 1160 which states:

(a) The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is

part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.

While this statute excludes the specific term "apology," as of the writing of this article, no court has ruled that the word "apology" is excluded.

Although Massachusetts was the first state to adopt statutory protection (Mass. Gen. Laws, ch. 233, § 23D), Florida acted a law in 2001 (Fla. Stat. Ch 90.4026), Texas in 1999 (Tex. Civ. Prac. & Rem Code Ann. § 18.061), and Washington state in 2002 (Wash.Rev.Code § 5.66.010(1)).

As seen in California's example, the Legislature distinguished expressions of sorrow and sympathy from admissions of fault. One need not be prescient to see there will be skirmishes over whether a given apology is an expression of sympathy or acceptance of guilt and/or liability. If the apology is not an acceptance of responsibility, then is it sincere?

One of a myriad of problems in insulating apologies or making them an ex-

pression of sympathy in lieu of a genuine apology is how they will be received by the aggrieved party. An effective apology must be *sincere*. Sincerity is enhanced when the person who gives the apology gives it even though they stand to be held financially liable or have something at risk.

If people are given the license to indiscriminately issue an apology, the recipient may wonder if it is sincere and the apology may lose its impact. On the other hand, Jonathan Cohen said, "[W]hile a full apology will usually be most powerful, merely expressing sympathy can often be a large step."

* * *

In Part II next month, the authors examine high-profile product liability and health care matters, applying principles for constructing effective apologies. ■

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Unclaimed Funds

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These functions, in our judgment, range too far from the judicial role and can lead to appearances of favoritism. How do potential recipients gain the attention of the court, after all? By hearings? Independent inquiry? Lobbying?

Unsurprisingly, some charities are hiring lawyers to lobby judges for these funds. While some potential recipients know nothing about the practice, others are starting to count on it.

Legal services organizations that represent indigent clients, for example, are beginning to rely on class-action settlements to finance their work. Accordingly, legislatures and higher courts are being asked to take actions that keep that money coming to them.

Before the practice becomes institutionalized, there should be serious, focused discussion on this issue. There should be a consensus on the proper disposition of

these funds, and the policies and procedures to manage their distribution, as well as making their existence and the means of access to them widely known.

Class Money

The issue: There is no guidance for disposing of unclaimed settlement funds.

Isn't that a good thing? For the judge-chosen beneficiaries, sure. But is this really a judicial function?

A proposed solution: A public distribution panel in each federal circuit.

As it is now, the way the funds are handled is neither transparent nor open to all

who may want consideration. There are no published criteria for determining who gets the money and, as far as we know, no way for interested parties to see a "grant request proposal" form, if, indeed, such a form exists in any of the federal circuit or state courts. Announcements after the fact hardly suffice.

The money is there, however, and should be put to productive use. The issue is how to do it responsibly, satisfying needs for fairness, transparency and accountability.

Judges have gotten into the business of charitable giving because there are no clear requirements for these funds' use. The American Law Institute, an influential Philadelphia group of lawyers, judges and academics that proposes ways to improve justice administration, takes the position that all sums from class-action settlements should go to plaintiffs unless they cannot be found or the sums involved are trivial. The institute has met vigorous resistance in its efforts to devise a plan to deal with the unused funds.

Unsurprisingly, perhaps, there already

have been actions taken to make these informal practices more formal. A law signed last August in Illinois requires up to half of all leftover funds be turned over to legal services groups to improve access to the legal system for low-income individuals. And, the *Times* article reports, last year in Washington, the high court adopted a rule requiring at least a quarter of leftover money to be used in a similar way.

There are persuasive arguments against returning all unclaimed sums to plaintiffs, including improper enrichment. Most observers do not favor sending the funds to the public treasury. But how can we meet objections to the present process?

PROPOSAL: AN INDEPENDENT PANEL

To begin with, each federal circuit court could set up a panel, drawn from the public as well as the bar, to give advice on distributing remaining settlement funds generated by cases in that circuit.

An effort should be made to include individuals who are not in the legal profession. These panel members should


The authors make the case for a transparent process to determine excess funds' distribution.

broadly represent the public's interest. They should be positioned to add perspective on the proper and appropriate uses of these monies.

This group could create a fair and open process to solicit interest, a mechanism to review grant proposals, and set forth how accountability will be assured. At the same time, it could develop rules to guide potential recipients. The panel should make recommendations to the circuit court.

Any administrative funds required for the panel's operation should come from the unused settlement funds. Community foundations in some circuits also might provide logistical support, including accounting, to monitor grants.

This bare outline suggests one way to rationalize the use of class-action settlement funds that remain after all obligations are paid. No doubt there are others.

The point here is not to delineate the elements of a specific program or suggest who the beneficiaries ought to be but rather to argue for an organized, consistent, fair and transparent process to make these determinations. The public deserves no less from its courts. 

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ADR BRIEFS • ADR BRIEFS • ADR BRIEFS

THE DIRECTIVE IS IN: EUROPEAN UNION STRONGLY BACKS CROSS-BORDER MEDIATION

After nearly a decade in the making, the European Parliament formally approved a directive strongly encouraging mediation use in cross-border disputes.

The final approval, issued April 23 and expected to take effect soon, empowers judges throughout the 27 European Union countries to refer appropriate international disputes to mediation, even where there had been no prior agreement.

The move closes a lengthy campaign to boost the parliament's support for commercial mediation processes. The biggest effect of the legislative resolution adopting the directive—"on certain aspects of mediation in civil and commercial matters" (No. 15003/5/2007 – C6-0132/2008 – 2004/0251(COD))(available at [\[ister.consilium.europa.eu/pdf/en/07/st15/st15003-re05.en07.pdf\]\(http://reg-ister.consilium.europa.eu/pdf/en/07/st15/st15003-re05.en07.pdf\)\)—may be to acclimate by force reluctant attorneys who in some areas believe that mediation is a threat to their practices.](http://reg-</p>
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For now, the directive's broad effect will be limited by its focus on cross-border civil disputes. Internal litigation rules aren't affected, though the directive urges member nations to consider revisions. Family and consumer matters aren't subject to the directive. It also doesn't apply immediately in Denmark, which has had itself written out of EU legal directives.

In 30 findings that set up the directive's operating rules, the parliament reasserts the official views of the European Council—first issued in May 2000, following an October 1999 resolution—that establishing basic ADR principles will help "simplify and improve access to justice."

The proposal, which sought to correlate civil procedure and mediation, was

aired and vetted by public and business interests over the years. It was redrafted based on the suggestions, with the proposed official directive emerging in October 2004.

In addition, the efforts were accompanied by a European Code of Conduct for Mediators, which was released in July 2004. (Available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.)

The council and the parliament form the European Union's legislature, and run the EU's operations, presiding over budgetary issues. Directives bind EU members to the stated goals, but the countries achieve directive purposes by changing their own laws, leaving wiggle room on compliance.

Arlene McCarthy, a Labor Party European Parliament representative based in Manchester, England, said in a statement for *Alternatives*, "The result of the negotia-

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