

Docket No. 13-2620

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In Re: BankAmerica Corporation Securities Litigation

David P. Oetting, Class Representative,

Plaintiff/Appellant,

v.

Green Jacobson, PC,

Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri, St. Louis

BRIEF OF AMICUS CURIAE MISSOURI LAWYER TRUST ACCOUNT
FOUNDATION IN SUPPORT OF APPELLEE AND AFFIRMANCE

William E. Quirk
Anthony W. Bonuchi
Jon R. Dedon
POLSINELLI PC
900 W. 48th Place, Suite 900
Kansas City, MO 64112
(816) 421-3355; FAX (816) 374-0509

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The Missouri Lawyer Trust Account Foundation is a not-for-profit corporation created by order of the Missouri Supreme Court. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The Supreme Court of Missouri administers rules for lawyer trust accounts, and requires that all trust accounts be set up as either interest-bearing Interest On Lawyer Trust Account (“IOLTA”) accounts or as non-IOLTA accounts. Amicus curiae Missouri Lawyer Trust Account Foundation (the “Foundation”) was created by order of the Missouri Supreme Court, and is tasked with collecting interest from attorney IOLTA accounts and distributing them in a way that helps provide civil legal assistance to the poor.

To this end, the Foundation has enacted bylaws that specifically provide that at least 94% of all grant funds dispersed by the Foundation must go to Legal Service Corporation entities, like Legal Services of Eastern Missouri, the recipient of the *cy pres* distribution at issue in this appeal. The decision to allocate such a large portion of its grant funds to Legal Services Corporation entities reflects the Foundation’s judgment that this is the best and most efficient means to further its goals. For this reason the Foundation supports the *cy pres* distribution in this case.

The Foundation’s extensive experience with Legal Services Corporation entities gives it a detailed understanding of the functions such entities perform and the tenuous nature of their funding. This amicus curiae brief will thus provide the Court a fuller picture of entities like Legal Services of Eastern Missouri.

All parties have consented to the filing of this brief as provided by Fed. R. App. P. 29(a).

AUTHORSHIP STATEMENT

No party's counsel authored this brief in whole or in part, and no party or other person contributed any money intended to fund preparation or submission of this brief. Counsel for the amicus curiae prepared this brief on a pro bono basis.

INTRODUCTION

In 2004, a settlement agreement was reached in the underlying class litigation, providing that the settlement funds would be distributed to class members in two rounds of distributions, and that any funds remaining after the second round would be “contributed to nonsectarian, not-for-profit 501(c)(3) organization(s) as determined by the Court in its sole discretion...” After two rounds of distributions to class members, the District Court exercised that discretion to order the surplus settlement funds be given to Legal Services of Eastern Missouri (“LSEM”) under the doctrine of *cy pres*. Appellant now challenges that distribution.

When selecting the proper recipient of a *cy pres* distribution in the context of surplus settlement funds, “the unclaimed funds should be distributed 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.” *In re Airline Ticket Comm’n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002). In this Circuit, such distributions should be tailored to both the purpose and geographic scope of the underlying litigation. *Id.* The district court has broad discretion to craft these awards. *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997).

The District Court’s *cy pres* ruling here, selecting Legal Services of Eastern Missouri (“LSEM”) as the recipient of the distribution, properly accounted for the

purposes and scope of the underlying litigation. First, there is a direct nexus between the purpose of the underlying litigation and the District Court’s chosen charity here. The Court found that, particularly in a fraud case like this, a distribution to a Legal Services entity is appropriate because those entities routinely work to defend the rights of fraud victims. And in a broader sense, LSEM is a fitting recipient here because class actions generally are designed to vindicate the rights of people who otherwise could not afford to litigate, much as LSEM—and Legal Services organizations generally—vindicate the rights of the needy.

Second, the District Court properly considered the geographic scope of this case in making its distribution to LSEM. It found that although some class members were not from Missouri, the case had been transferred to the Eastern District of Missouri because “much of the harm felt by class members was in the St. Louis region.”

In short, because the parties vested the District Court with sole discretion to award the excess, unclaimed settlement funds to a charity under the *cy pres* doctrine, and because the chosen charity, LSEM, fits both the purpose and geographic scope of the underlying litigation, the distribution here was proper.

ARGUMENT

I. Legal Services Corporation entities are the preferred charities of state and federal courts throughout the country.

LSEM—like most legal services organizations—is a charity favored by courts across the nation. It is not, as Appellant suggests, some pet cause of the District Court. *See* Appellant’s Br. at 22-23. Courts have long recognized both the importance of Legal Services Corporation entities and their current dire financial condition. These entities are thus frequently charities of choice.

Amicus curiae Missouri Lawyer Trust Account Foundation (the “Foundation”) exemplifies the recognized status of legal services corporation entities as favored charities. Some 30 years ago the Missouri Supreme Court ordered the creation of the Foundation. The Foundation collects and aggregates interest from Missouri lawyers’ IOLTA accounts, and distributes that money in the form of grants to nonprofit organizations. The Foundation’s purposes are limited to: (1) providing civil legal assistance to the poor; (2) improving the administration of Justice; and (3) promoting such other programs for the benefit of the public as are specifically approved from time to time by the Missouri Supreme Court for exclusively public purposes. *See* PURPOSES OF MISSOURI LAWYER TRUST ACCOUNT FOUNDATION, http://www.moiolta.org/about_us.aspx (last visited October 11, 2013). The Foundation determined that these purposes were best

served by giving over 90% of its grant funds to Legal Services Corporation entities in Missouri, including LSEM. As the Foundation's bylaws provide, its purposes include:

To provide civil legal services to low-income Missourians by providing not less than 94% of funds that the board determines to be available for grants for distribution in any year after 2013 ("Available Funds") to the legal services programs, funded by the Legal Service Corporation, the primary purpose of which is to provide civil legal services to low-income Missouri residents[.]

FOUNDATION BYLAWS, ART. III, [http://www.moiolta.org/FileHandler.aspx?UploadedFile=true&pg=\[XXX\]&file=~/App_Data/UserImages/File/Bylaws/amend2012.doc](http://www.moiolta.org/FileHandler.aspx?UploadedFile=true&pg=[XXX]&file=~/App_Data/UserImages/File/Bylaws/amend2012.doc), (last visited October 11, 2013).

The Missouri Foundation is no outlier. IOLTA programs have been created by high courts or legislatures in every state to help meet the enormous need for legal assistance that confronts low-income individuals, families, and communities across the country. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 221-23 (2003) ("Every State in the Nation and the District of Columbia have . . . adopted an IOLTA program [to help fund] charitable entities providing legal services for the poor."). The United States Supreme Court has blessed this practice. *See id.* at 240-41 (upholding the validity of IOLTA programs).

Apart from being a favored charity of the legal system, LSEM is badly in need of supplemental funding through these types of *cy pres* awards. Low interest rates, which by definition reduce IOLTA programs' contributions, combined with

fiscal austerity in state and federal governments, have led to marked underfunding of Legal Services entities. For example, the Foundation's own revenue—and thus its ability to fund indigent legal services—has declined dramatically over the past four years. Its grant pool has fallen from \$1.2 million in 2009 to some \$900,000 this year, and promises to be even lower in 2014. Due in part to decreased funding by the Foundation, in 2012, LSEM turned away 59% of those seeking aid. LSEM SERVICE AND STATISTICS NEWSLETTER (July 11, 2013). And the need for LSEM's services is as strong as ever: in the 21 counties served by LSEM, 286,000 people live in poverty according to the 2010 Census.

By using the *cy pres* doctrine to help alleviate the funding shortfall LSEM has suffered as a result of IOLTA's decreased contributions, the District Court was not somehow putting its own charitable goals ahead of the parties' intentions or the class members' interests. In fact, unlike any of the cases relied on by Appellants, the settlement agreement in this case *required* the District Court to distribute the surplus to a not-for-profit organization in the court's "sole discretion." The court's found that, like the funds distributed by IOLTA, the best use of the unclaimed settlement funds is to provide legal services for the poor. This is in keeping with the spirit of the underlying litigation in this case.

II. Distribution to a Legal Services entity fits the purpose of the underlying litigation.

Distribution to LSEM is a particularly appropriate use of surplus settlement funds resulting from a class action. One of the primary purposes of class action litigation is expanding access to the legal system to those who otherwise could not afford to litigate. *See DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) (class actions provide “small claimants with a means of obtaining redress for claims too small to justify individual litigation.”) (citation omitted). Similarly, LSEM’s mission is to provide high quality legal services to those who could not otherwise afford them. The *cy pres* distribution to LSEM vindicates both interests.

The *cy pres* award also directly serves the purposes of the fraud claims raised here. LSEM provides representation to indigent clients in several types of fraud cases. *See* LEGAL SERVICES OF EASTERN MISSOURI, WHAT WE DO, CONSUMER TAB, http://www.lsem.org/Consumer_33.aspx, (last visited October 11, 2013) (“LSEM accepts the following consumer cases: predatory lending practices, deceptive or fraudulent practices regarding the sale of automobiles and other goods and services, breach of warranty, breach of contract, wrongful repossession, illegal collection tactics, credit card defense and the false reporting of information on credit reports.”). In fact, LSEM is currently prosecuting a plaintiff’s securities fraud case. *See Lorraine Parks v. John R. Donnelly, Sr.*, Cause No. 11SL-

CC00195 (Circuit Court of the County of St. Louis). And Legal Services entities nationwide perform similar work. *See* FACT SHEET ON THE LEGAL SERVICES CORPORATION-WHAT KINDS OF ISSUES DO LOW INCOME PEOPLE NEED HELP WITH?, <http://lsc.gov/about/what-is-lsc>, (last visited October 11, 2013) (identifying consumer fraud issues such as predatory lending to elderly people).

By choosing LSEM, the District Court tailored the *cy pres* distribution to the purposes of the litigation, properly carried out the mandate given it by the settlement agreement, and acted consistently with this Circuit's *cy pres* precedent.

III. Distribution to LSEM also suits the geographic scope of the action.

Contrary to Appellant's argument, the distribution to LSEM is wholly consistent with the geographic scope of this case. First, the effect of LSEM's work is not limited to its own geographic domain. LSEM is one of over 130 independent corporations in all 50 states that is funded in part by grants from the Legal Services Corporation, a national entity. *See* LEGAL SERVICES CORPORATION, 2014 FUNDING ESTIMATES, http://grants.lsc.gov/sites/default/files/LSC/-FY_2014_Current_Funding_Estimates.pdf, (last visited October 11, 2013). LSEM, along with its sister Legal Services Corporation entities, is active in litigating systemic issues disproportionately affecting the poor, and the results of that litigation are relied on by courts across the country. *See, e.g., Weaver v. Reagan*, 886 F.2d 194 (8th Cir. 1989) (landmark Medicaid case brought by LSEM

holding that Medicaid must pay for the drug AZT for AIDS patients, cited by state courts in 19 states and federal courts in 9 circuits) *Mikel v. Gourley*, 951 F.2d 166 (8th Cir. 1991) (Aid for Families with Dependent Children case brought by LSEM interpreting federally-mandated time limits for hearing decisions, cited by seven federal circuit courts and a state court); *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2000) (Medicaid case brought by LSEM striking down limitation on durable medical equipment to most categorically needy, cited by courts in eleven federal circuits and four states); *Charleston Housing Authority v. USDA*, 419 F.3d 729 (8th Cir. 2005); (Fair Housing Act case brought by LSEM holding in part that demolition of a low-income apartment complex could have a disparate impact on African-Americans, cited by courts in five circuits and two states). Thus, a distribution to LSEM will indirectly benefit litigation of issues that disproportionately affect the poor throughout the country.

Second, the direct distribution of the excess settlement funds is not limited to the St. Louis area (or, as Appellant repeatedly claims, the District Court's "backyard"). LSEM serves a 21-county area that covers a large part of Eastern Missouri. See LEGAL SERVICES OF EASTERN MISSOURI, WHO WE ARE, http://www.lsem.org/WhoWeAre_5.aspx, (last visited October 14, 2013) (listing 21 counties served). Moreover, the four Missouri Legal Services affiliates (Legal Aid of Western Missouri, Legal Services of Southern Missouri, Mid-Missouri

Legal Services Corporation, and LSEM) have an agreement in place to share *cy pres* distributions. This arrangement will spread the direct benefit of the *cy pres* distribution across the state of Missouri.

A *cy pres* distribution to LSEM will thus directly benefit not just St. Louis, but Missouri as a whole, and will indirectly benefit the entire country.

CONCLUSION

For the foregoing reasons, the Foundation respectfully submits that the District Court did not abuse its discretion in selecting LSEM as the recipient of the *cy pres* distribution of the surplus settlement funds, and urges that the underlying order be affirmed

Respectfully submitted,

William E. Quirk
Anthony W. Bonuchi
Jon R. Dedon
POLSINELLI PC
900 W. 48th Place, Suite 900
Kansas City MO 64112
(816) 421-3355
FAX (816) 374-0509

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 2,174 words, excluding the parts of brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements in Fed. R. App. 32(a)(5) and the type style requirements in Fed. R. App. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century typeface, font size 14.

/s/ Jon R. Dedon

William E. Quirk
Anthony W. Bonuchi
Jon R. Dedon
POLSINELLI PC
900 W. 48th Place, Suite 900
Kansas City MO 64112
Kansas City, Missouri 64105
(816) 421-3355
FAX (816) 374-0509

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2013, I electronically filed the foregoing with the Clerk of the Court through Appellate CM/ECF System. I certify that all participants are registered CM/ECF users and service will be accomplished by the CM/ECF System.

/s/ Jon R. Dedon
Attorney for Amicus Curiae