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## Law Firm Hit Over \$2.7M Cy Pres Award In 8th Circ.

By **Emily Atkin**

Law360, New York (September 05, 2013, 6:19 PM ET) -- Attorneys who helped a class of NationsBank Corp. investors secure a \$333.2 million settlement over an allegedly botched merger with Bank of America Corp. should not be allowed to give part of that money to charity, a NationsBank investor told the Eighth Circuit on Wednesday.

Class representative David P. Oetting urged the appeals court in a Wednesday brief to overturn Green Jacobson PC's successful petition to distribute \$2.7 million remaining in the settlement fund to Legal Services of Eastern Missouri Inc., a St. Louis-based charity that provides legal service for low-income families. Oetting said giving the remaining money to the charity would be an "abusive" and "unfettered" exercise of the so-called cy pres doctrine, which allows judges to distribute settlement money to third parties when it would be difficult or unreasonable to give it to class members.

Oetting argues that the remaining settlement fund can and should be returned to investors, rather than distributed to charity. Giving the money to charity would be unlawful because it would violate a "national trend" of federal appellate circuits that have rejected the use of cy pres where distribution to the class is economically feasible, he said.

"The district court's application of precedent to award cy pres from a nationwide securities class to a local legal aid society in the court's backyard left much to be desired," the brief said. "While the district court paid lip-service to Eighth Circuit standards, its application of law to facts was reversible error."

Oetting is one of four class representatives for two nationwide classes of NationsBank shareholders who in 2002 settled multidistrict litigation over allegations that NationsBank of BofA failed to warn them of the risks of a stock-for-stock merger in 1998, the brief said. Oetting's current suit says Green Jacobson breached its fiduciary duty to its clients by diverting the leftover settlement money to a charity that has "nothing to do" with the case.

The district court had granted Green Jacobson's motion to distribute the remaining \$2.7 million to a charity because it couldn't guarantee that current NationsBank investors were harmed by the 1998 merger, and would have trouble tracking down those who were, the brief said. A local charity, they ruled, would be the "next best" approximation of a benefit to a nationwide class.

Green Jacobson and the district court also expressed concern that if the remainder of the settlement fund were distributed to the class, the "primary recipients" would be "very wealthy" investors — something Oetting took contention with.

"If Green Jacobson represented a single billionaire miser instead of a class, there would be no question that they would not have the authority to redistribute their client's assets to a deserving charity without the client's permission — even if the client was an especially

odious Montgomery Burns-type who would only spend the money on particularly distasteful bacchanalia," the brief said.

Oetting's brief also said the district court was treading on thin ethical ice by picking its own charity for a cy pres award. Because class action settlements require judicial approval, the brief said, a judge who was able to pick his own charity might look more favorably on approving the settlement.

"A judge that knows that a larger settlement fund will eventually result in a larger cy pres distribution at the end of the case for his favorite charity might be inclined to slant rulings to encourage such a larger settlement," the brief said. "Moreover, charities that know that a judge has discretionary funds to distribute can — and do — lobby judges to choose them, blurring the appropriate role of the judiciary."

Representatives for both parties were not immediately available for comment.

The case is David P. Oetting v. Green Jacobson, P.C., Case No. 13-2620, in the United States Court of Appeals for the Eighth Circuit.

The MDL is In Re: Bank of America Corp. et al., case number 4:99-md-01264, in the U.S. District Court for the Eastern District of Missouri.

--Editing by Richard McVay.

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