



October 13, 2022

VIA HAND-DELIVERY

Ms. Edythe Nash Gaiser, Clerk of Court
Supreme Court of Appeals of West Virginia
State Capitol, Room E-317
1900 Kanawha Boulevard, East
Charleston, WV 25305

Re: Comments to Proposed Revised Rules of Civil Procedure

Dear Clerk Nash:

This letter conveys comments from the West Virginia Insurance Federation (“WVIF”) on the proposed revisions to the West Virginia Rules of Civil Procedure recently published by the Supreme Court of Appeals of West Virginia.

The WVIF is the state trade association for property and casualty insurance companies doing business in West Virginia. Its members insure more than 80% of the automobiles insured in West Virginia, 70% of West Virginia’s homes, and more than 80% of the workers’ compensation policies insuring West Virginia workers. WVIF members are subjected to our state’s Rules of Civil Procedure and the corresponding costs associated with litigation involving both personal and commercial claims on a regular and routine basis.

The WVIF appreciates the Supreme Court of Appeals of West Virginia, the Clerk of the Court, and the Committee charged with drafting the proposed amendments for their work on these proposed amendments and the opportunity to provide comments. Below are the WVIF’s proposed comments.

1. Rule 23(i) of the Proposed Amendments to W. Va. R. Civ. P.

The current proposed Rule 23(i) creates potential uncertainty for parties to a proposed class settlement and courts that must approve the settlement. The uncertainty stems from the undefined term “residual funds” which could be misinterpreted to include *all unclaimed funds* in a claims-made settlement structure. As worded, the proposal appears to view uncashed checks as a species for residual funds, suggesting that residual funds is broader and could refer to all forms of “unclaimed” funds. The WVIF does not believe that this is the intent of the proposed rule; however, if a court were to view it in this manner, the result could result in unintended negative consequences for both the defendant and a proposed settlement class. In addition, the last sentence

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of proposed Rule 23(i) could be strengthened to expressly give the parties more authority over *cy pres*.

The WVIF suggests removing the last sentence of proposed Rule 23(i) and adding a new paragraph at the beginning, to read as follows:

(i) Residual funds.

(1) “Residual funds” are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys’ fees, any reversions to a defendant agreed upon by the parties, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from agreeing to, or the Court from approving, a settlement that does not create residual funds.

(2) When the claims process has been exhausted in class actions and residual funds remain, the court may, after notice to counsel of record and a hearing, distribute the residual funds to Legal Aid of West Virginia, to one or more West Virginia nonprofit organizations, schools within West Virginia universities or colleges, or foundations, which support programs that will benefit the class consistent with the objectives and purposes of the underlying causes of action upon which relief was based. With respect to checks or other methods of payment that are not cashed or otherwise negotiated by identified class members within a time period set by the Court or other unclaimed funds, the right to which is vested in identified class members, the Court may treat the funds as residual funds and distribute them pursuant to this subsection or declare the funds unclaimed property and order the funds paid over to the West Virginia Unclaimed Property Fund. ~~The Parties may, subject to the requirements of Rule 23, provide for the treatment of unclaimed or residual funds.~~

2. Rule 26 – Align with Federal Rules.

As a general matter, the WVIF encourages the Court to consider adopting amendments that closely align with the Federal Rules of Civil Procedure. Specifically, the WVIF respectfully urges the Court to consider that discovery is time-consuming and expensive, and settlements are now driven by litigation costs, not merit. This underscores the need for proportionality and will help align West Virginia’s Rules with the Federal Rules and the majority of states. Our Rules should reflect what is happening and influencing civil cases, and cases should be determined based on their merit.

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Accordingly, the WVIF urges the Court to expressly set forth the proportionality concept contemplated by Rules 26(b)(1) of the Federal Rules and to authorize protective orders that address cost-allocation to align with FRCP 26(c)(1)(B).

Thank you again for the opportunity to comment. If you have questions or need additional information of any kind, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in cursive script that reads "Jill CRice". The signature is written in black ink and is positioned to the left of the typed name and title.

Jill Cranston Rice
President