



NYSBA

Manual on Cy pres For Legal Services

Prepared by the Special Committee
On Funding for Civil Legal Services

January 2007



NEW YORK STATE BAR ASSOCIATION MANUAL ON CY PRES FOR LEGAL SERVICES

Table of Contents

NYSBA Manual on Cy pres for Legal Services

Introduction	1
Cy pres for Legal Services	2
How to Structure Cy pres Relief in Class Action Settlements	3
The Legal Basis for Cy pres Awards in New York	5
Cy pres in Other Jurisdictions	7
Conclusion	8

Appendix

A Roster of Special Committee on Funding for Civil Legal Services	9
B Programs Providing Civil Legal Services to Low-Income New Yorkers or Facilitating Delivery of Such Services	13
C The New York Bar Foundation: Board of Directors, Examples of Restricted Funds, 2006 Grant Awards.	27
D The Legal Framework of Cy pres Awards for Civil Legal Services	39
E A Short List of Cy pres and Other Court Awards to Legal Aid Programs	77
F National Association of Consumer Advocates Class Action Guidelines on Cy pres Awards	83
G Examples of Court Orders and Opinions Involving Cy pres Awards.	91
<u>Motorsports Merchandise Antitrust Litigation</u> U.S. District Court for Georgia, Northern District, Atlanta Division	93
<u>Folding Carton Antitrust Litigation</u> U.S. District Court for Illinois, Northern District, Eastern Division	103
<u>Superior Beverage Company v. Owens-Illinois</u> U.S. District Court for Illinois, Northern District, Eastern Division	117
<u>Fogie v. Thorn Americas</u> U.S. District Court for Minnesota	135

NEW YORK STATE BAR ASSOCIATION MANUAL ON CY PRES FOR LEGAL SERVICES

Equal justice under law is not just a caption on the façade of the Supreme Court building. It is perhaps the most inspiring ideal of our society...It is fundamental that justice should be the same, in substance and availability, without regard to economic status.

INTRODUCTION

The ideal of equal justice, expressed so eloquently by then retired U.S. Supreme Court Justice Lewis Powell, Jr., guides the efforts of the New York State Bar Association to meet the needs of disadvantaged and vulnerable New Yorkers. New York State is fortunate to have many legal aid and legal services programs with full-time staff attorneys, as well as various other public interest programs that leverage the talent and generosity of the private bar. Such programs provide critical services that benefit poor individuals and nonprofit organizations serving local communities. However, there is a profound justice gap. As Mark H. Alcott stated in June 2006 on assuming the Presidency of the New York State Bar Association: “Access to justice remains at the heart of our Association’s mission and at the center of its agenda. I don’t have to tell you why that is so. We know that 80 percent of the civil legal needs of the poor go unmet. We cannot tolerate a failure of this magnitude to meet the legal needs of the poor, and I can assure you this Association will never do so.”

Free legal services are a necessity in critical areas such as housing, family, income maintenance, and individual rights. Such services are a good investment, since they help to stabilize struggling families and secure public benefits and thus help avoid the costs of homelessness, hunger, health care, and foster care. The Legal Services Corporation (LSC) recently completed the first national comprehensive study of the civil legal needs of low-income Americans and issued a report, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*. The study found that the vast majority of the needs of low-income Americans for civil legal assistance are not being met and that New York LSC programs could not provide services to at least 80,000 low-income residents in dire need of civil legal assistance.

The three primary funding streams for civil legal services in New York – the LSC, the Interest on Lawyer Account Fund, and state legislative funding – do not come close to meeting the need. Because of the lack of adequate funding, the civil legal services programs in New York are required to perform legal triage. They help those in the most dire circumstances first and do what they can to provide brief services to others. Unfortunately, only a small fraction of those seeking help can be provided with full representation.

Recognizing the crisis of urgent, unmet needs, the American Bar Association House of Delegates adopted a resolution, in August 2006, urging governments to provide legal counsel as a matter of right at public expense to low-income persons in civil adversarial proceedings where basic human rights are at stake, such as those matters involving shelter, sustenance, safety, health or child custody. Until the so-called “Civil Gideon” concept becomes a reality in New York, however, new funding from other sources may be the best answer to helping more low-income New Yorkers. Cy pres awards are one possible source of such funding.

CY PRES FOR LEGAL SERVICES

When class action lawsuits result in an award for the plaintiffs, in almost every case, there are funds that go unclaimed by the class. These funds are rarely distributed as additional funds to the members of the class who filed claims. Instead, they become a residual fund that is available for another use. Historically, the use had to have some nexus with the original purpose of the class action, but today the nexus is often slight. Broadly speaking, cy pres is the term for finding another appropriate use for the funds. The decision as to such use is usually jointly arrived at by counsel and the court, most typically in the context of a settlement agreement. Cy pres awards are an ideal way to advance the goal of ensuring equal access to justice.

Indeed, in 1998, the Report on Funding Civil Legal Services for the Poor (“Cooper Report”) to Chief Judge Kaye cited cy pres as a potential revenue source. The Cooper Report noted that unclaimed class action proceeds were sometimes devoted to civil legal services to the poor. As there is considerable class action litigation in courts in New York, the report observed that such funds offered “great promise as a means of *voluntarily* raising funds for civil legal services for the poor.” The Cooper Report encouraged efforts to inform lawyers and judges of the societal benefit of dedicating unclaimed class action proceeds to legal services.

The New York State Bar Association took up the cy pres challenge presented by the Cooper Report when it created a Special Committee on Funding for Civil Legal Services to explore cy pres and other innovative ways of securing additional funding streams for civil legal services. (The Special Committee roster can be found at Appendix A.) In April 2006, the Association’s House of Delegates endorsed the Special Committee’s report on the use of cy pres funds and its proposal to create a cy pres manual to serve as an educational and promotional tool. In developing this manual, the Special Committee was guided in part by the Minnesota approach, which included producing a legal services cy pres manual used as a resource by the bench and bar handling class actions. The Minnesota cy pres program also involved the creation of a foundation donor advisory board that retains control over distribution of cy pres funds to legal services programs.

The New York State Bar Association cy pres program has three goals: (1) to educate the class action bench and bar about the priority that should be given to programs that provide civil legal services to low-income persons; (2) to provide information via its President’s Committee on Access to Justice and its Department of Pro Bono Affairs about relevant organizations that are potential recipients of cy pres awards, many of which are listed in Appendix B; and (3) to describe the important role The New York Bar Foundation can play in receiving cy pres awards and distributing them to legal service providers where they are most urgently needed.

The courts and counsel may wish to identify specific legal service organizations as recipients of cy pres awards, based upon a perceived nexus, and to utilize a list of potential grantees (such as provided in Appendix B) for that purpose. The New York Bar Foundation offers an alternative approach. Where the parties would like to dedicate the funds “core” legal services throughout the State of New York, The Bar Foundation can ensure that funds are broadly distributed geographically to service providers whose core mission is the provision of civil legal services to the indigent.

Established in 1950, The Bar Foundation is dedicated to aiding charitable and educational projects designed to meet the law-related needs of the public and the legal profession. The Bar Foundation awards grants to programs throughout New York State that relate to facilitating the delivery of legal services, increasing public understanding of the law, improving the justice system and the law, and enhancing professional competence

and ethics. Many of the law-related programs provide legal services to the indigent, including the elderly, victims of domestic violence, the homeless, and immigrants.

The Bar Foundation awards grants only after careful review by a Board consisting of 25 attorneys who possess extensive knowledge and experience with law-related organizations and programs throughout the State. The grant review process reflects the quality and sophistication of the Board's judgment as to which organizations deserve funding for meritorious programs. The Foundation receives charitable contributions from lawyers, law firms, corporations, and more than 1,000 Fellows who have been elected to membership as acknowledgement of their outstanding professional achievements, dedication to the profession, and commitment to the organized bar. Salient information regarding The Bar Foundation can be found at Appendix C.

HOW TO STRUCTURE CY PRES RELIEF IN CLASS ACTION SETTLEMENTS

In the litigation context, cy pres usually refers to a formal award of funds to a legal service provider or charitable entity. In practice, cy pres can be available as a remedy in a number of different types of cases: consumer fraud, antitrust class actions, mass tort, and securities fraud. Cy pres is often available in public interest cases brought by State Attorneys General. A number of states now even have statutes permitting or mandating the use of cy pres for civil legal services in certain types of cases.

Cy pres can be used in any class action or mass tort action where the payment of damages to individual class members would be impossible, impractical or inappropriate. For example, where large numbers of class members have suffered small monetary losses, direct payments to the class may be impossible or impractical. Cy pres also can be the remedy of choice where a defendant's conduct has made it difficult to identify class members and where allowing leftover funds to revert back to the defendant would undermine the deterrent effect of the relevant statute. In all these circumstances, outright grants to legal service providers and public interest organizations can be appropriate.

Cy pres also can be used even when class members are identifiable, but there is an unclaimed portion of a settlement fund. Class action settlements invariably involve class members who cannot be located, who choose not to make claims or who do not cash a settlement check. The leftover funds in such cases may be given to a legal service provider or public interest organization. The argument can, and should, be made that residual funds should never revert to a defendant. Not only is that a windfall for the defendant, but it may create an incentive for a defendant to be less than totally cooperative in locating class members and distributing settlement funds.

The decision to make a cy pres award in a class action settlement most often happens during the settlement process. Class action settlements must be approved by the court and must afford absent class members the opportunity to opt out or object. Therefore, while a cy pres remedy can be structured however the parties wish, it must pass muster with the court and the class members. Even where settlement funds are to be distributed to identifiable plaintiffs, cy pres may still be used by negotiating, from the start, to set aside a fixed percentage of the settlement fund or an amount certain. The most common use of cy pres is the case where a settlement provides that unclaimed or leftover funds will be used for the cy pres award. Once plaintiffs and defendants agree that a cy pres award is desirable and appropriate, the key is to fashion a remedy that will satisfy the court and the absent class members.

Often the driving force for cy pres awards to legal aid programs is the plaintiffs' counsel, but defense counsel frequently welcome a cy pres remedy as a way for their client to resolve a case and obtain some positive publicity out of the settlement. Suggesting such a donation in the early stages of settlement talks often helps to move them along. The defendant corporation may find that making a charitable contribution to legal aid programs as part of a negotiated settlement is a sound strategy. Such a contribution is tax-deductible, and many defendants would rather have the funds go to legal aid than to other types of nonprofit organizations that do not expand access to justice. Indeed, in some parts of the country, corporate general counsel are emerging as the legal community's strongest supporters of legal services.

While the classic definition of cy pres is an award that is tied as nearly as possible to the gravamen of the litigation, the case law suggests more fluid parameters. In the real world of class action settlements, the connection between the class, and the harm done to them, and the cy pres award can range from very closely aligned to very tenuous. The parties are often only limited by their own creativity and ability to convince the judge that what they are proposing makes sense.

After agreeing on the terms of a cy pres award in a class action, the parties must obtain the approval of the court. A motion to approve a settlement that includes a cy pres award should include information responsive to the following questions:

- What makes a cy pres award appropriate in this case?
- How does the cy pres award further the interest of the class in this case?
- How much will remain for cy pres after distribution to the class?
- How much will be set aside for cy pres out of settlement funds?
- Who are the potential awardees of a cy pres award in this case?
- How will a cy pres award further the mission, purposes, and goals of the proposed awardees?
- How will the awardees of a cy pres grant be chosen – will they be chosen by the parties, the court or an independent party?
- What are the procedures for potential recipients to request proposals for cy pres awards – what are the criteria for selection, and what is the process for judicial approval of the selection?
- Are there any conflicts of interest between or among the parties, counsel, and potential awardees?
- Will there be post-settlement reporting requirements and oversight of the awardees?

Counsel should always consider whether there are funds that can be made available for cy pres. As a general rule, counsel should resist efforts to allow reverter of unclaimed funds to defendants or to the state and should instead strongly advocate for cy pres awards for legal services.

A list of recent cy pres and other awards to legal aid programs and samples of court opinions and orders involving cy pres for legal services or other public interest programs can be found at Appendices E and G,

respectively. Class action guidelines on cy pres developed by the National Association of Consumer Advocates are set forth at Appendix F.

The list of recent awards found at Appendix E exemplifies the many creative ways to direct court awards to legal aid, including through the use not only of cy pres awards, but also of restitution and sanctions. In some states, the defendants in white-collar criminal cases have paid an extraordinary restitution – a kind of fine in addition to any other restitution defendants may normally pay out – and such fines have been used to fund civil legal services. Sanction awards imposed by judges against plaintiffs’ or defense counsel have also been used to benefit legal aid programs in some jurisdictions. Mediation offers another potential source of funding; many mediators have agreed that raising the possibility of a charitable donation to legal aid could help resolve some of the cases they handle. Considering the aforementioned awards can serve to stimulate thinking about other innovative ways of directing court awards to legal aid programs.

THE LEGAL BASIS FOR CY PRES AWARDS IN NEW YORK

A comprehensive discussion of relevant law regarding cy pres awards for legal services is found at Appendix D. A short discussion of the law follows here.

In recent years, courts nationwide have made cy pres awards to programs that provide free legal services to low-income persons. The cy pres doctrine (from the Norman French term *cy pres comme possible*, meaning “as near as possible”) was first used as a method of distributing a trust fund to the next best use when the original purpose could not be achieved.

The same basic concept is also employed in class action settlements. Generally, this occurs where there are leftover finds, such as when not all plaintiffs collect their awards, when it is impossible to determine each plaintiff’s actual damages or when the amounts of individual awards are too nominal for distribution. *See, generally*, Forde, “What Can a Court Do With Leftover Class Action Funds? Almost Anything!” *JUDGES’ JOURNAL*, Vol. 35, No. 3 (Summer 1996); Seligman and Larkin, “Fluid Recovery and Cy pres: A Funding Source for Legal Services,” <http://www.impactfund.org/pdfs/Cy%20Pres%20UPDATED.pdf>; Zazove, “The Cy pres Doctrine and Legal Services for the Poor: Using Undistributed Class Action Funds to Improve Access to Justice,” ABA National Institute on Class Actions (2001). But the cy pres concept also can be utilized to create cy pres funds as part of the settlement itself, not just where residual funds are a possibility. *See, e.g., In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1031 (N.D. Ill. 2000), *affd.* 267 F. 3d 743 (7th Cir. 2001), *cert. den.* 535 U.S. 1018 (2002).

Courts have broad discretion in determining distribution of unclaimed class action funds. *See*, 4 Newberg on Class Actions, § 11.20 (4th ed.). In class action settlements, many courts have found that cy pres awards given to legal aid programs indirectly benefit class members, since such programs represent the interests of those who cannot afford counsel, and this is consistent with the goal of class actions – to protect the legal rights of those who would otherwise be unrepresented. *See, id.*, at § 10.17.

Often cy pres awards are found preferable to giving leftover funds to defendants, which would lessen the deterrent effect of litigation; to giving the residual funds to claiming class members, thus providing a windfall to them; or to allowing them to escheat to the government, thus not indirectly benefiting class members. *See, id.*, at § 10.15.

The Appellate Division, Second Department, recently endorsed the cy pres concept in *Klein v. Robert's American Gourmet Food*, 28 A.D.3d 63, 73-74 (2nd Dept. 2006), stating that, in a settlement context, when an aggregate class recovery cannot economically be distributed to individual class members, subject to court approval, the parties may agree that undistributed funds will be distributed for the indirect benefit of the class. The Klein court cited Newberg, supra, at § 11:20, and *In re Mexico Money Transfer Litig.*, supra.

There is ample precedent for cy pres awards to legal service provider organizations in New York federal courts. In *Plotz v. NYAT Maintenance Corp.*, 2006 WL 298427 (S.D.N.Y. Feb. 6, 2006), a class action on behalf of tour guides and bus drivers alleging labor law violations, the parties settled the litigation and requested that the court make a cy pres donation of residual funds to two organizations that advocate on behalf of low-wage workers, the National Employment Law Project and the Workplace Project. The court noted that it possessed broad discretionary and equitable powers to make cy pres awards of unclaimed class settlement funds to public service organizations, stated that it had done its own research into the subject organizations, and cited two cases that also had involved cy pres donations to legal service providers: *Jones v. National Distillers*, 56 F. Supp. 2d 355 (S.D.N.Y. 1999), and *Fears v. Wilhelmina Model Agency*, 2005 WL 1041134 (S.D.N.Y. May 5, 2005), *appeal pending*.

Jones, a leading cy pres case regarding donations to a legal service provider, involved the settlement of a securities class action. The court noted that, increasingly, the cy pres doctrine is being applied flexibly and that the cy pres doctrine and the courts' broad equitable powers permit the use of residual funds for public interest purposes. Given the history of courts in approving donations of unclaimed class funds to benefit nonprofit legal services, the Civil Division of the Legal Aid Society in New York City was approved as an appropriate recipient of unclaimed class funds.

Fears, which also involves a settlement, contains a noteworthy discussion of the cy pres doctrine. The plaintiffs alleged that the defendant modeling agencies conspired to fix prices. The parties reached a settlement and authorized the court to decide how to distribute \$6 million in residual funds. After soliciting input from the parties as to appropriate organizations, the court approved distribution of \$1 million to the Civil Division of The Legal Aid Society in New York City and remaining funds to nonprofit or charitable groups dedicated to women's health. The pending appeal does not appear to challenge the vitality of the cy pres doctrine, since the key issues in the plaintiffs' appeal seem to be whether there was in fact a settlement and whether there should have been any residual fund at all. In their reply brief, plaintiffs stated that they "respect the mission of charities and have no objection to supporting them if funds are not exhausted – which is why they provided a list to the district court in the first place."

In another recent case, *Schwab v. Philip Morris USA*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006), the specific issue of a cy pres distribution of excess funds was deferred for later determination. Judge Weinstein set forth an exhaustive discussion of fluid recovery and cy pres cases within and outside of the Second Circuit. He noted that fluid recovery can include cases involving unclaimed settlement or damages funds to nonprofit organizations and stated that the residue, if any, could be distributed on the basis of cy pres principles. Another interesting discussion of the cy pres doctrine occurs in *In re Holocaust Victim Assets Litigation*, 311 F. Supp. 2d 407 (E.D.N.Y. 2004), *affd.* 424 F.3d 158 (2d Cir. 2005) and 424 F.3d 169 (2d Cir. 2005), a complicated case involving large subclasses of Holocaust victims and a \$60 million excess fund. Judge Korman confirmed that the cy pres doctrine is now applied in class action settlements.

The New York State Attorney General has also endorsed the use of cy pres to benefit public interest programs.

In one notable example, the Attorney General and other State Attorneys General brought a case against Nine West, alleging price-fixing as to women's shoes. A settlement was achieved, and New York's share was \$2 million. Because it would have been difficult to identify a meaningful number of individual shoe purchasers injured by Nine West's actions, the Attorney General recommended distribution of the funds to a wide variety of programs that benefit women, including programs that provided legal and others services to battered women. The court approved the distribution. *See*, http://www.oag.state.ny.us/press/2001/oct/oct26a_01.html.

CY PRES IN OTHER JURISDICTIONS

Cy pres awards have been made to legal services programs in numerous states, a few of which are highlighted here. An Illinois decision is oft-cited for the proposition that the cy pres doctrine has expanded, and awards need not be tied to the purpose of the legal action at issue. In *Superior Bev. Co. v. Owens-Illinois*, 827 F. Supp. 477 (N.D. Ill. 1993), an antitrust class action resulted in \$2 million in unclaimed funds. In choosing legal aid organizations and other nonprofits to receive the funds, the court concluded that use of funds for purposes closely related to their origin was still the best cy pres application, but the courts' broad equitable powers permitted use of funds for other public interest purposes by educational, charitable, and other public service organizations for current programs or for an endowment and source of future income for long-range programs.

Illinois has been a fertile source of cy pres awards for legal services, including \$2.3 million from an antitrust class settlement fund to the National Association for Public Interest Law for a program to give young lawyers opportunities to work at public interest organizations and provide legal services to the poor. *See, In re Folding Carton Antitrust Litigation*, 1991 WL 32867 (N.D. Ill. Mar. 6, 1991), *affd. in part, remanded in part* 934 F.2d 323 (7th Cir. 1991). There have also been numerous awards to the Land of Lincoln Legal Assistance Foundation. Civil legal services to the poor have also received a significant boost in Minnesota, thanks to major cy pres awards. In February 2005, the Minnesota Legal Aid Foundation Fund received \$2.5 million as part of a settlement of an antitrust class action suit against Microsoft Corporation.

The application of cy pres in state courts in California is also of interest. In *State of California v. Levi Strauss & Co.*, 41 Cal. 3d 460 (Cal. 1986), a price-fixing case, the California Consumer Protection Foundation was created to distribute \$4 million in residual funds. The court was concerned that otherwise defendants would retain ill-gotten gains simply because their conduct harmed large numbers of people in small monetary amounts, rather than small numbers of people in large amounts.

Several years after that decision, a cy pres provision was added to the California Code of Civil Procedure, in effect codifying the cy pres case law to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action or to promote justice for all Californians. The code specifies that unpaid residuals from class actions shall be paid to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons or that promote the law, consistent with the objectives and purposes of the underlying cause of action; to child advocacy programs; or to nonprofit organizations providing civil legal services to the indigent. A North Carolina law provides that residual funds generally must be dedicated to advancing civil legal services for indigent persons. A Washington State court rule requires that at least 25 percent of leftover class action funds be set aside for the state's IOLA fund.

CONCLUSION

The New York State Bar Associationa hopes that this manual excites plaintiffs' and defense counsel and judges about the opportunities to help fund access to justice through cy pres awards in New York State. To encourage such awards, we have provided you with the following resources:

- Statement on the need for new funding streams for civil legal services (p. 1)
- Theory of cy pres (p. 2)
- How to structure a cy pres argument (p. 3)
- Legal basis for cy pres funds going to civil legal service funding (p. 5)
- Summary of what is happening in other jurisdictions (p. 7)
- Partial list of legal service providers that could be appropriate recipients of awards (Appendix B)
- Strategy for using The New York Bar Foundation to ensure that funds go to the provision of core legal services throughout the state (p. 2-3)
- List of some cy pres awards for legal services (Appendix E)
- Selected orders approving cy pres awards (Appendix G)
- Extensive memorandum on the underlying law of cy pres (Appendix D).

We hope that, with these resources, you will be inspired to bring the promise of cy pres to bear upon the tremendous unmet need for civil legal services for poor New Yorkers.