

*Adopted by the ABA House of Delegates
August 2016*

AMERICAN BAR ASSOCIATION

**STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS
COMMISSION ON HOMELESSNESS & POVERTY
COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges state, local, territorial and tribal
2 jurisdictions to adopt court rules or legislation authorizing the award of class action residual
3 funds to non-profit organizations that improve access to civil justice for persons living in
4 poverty.

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6 FURTHER RESOLVED, That before class action residual funds are awarded to charitable, non-
7 profit or other organizations, all reasonable efforts should be made to fully compensate
8 members of the class, or a determination should be made that such payments are not feasible.

REPORT

Introduction

The unmet need for civil legal services among those living in poverty is well documented: study after study has demonstrated that the majority of poor people who need civil legal services are turned away due to a severe shortage of legal aid resources. This not only has grave consequences for the people who are unable to get this critical legal help; everyone with matters before the courts and the justice system suffers as well as a result of the large increase in people left with no choice but to represent themselves in court on often complex legal matters.

Funding for legal aid services is woefully inadequate and the Association annually organizes bar leaders from around the country to lobby for more funding for the Legal Services Corporation to partially address this problem. The Association has adopted policy statements in support of adequate funding for LSC, as well as called upon bar associations and lawyers to “undertake vigorous leadership and aggressive advocacy to identify, pursue and implement creative initiatives that will result in new funding mechanisms for legal services providers.¹”

A creative initiative that has now been adopted in 19 U.S. jurisdictions helps provide critical funding for legal aid while at the same time providing a balanced resolution to what otherwise can often become a thorny issue in class action litigation. Specifically, these rules and statutes authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of awards of undistributed class action settlement residuals. This resolution seeks to have the Association go on record as supporting this approach for the reasons articulated below.

The Origins of the Cy Pres Doctrine

Cy pres awards are distributions of the residual funds from class action settlements or judgments (and occasionally from other proceedings, such as probate and bankruptcy matters) that, for various reasons, are unclaimed or cannot be distributed to the class members or other intended recipients. The term cy pres derives from the Norman-French phrase, *cy pres comme possible*, meaning “as near as possible.” Originating at least as early as sixth-century Rome, the cy pres doctrine has its roots in the laws of trusts and estates, operating to modify charitable trusts that specified a gift that had been granted to a charitable entity that no longer existed, had become infeasible, or was in contravention of public policy. In such instances, courts transferred the funds to the next best use that would satisfy “as nearly as possible” the trust settlor’s original intent.

When class actions are resolved through settlement or judgment, it is not uncommon for excess funds to remain after a distribution to class members. Residual funds are often a result of the inability to locate class members or class members failing or declining to file claims or cash settlement checks. Such funds are also generated when it is “economically or administratively

¹ House of Delegates policy resolution 95A124.

infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed.²

In these circumstances courts have used the cy pres doctrine to accomplish the distribution of residual funds to charities that benefit persons similarly-situated to the plaintiffs, or that advocate to improve access to justice more generally. This preserves the deterrent effect of the class action device, and allows courts to distribute residual funds to charitable causes that reasonably approximate the interests pursued by the class action for absent class members who have not received individual distributions.

Cy Pres is a Well-Established Practice

The application of the cy pres doctrine in class actions, as with any other doctrine throughout legal history, has evolved as courts have been required to grapple with complex and unique facts and circumstances in each particular case. Because of such complexities, trial courts sometimes fashion unique cy pres distributions; some such awards have been reversed on appeal. The vast majority of such reversals are not for “abusing” the cy pres doctrine (i.e., using cy pres for personal gain for counsel or judges). Rather, most reversals are due to the misapplication of the doctrine within the particular circumstances of the case (e.g., failure to make every effort to fully compensate class members or misalignment between the interests of the class members and the interests of the cy pres recipients). While addressing these problems, federal courts have consistently found that the cy pres doctrine is valid in the class action context. The American Law Institute’s Principles of Law of Aggregate Litigation (“ALI Principles”) agrees and provides key guidance on the application of cy pres awards in class actions, which is respected and generally followed by the courts. The ALI Principles acknowledge that “many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members.³”

With respect to funds left over after a first-round distribution to class members, the ALI Principles express a policy preference that residual funds should be redistributed to other class members until they recover their full losses, unless such further distributions are not practical:

If the settlement involves individual distributions to class members and funds remain after distribution (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.⁴

² *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013)

³ PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. a (2010) [hereinafter ALI PRINCIPLES]

⁴ ALI PRINCIPLES, *supra* note 3, § 3.07(b)

As the ALI Principles recognize, when further distributions to class members are not feasible, the court has discretion to order a cy pres distribution, which puts the settlement funds to their next-best use by providing an indirect benefit to the class.

Legal Aid and Access to Justice Organizations Are Appropriate Recipients of Cy Pres Distributions

The fundamental purpose of every class action is to offer access to justice for a group of people who on their own would not realistically be able to obtain the protections of the justice system. This purpose is closely aligned with the mission of every civil legal aid and access to justice initiative across the nation.

In class action suits, when distributions to the class members are not feasible, it is necessary to determine other recipients who would be appropriate to receive the residual cy pres funds. The ALI Principles state that such recipients should be those “whose interests reasonably approximate those being pursued by the class,” and, if no such recipients exist, “a court may approve a recipient that does not reasonably approximate the interests” of the class.⁵

Courts evaluate whether distributions to proposed cy pres recipients “reasonably approximate” the interest of the class members by considering a number of factors, including: the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reason why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the cy pres recipient.

Organizations with objectives directly related to the underlying statutes or claims at issue in the relevant class action are clearly appropriate cy pres recipients. But narrowly limiting the scope of appropriate cy pres recipients to the precise claims in the class action may not always be possible or practical. Too narrow of a focus on the subject matter of the case can unnecessarily complicate the socially desirable settlement of large class action disputes. In a typical class action, counsel for plaintiffs and a defendant are resolving a complex dispute, and the disposal of residual funds is typically a detail in a larger resolution. While some court opinions speak of residual funds as “penalties” or “recoveries” for violations of the law, settling defendants usually see themselves as making a pragmatic business decision that specifically avoids any admission that they violated the law. Moreover, settling defendants have a practical interest in how residual funds are used, and may wish to avoid funding interest groups that campaign against the interests of the defendant.

There have been cases where parties improperly attempted to direct cy pres awards to causes that had no connection to the class or the case or to access to justice through the courts. Examples have included general awards to charities or educational institutions with no particular relationship to the class action. The concerns in the cy pres context are not about whether these are good and effective charities and institutions; it is their relevance to the class action where

⁵ ALI PRINCIPLES, *supra* note 3, § 3.07(c)

there are residual funds to be awarded. In some instances, the reasons for including the organization have not been articulated, leaving the appeals court to guess about the connection of a particular organization to the issues of the case.

An appropriate recipient in most cases will be a legal services organization, so long as the underlying premise of expanding access to justice is properly articulated. Thus, federal and state courts throughout the country have long recognized organizations that provide access to justice for low-income, underserved, and disadvantaged people as appropriate beneficiaries of cy pres distributions from class action settlements or judgments. The access to justice nexus falls squarely within ALI Principles' guidance that "there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests."⁶

An issue that sometimes arises in disposition of class action residuals is whether the scope of a suit (local or national) has been properly matched to the scope of a cy pres award. It is clearly disfavored under the case law for a cy pres award in a national class action case to be directed solely to a local charity. One advantage of an award to an organization with a broad access to justice mission is that such organizations exist throughout the country so any distribution can easily be structured to take into account the national nature of the case.

Because organizations with broad access to justice missions are widely recognized as appropriate recipients of cy pres awards, a growing number of states have adopted statutes or court rules codifying the principle that cy pres distributions to organizations promoting access to justice are an appropriate use of residual funds in class action cases. The state courts and legislatures in 19 states have adopted rules and statutes that specify, as appropriate cy pres recipients, charitable entities that promote access to legal services for low-income individuals.⁷ Nine of these courts and legislatures have mandated a minimum baseline distribution (usually 25% to 50%) to the pre-approved category of recipients.⁸ Because such statutes and court rules establish that it is permissible for any residual funds in class action settlements or judgments to be distributed to organizations that provide access to justice/civil legal aid, they make clear that such organizations are distinct from other charitable causes that have drawn legitimate concerns regarding a lack of nexus with the interests of the class members.

Conclusion

⁶ ALI PRINCIPLES, *supra* note 3, § 3.07 cmt. b.

⁷ The states are: California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Mexico, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Washington. As of this writing, it has been reported that the Wisconsin Supreme Court adopted a petition for a cy pres rule, which is expected to become effective January 1, 2017 after final orders are drafted.

⁸ The states with rules requiring a percentage of cy pres awards to be devoted to access to justice organizations are: Colorado (50%), Illinois (50%), Indiana (25%), Kentucky (25%), Montana (50%), Oregon (50%), Pennsylvania (50%), South Dakota (50%) and Washington (50%). When effective, Wisconsin (50%) will become the 10th state.

Class action litigation has become an important device for resolving a wide range of disputes between individual plaintiffs and corporate defendants. Cy pres awards of undistributed class action settlement residue are an important part of the settlement process. Distributing funds to appropriate recipients is a practical variant of the cy pres device long recognized in trust law and is generally accepted as preferable to returning undistributed funds to the settling defendants or escheat of those funds to the state.

Awards of class action settlement funds should follow these principles: (1) compensation of class members should come first; (2) cy pres awards are appropriate where cash distributions to class members are not feasible; (3) cy pres recipients should reasonably approximate the interests of the class; (4) cy pres distributions should recognize the geographic make-up of the class, and where circumstances dictate should be made on the basis of such factors; (5) legal aid and access to justice organizations should be considered as appropriate cy pres recipients.

The American Bar Association therefore urges that state, local, territorial, and tribal jurisdictions adopt court rules or legislation that authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of class action residual funds.

Respectfully submitted,

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Standing Committee on Legal Aid & Indigent Defendants

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