



## CY PRES AWARDS, LEGAL AID AND ACCESS TO JUSTICE: KEY ISSUES IN 2013 AND BEYOND

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[Journal Committee Note: MIE has long recognized the importance of cy pres as a funding source for legal aid. The work we do to obtain these awards has evolved in recent years, as courts have ruled in class action cases and appeals, and courts and legislatures have revised statutes and rules. This article provides a summary of the key issues involved in obtaining cy pres funds today. The appendix to this article, which can be found in the library of the MIE website at <http://mielegalaid.org/>, provides the details — copies of relevant cases, articles and sample materials. We encourage you to read this article with your computer open to the website!]

Cy pres awards, which in the class action context most often arise from undistributed residual funds in the case, have become an increasingly important source



of funding for legal aid and access to justice (ATJ) over the past decade. And appropriately so, as the one

common denominator in all class action cases is that they are fundamentally about access to justice, a principle that increasingly is recognized by state supreme courts and legislatures and a host of state and federal courts around the country.

In spite of a large and growing body of authority and precedent, there have been several cases and articles in recent years that have raised questions about these awards, inappropriately amalgamating the issue of legal aid's legitimacy as a cy pres recipient with other genuine concerns raised by the circumstances in individual cases. This calls for a coordinated, twofold response from the legal aid/ATJ community throughout the country: (1) educating the bench and bar about the well-established and well-reasoned authority for these awards to go towards legal aid and access to

justice initiatives, always remaining consistent on the fundamental arguments; and (2) recognizing the legitimate concerns raised in some cases involving cy pres awards and planning for them in education/outreach efforts so as not to inadvertently get caught in the crossfire when those concerns are present.

We all have a stake in doing this well, and we will all be more successful in our individual efforts if we utilize coordinated and complementary strategies. And when the proper foundation is set, designating one or more legal aid or ATJ organizations as the recipient of residual funds in a class action gives the parties and the court an excellent solution to what otherwise can become a thorny issue in the settlement of a complex case.

### A (Very Brief) Overview of Cy Pres Awards and How They Arise

Cy pres awards are funds that, for any number of reasons, are unclaimed or cannot be distributed to the class members or beneficiaries who were the intended recipients. Once it is known that the funds cannot be distributed as originally intended, the parties and the court have to determine how to dispense with those funds. These situations arise most often in class actions, and that is focus of this article. Under the cy pres doctrine and more specific laws in a growing number of states, courts can distribute these residual funds to appropriate charitable causes. As noted in the next section, legal aid and access to justice initiatives are appropriate charitable causes in any class action case.

In considering strategies around this issue, it is important to remember the context through which these awards normally arise. The parties are going to be focused on the underlying purpose of the class action and the larger settlement of the case. Generally speaking, the issue of what to do with any award of residual funds is considered by the parties settling a class action to be one of several minor collateral issues that must be addressed to close out the case. The residual fund issue

may be addressed during the settlement negotiations, but in many cases it is not addressed in the agreement at all and does not arise until the administration of the settlement has been completed, sometimes years after the rest of the case has concluded.

With that backdrop in mind, what is going to be most important to the parties in a residual fund context is to avoid anything complex or controversial that potentially could draw an objection and upset the larger settlement. And that creates a great opportunity for legal aid and ATJ programs that are properly prepared. With the broad base of authority noted in this article and the universal nature of the access to justice cause in this context, legal aid or ATJ programs always can be pitched as a great solution for the parties and the court.

### **Legal Aid and Access to Justice Initiatives Well-Established as Appropriate Recipients**

Federal and state courts throughout the country long have recognized that awarding residual funds from class action settlements or judgments to organizations that improve access to justice for low-income and disadvantaged people is an appropriate use of the *cy pres* doctrine. While some courts correctly have questioned awards to charities with no connection to the class or the underlying case, courts regularly approve *cy pres* awards to legal aid and ATJ organizations. That is because the one common underlying premise for all class actions is to make access to justice a reality for people who otherwise would not realistically be able to obtain the protections of the justice system.

In addition to the large body of case law supporting the use of *cy pres* awards to advance access to justice, a growing number of states have adopted statutes or court rules at the state level codifying the principle that organizations which promote legal aid and access to justice are always an appropriate use for residual funds in class action cases. These court rules and statutes underscore that legal aid and access to justice are distinct from other charitable causes that have drawn legitimate concerns because they are unconnected from the interests of the class members.

Based on this well-established authority, hundreds of *cy pres* and residual fund awards have been directed to legal aid and ATJ programs around the country in recent years. While the total amount of these awards varies on an annual basis, these awards now collectively on average provide more than \$10 million in support for the cause each year.

### **A Few Clouds on the Horizon, Yet the Sun Should Shine Through**

In spite of the well-established authority noted above, there have been a few cases and articles in recent years that have questioned the legitimacy of certain *cy pres* awards. In some cases, legal aid specifically has been included among those concerns based on particular circumstances present in those cases.

In reviewing these cases, we need to start with the recognition that there indeed 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 there are residual funds to be awarded. In some instances, the organizations selected, sometimes including legal aid programs, may be appropriate, but the reasons for including the organization has not been articulated, leaving the appeals court to guess, sometimes inaccurately, about the connection of a particular organization to the issues of the case.

Another issue that has properly been raised is when *cy pres* awards in national class action cases are directed to local charities only and do not account for the wider geographic character of the class. For example, in a recent case from the Ninth Circuit Court of Appeals, the court overturned the award of residual funds to a local legal aid organization and two other charities, focusing primarily on its concern that the distribution did “not account for the broad geographic distribution of the class.”

Some authors and commentators have inappropriately used those concerns in specific cases to more broadly challenge the legitimacy of legal aid as an appropriate *cy pres* recipient. However, as noted above, provided that geographic concerns are properly respected there is a large base of authority and precedent underscoring that legal aid is distinct from other charitable uses of these awards. Notably, this well-established authority is not acknowledged by the critics and commentators questioning legal aid more broadly, emphasizing the importance of good education and outreach to the bench and bar to ensure these fundamental points are understood and respected.

### **Three Things Every Program Should Do Now**

In order to ensure that the Sun indeed does shine

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through the potential clouds noted above, there are three things every legal aid program and its relevant stakeholders should do on a macro level as part of a coordinated education and outreach campaign:

### 1. Maximize the Impact of Rules and Statutes

In eleven states, the legislature or the Supreme Court has enacted a statute or rule stating that legal aid/ATJ is an appropriate recipient of *cy pres* funds. In those states, the legitimacy of legal aid as a *cy pres* recipient in state court cases is established and not subject to question. The presence of the rule or statute also serves as persuasive authority in federal court cases in those jurisdictions. As more states enact rules or statutes, the strength of the case that legal aid and access to justice are distinct from other charitable uses of *cy pres* awards becomes stronger, even in jurisdictions that have not explicitly spoken on the issue.

For these reasons, for states that do not have a rule or a statute in place, the ATJ community should consider whether it is feasible to implement an explicit rule. States of all political persuasions have adopted rules or statutes, underscoring that these policies are the embodiment of the well-established authority that legal aid and access to justice are appropriate recipients of *cy pres* and residual fund awards in any class action case.

### 2. Lead with the Access to Justice Principle

Always lead with the access to justice principle. This is particularly critical in states without a rule or statute, and imperative for all states in federal court cases. If there is another nexus that fits in a particular case (*e.g.*, in a consumer case noting the important work legal aid does to protect consumers), that can be a good secondary argument to also include. But it is crucial to always lead with the access to justice principle as that applies across the board in every class action for every legal aid program.

Again, the access to justice rationale is this: legal aid or ATJ organizations are always appropriate recipients of *cy pres* or residual fund awards in class actions because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system. This fundamental principle is the basis for the growing number of states that have adopted

rules or statutes and for hundreds of federal and state court cases throughout the country that have approved these awards to legal aid and ATJ organizations. While there may be other appropriate recipients of a *cy pres* award depending on the basis of a particular class action, a *cy pres* award always can be justified for legal aid or access to justice based on this fundamental principle.

### 3. Be Sure to Account for Geographic Issues

If a class is local or statewide and your legal aid or ATJ organization serves that geographic area, this will not be an issue. However, in multi-state or national class actions, this is a critical issue to address, as the Ninth Circuit case noted above underscores.

Even in national cases, the class action typically is certified, administered and resolved in one particular court. Access to justice in that particular jurisdiction therefore takes on added importance for that class, and on that basis courts typically approve up to half of an award to local legal aid or ATJ organizations. The other half of the award still must account for the broader geographic scope, and as we have seen, failure to account for it can be grounds for throwing out an entire award.

There are different ways to address the geographic scope issue. One way is to include other legal aid or ATJ organizations that have the appropriate regional or national scope (*e.g.*, Equal Justice Works, the National Consumer Law Center, Health & Disability Advocates and the Sargent Shriver National Center on Poverty Law). In larger national cases involving multimillion dollar awards, three approaches that successfully have been used were to give a proportionate share to each state IOLTA organization; a proportionate share to all LSC-funded organizations; or a representative geographic distribution of regional legal aid and ATJ organizations.

Any of these approaches to issues of broader geographic scope can be acceptable; the key is to make sure the issue is addressed!

### Key Education and Outreach Strategies

To ensure that *cy pres* awards remain a strong funding source for legal aid requires a strategic and coordinated education and outreach campaign in every jurisdiction. It may have worked okay in the past to look at these issues more informally, but some recent cases involving challenging facts—along with an organized campaign by organizations that aim to limit class actions more broadly—have put a much greater

spotlight on *cy pres* awards. Even in jurisdictions with a strong rule or statute or solid court precedents, it would be a mistake to assume that all of the relevant stakeholders (*i.e.*, the courts, the bar, key members of the legal community who work on class action cases, and other legal aid and ATJ organizations) are fully aware of these issues or understand the critical importance of addressing the key “macro” points noted in the preceding section of this article.

### 1. The Value of a Coordinated Effort

Many states and metropolitan areas have developed a centralized, coordinated effort to ensure that the core *cy pres* messages are communicated to the key stakeholders on an ongoing basis and that those stakeholders have an appropriate mix of access to justice options from which to choose. These coordinated campaigns are being run by bar foundations, IOLTA programs and access to justice commissions. If there is not already a coordinated effort in your jurisdiction, one of those entities will be the best place to start that conversation, stressing the key points we have emphasized in this article. MIE and the ABA’s Resource Center for Access to Justice Initiatives are good places to turn to for advice and counsel in starting such an effort.

The Chicago Bar Foundation (CBF) has been serving this role in the Chicago area for the last ten years. As part of that effort, the CBF consistently does outreach to the class action bar, the state and federal courts and other stakeholders, including information both about the CBF and the many individual legal aid organizations serving the community. The CBF also includes sample language, fact sheets and other information on its website and highlights the many successful court-based advice desks and pro bono projects made possible by these awards. These efforts collectively have generated an average of more than \$1.5 million per year in recent years for the CBF and a number of individual legal aid organizations.

### 2. Developing Your *Cy Pres* Effort—The Basics

Your program’s role in the *cy pres* effort will depend on how the overall campaign is structured in your community or state. What is listed here are the basics, which need to be done by somebody — either each individual program and/or a coordinating entity as described above. This part of *cy pres* resource development really has not changed in recent years, and there are plenty of materials available to help you get started if you are new to *cy pres*. (See the appendix!)

- **Have relevant information readily available:**

Every legal aid organization should include *cy pres* and residual fund awards (using both terms) as an option for supporting your organization. That option should appear on your website, with a brief description of your organization and contact information in case someone interested in directing an award has a question. It should also appear in printed brochures and other development materials.

- **Talk with your staff, board and other key volunteers:** Provide them with information about *cy pres* awards. Encourage them to be aware of opportunities for *cy pres* awards for legal aid.
- **Develop a *cy pres* committee:** If there is not a coordinating entity in your area, you should consider setting up a *cy pres* committee and developing a strategy. Your committee should include board members and other volunteers who are familiar with this area of law and/or have strong relationships with attorneys who do class action litigation and judges who hear these cases — volunteers who can have personal conversations with this relatively small number of attorneys and judges who are involved in class action litigation.
- **Develop and implement a *cy pres* strategy:** See the appendix (which includes sample messages, materials and manuals) for information on developing and implementing a *cy pres* strategy.
- **Don’t forget fundamentals of development:** A *cy pres* campaign is basically about resource development, and in many ways is the same as other private fundraising that is being done by your program:
  - » Remember the interests of the parties in avoiding potential controversy in the *cy pres* context. As noted above, legal aid can and should be pitched to the parties as a great solution.
  - » See the players as individuals, and treat this as you would other personal, one-to-one fundraising efforts.
  - » Stress initiatives that further the interests of those involved in the case (*i.e.*, plaintiff and defense counsel, one or more corporate defendants, and the court), keeping in mind that the great majority of these awards are distributed as part of a settlement. Examples include projects of your organization that directly assist the courts, such as court-based pro bono projects or *pro se* assistance projects, or particular services your organization provides that will be attractive to the parties.

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- » If you are contacted about a potential *cy pres* award, get back with any information requested as quickly as possible. Have template information and materials prepared as part of your strategy, so that with minor adjustments based on the case you can get respond to the attorneys or judge immediately.
- » Thank those involved and acknowledge them in your recognition efforts (after confirming they want to be recognized).

### 3. Your Bar Foundation or IOLTA as a Partner

Even if you are in a state or metro area without a coordinated campaign, there will be times where an award to one of those entities will be a preferable solution and it will be important to have such an organization as a partner. Examples include where the defendant or the court is uncomfortable with an organization that litigates in that court, or where one of the parties or judge is affiliated with the organization. This only occasionally becomes an issue, but when it does a bar foundation or IOLTA organization that does not litigate and has an objective grants process in place for distribution of funds can allay those concerns and ensure that an award will still advance access to justice.

## Conclusion

There are many things that counsel will disagree on in any class action case, but this is an area where counsel on all sides can agree that the solution is good for everyone involved: the class, the defendant and the courts. In addition to being an important source of funding for the cause, directing *cy pres* awards to legal aid or ATJ programs can be a great solution for the parties and the court so long as geographic and other key considerations are properly addressed.

The appendix (in the MIE website's library under resource development/*cy pres*) created with this article can serve as a central resource center for everyone, whether you are just getting started or are fine-tuning an already existing campaign. As we have noted throughout this article, we are all in this together, and it is absolutely key that we all have good, coordinated education and outreach campaigns that stick to the key messages highlighted in this article.

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