Cy Pres

Definition

An initiative that utilizes the doctrine of cy pres to direct class action residuals and other funds resulting from lawsuits to legal aid providers.

Explanation

The cy pres doctrine (from the Norman French term "cy pres comme possible," meaning "as near as possible") first was used as a method of fairly distributing a trust fund when the original purpose could not be achieved. Under cy pres, the funds are distributed to a use that reasonably approximates the interests involved. Courts utilize this doctrine to award funds that, for any number of reasons, are unclaimed or cannot be distributed to the class members or other beneficiaries who were the intended recipients.

In class action lawsuits, if there is to be a payment of damages to class members, a fund is created and potential class members are notified. A time period is established during which people may identify themselves as class members and make claims. Frequently, not all those who are eligible will do so. As a result, there are often residual monies in the fund after the claim period has expired. The defendants usually have no right to these excess funds. Under the doctrine of cy pres and the more specific laws and statutes that now exist in 21 states\(^1\), courts may distribute these residual funds to appropriate charitable causes. In the typical case, the award is made pursuant to the stipulation (or at least recommendation) of counsel for both plaintiffs and defendants.

Federal and state courts throughout the country have recognized that it is appropriate to award residual funds from class action settlements or judgments to organizations that improve access to justice for low-income and disadvantaged people. The unnamed class members in many class action lawsuits are people similar to legal aid clients - those who cannot afford legal

\(^1\) See page 3 under Maximize the impact of rules and statutes.
counsel or would not be able realistically to bring a claim on their own, and might very well not
know what their rights are or have their rights protected. In some cases, there also will be a
specific nexus - the case may be on an issue that is directly related to the work of legal aid.

*Cy pres* awards to legal aid entities have ranged in size from under $100 to more than $40
million. They have been awarded at the local, state and national level, with funds going to one
program or as many as 100 different legal aid organizations.²

In recent years, there have been a variety of attacks on the use of *cy pres*, ranging from
constitutional challenges and ethical concerns to criticism of *cy pres* awards to particular
recipients. Citing individual cases where there have been legitimate problems, critics have
sought to eliminate class action lawsuits generally and/or *cy pres* awards specifically. The legal
aid community can help to maintain this funding source by educating the bench and bar about
the well-established and well-reasoned authority for these awards to go to legal aid and access
to justice initiatives, and, recognizing that legitimate concerns have been raised in some cases,
utilizing the practices identified here to avoid getting caught in the crossfire when those
concerns are present.

**Pros**

♦ In states and cities where there are sufficient class action cases and the necessary
education efforts have been employed, *cy pres* is a relatively cost effective mechanism for
obtaining what can be substantial additional resources for legal aid.

♦ *Cy pres* distributions provide a means to achieve the goals of the lawsuit when the original
purposes cannot be fully met.

♦ Designating legal aid programs as the recipients of class action residuals gives the parties
and the court a good solution to what otherwise can become a thorny issue in the settlement
of a complex case.

♦ *Cy pres* awards are a source that does not seem to be impacted by general economic
conditions, and thus has helped a number of legal aid programs maintain services during
recent economic downturns.

² It should be noted that somewhat similar types of funds have been created as a result of the settlement of lawsuits
between the United States Department of Justice and/or state attorney generals and various large financial
institutions. Some of these funds have been awarded to legal aid programs, either directly or through IOLTA
programs. Also, the Texas legislature passed legislation, the Justice Jack Pope Act, which provides for the transfer
of civil penalties collected by the AG’s Office to legal aid. This will be included in the section titled *Other Possible
Public Sources*. 
Cons

♦ *Cy pres* awards are not an immediate or predictable source of funding.

♦ In recent years, constitutional challenges and ethical concerns have been raised about *cy pres* awards. Critics point to a few cases in which parties or judges have allegedly abused the doctrine as proof that *cy pres* awards should be avoided in all class actions. Some fear that this will result in fewer *cy pres* awards in the future.

♦ It appears that there has been a decline in the number of class action cases being filed due to the inclusion of clauses in many consumer contracts requiring the use of arbitration to settle any disputes.

♦ Judges may be unwilling to award funds to legal aid programs whose attorneys appear before them in litigation because of the appearance of favoritism. This concern can be eliminated by directing the funds to an entity such as IOLTA or a bar foundation for distribution to various legal aid entities.

### How to Implement Successfully

Here are three keys to implementing this initiative successfully while avoiding situations where the *cy pres* award may later be challenged:

♦ **Educate the bench and bar:** Educate the members of your bench and bar who are involved in class action cases about the well-established and well-reasoned authorities for *cy pres* awards to go to legal aid and access to justice organizations. When doing this, pursue a reasoned approach – *cy pres* recipients should approximate the interests of the class, should not be an organization in which counsel, judge or a party has an interest, should ideally be selected by the parties rather than the judge, and should account for the geographic make-up of the class.

♦ **Lead with the access to justice principle:** Legal aid and access to justice organizations are always appropriate recipients of *cy pres* awards in class actions because, no matter what the underlying issue is in the case, every class action is 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. After making the access to justice case, then explain if/how the work of the legal aid organization directly relates to the class or the case.
Maximize the impact of rules and statutes: Twenty-one states have adopted rules or statutes that codify the principle that legal aid and access to justice organizations are always an appropriate use for residual funds in class action cases. In these states, the legitimacy of legal aid as a cy pres recipient in state court cases is established. These rules and statutes also serve as persuasive authority in federal court cases in those jurisdictions. The other 29 states should consider whether it is feasible to implement an explicit rule.

Recognizing the value of these rules/statutes, the ABA House of Delegates passed a resolution in August, urging every state and jurisdiction to adopt a rule or statute authorizing the award of class action residual funds to legal aid entities. See the full resolution here.

See Cy Pres Provisions for more information about these rules and statutes.

Specific activities for ATJ commissions, bars and other state-level entities might include:

♦ Talking with judges and trial attorneys who are known to be supportive of legal aid to determine the extent of class action cases in the state or jurisdiction that could generate cy pres awards and to obtain advice on how best to proceed.

♦ Coordinating with legal aid providers to develop an effective campaign to encourage cy pres awards to go to legal aid entities. The campaign might include:
  o Developing written materials that can be used to educate judges and lawyers about cy pres awards and the appropriateness of making those awards to legal aid programs. Bar associations and foundations, IOLTA programs and ATJ commissions have prepared cy pres manuals; these manuals are available on here.
  o Meeting with judges and attorneys who are involved in class action cases to talk about the needs of legal aid and the use of cy pres to help fund legal aid providers. It can be particularly helpful to establish, in advance, relationships with firms in the state/city that typically handle class action lawsuits.
  o Notifying legal aid providers about any known cases in which the cy pres doctrine might be applicable.
  o Publicizing cy pres awards and acknowledging the attorneys who made those awards possible on websites, and in annual reports and newsletters. Websites should explain how cy pres awards can be made to legal aid and access to justice entities and the value of making such awards.
  o Using cy pres awards strategically in a manner that creates goodwill in the community and with the judges and lawyers who assisted in obtaining the award for legal aid. See the CBF example linked below for one way to do this.

♦ Adopting a resolution supporting an initiative to authorize or allocate class action residual awards to legal aid.
♦ Recommending that a state rule or statute expressly permitting cy pres awards to go to legal aid be adopted. Work with the supreme court to obtain a rule or run a campaign to gain approval from the state legislature.

**The role of the state’s highest court:**

♦ In most states, the supreme court will have responsibility for approving any rule supporting the use of cy pres awards to fund legal aid. The court may act on its own or at the request of a bar association or foundation, an ATJ commission, or a coalition of legal aid programs.

♦ In those states where express permission to use cy pres to fund legal aid must be approved by the legislature, the supreme court might indicate support for such a statute.

**The role of legal aid programs:**

♦ In jurisdictions without a coordinating organization, legal aid programs should organize their own campaign, as detailed in the steps above under the section on the role of ATJ commissions, bars and other state-level entities.

♦ Legal aid programs will usually have the responsibility for providing the written record for why their organization is an appropriate recipient for any cy pres award. Management staff of legal aid programs should be prepared to respond quickly when asked to provide such information by judges and/or attorneys involved in a potential cy pres award.

♦ Legal aid management staff should keep up-to-date on the changes in the legal community related to cy pres and class action lawsuits, and tailor their messages about these topics accordingly.

**Investment Required**

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<tr>
<th>Cost</th>
<th>Aside from the expense of staff time, there are unlikely to be any major costs associated with initiating or maintaining this initiative.</th>
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<tr>
<td>Time</td>
<td>There is a major time commitment when beginning to work on this initiative to do research, develop materials and make contacts with attorneys and judges. After the program is in place, staff and volunteers must continue to work on it periodically to ensure that relationships are maintained.</td>
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<td>Staffing</td>
<td>An on-going effort to obtain cy pres funds is probably best coordinated by a staff person, based at the entity that is receiving the funds, to organize periodic efforts to encourage judges and lawyers to consider legal aid as the beneficiary.</td>
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Examples

Legal Foundation of Washington: The Legal Foundation of Washington (LFW) received almost $16 million in cy pres awards in 2013; they have received approximately $34.5 million in cy pres awards since 2006. They have received some of the largest in the country, including one that has been shared nationally. Click WA example for more information.

The Chicago Bar Foundation: The CBF has been actively involved in raising cy pres funds since 2002. Revenue has averaged about $800,000 annually; it is estimated that Illinois legal aid programs combined generate at least that much annually as well. As with cy pres awards elsewhere, the amount generated each year fluctuates greatly, from a high of $2.7 million in 2006 to a low of $210,000 in 2014. Click CBF example for more information.

The four LSC-funded programs in Missouri: The four LSC-funded legal aid programs in Missouri have been very successful in generating cy pres funds. For example, in 2013 they raised approximately $450,000; in 2014 they raised $3 million. Click MO example for more information.

Additional Information

♦ Use of cy pres funds: Although some programs with a sufficient history of cy pres revenue will include an amount in their budgets, it is impossible to budget accurately for this revenue. It is a good idea to consider using these funds for one-time expenditures or as revenue for an endowment (see initiative, Building an Endowment), rather than for basic operating expenses.

♦ Rule or Statute: Of the 21 states where courts or legislatures have acted to officially authorize cy pres awards to legal aid and access to justice entities, 14 have been done by rule changes by the supreme courts and seven by legislatures. The decision about which to pursue may depend on the law in the state. In some states, either the court or the legislature could take up the issue, and in those states legal aid advocates may determine which is more likely to grant approval.

♦ Authorization only, or a designated amount to legal aid: In 11 of the 21 states that have rules or statutes, the court or legislature has designated a percent (either 25 or 50 percent) that must go to legal aid. States with a required percentage generally do better than those without. However, politically it might not always be possible to obtain a percentage, and authorization without an amount is better than no authorization at all.

♦ Cy pres in other cases: Opportunities for cy pres awards arise most often in class action cases, but cy pres also has been employed to dispose of funds produced by other court actions. For example, a bankruptcy judge used the cy pres doctrine to award surplus funds from a Chapter 11 bankruptcy case to legal aid organizations, and a judge made charities...
the beneficiaries of a sanction that she ordered against a defendant who destroyed court documents.

♦ **Similar distributions of funds:** As mentioned in the Explanation section above, other, somewhat similar, distributions of funds have occurred as a result of the settlement of lawsuits between the United States Department of Justice and/or state attorney generals and various large financial institutions. Some of these funds have been awarded to legal aid programs, either directly or through IOLTA programs. Legal aid programs and access to justice entities that have not already done so should consider developing relationships with their state attorneys general so that they are in a position to advocate for receipt of these sorts of funds in the future.

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For more information on cy pres funds, contact Meredith McBurney, Resource Development Consultant, ABA Resource Center for Access to Justice Initiatives, meredithmcburney@msn.com, (303) 329-8091. The ABA Resource Center for Access to Justice Initiatives is a project of the Standing Committee on Legal Aid and Indigent Defendants. This manual is funded in part by grants from the Public Welfare Foundation and the Kresge Foundation and in part by the American Bar Association.