

Chicago Bar Foundation Report



The Battle Over Cy Pres Awards

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[There is a] fundamental concern surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a cy pres remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on. This Court has not previously addressed any of these issues.

—Chief Justice Roberts in a statement released with the order denying the certiorari petition in *Marek v. Lane* in 2014

In settling class actions, there is a recurring practical problem: what to do with undistributed settlement funds? Court-approved awards to legal aid and other nonprofit organizations, commonly known as *cy pres* awards, give judges and settling parties a useful procedural device to solve the problem.

In 2006, the Illinois General Assembly recognized this principle and created a statutory framework that governs the

The CBA Class Litigation Committee recently joined with The Chicago Bar Foundation to present a panel discussion on “The Future of Cy Pres After the Supreme Court: Perspectives from Academia, the Bar, and the Bench.” It is available online on the CBA Class Action Committee’s home page at www.chicagobar.org.

distribution of residual funds in state court class actions (735 ILCS 5/2-807). Many other states have similar statutes or court rules. For federal court cases, *cy pres* awards as part of Rule 23 settlements find broad support from class action plaintiff and defense counsel, the American Law Institute, and the federal courts. Legal aid and access to justice organizations like The Chicago Bar Foundation (CBF) rely on these awards as an important source of funding.

Opponents of these *cy pres* awards (who are, in reality, often opponents of class action lawsuits generally) have been vocal in their criticism that these awards are not sufficiently tied to the plaintiff class or that the awards are merely window dressing for plaintiff’s attorneys fees. The opposition has been particularly fierce for class action settlements where there is no monetary distribution to the class members.

Congress has considered (but never adopted) legislation that would delineate or curtail the circumstances in which *cy pres* settlements are permissible. The committees that propose revisions to the Federal Rules of Civil Procedure also have considered but never recommended changes in Rule 23 addressing the subject. Now, the Supreme Court is hearing a challenge to *cy pres* awards in *Frank v. Gaos* (the “Google Supreme Court case”). The CBF and seven other legal aid and access to justice organizations around the country filed an amicus

brief in support of *cy pres* awards.

The Cy Pres Doctrine Works Well In Class Action Settlements

The *cy pres* doctrine arose in the context of estates and trust law, as a rule of construction to save a testamentary gift that would otherwise fail. The term “*cy pres* comme possible” means “as near as possible” in legal French, and the doctrine allows courts to direct bequests to a purpose close to the purpose of an original impossible bequest. In class actions, the courts have adopted a similar approach (endorsed by the American Law Institute) to approve residue distributions for purposes reasonably related to the settled lawsuit. So while different from the trust law setting, *cy pres* awards are used in class actions to achieve equitable results consistent with the *cy pres* doctrine’s origins and continued evolution.

In the usual class action settlement, a settlement fund is distributed to class members through a claims process or check mailing, but some amount often remains because not all class members can be located and not all file claims or cash settlement checks—or because the residual amount is so small that the cost of distribution would exceed the amount to be distributed. When further efforts to distribute to class members are not feasible, courts consistently favor distributing residual funds through court approved awards rather than reversion of the funds



to the settling defendant or escheat to the state as unclaimed property.

While *cy pres* awards solve a recurring class action conundrum, the awards have been controversial for several reasons, as Chief Justice Roberts noted in his statement quoted above. For example, any class action settlement—like the Google Supreme Court case—where the plaintiffs’ attorneys are compensated but not the plaintiff class (whose claims are discharged by the settlement) can create poor optics. Another concern is the scope of judicial discretion in *cy pres* situations and the propriety of judges (or counsel) selecting *cy pres* recipients from institutions with which they are affiliated or from which they graduated—which is also an issue in the Google Supreme Court case.

The Google Supreme Court Case

Class counsel in the Google case alleged that Google had violated Google users privacy rights; specifically, advertising pop-ups were uniquely generated based on an individual user’s searches. As part of Google’s settlement with the named plaintiffs, Google agreed to pay \$8.5 million, with \$6.5 million going to computer user education programs and \$2 million for attorney’s fees to plaintiffs’ counsel—but no distribution to class members. Directing the \$6.5 million to *cy pres* recipients made sense; to divide the settlement among 129 million class members would have yielded just 4 cents per person. The district court accepted that it was not feasible to distribute pennies to each class member,

and a divided Ninth Circuit upheld the settlement.

The petitioners in the Supreme Court are class members objecting to the settlement (including Theodore Frank—a crusader against class action lawsuits). The objectors’ briefs argue that the Supreme Court should restrict or eliminate *cy pres* awards. The respondents are the plaintiffs and Google, who argue that the settlement was reasonable and that *cy pres* awards are a legitimate settlement device. At the recent oral argument in the Supreme Court, the justices seemed divided on the propriety of *cy pres* generally and particularly where there is no distribution to class members. But the Court may not decide the *cy pres* issue; in the oral argument, the justices focused on the issue of standing to sue under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)). If Google is not the case for a Supreme Court *cy pres* decision, other appeals in the wings will provide opportunities for the Court to weigh in.

Legal Aid Organizations Are Appropriate *Cy Pres* Award Recipients

Dozens of amicus briefs were filed in the Google case, opposing and in support of *cy pres* awards. The amicus brief by the CBF and other legal aid organizations suggested that the Supreme Court should recognize and endorse the reasonable restrictions already in place for *cy pres* awards and, importantly, that the Court should recognize *cy pres* awards for legal aid as an appropriate use of residual settlement funds.

At a time when the selection of orga-

nizations to receive *cy pres* awards is under increased scrutiny, *cy pres* awards to legal aid and access to justice organizations provide a recognized and appropriate solution for counsel and the courts when selecting recipients and approving settlements. Legal aid organizations—like the class action device itself—exist to provide broad access to justice. Because of that “access to justice” connection, this one category of *cy pres* recipients always has interests that reasonably approximate the interests of class members. While many legal aid services do work that parallels particular class action lawsuits, legal aid will always reasonably approximate class actions relief by providing access to justice for those in need of legal help. As a result, federal and state courts throughout the country have long recognized legal aid organizations as appropriate beneficiaries of *cy pres* distributions from class action settlements.

This principle is the underlying basis for the statute in Illinois, which is one of 24 states that have adopted statutes or Supreme Court rules providing for *cy pres* distributions to legal aid and access to justice organizations like the CBF. For more information about the Illinois statute and *cy pres* awards to support legal aid and access to justice, please see: chicagobarfoundation.org/support/cy-pres/.

Conclusion

The Illinois statute and similar state laws offer a good roadmap for a fair resolution to the problem of undistributed settlement funds. While the Google Supreme Court case may not ultimately reach these issues, the Supreme Court would do well to adopt similar principles to govern class action residue distributions in the federal courts. ■

Bill Boies, Rebecca Finkel and Tim Kennedy of McDermott Will and Emery wrote the legal aid organization amicus brief in the Google Supreme Court case, and Boies and the firm have been lead pro bono counsel for the CBF and other partner organizations a number of other amicus briefs and federal rules submissions on cy pres issues.