

UNDERSTANDING CALIFORNIA'S CY PRES DOCTRINE

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A renter obtains guidance about an illegal eviction. A young attorney gains training, mentoring, and hands-on experience. An underemployed worker facing wage garnishment gets advice on how to surmount the financial problem. All three of these individuals are beneficiaries of a class action lawsuit settlement. The connection? A *cy pres* award to the Justice & Diversity Center (JDC) of The Bar Association of San Francisco (BASF).

Who Gets the Leftovers?

Cy pres—pronounced “sigh pray” (although some people pronounce it “see pray”)—is an abbreviated version of the French legal phrase *cy près comme possible*, which translates to “as near as possible.” When applied to a class action lawsuit, the doctrine allows for residual funds from a settlement to be distributed to a nonprofit organization that, in simple terms, provides services related to “the class members, statutes, issues, and wrongs you’re trying to address,” says Joy Kruse, a partner at Loefflacher Heimann & Bernstein.

“In the past, the award could go to an organization that was just doing good work, such as pro bono work,” says Michael Tubach, the managing partner at O’Melveny & Myers. Now, “you want to see close, substantial nexus to the facts and laws of the case,” says Kruse.

“The best [scenario] would be to give all the class members all the money,” says San Francisco Superior Court Judge Richard Kramer, but residual funds almost always remain. “In virtually all our cases,” says Bryan Kemnitzer of Kemnitzer, Barron & Krieg, “checks are written to people, but 20 percent will not be cashed.” Some class members did not make claims, could not be located, or failed to cash their checks before the 90- or 120-day expiration.

The size and scope of the class may also make it impractical for a direct distribution of settlement funds to individuals. Tubach refers to the dynamic random-access memory (DRAM) case (*The State of California et al v. Infineon Technologies AG et al.*). The plaintiffs were consumers who had purchased DRAM—essentially anyone who bought a computer, printer, video game console, or other electronic device that contains DRAM—between 1998 and 2002, an enormous and largely unidentifiable class.

“You try to get people to submit a claim, but can’t even identify people,” says Tubach, so “there may be a lot of money left over.”

In other cases, it is the amount of damages that makes distribution to class members impractical. For example, “when the costs don’t justify the money,” says Kramer. “You don’t spend \$6 to send a check for \$5.”

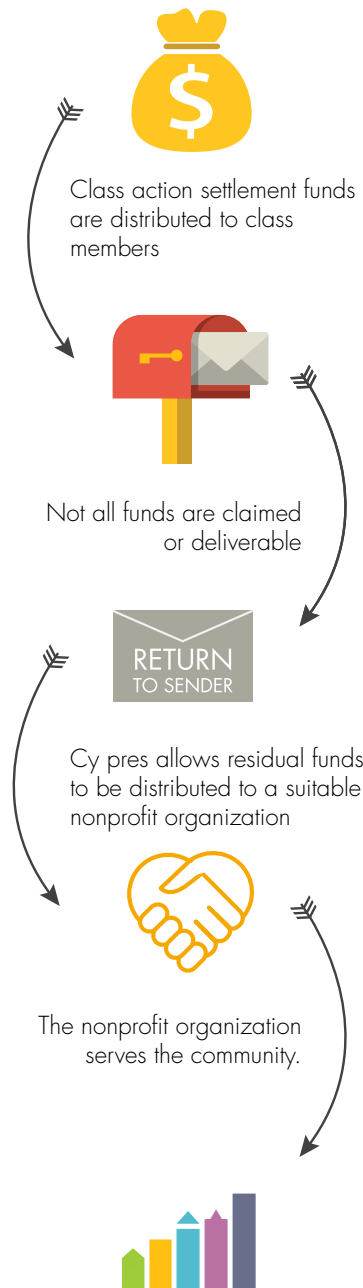
Per California Code of Civil Procedure Section 384, the leftovers may be distributed to one or more nonprofits that “promote justice for all Californians,” and slightly more specifically: . . . to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated 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.

Example: JDC

With its wide range of services, JDC is an ideal candidate for cy pres awards and a good example to use for explaining the process.

The money that comes from a cy pres award is an unexpected blessing. “We don’t budget for it—we can’t plan on it,” says Troy Arnold, JDC’s director of development. “It’s an unmeasurable item, a random occurrence, and there are a lot of variables.” In 2012, 10 percent of the annual support for the programs of JDC (then known as the Volunteer Legal Services Pro-

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gram or VLSP) came from several cy pres awards totaling more than \$350,000. In March 2014, JDC received \$110,000 from an award that was shared by five different nonprofit legal aid organizations.

“It goes into a reserve fund,” says Arnold. “It doesn’t have a period, like a grant that must be spent in one year.” Over time, it will help support JDC programs, of which 90 percent are pro bono legal services for people who can’t afford them and 10 percent are diversity educational programs, such as the School-To-College program, which helps underserved high school students go to college and impacts hundreds of families.

“Cy pres awards provide essential funding to support JDC’s Consumer Project so that it can continue to provide much-needed services to its clients,” says Marie Appel, supervising attorney of the Medical-Legal and Consumer Projects. Those services include Consumer Debt Defense and Education Clinics for low-income clients, legal advice, support for victims of domestic violence, and eviction defense, a hot issue during the current housing crisis. “The Consumer Project, as well as other JDC programs, provides services primarily through volunteer attorneys,” many of whom have expertise in other areas of law or are brand-new attorneys, Appel says. “JDC staff attorneys provide training, support, mentoring, and other resources to ensure the volunteers can provide appropriate assistance to clients.”

It’s important to note there are no

tax breaks for any of the parties. “We acknowledge specific attorneys and firms who direct awards to us in our annual report,” says Arnold, “but the donor of record is the administrative company.”

The Process

Potential recipients are usually proposed by plaintiff counsel; as a general rule, the defendant and defense counsel are not involved in the selection process, but they, as well as the class members, have the opportunity to object. The cy pres candidates are presented to the court in a written pleading. The trial judge makes the final decision, and the court of appeals can review that decision.

“There’s no set format for the pitch,” says Kramer, who is now in the Civil Division of San Francisco Superior Court and still adjudicates some complex litigation. “A fairly common process is counsel puts together the settlement proposal, with organizations to be submitted for consideration after approval of the settlement. Categories might be discussed during preliminary approval, or specific organizations might be named at that time.”

Choices

“Courts do very careful checking if you have a cy pres component in your settlement,” says Judith Zahid, a partner at Zelle Hoffman Voelbel & Mason. “There are more stringent rules, so you’re not arbitrarily picking nonprofits.” A recent example is the federal case *Dennis v. Kellogg Company*. In 2012, a \$10.6 million settlement resulted in a cy pres award to charities that provide food to people in need. While the agreement was deemed a “noble goal,” the Ninth Circuit said, “not just any worthy recipient can qualify as an appropriate cy pres beneficiary.” The

To learn more about JDC programs, visit www.sfbar.org/jdc. For more information about how these programs may qualify for cy pres awards, contact Troy Arnold at tarnold@sfbar.org or 415-782-8917.



settlement was reversed and remanded, and negotiations were reopened to select organizations that work to protect consumers from injuries caused by false advertising, a closer match to the issues of the lawsuit.

Choosing the right charities to pitch can be a daunting task because, as Tubach says, “There’s an infinite number of organizations doing great work out there.” Before entering into a settlement negotiation, attorneys familiarize themselves with programs, gather current information from organizations—brochures, documents, websites, and prepare to present the judge with a few options. “We do research into what their impact has been on the community they serve [by asking] is it well administered, are there no excessive administrative costs?”

says Dan Feinberg of Lewis Feinberg Lee Renaker & Jackson. “We check with third parties who are familiar with their work, their reputations.”

In light of the broad scope of many cases and classes, Feinberg also looks beyond the local market. “There’s more focus on geographic distribution,” he says. “Find an organization that provides statewide services . . . [or] find similar organizations in Los Angeles, San Diego—in each major region of the state.”

Last summer, Kemnitzer’s firm designated an intern to update its database of local nonprofits. “This is valuable, because needs and scopes have changed,” Kemnitzer says. The intern reviewed the last five years to determine how much money came from cy pres awards and where it went, updated organization contact and other crucial information, and prioritized a list of potential recipients. Organizations are happy to help attorneys be proactive, because “we can provide more compelling language to

prove we're a match," says Arnold. "The better known the organization, the less you have to pitch it," says Kramer, but it's important to be clear about what they do—and don't do. It's not appropriate to pitch counsel's pet project or alma mater.

Future of Cy Pres

Although the unfavorable alternatives are that residual money could revert to the defendant or be treated as abandoned or unclaimed property and escheat into the state's general funds, cy pres awards continue to be controversial and will likely come under more scrutiny in the future.

In November 2013, the U.S. Supreme Court opened the door to new debates when it declined to hear a case involving Facebook (*Megan Marek v. Sean Lane, et al.*). The proposed \$9.5 million settlement would have paid a few thousand dollars to each of the nineteen original plaintiffs, a \$3 million fee to attorneys, and cy pres funds to a newly formed charity with a Facebook representative on the board of directors (hence the class members' objection). The Court denied the petition for certiorari in part, as Chief Justice John Roberts wrote, because "granting review of this case might not have afforded the

Court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered." It also appears that the Court would like to address how recipients are chosen, establish criteria for matching an organization's goals to the interests of the class, and "may need to clarify the limits on the use of such remedies."

Meanwhile, "Funding allows us to expand our programs and to continue to exist in perpetuity," says Arnold, and each cy pres award will result in being able to "do a nice thing for a diverse group of people," says Kramer.

"The best time of my career was when I handed checks to each recipient," says Zahid. With that attitude, whether cy pres awards continue to be an avenue or an alternate process is created, good work will continue to be done in our community.

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