

CY PRES FOR CIVIL LEGAL SERVICES:

**A Report and Recommendations
To the New York State Bar Association
House of Delegates
From the Special Committee
On Funding for Civil Legal Services**

**Approved by the New York State Bar Association
House of Delegates on April 1, 2006**

CY PRES FOR CIVIL LEGAL SERVICES:

A Report to the House of Delegates From The Special Committee on Funding for Civil Legal Services

I. Introduction

The Special Committee on Funding for Civil Legal Services seeks House of Delegates' approval of a plan that holds the potential to increase funding available to civil legal services programs providing assistance to low-income New Yorkers. The concept is simple. Often class actions yield funds that cannot be distributed to class members for a variety of reasons. In settlement of class action litigation, the counsel and the court can agree to distribute such residual funds as cy pres awards to nonprofit entities. In almost any class action litigation, civil legal services programs may be appropriate recipients of such funds; and nationwide such awards are often made. Our four-part plan proposes that the Association:

- (A) educate the relevant portions of the New York bench and bar about the use of cy pres awards to increase access to justice;
- (B) provide information about relevant legal services programs statewide;
- (C) create a mechanism for distribution of cy pres funds; and
- (D) propose legislation regarding cy pres awards.

II. Cy pres for Civil Legal Services

In recent years, courts nationwide have made cy pres awards to programs providing free legal services to the poor. The cy pres doctrine (from *cy pres comme possible*, meaning “as near as possible”) was first used to distribute a trust fund to the next best use when the original purpose could not be achieved. The same concept is used in class action settlements where there are leftover funds, such as when not all plaintiffs collect their awards, when it is impossible to determine each plaintiff’s actual damage or when the amounts of individual awards are too nominal for distribution. See, Forde, *What Can Courts Do with Leftover Class Action Funds? Almost Anything!* JUDGES’ JOURNAL, Vol. 35, No. 3; Seligman and Larkin, *Fluid Recovery and Cy pres: A Funding Source for Legal Services*, www.impactfund.org/CyPres2000FED.html; Zazove, *The Cy pres Doctrine and Legal Services for the Poor: Using Undistributed Class Action Funds to Improve Access to Justice*, ABA CLASS ACTION NEWSLETTER (Summer 2002).

Courts have broad discretion in determining the next best use. See, Newberg on Class Actions (4th ed), at § 11.20. In class action settlements, many courts have found that cy pres awards given to legal aid programs do indirectly benefit class members, since such programs represent the interests of those who cannot afford counsel, and this is consistent with the goal of class actions – to protect the legal

rights of those who would otherwise be unrepresented. *See, id.*, at § 10.17. Often cy pres awards are found preferable to giving leftover funds to defendants, which would lessen the deterrent effect of litigation; to giving the residual funds to claiming class members, thus providing a windfall to them; or to allowing them to escheat to the government, thus not indirectly benefiting class members, as a cy pres award would. *See, id.*, at § 10.15.

In 1998, the Report on Funding Civil Legal Services for the Poor (“Cooper Report”) to Chief Judge Kaye cited cy pres as a potential revenue source. The Cooper Report noted that unclaimed class action proceeds were sometimes devoted to civil legal services to the poor and that such funds offered “great promise as a means of *voluntarily* raising funds for civil legal services for the poor,” since there is considerable class action litigation in courts in New York. The Cooper Report encouraged efforts to inform lawyers and judges of the societal benefit of dedicating unclaimed class action proceeds to legal services. However, since such funding is inherently unpredictable, the Cooper Report concluded that cy pres was not an appropriate vehicle to fulfill the subject mission: achieving permanent, stable state funding for civil legal services for the poor.

More recently, the New York State Bar Association established the Special Committee on Funding for Civil Legal Services; charged it with the mission of

exploring new and innovative ways of securing additional funding streams for civil legal services; and directed it to explore the advisability of a program to encourage cy pres awards to civil legal services programs in New York. The Special Committee determined that the cy pres concept was indeed promising and should be vigorously pursued by the Association, while it continued efforts to secure permanent, stable state funding.

There is precedent for cy pres awards in federal district court actions in New York. *See, e.g., Schwab v. Phillip Morris USA*, 2005 WL 3032556 (E.D.N.Y. Nov. 14, 2005) (detailed discussion of fluid recovery within Second Circuit, including cy pres distributions to nonprofit organizations whose goals are related to the subject of the litigation and the widespread use of cy pres awards in the settlement context); *Jones v. National Distillers*, 56 F. Supp 355 (S.D.N.Y. 1999) (cy pres award to Legal Aid Society in settlement of securities fraud class action, pursuant to court's broad equitable powers to use residual funds for public interest).

A noteworthy treatment of the cy pres concept is found in a very recent decision. In *Fears v. Wilhelmina Model Agency*, 2005 WL 1041134 (S.D.N.Y. May 5, 2005), *appeal pending*, the plaintiffs alleged that modeling agencies conspired to fix prices. The parties reached a settlement authorizing the court to decide how to distribute \$6 million in residual funds to benefit women; and the

court decided that \$1 million would go to the Legal Aid Society Civil Division in New York City and that remaining funds would be distributed to groups dedicated to improving women's health.

Even more recently, in *Plotz v. NYAT Maintenance Corp.*, 2006 LEXIS 4799 (S.D.N.Y. Feb. 15, 2006), a class action on behalf of tour guides and bus drivers alleging labor law violations, the parties settled the litigation and requested that the court make a cy pres donation of residual funds to two designated organizations that advocate on behalf of low-wage workers. The court noted that it possessed broad discretionary and equitable powers to make cy pres awards of unclaimed class settlement funds to public service organizations and that it had done its own research into the subject organizations. Donations to such entities were proper, the court concluded, and it set the amount each group would receive.

The New York State Attorney General has also facilitated significant cy pres awards to public interest programs. For example, several years ago, the New York Attorney General and other state attorneys general brought a case against Nine West alleging price-fixing as to women's shoes. In a settlement, as the result of a recommendation of the state Attorney General, \$2 million was distributed to New York programs for women, including programs providing legal services to battered women. See, http://www.oag.state.ny.us/press/2001/oct/oct26a_01.html.

Large cy pres awards have been made to legal services programs throughout the country. The Special Committee is keenly interested in the successful approach developed in Minnesota, where a coalition of legal services programs developed a cy pres manual to educate bench and bar and to create a mechanism for receipt and distribution of funds; and as a result of such efforts, a \$2.5 million cy pres award was received in 2005 and was used as a legal services programs endowment.

III. The Urgent Need in New York

There is a justice gap in New York and nationwide. The Legal Services Corporation (LSC) recently completed the first national comprehensive study of unmet civil legal needs of low-income Americans and issued a report, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*. The study found that 80 percent of the needs of low-income Americans for civil legal assistance are not being met. Further, for each person who received legal assistance from an LSC-funded program in subject areas in which the program provided service, at least one eligible client was turned away due to lack of resources. New York LSC programs could not provide services to at least 80,000 low-income residents in dire need of civil legal assistance, the report found.

The three primary funding streams for civil legal services in New York do not come close to meeting the need. Federal funding from the LSC is down from

\$26.7 million in 1994 to \$22 million last year; and President Bush seeks a 5% cut in LSC funding in his proposed 2007 budget. While this year the Interest on Lawyer Account Fund was able to increase its grants over last year's amount, the current \$10 million is less than one-third the 1992 amount. After IOLA interest rates sharply fell in 1992, the state legislature began providing an annual general fund appropriation to civil legal services. However, the \$4.6 million in such funding last year was far below the \$7.4 million in 1999. In 2003, the state legislature created a Legal Services Assistance Fund for civil and criminal legal services, to be distributed pursuant to an agreement between executive and legislative leaders. However, most of the fund is earmarked for criminal justice services, and there is uncertainty as to how much will go to civil legal services in the future.

Because of the lack of adequate funding, the civil legal services programs in New York are providing legal triage. They help those in the most dire circumstances first, do what they can to provide brief services to others, and deliver full representation to only a few clients. Much of the legal assistance is in the critical areas of housing and family issues, including eviction, mortgage foreclosure, domestic violence, child support and custody, and parental rights. Such civil legal services benefit all New Yorkers, since preventive services save money by avoiding costs of hunger, homelessness, foster care, and health problems.

IV. The Proposed Action Plan

A. Education of Bench and Bar

The Special Committee proposes to develop a Cy pres Manual to be distributed to relevant segments of the New York bench and bar. The Manual would be a handy booklet that would serve as an educational and promotional tool. Critical information would be provided in an executive summary, a cover letter, and a blast e-mail.

The Manual would outline the cy pres concept and describe the need in New York for expanded funding to civil legal services programs; the range of such programs statewide; the reasons to give priority to such programs when making cy pres awards in class action settlements; the legal framework supporting such awards; and the cy pres services available from the Association. As an appendix, the Special Committee would provide a detailed memorandum of law containing the most up-to-date statement of the relevant law in New York. Before publishing the Manual, the Special Committee would seek input on a draft from the same NYSBA committees, sections, and other entities that are being asked to review and comment upon this Report.

The educational program would consist not only of distribution of the Manual, but also presentations to relevant sections and committees of the

Association, to plaintiffs' lawyers who bring class actions and defense counsel who defend them, to chief judges of state and federal courts, and to the New York State Attorney General. The target date for education and outreach is this fall. At the 2007 Annual Meeting, we propose to convene a cy pres summit to further promote the concept of cy pres awards for civil legal services programs.

B. Information about Programs

The Special Committee envisions that the Association could serve as a resource to counsel and courts when they desire to make cy pres awards to benefit low-income persons in need of civil legal assistance. The Association's access to justice committees, The New York Bar Foundation, and the Department of Pro Bono Affairs have extensive information regarding legal services, pro bono, and other public interest groups throughout the state and could provide invaluable assistance in identifying appropriate groups for cy pres awards. The Department of Pro Bono Affairs director should be designated as the point person regarding cy pres information requests.

C. Distribution of Funds

The Special Committee also contemplates a role The New York Bar Foundation – the Association's charitable and philanthropic arm – could play in the distribution of cy pres funds. The Foundation is a 501 (c) (3) which has awarded

millions of dollars to law-related programs since it was established in 1950. One of the four major areas The Foundation supports – facilitating delivery of legal services – is consistent with the mission of the Special Committee on Funding for Civil Legal Services, and cy pres funds could be dedicated for that category. The Special Committee would recommend that, within that category, priority be given to comprehensive programs providing direct legal assistance to persons at or below 125% of Federal Poverty guidelines. In some cases, programs targeting a specific population relating to the gravamen of the litigation could be deemed the most appropriate recipients of cy pres funds.

Within The Foundation, there are also numerous Restricted Funds, including Funds to improve legal services to the indigent and to provide loan assistance to public interest lawyers, and such Funds could be selected to receive specific cy pres awards. If The Foundation and the House of Delegates favored the aforementioned partnership, the Special Committee, The Foundation, and the Department of Pro Bono Affairs could jointly produce the Manual and could describe The Foundation in detail, including its officers and directors, grant review procedures, and history of giving.

D. Legislation on Cy pres

In three states, there are rules regarding distribution of cy pres funds to provide free civil legal assistance to the poor. A Washington court rule requires that at least 25 percent of all leftover class action funds be set aside for the state's IOLTA fund; a North Carolina law mandates that residual funds generally be dedicated to advancing civil legal services for indigent persons; and a California law encourages the use of residual funds in class actions to further the underlying purpose of the litigation or promote justice for all Californians.

The Special Committee suggests that, after the Manual is distributed and the fund distribution mechanism is developed, the Association next undertake to study such legislation as a possible model for similar legislation in New York. However, since class actions are now brought more often in federal than state court, changes in Federal District Court rules might be a more fruitful route to expanded funding.

Respectfully submitted,

C. Bruce Lawrence
Barbara Finkelstein
*Co-chairs of the Special Committee
On Funding for Civil Legal Services*

February 17, 2006