

## 6 Tips For Addressing Cy Pres Awards In Class Actions

*Law360, New York (April 04, 2014, 11:39 AM ET)* -- Congratulations! You've just settled a big class action on favorable terms. Now all you need to worry about is getting your settlement agreement approved and implemented. One particular concern is how to address settlement funds that cannot be distributed to class members. The most common (and preferred) answer is a cy pres award of the residual funds to charities or other nonprofit organizations. But you have read that cy pres awards are attracting increased objections and are sometimes overturned on appeal. What can you do to avoid or defeat such objections to your settlement? The answer — adhere to the following six simple rules:

### **1. Don't Worry About Theoretical Attacks on Cy Pres Awards**

The cy pres doctrine was first introduced into the class action context in the 1970s. Since that time, cy pres awards have been approved in thousands of federal class actions. Despite all that precedent, a few law professors, practitioners and legal activists have generated a wave of articles arguing that cy pres awards violate constitutional due process, Article III's case-or-controversy requirement and the Rules Enabling Act. Though such attacks make for interesting reading, they have not been accepted by the courts and should not constitute cause for concern.

### **2. Compensate Class Members First**

Best practice and leading court decisions require that class action settlement funds first be distributed to the members of the settlement class. To accomplish this, a capable class action administrator should be retained to make an initial distribution to those class members (and perhaps make follow-up efforts) before any cy pres distribution. Courts generally follow the American Law Institute's Principles of Law of Aggregate Litigation, which recommend that settlement funds remaining after an initial distribution should be redistributed to other class members until they recover their full losses.

If such further distributions are not practical or too small to make individual distributions economically feasible, the ALI principles recognize that the court has discretion to order a cy pres distribution. Keep in mind that several leading decisions require undistributed funds to be reallocated among different subclasses before allowing cy pres awards to third parties.

### **3. Utilize Cy Pres Awards Where Cash Distributions to Class Members Are Not Feasible**

Consumer class actions increasingly involve huge classes of consumers and modest settlements where cash distributions to individual class members would be less than the cost of mailing out the checks. In these circumstances, courts have been receptive to settlements in which defendants agree to change some contested practice and pay a modest settlement amount, with the settlement funds (after

plaintiffs' legal fees) going to appropriate cy pres recipients. Though critics argue that these are sham settlements, courts (such as the Ninth Circuit in the Facebook case) do approve these settlements where the proposed relief and use of the settlement funds seem appropriate and consistent with the overall interests of the settlement class.

#### ***4. Don't Propose Cy Pres Awards That Will Attract Objectors***

If you want to attract objectors like flies to honey, try giving a cy pres award to the local Girl Scout troop or the law school attended by counsel. Professional objectors and certain law firms regularly review settlement notices proposing cy pres awards, looking for opportunities to file objections on behalf of class members. Federal court decisions make clear that cy pres awards should go to organizations that reasonably approximate the interests of the class. Courts are therefore increasingly responsive to objections challenging awards to organizations that have nothing to do with the underlying litigation.

When selecting cy pres recipients, avoid awards to organizations in which counsel, the judge or a party has some interest, such as board memberships, alumni affiliations or a spouse's favorite charity. While you are at it, don't put the judge in the uncomfortable position of picking charities for you. Work among counsel to select appropriate organizations and propose them to the court.

#### ***5. Account for the Geographic Composition of the Class***

Class actions are usually administered and resolved in one particular court for reasons related to the subject matter or the parties. That reality supports the common inclination to make cy pres awards to local organizations. However, some appellate courts have taken the position that at least part of the cy pres award in a national class action should be granted to national organizations. With that in mind, it is important to consider the geographic composition of the class when selecting cy pres recipients.

#### ***6. Propose Cy Pres Awards to Legal Services Organizations***

Recently, a trend has developed, particularly in the Ninth Circuit, toward limiting cy pres awards to the specific subject matter of the class action (for example, requiring an award to an Internet user advocacy group in a class action about allegedly fraudulent Internet services). That approach is so narrow as to be impracticable; after all, how many effective nonprofit Internet user advocacy groups exist in the United States?

Courts have borrowed the cy pres doctrine from trusts and estates law, where it originated as a way to amend the terms of a charitable trust when the original objectives of the testator were impossible, impracticable, or illegal to perform. By placing such narrow restrictions on a class action cy pres award, courts recreate the very problem of impracticability that the doctrine was created to avoid.

Additionally, and more importantly, limiting the awards to groups matched to the claims in the lawsuit may diminish a defendant's enthusiasm to settle, because such an award may appear to be admitting liability and would provide funds to an organization which will target the defendant in the future.

An excellent solution to the problems of awards to unrelated organizations and awards that diminish the desire to settle is directing cy pres awards to legal services organizations. Federal and state courts have long recognized organizations that provide access to justice for disadvantaged people as appropriate beneficiaries of cy pres distributions. Such awards are granted based on one of the common underlying premises for all class actions: to make access to justice a reality for people who otherwise would not be

able to obtain the protections of the justice system.

An interest of every class member in every class action is access to justice for a group of litigants who, on their own, would not realistically be able to seek relief, either because it would be too inefficient to adjudicate each individual's claim separately or because it would be cost prohibitive for each individual to file separate claims. In addition to court decisions approving cy pres awards to legal services organizations, at least a dozen states have adopted statutes or court rules which actually require that part, sometimes up to 50 percent, of any residue in class action settlements be directed to legal services organizations.

In sum, for counsel who want to get a class action settlement approved without battling objectors (or a skeptical judge) about settlement mechanics, directing cy pres awards to legal services organizations avoids many pitfalls. Such awards should be made after making settlement distributions to class members or when such distributions are not feasible, should address the geographic composition of the class and should be provided for in the settlement agreement presented to the court for approval.

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*For a detailed discussion on each rule discussed in this article, see Wilber H. Boies and Latonia Haney Keith, Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions, 21 Va. J. Soc. Pol'y & L. 269 (2014), at [http://www.vjspl.org/wp-content/uploads/2014/03/3.25.14-Cy-Pres-Awards\\_STE\\_PP.pdf](http://www.vjspl.org/wp-content/uploads/2014/03/3.25.14-Cy-Pres-Awards_STE_PP.pdf).*

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