



# **Impact on Justice** *through* **Court Awards**

## — *Toolkit* —

*Learn how you can help increase funding  
for low-income Texans.*

**TEXAS** | **ACCESS** *to* **JUSTICE**  
**FOUNDATION**

## Court Awards Strategies Committee

A joint committee of the Texas Access to Justice Commission and the Texas Access to Justice Foundation



By Tom Godbold, Chair

*When the Texas Access to Justice Foundation and Texas Access to Justice Commission created the Court Awards Strategies Committee (“Committee”), we were just beginning to see the devastating effects of low interest rates on funding for civil legal aid in Texas. The Interest on Lawyers’ Trust Accounts (“IOLTA”) program, a primary funding source for legal services administered by the Texas Access to Justice Foundation, has seen a drastic decline in IOLTA revenue as the need for civil legal services continue to rise for poor and low-income Texans. These are people for whom basic civil legal services can serve as a life-line during these economic times – helping a worker receive just wages, protection from losing one’s home, or securing benefits for persons with disabilities or our veterans.*

*Our Committee began looking at ways to compensate for this crisis in legal aid funding by exploring options for court awards – like cy pres awards – to generate desperately needed resources for our state’s most vulnerable. During the last two years, our Committee studied court award models in other states, examined legal precedence for court awards for legal aid, and continues to work to educate judges and lawyers about the positive impact court awards can have on funding for civil legal services.*

*This toolkit is designed for lawyers, judges and others involved in our legal system who are interested in employing various court award strategies to support civil legal aid in Texas. We hope that it provides you with the basic information you need to help make an impact on access to justice in Texas as you consider the Texas Access to Justice Foundation and its more than 40 grantees as recipients of court awards. Thank you.*

Tom Godbold, Chair, Houston  
Randy Chapman, Austin  
Jeanne C. “Cezy” Collins, El Paso  
Judge Jennifer Walker Elrod, Houston  
Craig Enoch, Austin  
Lamont A. Jefferson, San Antonio  
David R. McAtee, II, Dallas  
Manuel H. Newburger, Austin,  
Judge Karen Pozza, San Antonio  
Richard L. Tate, Richmond  
Justice Linda B. Thomas, Dallas  
Bill Whitehurst, Austin



Texas Access to Justice Commission  
Harry M. Reasoner, Chair  
Elma Garcia, Executive Director



Texas Access to Justice Foundation  
Richard L. Tate, Chair  
Betty Balli Torres, Executive Director

# Impact on Justice

*through* **Court Awards**

— *Toolkit* —

## Table of Contents

<b>Introduction</b>	Page 1
Courts in the Administration of Justice	Page 3
<b>The Texas Access to Justice Foundation</b>	Page 5
Funding Legal Aid in Texas with Court Award Funds	Page 6
Legal Aid Programs in Texas	Page 8
Examples of Cy Pres Awards	Page 10
<b>Appendix</b>	
Practice Points/Tips in Structuring Cy Pres Relief	Page 11
Sample Provision for Settlement Agreement	Page 12
Sample Order Approving Settlement Agreement	Page 13
Memorandum and Opinion Regarding Cy Pres	Page 14

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Free legal aid in civil matters in Texas is a necessity in critical areas such as housing, family, consumer and individual rights. Such services are a good investment because they help to stabilize struggling families and secure public benefits and thus help avoid the costs of homelessness, hunger, health care, and foster care. In 2007, the Legal Services Corporation (LSC) completed a national comprehensive study of the 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 the vast majority of the needs of low-income Americans for civil legal assistance are not being met. Texas LSC programs cannot provide services to at least two out of four low-income residents in dire need of civil legal assistance.



Texas is fortunate to have many legal aid and pro bono programs with full-time staff and volunteer attorneys, as well as various other public interest programs that leverage the talent and generosity of the private bar. Such programs provide critical services that benefit poor individuals and nonprofit organizations serving local communities. However, there is a profound justice gap. The major problems that impact access to the justice system in Texas are limited resources, restrictions on uses of funding, scarcity of legal services in rural areas of the state, and a rapidly increasing poverty population. Texas experienced a 27 percent increase in its poverty population from 2000 to 2007 which does not include those Texans who have fallen into poverty due to the severe economic downturn in 2008.

The primary funding streams for civil legal aid in Texas do not come close to meeting the need. Due to inadequate funding, the civil legal services programs in Texas are required to perform legal triage. They help those in the most dire

circumstances first and do what they can to provide brief services to others. Unfortunately, only a small fraction of those seeking help can be provided with full representation.

### Cy Pres

In a 2004 report, “A Framework for Resource Development,” presented to the Texas Access to Justice Commission and the State Bar of Texas, cy pres awards was cited as a potential revenue source for civil legal services in Texas. The report noted that unclaimed class action proceeds were sometimes devoted to civil legal services to the poor. The report stated:

*“..in several states and communities, legal services programs have developed effective strategic approaches to securing cy pres awards for legal aid. States like Illinois, Washington, Maryland and Minnesota have achieved impressive results. Texas should follow their example and institute a plan.”*

When class action lawsuits result in an award for the plaintiffs, in almost every case, there are funds that go unclaimed by the class. These funds are often not distributed as additional funds to the members of the class who filed claims. Instead, they become a residual fund that is available for another use. Broadly speaking, cy pres is the term for finding another appropriate use for the funds. The decision as to such use is usually jointly arrived at by counsel and the court, most typically in the context of a settlement agreement. Cy pres awards are an ideal way to advance the goal of ensuring equal access to justice.

### **Court Awards Strategies Committee**

The Texas Access to Justice Commission and the Texas Access to Justice Foundation took up the cy pres challenge presented by the Report when it created a joint Court Awards Strategies Committee in 2008 to explore cy pres and other innovative ways of securing additional funding streams for civil legal services. The Court Awards Strategies Committee, chaired by Houston attorney Tom Godbold, set the goal of reaching out, educating and informing a variety of groups - bar associations, mediators, members of the judiciary, groups of trial lawyers, etc. about cy pres and its' use for funding civil legal aid.

This toolkit is for the profession and others interested in securing cooperation and collaboration with members of the bar and Texas courts and employing various court awards such as cy pres awards as a key method of supporting civil legal aid in Texas. In particular, one popular and more commonly utilized strategy is cy pres awards. This is because of the recent legal trend as to both the doctrine of cy pres and the courts' broad equitable powers to allow flexibility in the distribution of class action residual funds, and permit the use of funds for broad public interest purposes by educational, charitable, and other public service organizations.

### **Access to Justice In Texas Facts**

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*Texas ranks 43rd in the nation in per capita spending on legal aid.*

*There are 5.3 million Texans who qualify for legal aid.*

*There is one legal aid lawyer for every 11,512 Texans who qualify for legal aid.*

## Courts and the Administration of Justice

The denial of equal justice for the poor who cannot afford attorneys in basic civil legal matters has an adverse impact on low-income individuals, families, and society as a whole. It works to erode public trust and confidence in our system of justice. The judicial branch, in our constitutional structure, shoulders primary leadership responsibility to preserve and protect equal justice and take action necessary to ensure access to the justice system for those who face impediments they are unable to surmount on their own. The Supreme Court of Texas has provided leadership in improving the administration of justice by creating the Texas Access to Justice Foundation and the Texas Access to Justice Commission, by encouraging pro bono legal services in civil matters, supporting the Interest on Lawyers' Trust Accounts (IOLTA) Program, and supporting the continued funding of the Legal Services Corporation.



The Texas Supreme Court leadership has been critical and has been setting the tone and creating a climate of support for equal access to justice in Texas. In states across the country where the courts have taken on this leadership role, the bar, policy-makers and others have followed. The Court has the capacity to set the context within attorneys, law firms, the courts and others will act and react to opportunities to creatively expand access to the justice system.

*“Legal aid is the safety net that keeps these fellow Texans from going over the edge; without it, they might never recover, even when the economy improves. We cannot afford to let this safety net unravel. Solving the critical legal needs that thousands of poor Texans face will help them remain productive and inevitably hasten our state's recovery. — Justice Harriet O’Neill, Supreme Court of Texas*

Judicial leadership and commitment are essential to ensuring equal access to the justice system and to the achievement through statewide effort of equal justice for all. The courts can remove impediments to access to the justice system, including physical, economic, psychological and language barriers; be part of strategies in establishing or increasing public funding and support for civil legal services for individuals and families who have no meaningful access to the justice system; and expand assistance available to self-represented litigants.

The unavailability of civil equal justice services for vulnerable and low-income people severely limits the administration of justice in Texas, and the courts’ commitment to exercise leadership to expand public and private funding is crucial.

## **Texas Strategic Plan**

The Texas strategic plan for increasing resources for legal aid calls for leadership roles for the Texas courts. While much time is spent addressing immediate funding needs, the efforts can obscure the necessity to develop plans that will lead to long-term, stable and enduring infrastructures of financial support. If court award strategies are implemented in Texas, they will have a substantial effect on the capacity of legal aid programs to maintain and perhaps increase their current levels of funding and services. An important goal for Texas is to have the idea of financially supporting legal aid become an accepted cultural value within the legal and judicial community.

Court awards strategies should be pursued, not just for the funds needed to support the existing infrastructure for the delivery of civil legal aid to the poor in Texas, but also to:

- help strengthen ties to the bar and judiciary
- open up avenues of communication with new and existing supporters
- stimulate creative thinking on the part of attorneys and judges
- promote greater awareness of clients and their issues

## **Sources of Court Awards**

There are multiple sources of potential funds from court awards strategies, including:

- Cy Pres Awards
- Negotiated Settlements
- Criminal Restitution
- Sanction Awards
- Seizure
- Mediation, Arbitration and Settlement Agreements

# Texas Access to Justice Foundation

## *A Deserving Beneficiary of Court Award Funds*



The Texas Access to Justice Foundation (TAJF) created by the Supreme Court of Texas in 1984, is the primary state-based funding source for the provision of civil legal aid in Texas. The Foundation administers a variety of funding sources, which are earmarked to assist nonprofit organizations in providing legal aid to approximately 100,000 Texas families each year. TAJF has administered the interest on lawyers' trust accounts (IOLTA) for more than 25 years. IOLTA funds are the primary state funding source for civil legal aid to the poor in Texas. More than forty Texas nonprofits rely upon IOLTA funding to support civil legal aid in order to assist low-income families meet very basic legal needs involving: shelter, safety and utilities.

- The Foundation has a proven track record of awarding and administering grants for more than 25 years.
- The Foundation is considered a leader in the national IOLTA foundation community, has an impeccable reputation among the Texas legal community, including state, local and minority bar associations and other social, human service and faith based providers and is considered the primary underpinning for the delivery of civil legal aid to the poor in Texas.
- The Foundation has awarded and administered over \$254 million to Texas nonprofit organizations and been entrusted to administer a wide variety of funds by the Supreme Court of Texas, Office of Attorney General, Texas Legislature, the State Bar of Texas, the Texas Access to Justice Commission and private and corporate donors.
- The Foundation has extensive experience in screening and awarding grants to deserving nonprofits based upon selective grant criteria, research and assessment and strong board involvement and leadership.
- The Foundation provides ongoing compliance and monitoring reviews to ensure adherence to grant requirement and agreements and to ensure fiscal oversight and programmatic accountability and transparency.

The Texas Access to Justice Foundation supports more than 40 independent non-profit legal aid providers throughout the state. Their clients include victims of domestic violence, homeless families, persons denied access to necessary health care services, victims of discrimination, children in need of special education, families and individuals who are targets of consumer fraud, and the elderly. For more information, visit [www.teajf.org](http://www.teajf.org).

## Funding Legal Aid in Texas with Court Award Funds

Courts have found legal aid programs to be appropriate recipients of cy pres funds for two basic reasons:

- Legal aid programs commonly represent the next best use of unclaimed funds to indirectly benefit the members of a class under the cy pres doctrine.
- The underlying mission of legal aid programs for the poor is consistent with the purpose of class action lawsuits and Rule 23 of the Federal Rules of Civil Procedure. Rule 23 recognizes the need to protect the legal rights of those who, because of their economic position, would otherwise be unrepresented.

### Nexus

A key issue with regard to seeking and obtaining cy pres awards is the need for a well-defined connection or “nexus” between the underlying litigation and the recipient and use of a cy pres award. An easy example of a nexus would be litigation over health insurance premiums in which cy pres funds were used to fund a legal aid position to do health care access advocacy for low-income clients.

Broader arguments showing connections or nexus can be made regarding the concept of access to justice as well as in terms of specific populations served or particular subject areas addressed.

### Access to Justice

Access to the judicial system is subsidized by our society in the belief that it is essential that persons have access to a peaceful method of resolving disputes. However, thousands of Texans are denied effective access to civil justice because they are unable to obtain legal counsel. Therefore, it is appropriate for funds created through the use of the tax-subsidized judicial system to be distributed in part for the purpose of providing access to that system by indigent Texans.

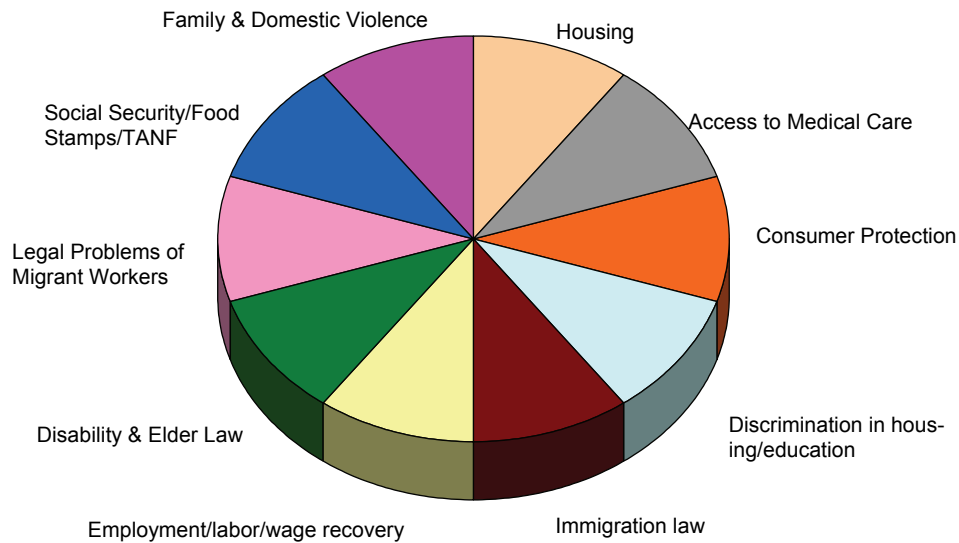
### Special Populations

Legal aid programs have special projects serving many identifiable populations including: persons over 60 years of age, children, abuse victims, persons with disabilities, public assistance recipients, veterans, migrant workers, immigrants and refugees, low-wage workers, children with special educational needs, and low-income persons in general.

## Scope of Substantive Services

Legal aid programs provide a broad range of services.

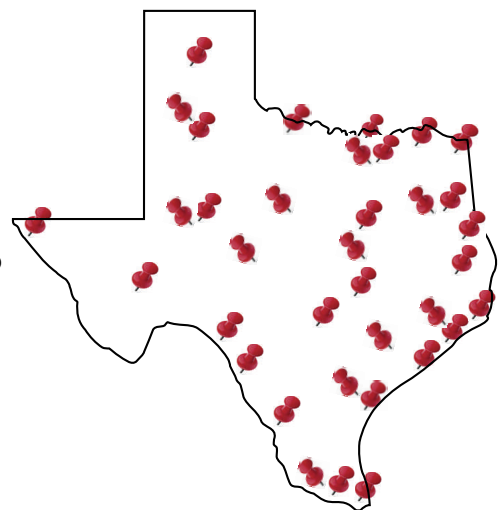
### Legal Aid Addresses Societal Problems



## Geographic Scope

There are a number of ways to use cy pres funds so as to have regional or statewide impact if that is deemed appropriate. The Foundation awards and administers grants designated for specific legal aid programs in regions throughout the state. Each pin represents a Foundation grantee. The geographic scope of a cy pres award could be limited or expanded geographically in almost any way deemed appropriate by a court.

Every population group and geographic region is touched by the services of legal aid providers and any cy pres award can be structured to impact the desired group or locale.



# Legal Aid Programs

## *Funded by the Texas Access to Justice Foundation*

**Advocacy, Incorporated** provides civil legal services to low-income persons with disabilities and mental illness.

**Aid to Victims of Domestic Abuse** provides civil legal services to victims of domestic violence in Harris County.

**American Gateway** (formerly Political Asylum Project of Austin) provides a range of immigration representation to low-income persons seeking assistance in Central Texas.

**Boat People SOS, Inc.** provides civil legal services to low-income Asian immigrant community in Harris County.

**Cabrini Center for Immigration Legal Services** provides civil legal services to low-income immigrants who are seeking assistance with asylum and residency issues in Harris County.

**Casa de Proyecto Libertad** provides a range of immigration representation to low-income seeking assistance in Harlingen and the South Texas area.

**Cathedral Justice Project** provides a range of civil legal service to the homeless population of Houston.

**Catholic Charities of Southeast Texas** provides a range of immigration representation to low-income persons seeking assistance in the Beaumont area.

**Catholic Charities of Central Texas** provides a range of immigration representation to persons seeking assistance in the Waco area.

**Catholic Charities of Dallas, Inc.** provides a range of immigration representation to low-income persons seeking assistance in Dallas and adjacent counties to the north and east.

**Catholic Charities of San Antonio** provides a range of immigration representation to low-income persons seeking assistance in Bexar and Webb counties.

**Dallas Bar Association Community Service Fund/ Dallas Volunteer Attorney Program** provides civil legal services via volunteer attorneys to low-income persons in Dallas.

**Legal Hospice of Texas** provides civil legal services to low-income persons in Dallas who are HIV+, have AIDS or other terminal illness.

**Diocesan Migrant and Refugee** provides a range of immigration representation to low-income persons seeking assistance in El Paso, Brewster, Culberson, Jeff Davis, Loving, Hudspeth, Presidio, Pecos, Reeves, Ward, and Winkler counties.

**Equal Justice Center** provides civil legal services to low-income workers in wage claims in Central Texas.

**Family Violence Prevention Services** provides civil legal services to low-income victims of domestic violence in Bexar County.

**Fort Bend Lawyers Care** provides civil legal services via volunteer attorneys to low-income persons in Fort Bend County.

**Houston Volunteer Lawyers Program** provides civil legal services via volunteer and staff attorneys to low-income persons in Harris County.

**Las Americas Refugee Asylum Project** provides a range of immigration representation to low-income persons and, particularly juveniles in detention seeking assistance in the El Paso area.

**Legal Aid of NorthWest Texas** provides civil legal services to low-income persons in 106 North and West Texas counties.

**Lone Star Legal Aid** provides civil legal services to low-income persons in 72 counties in the East Region of Texas.

### *Funded by the Texas Access to Justice Foundation*

**Legal Aid Society of Lubbock** provides civil legal services to low-income persons in Lubbock.

**Montgomery County Women's Center** provides civil legal service to low-income victims of domestic violence in Montgomery County.

**NAACP- Houston** provides civil legal services to low-income persons in Harris County.

**Oficina Legal del Pueblo Unido, Inc./Texas Civil Rights Project** provides civil legal services to low-income farm workers and *colonia* residents in the Rio Grande Valley and El Paso and to low-income and minority individuals in civil rights matters.

**ProBar – ABA Fund for Justice and Education** provides a range of immigration representation to indigent, detained immigrants and asylum seekers in South Texas.

**Refugee Aid Immigration Counseling and Education Services** provides a range of immigration representation to low-income persons seeking assistance in Bexar County.

**Southern Disability Law Center** provides legal representation to low-income persons with disabilities throughout Texas.

**Southeast Texas Legal Clinic** provides legal representation to low-income persons in Harris and surrounding rural counties who are HIV+ or have AIDS.

**South Texas College of Law, Civil Clinic** provides civil legal services in family law cases and Social Security appeals to low-income persons in Harris County.

**St. Mary's Immigration Clinic** provides a range of immigration representation to low-income persons seeking assistance in Bexar County.

**Texas Advocacy Project Inc.** (formerly Women's Advocacy Project) provides free legal advice and assistance to victims of domestic violence.

**Texas Legal Services Center** provides legal advice and representation to persons 60+, public utilities advocacy on behalf of low-income persons and support the Statewide Website and Earned Income Tax Credit Projects.

**Texas RioGrande Legal Aid, Inc.** provides civil legal services to low-income persons in 68 counties in Southwest Texas.

**Texas Wesleyan University School of Law Clinic** provides legal services to assist caretakers of children who were victims of abuse or neglect in Tarrant County.

**Earl Carl Institute for Legal and Social Policy/Thurgood Marshall School of Law** provides civil legal services to low-income residents of Harris County experiencing African-American land loss in Harris County area.

**University of Houston, Immigration Clinic** provides and assists other programs with immigration appeals throughout Texas and provides a range of immigration representation to low income persons in Harris County

**Volunteer Legal Services of Central Texas** provides civil legal services via volunteer attorneys to low-income persons in Travis, Williamson and Lee Counties.

**YMCA International Services** provides civil legal services to the immigrant community in Harris County.

## Examples of Cy Pres Awards

- In Texas a cy pres award was used to fund a major initiative aimed at increasing legal resources available online at [www.TexasLawHelp.org](http://www.TexasLawHelp.org). With the award, the Foundation partnered with the Travis County Law Library to develop legal information and self-help forms related to issues facing low-income Texans, as well as implement a broad-based public education campaign statewide.
- Austin attorney J. Hampton Skelton was instrumental in designating a significant amount of cy pres funds to the Texas Access to Justice Foundation (TAJF) and five of its grantees to support civil legal services to persons with disabilities.
- Cy pres funds of \$250,000 were awarded to the TAJF through the efforts of Amarillo attorney, Jeremi K. Young, along with co-counsel, Michael C. Smith of Marshall and Jeff Rasansky of Dallas.
- In 2008, a small cy pres award was awarded to the TAJF, through the efforts the Fugate Law Office stemming from a case under the Fair Debt Collection Act.
- The Equal Justice Center, a Texas nonprofit legal aid program and Foundation grantee, received a cy pres award in 2008 in the amount of \$97,000.
- In 2007 and 2008, Texas RioGrande Legal Aid, a Foundation grantee received consecutive cy pres awards as a result of El Paso attorney Scott Vogelmeier, along with co-counsel Daniel Edelman.



Harry M. Reasoner and J. Hampton Skelton



Jeff Rasansky, Committee Chair Tom Godbold, and Jeremi K. Young

### In Other States

- **Washington, DC:** One legal aid program and three law school clinical programs received more than \$10 million from cy pres awards resulting from a single lawsuit
- **Maryland:** Maryland's only LSC-funded program has received three cy pres awards totaling more than \$280,000.
- **Minnesota:** Minnesota Legal Aid Foundation received \$3,250,000 in two cy pres awards.
- **Illinois:** Legal Aid Foundation of Metro Chicago and Land of Lincoln Legal Assistance Foundation collectively received \$824,000 from 19 cy pres awards.
- **Georgia:** Georgia LSP and Atlanta Legal Aid Society have collectively netted \$3,029,034 from cy pres awards in three lawsuits.
- There have been recent cy pres awards made to legal aid programs in Atlanta, Boston, Cincinnati and Tallahassee.

## Practice Points & Tips *How to Structure Cy Pres Relief in Class Action Settlements*

Raising the issue of a cy pres provision relatively early in settlement negotiations can have a positive impact on the process. Some defendants may find the prospect of paying money to settle a case more palatable when they consider that some of the money will benefit a good cause. Counsel should always consider whether there are funds that can be made available for cy pres. As a general rule, counsel should resist efforts to allow reverter of unclaimed funds to defendants and should instead strongly advocate for cy pres awards for legal aid to the poor.

The decision to make a cy pres award in a class action settlement most often happens during the settlement process. Class action settlements must be approved by the court and must afford absent class members the opportunity to opt out or object. Therefore, while a cy pres remedy can be structured however the parties wish, it must pass muster with the court and the class members. Even where settlement funds are to be distributed to identifiable plaintiffs, cy pres may still be used by negotiating, from the start, to set aside a fixed percentage of the settlement fund or a certain amount. The most common use of cy pres is the case where a settlement provides that unclaimed or leftover funds will be used for the cy pres award. Once plaintiffs and defendants agree that a cy pres award is desirable and appropriate, the key is to fashion a remedy that will satisfy the court and the absent class members. It is also important to study the relevant provisions of the Texas Property Code that deal with unclaimed property to ensure compliance with state law.

Often the driving force for cy pres awards to legal aid programs is the plaintiffs' counsel, but defense counsel frequently welcome a cy pres remedy as a way for their client(s) to resolve a case and obtain some positive publicity from the settlement.

### Questions to Consider

After agreeing on the terms of a cy pres award in a class action, the parties must obtain the approval of the court. A motion to approve a settlement that includes a cy pres award should include information responsive to the following questions:

- What makes a cy pres award appropriate in this case?
- How does the cy pres award further the interest of the class in this case?
- How much will remain for cy pres after distribution to the class?
- How much will be set aside for cy pres out of settlement funds?
- Who are the potential awardees of a cy pres award in this case?
- How will a cy pres award further the mission, purposes, and goals of the proposed awardees?
- How will the awardees of a cy pres grant be chosen - will they be chosen by the parties, the court or an independent party?
- What are the procedures for potential recipients to request proposals for cy pres awards - what are the criteria for selection, and what is the process for judicial approval of the selection?
- Are there any conflicts of interest between or among the parties, counsel, and potential awardees?
- Will there be post-settlement reporting requirements and oversight of the awardees?

## Sample Provision

### *Settlement Agreement Providing Cy Pres Distribution*

Unclaimed Funds: Any funds allocated in Paragraph \_\_\_\_ above that are not paid due to any Plaintiff's failure to cash a settlement check within six (6) months of its issuance or because the mailing of such a check was returned as undeliverable or for any other reason (hereinafter "Unclaimed Funds") shall be contributed to the Texas Access to Justice Foundation, P.O. Box 12886, Austin, Texas 78711.

*Approving Settlement Agreement*

IN THE UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF TEXAS  
\_\_\_\_\_ DIVISION

PLAINTIFFS

VS.

CASE NO. \_\_\_\_\_

DEFENDANT

**ORDER**

Upon consideration of the parties' Joint Motion and Order to Create Qualified Settlement Fund, it is ordered, judged, and decreed that:

1. The payment set out in paragraph \_\_\_ of the Master Release Agreement will be made to the Settlement Administrator designated in the Master Release Agreements, \_\_\_\_\_, and that the account created by \_\_\_\_\_ for receipt of these funds will be deemed a Qualified Settlement Fund in accordance with Section 468B of the United States Internal Revenue Code (26 U.S.C. § 468B) and the regulations promulgated thereunder (26 C.F.R. § 1.468B-1).
  
2. The Settlement Administrator agrees to act strictly in accordance with its obligations as described in the Master Release Agreement.
  
3. The Qualified Settlement Fund created by this Order will be subject to the continuing jurisdiction of this Court.

SIGNED this \_\_\_\_\_ of \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

UNITED STATES MAGISTRATE JUDGE

# Memorandum and Opinion Re: Cy Pres Award

FOGIE v. THORN AMERICAS, INC. (Mimi. 2001) Vickie Fogie, Joan Leonard, and Angela Adams, on behalf of themselves and all other similarly situated, Plaintiffs, v. Thorn Americas, Inc., (formerly known as Rent-A-Center, Inc.) a Kansas corporation, and Thorn EMI North America Holdings, Inc. a Delaware corporation, Defendants.

Civil File No. 3-94-359 MJD United States District Court, D. Minnesota. March 9, 2001

Phillip A. Cole and Mary L King, Lommen, Nelson, Cole & Stageberg, P.A. for and on behalf of the Plaintiff Class.

Janice M. Symchych, Peter W. Carter, Dorsey & Whitney, LLP for and on behalf of the Defendants.

## MEMORANDUM OPINION AND ORDER

Michael J. Davis, United States District Court

### Background

This case is a class action that was brought on behalf of approximately 23,000 class members who had entered into rent-to-own contracts with Rent-A-Center (“RAC”). RAC stores are owned and operated by Defendant Thorn Americas, Inc. and Thorn EMI North America Holdings, Inc. The complaint alleged that Defendants, through RAC, had engaged in usury and deceptive and unlawful business practices through its rent-to-own contracts and that such practices violated Minnesota and federal law. After hearing the parties’ arguments at summary judgment, this Court found that Defendants’ rent-to-own contracts were usurious and enjoined Defendants from entering into rent-to-own contracts with interest rates exceeding the usury statute’s limits, voided the existent rent-to-own contracts with the Plaintiff Class abs initial, ordered rescission of all payments made by the Plaintiff Class to Defendants and enjoined Defendants from collecting any further payments under any such contracts. The injunction was later modified to allow Defendants to collect payments to prevent customer confusion, but that such funds had to be deposited in an interest bearing escrow account (“Escrow Fund”), to be returned to the appropriate customer (“Escrow Refund Member”) at a later date.

Judgment was entered on April 15, 1998, which was later affirmed on appeal with the exception of the creation of a Cy Pres Fund, *Fogie v. Thorn Americas Inc. et al* 190 F.3d 889 (8th Cir. 1999). Pursuant to the Judgment of this Court, Defendants were ordered to pay damages to the Plaintiff Class, and return to the monies held in the Escrow Fund to the Escrow Refund Members. With regard to the Cy Pres Fund, the Eighth Circuit held that creation of such a fund at a time when it was not known whether any undistributed monies would remain, without designating the recipient of such a fund, was premature. *Id.* at 904.

According to the Defendants, as of January 10, 2001, 1,813 checks have been issued and cashed from the escrow account, totaling \$1,327,401.30. Defendants have taken steps to reissue 53 checks, after receiving updated addresses from class counsel and the plan administrator. Defendants have identified 300 checks that are undeliverable, totaling \$148,584.21. Defendants now move the Court for the return of the undeliverable portion of the Escrow

Fund. The Plaintiff Class opposes this Motion, and moves for an order establishing a Cy Pres Fund, and that three charitable organizations receive these funds as follows; 75% to the Mid-Minnesota Legal Assistance; 15% to the National Law Consumer Center; and 10% to the Minnesota Justice Foundation.

## **ARGUMENT**

### **Standard**

The Eighth Circuit has recognized that there are four ways in which courts have distributed unclaimed funds remaining from a class judgment: pro rata distribution to class members; reversion to the defendant; escheat to the government and cy pres distribution. Powell v. Georgia-Pacific Corporation 119 F3d at 703,706 (8th Cir. 1997). Defendants have asked that it be allowed to retain the remaining unclaimed funds.

### **Reversion**

The Plaintiff Class opposes Defendants request because the Defendants have no legal or equitable claim to the funds at issue, as that money was never in the Defendants' possession and it was never intended to pass to the Defendants. Instead, the Plaintiff Class requests that the unclaimed Escrow Funds be placed in a Cy Pres fund for distribution to charity. The Court agrees that reversion to the Defendants is not appropriate. As noted above, the Defendants were ordered to place monies received from illegal usurious rent-to-own contracts in an escrow account because it would be inappropriate to allow Defendants to benefit from its illegal conduct. Under these circumstances, allowing Defendants to retain such ill-gotten gains is completely contrary to the final judgment of this Court, and the goals of Minnesota's Usury Statute, which is to deter business entities from charging excessive interest rates to consumers. See Six Mexican Workers v. Arizona Citrus Growers 904 F.2d 1301, 1308 (9th Cir. 1990) (where statute's objectives include deterrence or disgorgement, reversion to defendant is inappropriate as it would contradict statute's goals).

### **Cy Pres Fund**

Typically, Cy Pres distribution has been used in cases in which class members are hard to identify or where class members change constantly. Powell 119 F3d at 706. "In these cases, the court, guided by the parties' original purpose, directs that the unclaimed funds be distributed for the indirect prospective benefit of the class." Id. (citing New and Conte, Newberg on Class Actions § 10.17 at 10-41.)

Factors the Court may consider in determining the appropriateness of the creation of a Cy Pres Fund include: 1) to whom does the residue belong; 2) would it be practicable to distribute the residue to its owners and; 3) if not, who is an appropriate alternate recipient. Wells Fargo Securities Litigation. 991 F. Supp. 1193, 1195 (N.D. CA. 1998). In considering these factors, the Court finds that creation of a Cy Pres Fund is appropriate in this case.

The funds at issue here belong to class members that have not been located. Defendants have submitted affidavits from Ms. Renae Hughes, detailing the extensive efforts used to locate all class members entitled to refunds from the Escrow Account. Second and Third Affidavits of Renae Hughes, Given the extensive efforts expended in trying to locate these class members, it will be impracticable to distribute these funds to its owners.

In determining whether an appropriate alternate recipient exists for the remaining funds, the Court must keep in mind why the escrow fund was created in the first place. The Plaintiff Class in this case consisted of a disproportionate number of persons who were of lower incomes, persons of color, persons with little or no education, with disabilities or unemployed. Jerry Lane Aff., § 2. These are the weak and necessitous consumers that the Minnesota usury statute was designed to protect. *Fogie*, 190 F.3d at 903 (quoting *Trapp v. Hancuh*, 530 N.W.2d 879, 884 (Minn.Ct.App. 1995)), The Plaintiff Class, therefore, asks that the Cy Pres Fund be distributed to three charitable organizations that serve and educate Minnesota consumers in similar demographics to the Plaintiff Class; namely Mid-Minnesota Legal Assistance (“MMLA”), National Consumer Law Center (“NCLC”) and the Minnesota Justice Foundation (“MJF”).

Defendants object to the funds being distributed to the MMLA and the NCLC because they are, in effect, the same organization, and the MMLA was the attorney of record in this case and as such, received a portion of the \$8,200,000 attorney’s fee that was awarded.

Defendants have not objected to MW as being the recipient of a Cy Pres Fund. MW is designed to provide law student clerk assistance to legal advocates that represent lower income consumers in Minnesota. MJF enables non-profit organizations to help more low- income consumers in consumer protection and other related areas. For these reasons, the Court finds that distribution of the Cy Pres Fund to MW would further the goals of the damage award in this case.

**IT IS HEREBY ORDERED** that:

1. The Motion of Defendant Thorn Americas, Inc., now known as Rent-A-Center, for Return of Remaining Escrow to Defendant Rent-A-Center, Inc. is DENIED.
2. Plaintiffs Motion for Creation of a Cy Pres Fund is GRANTED.
3. All funds remaining in the Escrow Fund following, the expiration of the ninety-day negotiable period for the outstanding 53 reissued Escrow Refund Member checks are hereby designated as a Cy Pres Fund, with such funds to be distributed to the Minnesota Justice Foundation.
4. Within five (5) days of this Order, Defendants shall disburse the remaining Escrow Account funds as directed herein by issuing appropriate certified funds made payable to the Minnesota Justice Foundation. The certified funds shall be tendered to class counsel who shall distribute the fluids to the Minnesota Justice Foundation.
5. Escrow Refund Members who were not located by the Plan Administrator by September 3, 2000 are deemed to have forfeited their claims for a refund from the Escrow Account.
6. This Court shall have and retain jurisdiction to implement and enforce its orders here made upon application of the parties to the Court upon such occasions as the orders provide for applications or accounting to the Court.

LET JUDGMENT BE ENTERED ACCORDINGLY.

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For more information about Impact on Justice through Court Awards contact:

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**TEXAS** | **ACCESS** *to* **JUSTICE**  
**FOUNDATION**