

NC
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NORTH CAROLINA SUPREME COURT



*CY PRES & OTHER COURT AWARDS
CAN INCREASE ACCESS TO JUSTICE*

A reference for North Carolina attorneys & judges

UPDATED IN SEPTEMBER 2021

Introduction
from the
CHAIR OF THE
NORTH CAROLINA
EQUAL ACCESS TO
JUSTICE COMMISSION



A LARGE PERCENTAGE OF THE POPULATION in North Carolina cannot afford the services of a private attorney. Each year, thousands of North Carolinians must navigate complex civil legal issues such as housing and family matters without the benefit of representation. As a result, basic human needs like food, safety, shelter, and healthcare may be threatened. Legal aid providers are under-resourced and unable to meet the demand for their services.

This toolkit was designed in 2012 to provide information about how *Cy Pres* and negotiated settlement awards can increase funding for legal aid providers in North Carolina. Since 2007, *Cy Pres* and negotiated settlement awards have enabled NC IOLTA to distribute more than \$4 million to support the work of legal aid providers. As the opportunity presents itself, I hope you will continue to use this manual to increase access to justice for all North Carolinians and help fulfill the state constitutional mandate that the courts “shall be open” and that “justice shall be administered without favor, denial, or delay.”

A handwritten signature in dark ink that reads "Paul Newby". The signature is written in a cursive, flowing style.

Chief Justice Paul Newby
CHAIR, NORTH CAROLINA EQUAL ACCESS TO JUSTICE COMMISSION

More than **2 million North Carolinians** are eligible to be served by civil legal aid providers.

There is only **1 legal aid attorney for every 8,000** of those eligible to be served, while **1 private attorney exists for every 367 people** in North Carolina.

Financial eligibility is generally set at or below 125% of the Federal Poverty Level. The average household income for a **legal aid client is \$12,875 per year**.

71% of low-income families will experience at least one civil legal problem in a given year. **86% of those civil legal needs will go unmet.**

More than **340,000 civil legal cases of 26 civil issue types** are filed annually. The most frequent filings, and the areas of highest need according to legal aid providers, involve family and housing areas of law.

Low-income North Carolinians have **much less trust** in lawyers, the court system, and the legal system compared to people with higher incomes.

Cy Pres and Other Court Awards Can Increase Access to Justice

THE USE OF THE *CY PRES* DOCTRINE in class action settlements allows the court to distribute unclaimed and residual funds to charitable organizations that have a positive connection to either the case itself or the class. Legal aid organizations across the country are often the recipients of these awards, as they exist to provide critical legal services to those who cannot afford private attorneys and are therefore unable to effectively access the system.

The distribution of funds to legal aid providers can also occur through mediation, arbitration, and settlement agreements. These strategies, along with *Cy Pres* awards, can be valuable sources of funding for legal services for low-income North Carolinians, providing financial support for under-resourced legal aid organizations. In the face of increasing legal needs, these funds have become more important than ever in ensuring justice for all residents of North Carolina. According to the Legal

Services Corporation, low-income people who reach out to legal aid providers will receive only limited or no legal help for more than half of their civil legal problems due to insufficient resources.

This guide will outline strategies and summarize court awards in order to make judges and attorneys aware of the importance of such awards to legal aid organizations. The following pages include information on different types of court awards, tips for structuring award agreements, examples of awards, and a primer on how to structure a *Cy Pres* settlement.

On the Use of Cy Pres Funds in North Carolina

The court has broad discretion in exercising their general equity powers to distribute *Cy Pres* funds. Manuals abound concerning how to establish a suitable “nexus” for allocating funds and seeing that they are distributed fairly and for the specific benefit of the plaintiffs.

Fortunately, these challenges are minimal obstacles to the use of *Cy Pres* awards in North Carolina. North Carolina has one of the broadest *Cy Pres* statutes in the United States, NC Gen. Stat. § 1-267.10. This statute directs the courts to allocate unpaid residuals in class action litigation to “further the purposes of the underlying causes of action” of the suit OR to “promote justice for all citizens of this State.”

Unless otherwise directed by the court, the statute provides that all residual funds be divided equally, with half going to the Indigent Person’s Attorney Fund and half to the North Carolina State Bar “for the provision of civil legal services for indigents.” Even under the North Carolina statute, the Court has broad discretionary powers given the clause “unless it orders otherwise” NC Gen. Stat. § 1-267.10.

NC State Bar: A Suitable Nexus

The NC State Bar and its Interest on Lawyers’ Trust Account (IOLTA) program serve as a funding nexus for organizations that provide civil legal services to low-income North Carolinians in all 100 counties. IOLTA works closely with legal aid providers and a host of legal professionals to develop and fund statewide legal aid projects where help is needed most. Since 1984, IOLTA has provided more than \$100 million to various North Carolina programs to help those in need.

Case Law

The following cases are intended to illustrate some recent precedent on the use of *Cy Pres* awards in North Carolina. Specifically, these cases indicate the usefulness of *Cy Pres* awards in constructing a settlement agreement in cases where the plaintiff class is diffuse or the distribution to individual class members is de minimis.

Order Authorizing Final Distribution of Unused Residual Funds Remaining in Settlement Fund, In re: Polyester Staple Antitrust Litig., No. 3:03CV1516 (W.D.N.C. Aug. 18, 2014)

More than \$44 million was distributed to 425 class claimants in this class action settlement, where the court found plaintiffs had paid artificially inflated prices for polyester staple due to defendants’ unlawful conduct and conspiracy. After class distributions, \$10,528.41 of residual funds remained. On class counsel’s recommendation, the judge ordered the final distribution of unused residual funds through *Cy Pres* awards to the Indigent Person’s Attorney Fund and NC IOLTA.

Thompkins v. Key Health Med. Solutions, Inc., No. 1:12CV613 (M.D.N.C. Mar. 23, 2015)

Plaintiffs brought this class action alleging Key Health Medical engaged in the practice of lending money to individuals who had sustained personal injuries. After the individuals sought medical treatment, they were charged significantly higher amounts of money than if they had paid cash at the time of service. The court approved a settlement that provided payments to all class members with a notice of expiration after ninety days. The settlement provided that any money not distributed after the expiration of Initial Benefit Checks be distributed to NC IOLTA and the Indigent Person’s Attorney Fund.

Order Granting Motion Final Class and Collective Action Notice and Method of Distribution, Hernandez v. Teachey, No. 7:17CV00056 (E.D.N.C. Dec. 5, 2017)

In this class action suit, the court found a closely held farming enterprise violated the rights of employed migrant workers by failing to pay wages when due and providing inadequate working arrangements. The indigency status of the class members, their unfamiliarity with the English language and the American judicial system, and the difficulty in identifying or locating potential class members with small individual claims made this case suitable for a *Cy Pres* distribution to NC IOLTA.

Cy Pres a Significant Source of Revenue For Legal Services

According to the American Bar Association's *Fundraising Manual*, "Cy Pres awards are a source that does not seem to be impacted by general economic conditions, and thus has helped a number of legal aid programs maintain services during recent economic downturns." In 2019, legal aid organizations across the country reported nearly \$83 Million from Cy Pres or settlement funds. This is an incredible growth compared to the previous decade, when less than \$10 Million Cy Pres funds were reported nationally in 2009.

NC Practice Points and Tips

Counsel should raise the issue of a Cy Pres provision very early in settlement negotiations. This often makes the idea of paying money more palatable for a defendant given the knowledge that the funds will be directed toward a good cause. From the plaintiff's side, a Cy Pres provision ensures that residual funds will be directed to legal aid for low-income North Carolinians instead of allowing these monies to revert to the defendant.

While structuring a Cy Pres provision in a class action lawsuit, counsel should keep in mind that the court, as well as the class members, must approve the settlement agreement. Ample opportunity must be given for the absent class members to opt out or object to the settlement. Most commonly, Cy Pres agreements stipulate that leftover funds be awarded to a charity. However, even if all class members are identifiable and likely to receive settlement funds, the parties can agree to set aside a certain amount or a defined percentage for a Cy Pres award.

Although plaintiff's counsel most often creates the initial proposal for a Cy Pres provision, counsel for the defendant should consider Cy Pres settlements as an opportunity to further the work of organizations they already strongly support. Consequently, settlement awards may be an attractive option for both parties during a class action suit.

Negotiated Settlements: Another Type of Court Award

Cy Pres awards refer specifically to the undistributed residuals in a class action suit. However, there are other types of court awards, particularly negotiated settlements, which can be distributed to charitable organizations via the NC State Bar. Like Cy Pres awards, these grants can be useful when the plaintiffs in a class action are especially diffuse.

Terms of negotiated settlements may provide for donations to one or more specific charities. In class action settlements, the parties can stipulate that a designated charity or nonprofit receives residual funds after disbursement to the class. This can also provide an unambiguously positive destination for punitive damages.



Conclusion

It is important for counsel and judges to note that there are many ways to allocate court awards, including Cy Pres awards, whether through the North Carolina Statute or directly to specific organizations to fund the delivery of civil legal aid to low-income North Carolinians. On the next page is a sample court order that relies on the language in NC Gen. Stat. § 1-267.10 to distribute Cy Pres funds. This is merely a guide as the court has broad discretion in its distribution authority.

SAMPLE ORDER
CIVIL FILE NO. 0-0

Person, Other Person, et al on behalf of themselves and all other similarly situated,

Plaintiffs,

v.

Corporate, Inc.

Defendant.

After hearing the facts of the case, this court entered a judgment for the plaintiffs on _____. In its judgment, the court held that the creation of a *Cy Pres* fund at a time when it was not known whether any undistributed monies would remain was premature. As of today, _____, Defendants have issued _____ checks, totaling \$_____, and move the Court for the return of all undeliverable monies remaining in the Escrow account. The Plaintiff Class opposes this Motion, and moves for an order establishing a *Cy Pres* fund to allocate all residual funds to be divided equally between the North Carolina State Bar and Indigent Person's Attorney Fund, pursuant to NC G.S. §1-267.10.

Per this statute, this court has broad jurisdiction concerning the *Cy Pres* allocation of residual funds. Unless otherwise directed by the court, residual funds are to be distributed equally between the Indigent Person's Attorney Fund for criminal representation and the North Carolina State Bar "for the provision of civil legal services for indigents" (NC G.S. §1-267.10). Consequently, the court finds that a payment of the remaining undistributed balance in this suit, totaling \$_____, allocated equally to the NC State Bar and the Indigent Person's Attorney Fund would satisfy the statutory requirements of the *Cy Pres* doctrine as well as the best interests of the Plaintiff Class in this suit.

IT IS HEREBY ORDERED THAT:

1. The Motion of Defendant Corporate, Inc. for Return of Remaining Escrow to Defendant Corporate, Inc. is DENIED.
2. Plaintiff's 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 Escrow Refund Member checks are hereby designated as a *Cy Pres* fund, with such funds to be distributed equally between the Indigent Person's Attorney Fund and the North Carolina State Bar.
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 in equal parts to the North Carolina State Bar and the Indigent Person's Attorney Fund. The certified funds shall be tendered to class counsel who shall distribute the funds to the respective organizations.
5. Escrow Refund Members who were not located by the Plan Administrator by _____ 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 THE JUDGMENT BE ENTERED ACCORDINGLY.

Date: _____

The Honorable Judge

Court

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Thank you to Donn Young for client photos on the front cover