



Feature

## Little-Known Cy Pres Awards Can Bring Big Benefits to Pro Bono Legal Services

By Erica Winter

**Pro bono legal services for Washington, DC, consumers saw a real boost this past winter with a \$10-million donation divvied up between four law student clinical programs in the region. The windfall was a cy pres award stemming from a class-action lawsuit against a cable company accused of overcharging customers.**



In the settlement agreement for the case *Robert H. Bassin & Sherl Weems v. District Cablevision*, the Comcast cable company was ordered by the Superior Court of the District of Columbia to donate any settlement money left unclaimed by members of the class to organizations working *pro bono* for consumers' legal rights.

The George Washington University School of Law's clinical program received \$2.4 million, its largest gift ever. The other beneficiaries were Law Students in Court, the Georgetown University Law Center Clinical Program, and Legal Counsel for the Elderly—all based in Washington, DC.

The attorney who argued the case, Philip Friedman of Friedman Law Offices Washington, DC, "deserves a lot of credit" for urging the court to set aside the money for the *pro bono* programs, says Carol Izumi, Associate Dean for Clinical Affairs at George Washington School of Law.

While the awards can be substantial and make a great difference to the clients served by benefiting organizations, *cy pres* awards are still not well known by future or current members of the bar and bench.

The term *cy pres* (pronounced "see pray") stems from a medieval French phrase *cy pres commé possible*, meaning "as close as possible." Its legal use started with trusts and estates law, explains Kieron Quinn, an attorney with Quinn, Gordon & Wolf in Baltimore. If money is left in trust to maintain an estate's gardens, for example, and after 75 years of a nearby river's rising, those gardens are flooded permanently, the estate's trustee still has to follow the guidelines of the trust.

Given the impossibility of planting daffodils underwater, the trustee might request a court to approve a change in the

trust's guidelines. If the court does so, then it must apply the gardening money to the next best use, a use that is as close as possible (*cy pres*) to the original intent of the trust. In this example, the judge would possibly require the money go to maintaining other gardens nearby.

And so the *cy pres* concept evolved to its current and most common use: accounting for the funds left over from class-action lawsuit settlements. In most states, if the money in a class-action settlement or judgment is not put into a *cy pres* award, then it goes back to the defendant. There are two parts to reaching a *cy pres* award: agreeing to do it and deciding its beneficiaries.

Most class-action lawsuits settle, so most *cy pres* awards are established in a mutual agreement from both sides. When cases go to court and the jury finds for the plaintiffs, however, a judge can also impose a *cy pres* award as part of the penalties.

In either situation, there are two main justifications for setting up a *cy pres* award: it will be impossible to find all the class members to give them their individual shares of the money and giving out the money will cost more than the award itself (if the award comes to one dollar, but it costs two dollars to send the money).

Defendants, Quinn points out, will argue vehemently against *cy pres* awards, since otherwise they would be getting their unclaimed money back.

This wrinkle can bring up ethical issues for attorneys involved in class-action settlement negotiations, says Quinn, who says he has seen lawyers make the wrong choices in these situations. A lawyer must be very careful never to use a *cy pres* award as a bargaining chip to increase his/her own fees from a case (plaintiff's side) or to decrease his client's actual settlement payments (defendant's side). Doing this is unethical, says Quinn.



## Feature

For example, in negotiating a class-action settlement, both sides know it will be impossible to find all the members of this class. The plaintiff's attorney honestly thinks that an \$8-million settlement would be reasonable. But at the very start of the negotiations, the defendant's attorney offers a much larger settlement (\$12 million) on the condition that there is no cy pres award provision.

When presenting the settlement to the judge, the plaintiff's attorney gets his/her 25% or 30% of the settlement in fees, depending on what the judge decides. "You see the difference," says Quinn.

The plaintiff's lawyer would be getting a lot more money from the \$12-million settlement, but the defendants would be paying far less for their punishment. The \$8 million with a cy pres provision would be \$8 million total in defendant payments. The \$12 million would be \$1 million or so in actual payments, if that many class members could even be located—unethically "saving" the defendants money by bribing the plaintiff's attorney with higher fees.

Luckily, there are more honest lawyers than dishonest ones—despite popular myth—and cy pres awards are growing in frequency and visibility.

The awards must go to nonprofit organizations that serve people who are close to, or the next best thing, to the lawsuit's class members.

In October 2004, the Maryland Legal Aid Bureau received a \$30,000 cy pres award from a \$2.6-million class-action lawsuit settlement against a local car dealership brought by Quinn, Gordon & Wolf. The lawsuit was brought against Jim Coleman Automotive of Columbia, MD, for overcharging customers an average of \$50 each on tax, title, and registration fees.

Maryland Legal Aid is one of the largest legal services groups in the country, partly because it serves the whole state, with 150 lawyers in 13 offices on a budget of \$20 million per year, says Joe Surkiewicz, Director of Communications. Its lawyers help low-income people in civil matters such as evictions, consumer fraud cases, domestic violence, and family law cases.

The group receives funding from a wide range of sources, including grants, state and federal money, private fundraising,

and occasional cy pres awards.

The organization "has always been pressed for dollars," says Executive Director Wilhelm Joseph, Jr., who has been a legal-services attorney since 1975. Cy pres award money "helps with the budget crunch," he adds. Although these unplanned, one-time awards cannot be included in the group's budget, they do benefit clients.

The Maryland group will most likely put the recent \$30,000 award towards an endowment fund to help newly hired recent law school graduates pay off student loans, says Joseph. High law school loan repayment costs are often a barrier to new graduates' taking public service jobs.

California law has exact guidelines on what groups receive cy pres awards in what circumstances. For other states, exactly which organizations benefit from cy pres awards depends on local laws, local practices, and the judge. Ultimately, the judge decides on the recipients of the cy pres money, but attorneys from either side can make suggestions.

Hence the field of cy pres fundraising.

Some groups that might benefit from cy pres awards are taking the initiative and are working to spread the word about the awards, as well as about their own work and other pro bono legal services provided to low-income people.

Maryland Legal Aid is currently developing a manual on cy pres and is "hoping to educate judges and lawyers" on the practice and on the legal services that the organization provides, says Joseph. The group has already given judges some information on cy pres, and they have welcomed it, says Joseph.

Cy pres fundraising is not a new trend, says John Isbister, an attorney with Tydings & Rosenberg, LLP, Baltimore. Isbister is also a member of the Equal Justice Council, the fundraising board for Maryland Legal Aid. Cuts in government funding have led legal services organizations to look for other ways to support their services over the past 10 to 15 years, he says.

Since Maryland Legal Aid received cy pres awards in the past, the largest being \$200,000, the Equal Justice Council "decided to make a conscious effort," says Isbister, to educate the bar and the bench on the availability of cy pres awards



## Feature

as an option in class-action case decisions and settlements. The education effort started last fall, so no actual cy pres award money has come in quite yet. Isbister notes that the

information campaign has received “a good reception from the bench so far.”

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