

EQUAL ACCESS TO JUSTICE:
A CY PRES MANUAL



MSBA Legal Assistance to the Disadvantaged Committee and the Minnesota Legal Services Coalition



***Cy Pres*, Legal Services to the Disadvantaged, and the Minnesota Legal
Aid Foundation Fund**

The Minnesota State Bar Association

and

The Minnesota Legal Services Coalition

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For more information, contact Steven Hirsh, Access to Justice Director, Minnesota State
Bar Association
612.278-6322, shirsh@mnbar.org

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***Cy Pres*, Legal Services to the Disadvantaged, and the Minnesota Legal Aid Foundation Fund**

1. Introduction

Courts throughout the country have applied the *cy pres* doctrine to award residual class action funds to programs that provide free legal services to poor people. *Cy pres* (from the French “*cy pres comme possible*”, meaning “as near as possible”) was first used as a method of distributing trust funds when the trust’s original purpose could not be achieved. Under *cy pres*, the funds are distributed to the “next best” use.

Courts have found legal aid programs to be appropriate recipients of *cy pres* funds for two basic reasons: funding legal services programs directly or indirectly benefits the members of a particular class; or, more generally, that the underlying mission of legal services programs for the poor is consistent with the courts’ overall mission and the purpose of class action lawsuits.

The Minnesota Legal Aid Foundation Fund of the Minnesota Foundation was created in 1998 as a permanent endowment to help ensure the continued availability of civil legal services for the poor of Minnesota. As a permanent endowment, it guarantees that any funds secured through a *cy pres* or other settlement award will be directed to providing representation and protecting the rights of poor persons for as long as this need exists. The Fund provides a vehicle for receiving *cy pres* funds and distributing them to legal services providers statewide.

2. The *Cy Pres* Doctrine

Courts apply the *cy pres* doctrine to distribute residual damages when not all plaintiffs in a class action collect their portion of the awards, it is not possible to determine each plaintiff’s actual damages, or the cost of distributing residual funds would exceed the amount individual class members would receive.¹

Cy pres dictates that residual funds should be put to their next best use for the aggregate, indirect, or prospective benefit of class members. The awards are thus based on an analysis of class characteristics, followed by designation of a third party that will use the funds in a way that indirectly benefits class members. *Newberg on Class Actions* notes that, “*Cy pres* and other fluid recovery distributions of unclaimed class funds have found growing acceptance among the laws, procedural rules, and precedence of various states, as well as express authorization in federal statutes.”² Several states have enacted statutes

¹ See, e.g., *Jones v. Nat’l Distillers*, 56 F.Supp.2d 355, 357 (S.D.N.Y. 1999) (“With 17,198 class members, the postage and administrative costs of distributing \$18,400.80 to all qualified claimants would be prohibitive and the amount per recipient would be negligible. Where distribution of class funds to class members is infeasible, courts often use *cy pres* principles to determine an appropriate use for the funds.”)

² *Newberg on Class Actions* §10.25 (3d ed.)

or court rules explicitly providing for *cy pres* awards to legal services programs.³

In determining the “next best use” of residual funds, courts have broad discretionary powers. In *Van Gemert v. Boeing*, the Court noted that “...trial courts are given broad discretionary powers in shaping equitable decrees. ‘[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable.’ ...We believe that this principle should apply to equitable decrees involving the distribution of any unclaimed class action fund.”⁴

In Minnesota, the *cy pres* doctrine has been used to distribute residual funds to legal services programs in several cases. In *Bokusky, et al. v. Edina Realty, et al.*,⁵ the District Court approved distribution of class action residual funds to Southern Minnesota Regional Legal Services, Children’s Law Center of Minnesota, the Fund for the Legal Aid Society, as well as other nonprofit organizations. The same court, in *Chutich, et al. v. Green Tree Acceptance, Inc., et al.*⁶, provided for a distribution of residual funds to Southern Minnesota Regional Legal Services, the Fund for the Legal Aid Society, and the Alliance for Speaking Truth on Prostitution. And, in *Fogie, et al v. Thorn Americas, Inc.*,⁷ the Court distributed *cy pres* funds to the Minnesota Justice Foundation.⁸ Courts in a number of other states have awarded residual class action funds to programs providing free legal services to the poor.⁹

3. Nexus: Appropriate recipients for *cy pres* funds

A critical issue with regard to seeking and obtaining *cy pres* awards is the need for a well-defined nexus between the underlying litigation and the recipient and use of a *cy pres* award.

Cy pres awards should direct money to a charitable purpose related to the underlying purpose of the litigation that created the award.¹⁰ While in many cases there is no controversy regarding the recipient of a *cy pres* award, the court must always articulate the nexus between the litigation and the award to a specific charitable organization.¹¹ While courts have broad discretion in making *cy pres* awards, that discretion is not

³ E.g., N.C. Gen. Stat. § 1-267.10; Wash. CR 23. See also [Cy Pres Awards: A Windfall for Nonprofits](#), 33 San Francisco Attorney 26 (2007)

⁴ 739 F.2d 730 (2d Cir. N.Y. 1984)

⁵ 1993 WL 515827 (D.Minn.) (D.Minn.,1993)

⁶ 759 F.Supp. 1403 (D. Minn 1991)

⁷ 95 F.3d 645 (8th Cir. 1996)

⁸ The orders in [Bokusky](#), [Chutich](#), and [Fogie](#) are included in the attachments to this manual.

⁹ See, e.g., *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2nd Cir 2005); *Plotz v. Nyat Maint. Corp.*, 2006 WL 298427 (S.D.N.Y. 2006); *Jones v. Nat’l Distillers*, 56 F.Supp.2d 355 (S.D.N.Y. 1999) (*cy pres* awards to legal aid providers listed at p. 359) ; Robert E. Draba, [Motorsports Merchandise: A Cy Pres Distribution Not Quite “As Near As Possible”](#), 16 Loy. Consumer L. Rev. 1212004(2004); *Stanfield, et al. v. First NLC Financial Services, LLC*, N.D. Cal. 06-cv-3892-SBA.

¹⁰ See, e.g., *In re Lease Oil Antitrust Litig.*, 2007 U.S. Dist. Lexis 91467 (2007)

¹¹ See, e.g., *Diamond Chemical Co. Inc. v. Akzo Nobel Chemicals B.V. et al*, 2007 U.S. Dist. Lexis 49406 (2007)

unfettered, and appellate courts have reversed such orders for lack of an adequate nexus. In one case, the Eighth Circuit overturned the district court twice regarding selection of *cy pres* recipients. Both times the Court of Appeals criticized the failure to adequately articulate the nexus. The second time, the appellate court took the issue into its own hands and made the *cy pres* award itself.¹²

A nexus can be articulated in very broad, general terms, in terms of specific populations served, or in terms of particular subject areas addressed. Legal services organizations have received *cy pres* distributions because of their efforts to make the justice system generally more available to disenfranchised citizens, because of the specific populations they represent, because of a particular area of law they work in, or due to some combination of the above.

- **The broadest nexus: access to justice.**

All *cy pres* funds are created through the use of the judicial system, which promises all people equal justice under the law. The judicial system is a core government function that offers access to a peaceful method of resolving disputes. However, reality falls far short of the ideal. Thousands of Minnesotans are denied effective access to civil justice because they are unable to obtain legal counsel.

National and state studies have consistently found that some 80% of the legal needs of poor people go unmet because of lack of access to a lawyer. A 2005 report of the Minnesota Legal Services Planning Commission¹³ concluded that Minnesota's regional legal services programs can serve only between 2% and 19% of the estimated legal needs in their respective service areas. Similarly, a 2007 report from the Legal Services Corporation, [*Documenting the Justice Gap: The Current Unmet Civil Legal Needs of Low-Income Americans*](#),¹⁴ found that:

- for every client served by an LSC-funded program, at least one was turned away for lack of resources;
- lawyers are available to help address fewer than 20% of poor people's legal problems; and
- the per capita ratio of legal aid lawyers to the low income population is a tiny fraction of the ratio of private lawyers providing civil legal representation to the general population.

The bench and the bar recognize their obligation to help close the "justice gap". Cases in which *cy pres* funds are available tend to use disproportionately large amounts of judicial resources. It is therefore particularly appropriate that funds created through the use of the tax-subsidized judicial system be distributed in part for the purpose of providing access to

¹² [*Airline Ticket Comm'n Antitrust Litig. Travel Network, Ltd. v. Am. Soc'y of Travel Agents*](#), 2002 U.S. App. LEXIS 23762 (8th Cir. 2002)

¹³ 26 Hamline J. Pub. L. & Pol'y 265 (2005), also available [here](#)

¹⁴ <http://www.lsc.gov/justicegap.pdf>

that system to all Minnesotans, not just those with the means to pay counsel.¹⁵

- **Nexus to a particular client population**

A *cy pres* fund might be available in a lawsuit based on race, gender or age discrimination. There would be a clear nexus between legal aid and the class of plaintiffs in such a lawsuit. Two-thirds of Minnesota's legal aid clients are women. A third or more are persons of color, and some fifteen percent are limited English speakers. Most legal aid programs have special projects serving persons over 60 years of age. Services are also provided to many other identifiable populations including: low-income persons in general; children; abuse victims; persons with disabilities; public assistance recipients; low-income taxpayers; migrant workers; immigrants and refugees; vulnerable adults; senior citizens; farmers; low-wage workers; and children with special educational needs.

- **Scope of substantive services or area of law**

Legal aid programs provide a broad range of services. Among their priority substantive areas are:

- housing (homelessness, landlord/tenant relationships, homeownership, housing discrimination, access to public and subsidized housing, predatory lending, lead poisoning, access to affordable housing, mortgage foreclosure, etc.);
- family law (domestic violence, child abuse and neglect, divorce, child custody, child snatching, child support enforcement, etc.);
- access to medical care;
- consumer protection;
- housing discrimination;
- predatory practices in the areas of real estate and consumer law;
- Native American rights and the relationship between tribal, state and federal law;
- special education and discrimination in education;
- immigration law and the overlay between immigrant/refugee status and other civil legal matters;
- mistreatment of vulnerable senior citizens;
- legal problems of financially distressed family farmers;
- legal issues of migrant workers; and
- tax and employment rights of low-wage workers

A *cy pres* award would be appropriate for cases related to any of these legal issues.

- **Geographic scope and special projects:**

Cy Pres funds can be directed either statewide or to specific geographic regions. The Minnesota Legal Aid Foundation Fund, a component fund of the Minnesota Community Foundation, was established specifically to receive and distribute funds to legal services

¹⁵ See, e.g., *Jones v. Nat'l Distillers*, 56 F.Supp.2d 355 (S.D.N.Y. 1999)

programs (see below). The Fund distributes awards statewide through the Lawyers Trust Account Board; it can also direct funds to specific programs, in almost any way deemed appropriate by a court.

Awards can also be distributed to special projects within legal aid programs that serve the entire state. These include the Minnesota Disability Law Center (housed within Mid-Minnesota Legal Assistance), the state-designated protection and advocacy system that serves people with mental, physical, and developmental disabilities throughout Minnesota. Southern Minnesota Regional Legal Services' Refugee, Immigrant and Migrant Services represents migrant and seasonal farmworkers throughout Minnesota and North Dakota. Farmer's Legal Action group, a national organization headquartered in Minnesota, serves distressed family farmers. The Minnesota AIDS Project's mission is to lead Minnesota's fight to stop HIV through advocacy, education and service. The Minnesota Legal Services Coalition State Support Center, housed within Mid-Minnesota Legal Assistance, serves programs and their clients statewide, providing community legal education materials, poverty law training and statewide technology support, including extensive websites for clients and advocates (www.lawhelpmn.org, www.projusticemn.org).

4. Other Settlement Awards

In addition to *cy pres* awards, legal services providers can receive awards directly as part of a class action settlement. Class action defendants may be willing to include an uncontingent payment to legal services programs in settlement agreements to show good faith in remedying the cause of the litigation, and to improve the public's opinion of the defendant. For example, settlement of the recent Minnesota antitrust litigation against Microsoft Corporation¹⁶ included a payment of \$2.5 million to the Minneapolis Legal Aid Society "to be utilized for its charter purposes." Similar litigation in Iowa produced a payment of \$1 million to Iowa Legal Aid.¹⁷ A federal class action filed in Tennessee over discriminatory lending practices produced \$150,000 for the Minneapolis Legal Aid Society, to fund two years of client education on consumer credit financing.¹⁸

Recently, plaintiffs in litigation other than class actions have negotiated settlements which include substantial donations to charitable organizations, in addition to damage awards to the injured parties.¹⁹ Similarly, Minnesota's criminal courts have ordered convicted defendants to pay restitution to charitable organizations that are not necessarily related to the crimes at issue.²⁰ All of these examples offer inspiration for creativity in securing additional funding for providers of legal services to the poor.

¹⁶ [Gordon, et al v. Microsoft Corporation](#), 2003 WL 23105550 (Minn. Dist. Ct.)

¹⁷ [Comes, et al v. Microsoft Corporation](#), 646 N.W.2d 440 (Iowa 2002)

¹⁸ [Logan, et al v. Firststar](#), No. 3-02-0681 (Tenn. Mid. Dist. Ct.).

¹⁹ Peter Geier, *A Creative Flair Rising in Lawsuit Settlements*. THE NATIONAL LAW JOURNAL, Dec. 19, 2006.

²⁰ Henry J. Shea, *A Worthy New Wrinkle in Restitution*, MINNEAPOLIS STAR TRIBUNE, March 20, 2005, <http://www.startribune.com/535/story/62382.html>; Terry Fiedler, *Surprise Source Aids Red Lake* MINNEAPOLIS STAR TRIBUNE, April 8, 2005, <http://www.startribune.com/business/11204941.html>.

5. The Minnesota Legal Aid Foundation Fund

The Minnesota Legal Aid Foundation Fund (MLAFF) was established under the aegis of the Minnesota Foundation to receive and distribute funds for legal services for the poor. It is a permanent, donor-advised fund of the Foundation.²¹ As an endowment, MLAFF aims to ensure a perpetual source of income for organizations providing civil legal services to low-income Minnesotans.

MLAFF was created out of the recognition that access to justice is fundamental to our system of government. This right is recognized in the state Constitution²². The state legislature and the courts have, through the years, tried to insure that this right is actually available, regardless of income. The legislature has provided funding for legal aid programs through a variety of programs since 1982. The Minnesota Supreme Court oversees the disposition of these State funds. By statute, 85% of state appropriations is distributed on a proportionate poverty basis to the six regional providers of civil legal services to the poor in Minnesota.²³ Despite these efforts, legal services for the poor remain grossly underfunded.

In 1995, recognizing the severe shortage of resources to support civil legal services for the poor in Minnesota, the Supreme Court established the Joint Legal Services Access and Funding Committee. The committee found that legal services programs benefit society by helping to “stabilize families, maintain communities, save taxpayer money, prevent legal problems which otherwise further clog the court system, and help people to become self-sufficient and participate effectively in society.”²⁴ The committee also found that “Minnesota’s legal services programs are considered nationwide to be a model for the ways in which they have worked cooperatively with each other, the private bar, funders, the courts, and the legislature.”

The committee recommended a series of steps to raise the level of funding for legal services programs. Among these was that, “Trial judges in all courts in Minnesota should be educated about the need for funding for legal services for the disadvantaged, and be encouraged to consider making counsel and litigants aware of the possibility, in appropriate cases, of designating local legal services or volunteer programs, or the Supreme Court’s Legal Services Advisory Committee (LSAC), as the recipients of *cy pres* funds.” The creation of the Legal Aid Foundation Fund follows up on this recommendation and creates a single, permanent endowment fund to consolidate *cy pres* awards with other funds to provide long-term stable income for legal aid services.

MLAFF was jointly established by six programs of the Minnesota Legal Services Coalition: Anishinabe Legal Services, Judicare of Anoka County, Legal Aid Service of Northeastern Minnesota, Legal Services of Northwest Minnesota, Mid-Minnesota Legal Assistance, and Southern Minnesota Regional Legal Services. Together, these

²¹ [Agreement Establishing MLAFF](#)

²² M.N. Const. art. I, §8.

²³ *Pro bono* and other legal aid groups receive the remaining 15%.

²⁴ <http://www.mncourts.gov/Documents/0/Public/administration/penn-stageberg.pdf>

organizations annually provide legal services to over 40,000 low-income people. 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. Additional information about these programs and their clients is contained in the [Report of the Joint Legal Services Access and Funding Committee](#).²⁵

MLAFF is administered by the Minnesota Foundation. The Foundation is guided in its decisions on the distribution of income by an Advisory Committee appointed by the Minnesota Legal Services Coalition. The agreement establishing MLAFF provides for sub-accounts within the Fund for specifically designated purposes, programs or organizations, permitting *cy pres* awards to be directed to a special population or geographic area. A list of all of the [civil legal aid and pro bono programs in Minnesota](#), together with a description of the range of services offered by these programs, is included in the attachments²⁶.

²⁵ <http://www.mncourts.gov/Documents/0/Public/administration/penn-stageberg.pdf>.

²⁶ <http://www.mnbar.org/committees/lad/CyPresManual/MNLegalServicesPrograms.pdf>

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List of Attachments

1. Background Materials on Legal Aid and Client Needs

- [Penn-Stageberg Committee, Report of the Joint Legal Services Access and Funding Committee \(1995\)](#)
- [Recommendation Of The Minnesota Legal Services Planning Commission On The Configuration Of LSC-Funded Programs](#), (Spring 2005) Also available at 26 Hamline J. Pub. L. & Pol'y 265
- Legal Services Corporation, [Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans](#) (2nd Ed., 2007)

2. Cy Pres Materials

Articles

- Kevin M. Forde, [What Can a Court Do with Leftover Class Action Funds? Almost Anything!](#), 35 Judges' J. 19 (1996)
- Robert E. Draba, [Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near As Possible."](#) 16 Loy. Consumer L. Rev. 121 (2004)
- Bob Glaves, [What Would You Do with a Million Dollars? How to Seek Cy Pres Awards](#), ABA Bar Leader Journal (Sept. - Oct. 2007, 25-27)
- [Cy Pres Awards: A Windfall for Nonprofits](#), 33 San Francisco Attorney 26 (2007).

Cases

- **Minnesota State Courts**
[Gordon v. Microsoft Corp.](#), Nos. MC 00-5994, 03 -4162 (2004).
- **U.S.D.C.Minnesota**
[Bokusky, et al. v. Edina Realty, et al.](#), No. 3-92 CIV 223 (D.Minn. 1996)
[Chutich, et al. v. Green Tree Acceptance, Inc., et al.](#) 759 F.Supp. 1403 (D. Minn. 1991)
[Fogie, et al. v. Thorn Americas Inc.](#), 95 F.3d 645 (8th Cir. 1996)
[Stewart, et al. v. CenterPoint Energy Resources Corporation](#), No. 05-CV-1502 (D. Minn. 2006)
- **Eighth Circuit Court of Appeals**
[In re: Airline Ticket Commission Antitrust Litigation \(I\)](#),268 F. 3d 619 (2001)
[In re: Airline Ticket Commission Antitrust Litigation \(II\)](#),2002 U.S. App. LEXIS

23762 (8th Cir. 2002).

- **Other Jurisdictions**

Jones v. National Distillers, 56 F.Supp.2d, 355, (S.D.N.Y. 1999)

[Comes, et al. v. Microsoft](#), 646 N.W.2d 440 (Iowa 2002)

In re Holocaust Victim Assets Litigation, 424 F.3d 132, (2nd Cir. 2005)

[Logan v. Firststar](#), No. 3-02-CV-0681, (USDC MD Tenn 2005)

Plotz, v. NYAT Maintenance Corp., 2006 WL 298427 (S.D.N.Y.).

Diamond Chemical Co. Inc. v. Akzo Nobel Chemicals B.V. et al, 2007 U.S. Dist. Lexis 49406 (2007).

In re Lease Oil Antitrust Litigation, M.D.L., 2007 U.S. Dist. Lexis 91467 (2007).

3. Other Materials

- [Agreement Establishing Minnesota Legal Aid Foundation Fund](#)
- [Minnesota Civil Legal Services Programs](#)