

# NC Equal Access to Justice COMMISSION



## *Cy Pres & Other Court Awards Can Increase Access to Justice:*

A reference for North Carolina attorneys & judges

*Updated in May 2015*





## Introduction from the Chair of the NC Equal Access to Justice Commission

As poverty in North Carolina has increased, so has the demand for civil legal services to support the state’s indigent population. At the same time, funding from traditionally consistent sources of support for legal aid has dropped dramatically due to reduced interest rates on IOLTA accounts, dwindling state and federal government grants, and the loss of support from several public and private foundations.

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, NC IOLTA has received more than \$2 million to support civil legal aid from *Cy Pres* and negotiated settlements. As the opportunity presents itself, I hope you will continue to use this manual to increase access to justice for all North Carolinians.

*Mark Martin*

CHIEF JUSTICE MARK MARTIN  
*Chair, NC Equal Access to Justice Commission*

**80% of the civil legal aid needs of the poor—domestic violence, divorce, child custody, housing, consumer protection, employment, benefits, and health—go unmet.**

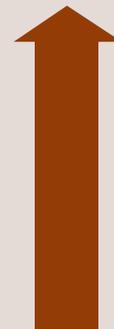
**There is one private attorney for every 562 residents of North Carolina. There is one legal aid attorney for every 13,170 low-income residents of North Carolina.**

## 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 deserving recipients of these awards, as they exist for the benefit of the members of the disadvantaged class.

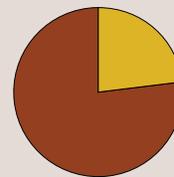
The distribution of funds to legal aid providers can also occur through mediation, arbitration, and settlement agreements. These strategies, along with *Cy Pres* awards, can be valuable sources of funding for legal aid providers. Legal aid organizations can use these court awards to fund the delivery of civil legal aid to the poor in North Carolina. In the face of budget cuts, these funds have become more important than ever in ensuring justice for all residents of North Carolina. According to the Legal Services Corporation, for every civil legal aid client served across the country, one eligible person is turned away due to insufficient resources.

This guide will outline strategies and analyze 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.



Since 2008, the need for legal aid has increased 30%.

### North Carolinians Qualifying for Assistance from Legal Aid Agencies



2.2 million North Carolinians, over 23% of the population, qualify for legal aid.

## 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 the 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, N.C. 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 the 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 NC 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 otherwise directed by the court. . . .”

### N.C. 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 local aid providers and a host of legal professionals to develop and fund state-wide legal aid projects where help is needed most. Since 1984, IOLTA has provided nearly \$75 million to various North Carolina programs to help those in need. Strategically positioned to serve the entire state, the NC State Bar’s IOLTA program is an ideal nexus for the simple and effective distribution of *Cy Pres* awards in North Carolina for the distribution of civil legal services for low-income residents, while the Indigent Person’s Attorney Fund supports criminal defense for indigent persons.

## 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.

### *Teague v. Bayer AG, No. 05-CVS-90 (N.C. Super. Ct.)*

Wimer & Associates, an Asheville law firm, filed a class action in Buncombe County in 2004. Because the class included a large number of difficult to identify consumers suffering only small monetary losses, the settlement provided for a *Cy Pres* distribution in lieu of a claims process. With court approval, the funds were distributed to regional charitable organizations so the funds could be used for the benefit of citizens in the settling five states. In North Carolina, the remaining \$518,246.79 was divided equally among NC IOLTA, Pisgah Legal Services, Habitat for Humanity, and the NC Office of Indigent Defense Services.

### *Jerry Cooper, Inc. v. Lifequotes of America, Inc., No. 04-2-40304-9 (Wash. Super. Ct. judgment satisfied Sept. 19, 2012)*

The original lawsuit was brought against a Washington company that hired a fax blaster to send unsolicited advertisements by facsimile to individuals and businesses advertising life insurance rates. Blast faxes violate Washington state and federal statutes. In this case, 75% of the funds remained after class distribution and initial distribution of residuals to the Washington state IOLTA program. The remaining funds were distributed to IOLTA programs in all states and the District of Columbia on a pro rata basis using an estimate of the statutorily prohibited behavior that occurred in each state. NC IOLTA received \$1.2 million of these residual funds.

### *Kucan v. Advance America, Cash Advance Ctrs. of N.C., No. 04-CVS-2860 (N.C. Super. Ct. settlement approved Jan. 31, 2011)*

### *McQuillan v. Check ‘n Go of N.C., No. 04-CVS-2858 (N.C. Super. Ct. settlement approved Mar. 31, 2011)*

### *Hager v. Check Into Cash of N.C., Inc., No 04-CVS-2859 (N.C. Super. Ct. settlement approved Apr. 15, 2011)*

These class action suits challenged the legality of payday lending in North Carolina and sought the return of illegal fees and interest paid by borrowers. The three cases, settled in 2010, have resulted in payouts to class members of over \$28 million. \$1 million in residual funds from these cases was split between NC IOLTA and Indigent Person’s Attorney Fund.

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

After the payment of over \$44 million to 425 class claimants in a class action settlement, \$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 the North Carolina State Bar for the provision of civil legal services for indigents.

## 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 non-profit receives residual funds after disbursement to the class. This can also provide an unambiguously positive destination for punitive damages.



## N.C. 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 the poor 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 plaintiffs' 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.

## 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 the poor in North Carolina. On the next page is a sample court order that relies on the language in N.C. 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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