

## Discussion Guide for CCPF June 11 Forum

### SYNOPSIS OF LAW GOVERNING *CY PRES* AWARDS IN CALIFORNIA COURTS

#### I. C.C.P. SECTION 384: *CY PRES* AWARDS FROM AMOUNTS REMAINING AFTER DISTRIBUTIONS TO CLASS MEMBERS (AKA "RESIDUALS")

Section 384 of the California Code of Civil Procedure governs distributions of residuals remaining from class action settlements (or very rarely judgments after trial) after distributions to class members (e.g., because some class members did not make claims, could not be located, failed to cash checks, etc.). It provides a general standard, and then enumerates categories of permissible *cy pres* recipients:

##### § 384. Distribution of unpaid residuals in class action litigation

(a) **It is the intent of the Legislature in enacting this section to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Californians.** The Legislature finds that the use of funds collected by the State Bar pursuant to this section for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.

(b) Except as provided in subdivision (c), prior to the entry of any judgment in a class action established pursuant to Section 382, the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue, plus interest on that sum at the legal rate of interest from the date of entry of the initial judgment, **to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent.** The court shall ensure that the distribution of any unpaid residual derived from multistate or national cases brought under California law shall provide substantial or commensurate benefit to California consumers. (emphasis added).

#### KEY POINTS THAT ILLUSTRATE CATEGORY I.

- Applies Only to Class Action Residuals, Not Class Action Settlements Expressly Providing for *Cy Pres* Awards Rather Than Direct Distributions to Class Members (Category II Below)

*(In re Vitamin Cases* (2003) 107 Cal.App.4th 820; *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706)

- Interpreted Broadly to Preclude Reversion of Residuals to Defendants (*Cundiff v. Verizon* (2008) 167 Cal.App.4th 718)
- Query Whether Section 384 Governs in Federal Court Cases Under California Law, e.g., Indirect Purchaser Antitrust Class Actions Under Cartwright Act (see, for example, Seligman and Larkin, "Fluid Recovery and *Cy Pres*: A Funding Source For Legal Services" at 2, arguing that CCP §384 is substantive and thus applies in federal court cases under California law under *Erie* doctrine)
- Broader Than Traditional *Cy Pres* Doctrine in that Specifies Certain Categories of Permissible Recipients (child advocacy groups and organizations providing civil legal services for the poor) and Thus Does Not Require Nexus Between Class/Nature of the Case and the *Cy pres* Recipients
- Does Not Specifically Allow Second Distributions of Residuals to Class Members Who Made Claims or Cashed Checks (some object that this produces "windfall" to class members)
- No Specified Procedures/Rules For Selecting Recipients or Choosing Among Categories
- Class Typically Receives No Notice of Recipients But May Object If Learn About Them

## **II. *CY PRES* AWARDS FROM CLASS ACTION SETTLEMENTS WHERE NO INITIAL DIRECT DISTRIBUTIONS TO THE CLASS FROM AMOUNT RECOVERED (OR FROM PORTION OF THAT AMOUNT)**

- No Statutory Standard: Settled that CCP 384 Does Not Apply (*In re Vitamin Cases* (2003) 107 Cal.App.4th 820 (no direct distribution to the class); *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706 (settlement agreement designated portion of recovery to go to schools))
- Parties Typically Designate Recipients in Settlement Agreement
- Class Usually Receives Notice of Recipients and Opportunity to Object as Part of Settlement Approval Process
- Courts Typically Defer to Parties' Choices so Long As Plausible Indirect Benefit

- Very Deferential Standard of Review in California Appellate Courts (See e.g., *Edelist v. First USA Bank* (Cal App 2006) 2006 WL 1555765 and *Lamb v. Wells Fargo Bank* (Cal App 2006) 2006 WL 925490 (affirming trial courts' orders approving settlements providing for *cy pres* awards to charities with little or no relationship to lawsuit))
- Perceived As Particularly Subject To Abuse at Least Among These Generally Hostile To Class Actions (See e.g., Frank, *Class Action Watch*, "Cy Pres Settlements," noting, among other things, that *cy pres* recipients may be related to plaintiffs' counsel, or, where selected by defendants, merely replace charitable giving the defendant would have made anyway)

### **III. CONTRAST STANDARD FROM AMERICAN LAW INSTITUTE PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION**

The American Law Institute recently issued its final official Principles of the Law of Aggregate Litigation. Section 3.07 deals with *cy pres* settlement. It provides that a court may approve a settlement that proposes a *cy pres* settlement subject to three criteria:

- (a) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members.
- (b) If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair
- (c) If the court finds that individual distributions are not viable based upon the criteria set forth in subsections (a) and (b), the settlement may utilize a *cy pres* approach only if the parties can identify a recipient involving the same subject matter as the lawsuit that reasonably approximates the interest being pursued by the class.

#### **KEY POINTS THAT ILLUSTRATE CATEGORY III**

- Requires Distributions To Class Members if Feasible
- Requires Second Distributions of Residuals To Class Members Who Made Claims/Cashed Checks If Feasible
- Restricts *Cy pres* To Recipients With Close Nexus To the Lawsuit ("recipient involving the same subject matter as the lawsuit that reasonably approximates the interests being pursued by the class")

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Page 4 of 4

- Query if Consumer Trust Funds, or Public Interest Organizations Advancing Consumer Interests, Generally Satisfy this Standard In Consumer Cases, Whatever Industry the Case Concerns?