HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 409 Distribution of Residual or Undistributable Funds in Civil Matters
SPONSOR(S): Public Integrity & Elections Committee, Civil Justice & Property Rights Subcommittee, Eskamani and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1270

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	16 Y, 0 N, As CS	Walsh	Jones
2) Public Integrity & Elections Committee	13 Y, 3 N, As CS	Pardo	Rubottom
3) Judiciary Committee			

SUMMARY ANALYSIS

The legal doctrine of cy pres refers to a court's equitable power to redistribute unclaimed or nondistributable assets to the next best beneficiary. When using this tool, courts may reallocate funds to a charitable entity. In the United States, the cy pres doctrine has largely been limited to the law of trusts. However, as the number of class action lawsuits increased, courts began expanding the use of the cy pres doctrine to reallocate leftover or earmarked class funds to charities or nonprofit organizations.

Under the common law doctrine, a court may utilize the cy pres doctrine in a trust case if:

- The trust is charitable;
- The donor held a general charitable intent, as opposed to a specific charitable intent to benefit a specified charitable object; and
- The trust is either unlawful at inception, or has become impossible or impracticable to continue as specified by the trust.

Section 736.0413, F.S., part of the Florida Trust Code, expressly authorizes courts applying Florida law to use the cy pres doctrine in cases involving charitable trusts.

In the class action context, courts may use the cy pres doctrine to distribute the residual funds of an award to a charitable organization; however, this is only permissible when it is not feasible to distribute the unclaimed funds to class members.

Florida courts have taken a conservative approach to the cy pres doctrine by applying the doctrine only in the trusts and wills contexts. In 2019, the Supreme Court of Florida declined to adopt a proposed rule that would have allowed a court to direct the defendant to distribute unpaid residual funds awarded in a class action to recipients agreed to by the parties. Several other states have enacted legislation and rules codifying the cy pres doctrine relating to civil judgments.

CS/HB 409 authorizes a court to apply the cy pres doctrine when distributing residual or undistributable funds in all civil matters. Prior to settlement or entry of judgment, the court may approve the recipient of such funds, as may be agreed to by the parties, and as reasonably related to the subject matter of the civil matter involved.

The bill provides an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

The Cy Pres Doctrine

The term "cy pres comme possible" is French in origin and means "as near as possible."[1] The legal doctrine of cy pres refers to a court's equitable power to redistribute unclaimed or nondistributable[2] assets to the next best beneficiary when the original beneficiary is unavailable.[3,4] The American version of the cy pres doctrine requires a general charitable intent to be shown before a court may apply the doctrine.[5]

In the United States, the cy pres doctrine has largely been limited to the law of trusts.[6] However, when the number of class action lawsuits increased, courts began utilizing the cy pres doctrine to reallocate leftover or earmarked class funds to charities or nonprofit organizations.[7]

Today, the doctrine of cy pres takes on many different forms depending on the jurisdiction. At least 25 states have enacted rules or statutes regarding the distribution of class action residual awards to charitable organizations.[8]

Cy Pres in Trusts

The cy pres doctrine is attractive to courts in charitable trust cases, as it provides a way to fulfill the donor's charitable objective when there are leftover trust funds.[9] Under the common law doctrine, a court may utilize the cy pres doctrine in a trust case if:

- The trust is charitable;
- The donor held a general charitable intent, as opposed to a specific charitable intent to benefit a specified charitable object;[10] and
- The trust is either unlawful at inception, or has become impossible or impracticable to continue as specified by the trust.[11]

If these requirements are satisfied, a court may reallocate the trust assets to another charitable cause in a manner that is as near as possible to the donor's original intent.[12, 13]

Cy Pres in Class Actions

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[1] Jennifer Johnston, *Cy Pres Comme Possible to Anything Is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements*, 9 J.L. Econ. & Pol'y 277, 279 (2013).
[2] For example, an asset may be deemed nondistributable when the charitable beneficiary of the asset no longer exists.
[3] Alberto B. Lopez, *A Revaluation of Cy Pres Redux*, 78 U. Cin. L. Rev. 1307, 1308 (2010).
[4] Am. Jur. 2d Federal Courts s. 1768.
[5] Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 Clev. St. L. Rev. 471, 473 (1998).
[6] Emily C. Baker and Lynsey M. Barron, *Cy Pres…Say What? State Laws Governing Disbursement of Residual Class-Action Funds* (June 2011), https://www.jonesday.com/files/Publication/d5da170f-e20d-4f96-aec1-12cf62115d70/Presentation/PublicationAttachment/fbbc24cf-ffcd-43ed-98ba-be026d39ef17/cypres2.pdf (last visited Mar. 11, 2021).
[7] *Id*.
[8] ABA Resource Center for Access to Justice Initiatives, *Legislation and Court Rules Providing for Legal Aid to Receive Class Action Residuals*, https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls-sclaid-atj-cypres.pdf (last visited Mar. 11, 2021).
[9] Lopez, *supra* note 3, at 1310.
[10] Several states have adopted the revisions of the cy pres doctrine found in the Uniform Trust Code (UTC), which allows courts to operate under the rebuttable presumption that the general charitable intent requirement is met. *Id.*
[11] *Id*.
[12] The revisions to the doctrine of cy pres found in the UTC do not follow the "as near as possible" standard of redistribution and gives courts another justification to exercise cy pres. *Id*.
[13] *Id*.

In the context of class action suits, the doctrine of cy pres may be applied to achieve a "second best" form of relief.[14] Funds awarded in a class action lawsuit commonly go unclaimed after the suit is over.[15] In such situations, a court may use the cy pres doctrine to distribute the residual funds to a charitable organization.[16] However, using the cy pres doctrine to distribute such funds is permissible only when it is not feasible to further distribute the unclaimed funds to class members.[17]

Some courts applying the cy pres doctrine to the distribution of residual funds in a class action settlement have recognized the importance of distributing the funds in a manner that benefits the underlying objectives of the lawsuit. The United States Court of Appeals for the Eighth Circuit held that "unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated."[18]

Cy Pres in Florida

Section 736.0413, F.S., part of the Florida Trust Code, authorizes courts applying Florida law to use the cy pres doctrine in cases involving charitable trusts.[19] Under this section, a court may apply the cy pres doctrine to order that trust property be distributed in a manner consistent with the settlor's charitable purpose if the particular charitable purpose becomes:

- Unlawful,
- Impracticable,
- Impossible to achieve, or
- Wasteful.[20]

Under s. 736.0413, F.S., a settlor, trustee, or any qualified beneficiary may commence a proceeding to modify or terminate the trust in accordance with the section.[21]

Florida courts have taken a conservative approach to the cy pres doctrine, narrowly applying the doctrine only in the trusts and wills contexts. In *Lewis v. Gaillard*, the Supreme Court of Florida found that the Florida State College for Women was entitled to receive part of the testator's estate, even though the testator had named the predecessor institution as the beneficiary.[22] However, the Supreme Court of Florida has clarified that the cy pres doctrine "does not apply when the provisions of the will can be carried out, such as where the will provides an alternative that can be performed."[23]

In 2019, the Supreme Court of Florida considered an amendment to Florida Rule of Civil Procedure 1.220 proposed by the Florida Bar's Civil Procedure Rules Committee and Pro Bono Legal Services Committee.[24] The proposed new rule would have expressly allowed a court to direct the defendant to distribute unpaid residual funds awarded in a class action to recipients agreed to by the parties.[25] The Supreme Court of Florida declined to adopt the proposed rule.[26]

Cy Pres in Other States

[14] Martin H. Redish et. al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 620 (2010).
[15] Baker *supra* note 6.
[16] *Id*.
[17] *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011).
[18] *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002).
[19] S. 736.0413, F.S.
[20] S. 736.0413(1), F.S.
[21] S. 736.0413(2), F.S.
[22] *Lewis v. Gaillard*, 61 Fla. 819, 842 (1911). *See also Christian Herald Ass'n v. First Nat. Bank of Tampa*, 40 So. 2d 563 (Fla. 1949) (holding that after a testator allocated property to a charitable organization that no longer existed, the successor in interest to the former organization was entitled to the property).
[23] *SPCA Wildlife Care Ctr. v. Abraham*, 75 So. 3d 1271, 1276 (Fla. Dist. Ct. App. 2011).
[24] *In re Amendments to Fla. Rule of Civ. Proc. 1.220*, 271 So. 3d 936, 937 (Fla. 2019).
[25] *Id.*
[26] *Id.* at 938.

Several states have enacted legislation and rules codifying the cy pres doctrine relating to civil judgments.[27] Tennessee cy pres law, which governs both class action settlements and civil judgments, authorizes the court to disburse residual funds.[28] A Tennessee Rule of Civil Procedure specifically authorizes, but does not require, "a distribution of residual funds to a program or fund which serves the pro bono legal needs of Tennesseans including, but not limited to, the Tennessee Voluntary Fund for Indigent Civil Representation."[29]

Cy pres distributions are also discretionary in Massachusetts; however, any residuals must be directed either to a charity or foundation "which support[s] projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based" or to the state's Interest on Lawyers Trust Accounts (IOLTA) Committee for indigent representation.[30]

In North Carolina, the court must direct the defendant to divide any residual balance between the "Indigent Person's Attorney Fund" and the North Carolina Bar "for the provision of civil legal services for indigents."[31] Moreover, in California, interest on the fund begins to accrue from the date of judgment and must be directed toward:

- A charity that supports projects that benefit either the class or a similarly situated person;
- An organization that promotes law consistent with the underlying cause of action's objectives;
- A child advocacy program; or
- A legal services organization for the indigent.[32]

Effect of Proposed Changes

CS/HB 409 authorizes a court applying Florida law to apply the cy pres doctrine when distributing residual or undistributable funds in all civil matters "as deemed appropriate" under the circumstances or by agreement of the parties.

The bill provides that before settlement or entry of judgment, the court has the discretion to approve the timing and method of the distribution of funds subject to cy pres distribution. Further, the court has discretion to approve the recipients of the funds, as may be agreed to by the parties, and as reasonably related to the subject matter and purposes of the civil matter involved.

The bill provides an effective date of July 1, 2021.

B. SECTION DIRECTORY:

Section 1. creates s. 45.085, F.S., relating to distribution of residual or undistributable funds in civil matters.
Section 2. provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

[27] Baker *supra* note 6.
[28] Tenn. R. Civ. P. 23.08.
[29] *Id*.
[30] Mass. Civ. Proc. 23(e).
[31] N.C. Gen. Stat. § 1-267.10 (2020).
[32] Cal. Code Civ. Proc. § 384.

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a direct economic impact on the private sector by allowing charitable organizations to receive funds in civil matters that might otherwise be undistributable.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2021, the Civil Justice and Property Rights Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment clarifies that:

- A court may apply the cy pres doctrine to the distribution of residual or undistributable funds.
- The recipients of a cy pres distribution under the bill are limited to nonprofit, tax-exempt organizations that provide civil legal services to the poor or funding or support for the provision of civil legal services to the poor.

This analysis is drafted to the committee substitute as passed by the Civil Justice and Property Rights Subcommittee.

On April 9, 2021, the Public Integrity & Elections Committee adopted an amendment and reported the bill favorably as a committee substitute to the committee substitute. The amendment provides that before settlement or entry of judgment, the court has the discretion to approve the timing and method of the distribution of funds subject to cy pres distribution. Further, the court has discretion to approve the recipients of the funds, as may be agreed to by the parties, and as reasonably related to the subject matter and purposes of the civil matter involved. the parties and as reasonably related to the subject matter and purposes of the civil matter involved.

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