

DC Circ. Dissent Could Blunt Presidential Deal-Making Tool

By **Andrew Westney**

Law360, New York (May 19, 2017, 7:23 PM EDT) -- Although the D.C. Circuit has refused to upend a plan for the U.S. government to give nonprofits \$300 million left over from a class action settlement with Native American farmers, one judge's dissent blasted the set-aside as a "slush fund" that usurps congressional spending authority, potentially fueling future efforts to limit executive deal-making powers.

A panel majority turned back a challenge to the plan for divvying up an eye-popping \$380 million that went unclaimed in the U.S. Department of Agriculture's \$680 million agreement in the so-called Keepseagle suit. Of that remainder, roughly \$300 million was slated to go to nonprofit organizations for Native American farmers and ranchers through the deal's cy pres provisions.

Supporters of cy pres — which permits money from settlements to go to groups that help fulfill the purpose of a deal rather than just to successful claimants — say it's an invaluable tool for both public and private parties to resolve complicated settlement negotiations and make good use of funds to redress wrongs. In this case, those alleged wrongs include racial discrimination that lead class representative Marilyn Keepseagle and others to say they suffered from the USDA's loan program.

"Closing off this kind of huge, policy-oriented litigation in the ordinary way is difficult, so having these kinds of more creative ways of achieving the goals of litigation are important in coming to a satisfactory conclusion for the people who brought it, and for the government," Mayer Brown LLP special counsel Charles A. Rothfeld said.

But in a dissent, U.S. Circuit Judge Janice Rogers Brown, a George W. Bush appointee, torched the Obama administration for using cy pres in what she said was an attempt to score political points with "photo-op compassion towards a discriminated minority group." By shipping money from the government's Judgment Fund to the nonprofits, she said, the executive branch violated Congress' power to appropriate funds.

Judge Brown offered recommendations to fix that perceived constitutional issue, including a call for the government to return the unclaimed \$380 million to the Treasury, and for Congress to forbid cy pres distribution in class action settlements with the federal government.

While she didn't win the day, attorneys say Judge Brown provided a compelling agenda for opponents of cy pres to challenge its use.

Paul F. Figley, a longtime U.S. Department of Justice litigator who is now a professor at American University Washington College of Law, wrote an article on the Judgment Fund that was cited several times in Judge Brown's dissent.

In an interview, he told Law360 that he believes the executive branch's use of the fund has gone fairly well for several decades, but that the Obama administration ventured beyond its traditional purposes and into dubious constitutional territory through the exploitation of cy pres.

"Now that somebody in the executive branch has used cy pres more aggressively, everybody sees the path, and it would be no surprise to me that if Congress doesn't make changes, future administrations of both parties will use the Judgment Fund as a way to pay money where Congress has not appropriated it for a purpose the president sees as valid," Figley said.

The cy pres plan at issue here came about after lengthy negotiations over what to do with the unclaimed Keepseagle money resulted in two court proposals that were rejected by the district court in 2015. The lower court approved a hybrid proposal in April 2016 that would divide \$77 million among the successful plaintiffs but send the remainder of the \$380 million to a new trust for nonprofit organizations via an amendment to the settlement's cy pres provisions.

Keith Mandan, one of the four class representatives in the case, opposed that plan in his D.C. Circuit appeal, saying all the remaining money should go to successful claimants.

Attorneys said the panel majority properly rejected that bid, as Mandan and the other successful claimants had already been fully compensated and stood to gain from the revised deal.

But while the majority backed the district court's view that the proposal's use of cy pres to redistribute the rest of the leftover funds was reasonable, Brown said the court should have considered the constitutionality of the cy pres redistribution. She slammed the Keepseagle deal as "a slush fund disguised as a settlement" that let the executive branch funnel money to nonprofits and charities it favored.

Class counsel Joseph M. Sellers of Cohen Milstein Sellers & Toll PLLC said he didn't believe there was anything unconstitutional about the proposal, even though not all the money would go to those with successful claims against the government.

According to Sellers, it was difficult to identify claimants given the roughly two-decade period covered by the plaintiffs' discrimination claims and the government's failures to keep records of who was denied loans by the USDA. Redistributing the funds will help members of the class who otherwise wouldn't have received any benefit from the deal, he argued.

"This wasn't just some free giveaway of funds," Sellers said. "These funds were paid in exchange for the government getting all these claims settled."

Harry Snyder, a settlement administrator specializing in cy pres, said that the mechanism, whether used in a settlement with a corporation or in one with the government, was created to allow courts to craft an equitable solution to correct wrongs and "not to allow the wrongdoer to retain ill-gotten gains."

"The alternative is letting the wrongdoer get away with wrongdoing," Snyder said. "Why doesn't this apply to the federal government?"

But Judge Brown contended that the Obama administration abandoned a strong litigation position in the Keepseagle suit, where the class had yet to be certified, to win political favor and shower money on its preferred nonprofits. In the process, the executive branch used money from the Judgment Fund that must be appropriated by Congress, she argued.

In the Figley article cited in Judge Brown's dissent, the professor said that "congressional trust in executive branch attorneys to protect the [Judgment] Fund seems to be well-founded," but that the Obama administration's use of the fund to effectively create a new claims program went too far.

Judge Brown suggested several ways to undermine cy pres, including calling for the U.S. Department of Justice to consider striking those provisions in the Keepseagle settlement and to potentially issue guidelines "disapproving the use of cy pres in class settlements" with the federal government.

The judge also called on Congress to amend the Judgment Fund Act to block cy pres distributions altogether in class action settlements with the federal government, and to authorize the comptroller general to report to Congress on any class action deal worth more than \$100 million.

Now, attorneys say, the question is whether Congress or the DOJ will take up the gauntlet Judge Brown threw down. Or even a better-positioned litigant: The panel majority found that Mandan had waived his legal challenges to the cy pres provisions of the Keepseagle deal, although Judge Brown believed the court should still have weighed those issues.

A plaintiff who could demonstrate that there was improper coordination or any other attempt by executive agencies to direct settlement funds to certain charities could establish a reason not to approve a settlement distinct from the separation-of-powers issue, Rothfeld said.

But according to University of Texas School of Law professor Stephen I. Vladeck, the panel majority properly left alone the specific constitutional question of whether the executive branch can use cy pres in any circumstances to pay nonlitigants out of the Judgment Fund, as courts aren't meant to go looking for constitutional conflicts.

Still, Vladeck added, Judge Brown's dissent is "incredibly useful in flagging a policy concern and in inviting Congress to respond."

Sellers said that it would be "a real tragedy" if Congress were to implement the restrictions on cy pres Judge Brown proposed. He believes such a move would potentially cost the government and plaintiffs the flexibility to reach the kind of creative deal that might not be formally approved if a case were to go to trial.

On the other hand, Figley said that if Congress doesn't act, then the executive branch "will continue to use this as kind of a private piggy bank."

However, attorneys say it's doubtful whether the current presidential administration or the Republican-controlled Congress will have any appetite to curb executive power.

In Snyder's view, if lawmakers don't choose to take up Judge Brown's invitation to step into the controversy, the best way to guard against misuse of the cy pres funds going to Native American nonprofits would be to impose strict criteria for how that money is used and what groups it goes to.

The case is *Keepseagle et al. v. Perdue*, case numbers 16-5189 and 16-5190, in the U.S. Court of Appeals for the D.C. Circuit.

--Additional reporting by Vidya Kauri and Adam Lidgett. Editing by Mark Lebetkin and Jill Coffey.

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