

REFLECTIONS FROM A SPECIAL MASTER:

The *cy pres* process in a high-dollar, class-action case

BY LESLIE J. WINNER



In 2018, I was appointed as special master under Rule 53 of the Federal Rules of Civil Procedure in a nationwide class action that had resulted in a judgment of over \$60 million. The court deemed nearly 20 percent of that award — more than \$11 million — undistributable, either because the class members could not be located or would not collect their damages. My job was to recommend to the court the best way to disperse these funds. Here I describe the process I used, the results, my assessment of the experience, and some recommendations for future use of this approach.

CASE BACKGROUND

The Telephone Consumer Protection Act (TCPA) made headlines in the '90s for offering a solution to those pained by unsolicited phone calls: They could sue the perpetrating company for treble damages under a federal statute — up to \$1,500 per violation (that's per call) with no cap.¹ The case on which I served, *Krakauer v. Dish Network, LLC*,² was one such case.

The jury found that Dish had made more than 50,000 telephone solicitations to over 18,000 residential phone numbers in violation of the act. The jury awarded damages, and the Hon. Catherine Eagles of the Middle District of North Carolina, the presiding judge, trebled them after she found that the violations were willful. The final judgment totaled just over \$61.3 million³ and was affirmed on appeal.⁴

Not all of the judgment funds could be distributed to the class members. The court determined that at least \$11 million was likely to remain undistributed after providing for payment of attorneys' fees and costs and distributions received by class members. The court decided that returning the funds to Dish was not appropriate in light of the deterrence purpose of the statute. It also determined that dividing the funds among all 50 states (through escheat) would be too costly and administratively burdensome.

The court determined that distributing the funds to nonprofit organizations might be the best use of the funds, so long as doing so furthered the objective of the underlying statute and benefited the members of the class. But which organizations, and how much should be distributed to each? The court decided to appoint a special master to help it evaluate potential *cy pres* recipients (nonprofit or government organizations) so that it could determine whether *cy pres* or federal escheat (giving the funds to the federal government) would be the better course.⁵ Citing *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990), the court gave notice of its intent to appoint a special master pursuant to Rule 53(a)(1)(c), provided all parties an opportunity to suggest a special master, and ultimately appointed me based on my "training, experience, and temperament."⁶ Of particular relevance

were my experiences as trial counsel in federal court class actions and as the executive director of a private grant-making philanthropy.

Note that I did not have any experience with the TCPA as a lawyer or as a grantmaker. I do not think this impeded me, as I was able to quickly educate myself on how the statute was being used to protect consumers, do a scan of the array of organizations working on both prevention and enforcement, and understand what their primary challenges were. It may have even increased my objectivity, since I was not enmeshed with the people working in the field and did not have any preconceived ideas about how the funds should be distributed.

THE PROCESS

My goal was to create a process that would be open, reasonably transparent, efficient, and not unduly burdensome on the organizations applying for the awards. First, I established a process for soliciting applications, including developing criteria for those receiving the awards. Then I created a notice of the *cy pres* award process and a publicly accessible website with the notice, the criteria, and an online application.

Articulating eligibility criteria is crucial: It limits the applications to reasonable candidates, thus saving my and the court's time and discouraging organizations that are far afield from wasting their time. I created the crite- ►

ria based on the language in the court's order and my grantmaking experience.

The criteria were, in summary:

- Applicants must be a §501(c)(3) tax-exempt organization, a state governmental entity authorized to enforce the TCPA, or a non-§501(c)(3) state university or college.
- Organizations that receive the award must engage in projects that benefit the class by their work on behalf of consumers injured by willful violators of the TCPA.
- Funds from the award must be used to further the purposes of the TCPA.
- An applicant must demonstrate its capacity to implement its proposed project.
- Each awardee must agree to certify to the court that the funds it received were used solely for the project described and the purposes stated in its application.

To distribute the notice, I scanned the nonprofits and government entities that were working in the field. I asked several relevant organizations with large email lists to distribute the notice broadly. I also consulted with the lead attorney for the plaintiff class and others working in the field and distributed the notice to organizations they recommended. The notice included the criteria, a link to the online application, and a clear application deadline.

Thirty-eight applications, requesting more than \$23 million total, were

received. They proposed activities including consumer education and counseling, research, violation prevention, enforcement, and advocacy related to the TCPA. They came from large and small organizations across the United States.

Of the 38 applications, 22 came from individual civil legal aid organizations spanning the country (more on them below). I scheduled clarifying conversations with each of the other 16 applicants in order to better understand their organizational experience, capacity, proposed projects, and priorities. As I was unfamiliar with most of these organizations, these conversations were critical to my ability to make good recommendations. In a few cases they resulted in revised project descriptions and/or budgets, though always with a limitation that no one could request a larger amount than it had requested before the deadline.

The order appointing me as special master enabled me to rely on class counsel for administrative and logistical assistance. The court also allowed me to communicate *ex parte* with counsel for any party, any potential *cy pres* recipient, and anyone else with helpful information, and with the clerk of court and the court for clarification or logistical assistance. These permissions were essential in enabling me to do the job effectively and efficiently.

MY RECOMMENDATIONS

Four months after being appointed, I filed recommendations to the court for awards to 12 organizations totaling just over \$11 million. These awards were for projects all over the country that provided benefits to the nationwide class and furthered the purposes of the TCPA through a host of approaches: enforcement by direct action and by training lawyers, prevention of illegal telephone calls and resulting consumer fraud through consumer education, TCPA advocacy before the Federal Communications Commission and the courts, and addressing emerging technology and telemarketing trends. A few examples are illustrative of the range of proposed organizations and services I recommended:

- **National Association of Attorneys General (NAAG)**, based on an application signed by 52 state and territorial attorneys general, to establish a revolving fund to pay the expenses necessary for the AGs to collaborate in pursuing multi-state litigation to enforce the TCPA. This project was developed in my conversations with NAAG to enable state AGs to use their statutory enforcement authority collaboratively.
- **National Legal Aid and Defender Association (NLADA)** to provide services and award mini-grants to civil legal aid organizations across the country. Many of the 22 legal aid organizations that applied for

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an award wanted funds to develop educational materials for their clients, translate them into Spanish and other languages, and provide training for their lawyers and other staff. These activities were more efficiently done centrally by NLADA, which would also administer a pass-through grant program for the local organizations and develop a peer learning network among them. After our discussions, NLADA submitted a revised application to enable it to assume this coordinating and supporting role.

- **Consumer Action**, an organization that supports 7,000 community-based organizations (CBOs) across the country. Most of these CBOs serve low- and moderate-income consumers who are especially vulnerable to telephone scammers. Consumer Action works with these CBOs, helping them provide effective consumer protection education to their clients. This award would allow Consumer Action to focus its attention on TCPA-prohibited telemarketing privacy invasions and abuses.
- **Columbia University Department of Computer Science** for technical research on how telephone companies can identify and prevent illegal calls before they reach consumers. Currently, telemarketers often use spoof caller IDs or rapidly cycle through phone numbers, making their calls difficult to block. The

Columbia researchers will help develop better technical methods for telephone service providers to identify and block illegal calls — without blocking legal and necessary robocalls from entities such as school systems or utility companies.

The process I was able to use as special master produced an array of recommended projects that were a cogent set aimed at preventing and providing redress for violations of the TCPA across the country. A complete list of my recommendations is available online.⁷

THE COURT'S FIRST DISTRIBUTION ORDER

The court found that the recommended projects were more targeted to the interests of the class than a federal escheat would be. It focused on the careful, impartial, and in-depth selection process and found that the proposed *cy pres* distribution to the recommended organizations would provide a reasonable certainty that the class members would benefit from their work, and ordered a distribution of the funds substantially in accordance with my recommendations.⁸

FURTHER PROCEEDINGS

Dish appealed the April 2021 order, and the court stayed the distribution of *cy pres* funds pending appeal.⁹ Plaintiffs moved to dismiss the appeal. When

the court of appeals had not ruled on that motion by spring 2023, the parties agreed to settle the matter, reverting a portion of the remaining funds to Dish, and distributing the remaining funds by *cy pres*. At that point, the court asked me to file a supplemental report recommending any necessary modifications to the initial distribution order to account for work completed using other available funds, changes in budgets, etc., which I did.¹⁰

By then it was clear that an additional \$6 million would remain unclaimed. So the court also asked that I make recommendations for the distribution of those funds. I did not widely distribute notice of the availability of this second round of funding. Instead, I notified recipients of the first round of funding and class counsel, inviting them to forward the notice to other organizations as appropriate. In response I received nine applications, seven from previous recipients and two from other organizations, totaling \$11.5 million. Again, I had clarifying conversations with the applicants, applied the criteria, and made a recommendation for the distribution of just under \$6 million to the seven previous recipients and one new applicant.¹¹ The court substantially accepted these recommendations.¹²

In total, over \$17 million was ordered to be distributed to benefit the class and further the purpose of the TCPA by providing consumer education and research for prevention of violations, building the capacity for enforce- ►

REFLECTIONS FROM THE JUDGE

The appointment of a special master was a real help in this case, and the process worked quite smoothly, thanks to the cooperation of the special master, the claim administrator, the clerk's office, and class counsel. The court was fortunate to have someone with extensive grantmaking experience who was willing to help. Ms. Winner's transparent process for identifying and evaluating proposed *cy pres* recipients was a good use of class funds and was inexpensive for the benefit it provided. Use of a special master might not be needed in every class action with undistributed funds, but when the amounts are large, as they were here, it was the best way to go."

— JUDGE CATHERINE EAGLES
U.S. DISTRICT COURT FOR THE MIDDLE
DISTRICT OF NORTH CAROLINA

ment, and enabling advocacy on behalf of telephone consumers.

TAKEAWAYS FROM THE PROCESS

I believe that using a special master to develop *cy pres* recommendations provided the best avenue for distributing funds to benefit class members and help prevent and redress future violations of the TCPA. The court did not have the time or internal resources to conduct what amounted to a nationwide grantmaking process,¹³ but the role was ideal for a special master, who was able to devote attention and expertise to the matter. The process was thorough, efficient, and fair, aided by networking with a variety of people in the field, a publicly available website, and an easily accessible, widely distributed application. This open process ensured the available funds could be deployed nationwide.

The process was made transparent by clear criteria based on the legal parameters articulated by the court, combined with other criteria based on my grantmaking experience. I stuck to these criteria in making my recommendations, and the court adopted those in all material aspects.

Because I could talk *ex parte* with applicants, I was able to suggest modifications to proposals to avoid redundancy and also compile a cogent set of proposals: a combination of building capacity for direct education and enforcement and providing

for high-level advocacy and research. Since the total amount requested in each round far exceeded the amount available, I was also able to talk with applicants about their priorities and which portions of the submitted projects would produce the most benefits.

The whole process was also cost-efficient. My total fee through the first-round recommendation was \$38,062, less than one-half of 1 percent of the initial distribution. Even considering my \$12,687 fee for the 2023 modifications and second-round recommendations, the total fee was \$50,749, less than one-third of 1 percent of the over \$17 million ultimately awarded. In addition, my work enabled Judge Eagles and her staff to spend their time on other important matters.

The case's claims administrator handled the creation of the website, the collection of electronic applications, the distribution of claims over multiple years and the archiving of certain documents, like budgets showing salaries and profit and loss statements, which are not properly a part of the public record. This additional capacity was important to enabling the *cy pres* process to function well.

To close out the process, the court needed to set a time limit by which all funds were required to be spent. How long was appropriate? One-year awards can force organizations to spend funds on activities that are not sustainable, while multiyear awards

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enable them to, for example, hire new staff with salary assured for two or three years. In this case, the court provided for awards for up to four years, set a five-year time limit for the expenditure of all funds, and provided for the distribution of any unspent funds.¹⁴

Finally, the court and fiscal responsibility required each *cy pres* recipient to certify that the distributed funds were used for their stated purpose.¹⁵ Unfortunately, there is no mechanism in place to assess the effectiveness of the funds' use. Ideally, for large awards such as this one, a post-expenditure assessment would determine which awards produced what kinds of benefits, and future special masters and courts would be able to learn from that. If these kinds of *cy pres* distributions become common, it would be beneficial to create the capacity to evaluate their effectiveness.

CONCLUSION

Every class action resulting in funds to be distributed to a large class will yield some funds that are not distributable or that go unclaimed. These funds should be distributed in a way that furthers the purposes of the case's underlying statute and in a way most likely to benefit the class members who did not receive their share. Using a *cy pres* approach is much more likely to accomplish these goals than is escheat to states or the federal government, which fails to further the purpose of the underlying act. And return of the funds to the offending defendant effectively rewards a bad actor.

Often in settlements, the parties identify charitable organizations they are familiar with to receive the funds. That approach is noble, but it does not necessarily further the purposes of the act and does not provide

a means of vetting the organizations suggested. A special master can devote the time necessary to develop an open, fair, efficient process that results in the best options to be presented to the court. I recommend more use of special masters for determining large *cy pres* distributions in a broad array of class actions, whether the undistributed funds result from a judgment or a settlement.



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is an attorney who served three terms in the North Carolina Senate. She practiced public interest law at every level of the state

and federal courts, served as vice president and general counsel of the University of North Carolina, and was the executive director of the Z. Smith Reynolds Foundation.

¹ Shay Dvoretzky et al., *The Evolving Telephone Consumer Protection Act Landscape Post-Dugiud*, SKADDEN INSIGHTS (Apr. 2022), <https://www.skadden.com/insights/publications/2022/04/quarterly-insights/the-evolving-telephone-consumer-protection-act>.

² See *Krakauer v. Dish Network, LLC*, No. 1:14-CV-333, 2020 WL 6292991 (M.D.N.C. Oct. 27, 2020) (appointing special master); see also *Krakauer v. Dish Network L.L.C.*, No. 1:14-CV-333, 2017 WL 2455095 (M.D.N.C. June 6, 2017) (reviewing case details and denying defendant's motion for a new trial).

³ *Krakauer*, 2020 WL 6292991 at *1.

⁴ *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643 (4th Cir. 2019).

⁵ *Id.*

⁶ Order, *Krakauer v. Dish Network, LLC*, No. 1:14-CV-333 (M.D.N.C. Nov. 6, 2020), ECF No. 594.

⁷ R. & R. of Special Master Leslie Winner Regard-

ing *Cy Pres* Distribution of Unclaimed J. Funds, Mar. 22, 2021, ECF No. 617.

⁸ Mem. Op. and Order, Apr. 29, 2021, ECF No. 620.

⁹ Mem. Op. and Order, May 21, 2021, ECF No. 628.

¹⁰ Order, Jul. 27, 2023, ECF No. 665.

¹¹ R. & R. of Special Master Regarding the *Cy Pres* Distribution of the Remaining Unclaimed J. Funds, Nov. 29, 2023, ECF No. 676.

¹² Mem. Op. and Order, Mar. 29, 2024, ECF No. 682.

¹³ Mem. Op. and Order, Oct. 27, 2020, ECF No. 590.

¹⁴ Mem. Op. and Order, Mar. 29, 2024, ECF No. 682.

¹⁵ *Id.*