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## PRACTICE TIP

### The Use of Cy Pres Funds in Class Action Litigation

**By Ronald J. Levine and Yael Weitz**

Any product liability litigator who prosecutes or defends class actions should be familiar with the concept of “cy pres” — which has been the subject of significant recent attention by the courts and commentators. Many practitioners may not be aware that, under the cy pres doctrine, millions of defendants’ dollars have been paid to charities throughout the country at the conclusion of class actions. Incorporating a cy pres distribution into the settlement of a product liability class action propels the product liability attorney into the unanticipated realm of philanthropy.

#### UNCLAIMED FUNDS

The purported benefit of the class action process is sometimes hindered by class members who are difficult to locate or who fail to submit a claim. In such cases, class action lawsuits and settlements may leave large sums of money unclaimed. As a result,

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judges and parties are often left with the task of deciding how the funds should be distributed. One common alternative, “cy pres,” involves the distribution of the remaining funds to a charitable cause that is often related in some way to the underlying purpose of the lawsuit.

Although Federal Rule of Civil Procedure 23, the federal rule governing class action procedures, does not directly address the issue of remedies, the federal courts have upheld the application of cy pres in some form. *See, e.g., In re Pet Food Products Liability Litigation*, 2010 WL 5127661 (3rd Cir. Dec. 16, 2010) (in an action arising from a pet food recall the remaining class action funds were to be donated to animal welfare-related organizations); *In re Tyson Foods, Inc.*, 2010 WL 1924012 (D. Md. May 11, 2010) (the court upheld the application of cy pres in an action brought alleging that promotional claims made by the defendant about its product were misleading). The state courts have applied cy pres as well. *See, e.g., Klein v. Robert’s American Gourmet Food, Inc.*, 28 A.D.3d 63 (2d Dep’t 2006) (in a class action initiated due to alleged misrepresentations regarding the caloric content of defendant distributor’s products, the court explained, “[i]n cases where it is difficult to lo-

cate class members or to distribute funds directly to them, a cy pres distribution may prove a useful complement to more traditional distribution formulas”); *Cal. v. Levi Strauss & Co.*, 715 P.2d 564 (Cal. 1986).

#### HOW CY PRES WORKS

The term “cy pres” derives from the Norman French expression “*cy pres comme possible*,” meaning “as near as possible.” This equitable doctrine has its origins in trust and estates law, and was originally developed as a judicial saving device that allowed the court to direct property to a charitable purpose where the donor’s original objective was impossible or illegal to effectuate. For example, in *Jackson v. Phillips*, 96 Mass. 539 (Mass. 1867), one of the earliest applications of cy pres by a United States court, the court utilized the doctrine to keep a trust from failing that had been created to aid in the abolishment of slavery. Because slavery had already come to an end by the time the trust came into effect, and therefore the purpose of the trust could not be effectuated, the court ordered the funds to be distributed in a way that would benefit African-Americans. The funds were used for a purpose that was “as near as possible” to the testator’s original intent.

Courts now apply the cy pres doctrine to cases outside the scope of trust and estates law and within the context of class action litigation. The use of cy pres provides courts with the option of donating the leftover funds instead of returning the funds to the defendant. Traditionally, courts simply allowed the funds to revert to the defendant, reasoning that if the plaintiffs did not come forward to claim their damages, there was nothing else for the defendants to do except reclaim the money that had been set aside for the class action.

## PRO AND CON

Advocates of cy pres criticized this approach, however, on the grounds that the deterrent effect of class action lawsuits was not being properly carried out. Furthermore, cy pres supporters feared that a reversion of the funds would create a windfall for defendants. Cy pres offered a more attractive solution to the unclaimed funds, since pursuant to the doctrine, defendants are still required to pay out the full settlement or damage award.

But critics of cy pres have considered the potential punitive effect of the doctrine. Judge Richard A. Posner, writing for the Seventh U.S. Circuit Court of Appeals, remarked that although “the reason for appealing to cy pres” in class actions is to “prevent the defendant from walking away from the litigation scot-free,” the charitable distribution of leftover funds may not provide an actual benefit to the class. *Mirfasibi v. Fleet Mortg. Corp.*, 356 F.3d 781 (7th Cir. 2004). Stated simply: Where the funds, which were intended to rectify a specific wrongful act, are redistributed using cy pres, those in-

dividuals who were allegedly affected by the defendant's acts receive no direct benefit. As a result, Judge Posner concluded that the cy pres remedy is “purely punitive.”

Proponents of cy pres, on the other hand, posit that although cy pres does not directly compensate missing class members, it does benefit members by providing the funds to the “next best” purpose. For example, in one federal court decision, the court explained that “[cy pres] benefits society as a whole [by achieving] justice for those who might not otherwise have access” to the charitable purpose to which the funds have been applied. *In re Folding Carton Antitrust Litigation*, 1991 WL 32867 (N.D. Ill. March 6, 1991), *aff'd* in part, 934 F.2d 323 (7th Cir. 1991). Courts may also choose to distribute the award to a number of charitable causes, rather than a single charity. In doing so, the chances of reaching people who are as close as possible to the actual class members may be increased.

## DISTRIBUTION PLANS

In *In re Motorsports Merchandise Antitrust Litigation*, 160 F.Supp.2d 1392 (N.D. Ga. 2001), the court approved a cy pres allocation of unclaimed settlement funds to nine different charities. The claimants in the case had brought the class action against vendors of merchandise sold at NASCAR races, alleging that the defendants had engaged in unlawful price fixing. At the conclusion of the action, over \$2 million remained in the settlement fund. The plaintiffs proposed that the funds be allocated pursuant to cy pres. The court approved the settlement terms and explained that it had ordered the

distribution of the unclaimed funds according to whether the charitable organizations “at least indirectly benefit[ed] the members of the class of NASCAR racing fans.” In this way, the court ensured that the funds would be donated to charitable organizations able to have an impact on the community to which the claimants belonged. Thus, the court adhered to the “next best” purpose of the doctrine.

Reversion of leftover funds to the defendant and cy pres are not the only distribution plans to which courts ascribe. As described in *In re Motorsports*, courts may also decide to “escheat the funds to a governmental body” in lieu of cy pres. See also *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990) (explaining that courts have distributed the funds using escheat “when it served the deterrence and enforcement goals of the substantive federal statute ... [and] where a cy pres award was inappropriate ...”). This alternative has been criticized, however, as going against one of the fundamental goals of class action litigation: compensating claimants for their harm. As stated by the California Supreme Court, to “compel the use of this method would be to cripple the ‘substantial compensatory function’ of the private class action.” *Cal. v. Levi Strauss & Co.*, 715 P.2d 564 (Cal. 1986).

Nonetheless, judges have broad discretion in determining how the funds should be allocated. Within the context of cy pres, this means that, while some judges distribute the funds to organizations that are related to the litigated claim — thereby ascribing to cy pres’ “next best” meaning — other judges award the leftover funds to organizations only tangentially related

or not at all. In one case decided in 2007, a judge approved a cy pres distribution that would provide \$5.1 million gift to an endowment fund at The George Washington University Law School. *Diamond Chemical Co., Inc. v. Akzo Nobel Chemicals B.V.*, 517 F. Supp. 2d 212 (D.D.C. 2007), motion granted by 2007 WL 2007447 (D.D.C. July 10, 2007). The action was brought on behalf of plaintiffs alleging that the defendants had conspired and carried out violations of the Sherman Antitrust Act. Although the funds would be directed toward research and the practice of antitrust law, decisions such as these approving such awards have been criticized by some as allowing a distribution with too tenuous a relation to the original injured class.

In the face of such criticisms, state legislation and court rules have been enacted in order to provide guidance on the disposition of cy pres awards. Indeed, some states have seen the benefit in using funds from class action settlements to serve the states' own purposes. Laws have been enacted requiring cy pres funds, for example, to go to legal aid societies.

Professional organizations also provide similar guidance, including the American Law Institute ("ALI") (which published the Principles of the Law of Aggregate Litigation). These recommendations offer practical advice to attorneys, parties and courts involved in class action litigation. For example, ALI suggests that if funds remain after the identified class members have received their portion, additional distributions should be made to the participating class members, unless the amounts involved are too small or where other reasons would make such distributions impossible

or unfair. ALI-AGGLIT § 3.07. Where further distributions are not viable, cy pres may then be utilized. But ALI cautions that cy pres distributions should "reasonably approximate" the interests pursued by the class; distributions to organizations with different interests are appropriate where related recipients are not readily identifiable. *Id.*

### ASKING THE CHARITIES

Another way for parties and courts to learn about which charitable foundations should receive the funds is from the charities themselves. Indeed, courts have been known to invite public interest organizations to file applications with the court, thereby providing the court with information on why that charity is the best fit for receiving the funds. For example, the Philadelphia Bar Foundation has received cy pres dollars and supports a network of public interest legal organizations. (See [www.philabarfoundation.org](http://www.philabarfoundation.org).)

Critics have expressed concerns that such petitioning of the courts may lead to unethical results or misconduct on the part of the parties. In order to avoid this, courts should review and approve the terms of the distribution. See, e.g., *Wilson v. Airborne, Inc.*, 2008 WL 3854963 (C.D. Cal. Aug 13, 2008).

To date, there is no one generally accepted or applied set of guidelines for cy pres awards. Nevertheless, cy pres has become a popular tool for distributing unclaimed class action funds. Indeed, individual members of the bar have gotten into the act in an effort to make sure that cy pres awards are used for a purpose "as near as possible." For example, in Ohio, lawyers have formed an ad hoc committee to encourage courts to contribute funds

to worthy causes, and to help courts determine which charities should receive them. (See [www.ohiolawyers-giveback.com](http://www.ohiolawyers-giveback.com).) With the support of an increasing number of organizations, judges and the parties are able to better provide cy pres distributions that are made in accordance with the goals of class actions, while providing indirect benefits to class members.

### CONCLUSION

Careful product liability practitioners who are involved in settling class actions must consider the cy pres issue when drafting the settlement agreement. In many cases, residual funds will remain after the settlement funds are distributed. Prudent attorneys will designate the non-profit funds in the agreement, or, at the very least, a procedure for designating the organizations, subject to court approval. For now, there is little guidance for the bar or the courts on how to distribute cy pres funds, and attorneys need to take the lead in determining the procedure for, and recipients of, cy pres distributions.