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Criticism of Cy Pres Settlements Goes Too Far

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What should be done with money paid into a class action settlement that can't be distributed to persons in the plaintiff class? The best option is a cy pres award distributing residual funds to legal services organizations to help ensure future plaintiffs can access the justice system. But this long-standing, common sense approach has recently come under attack in the Ninth Circuit and elsewhere.

The Ninth Circuit most recently addressed cy pres awards in *Lane v. Facebook*. The highly publicized settlement in *Lane* was controversial because it provided no distributions to the injured plaintiff class, but millions in plaintiffs' attorneys' fees and several million dollars in a cy pres award to a new foundation to be created and focused on privacy and identity protection issues.

The propriety of the *Lane* settlement was even questioned by Chief Justice John Roberts in a statement accompanying the denial of the petition for writ of certiorari. And in *Fraley v. Facebook*, the Ninth Circuit Court of Appeals will soon hear another appeal challenging the structure of a proposed class action settlement and the choice of cy pres recipients. Critics have pointed to such cases as evidence cy pres is a bad doctrine for class actions. The critics overstate the problem, and overlook obvious and practical solutions.

When class action lawsuits are resolved through settlement or judgment, it is not uncommon for excess funds to remain after a distribution to class members, typically due to the inability to locate class members or members failing to file claims or cash settlement checks. Such funds are also generated when it is economically infeasible to distribute funds to class members, like when individuals' recovery would be less than the cost of mailing the settlement checks. In such circumstances, courts have discretion to order a cy pres distribution of the settlement funds or undistributed residue.

The term cy pres derives from the Norman French phrase "cy pres comme possible," meaning "as near as possible." Class action courts have borrowed the cy pres doctrine from trusts and estates law, where it originated as a way to amend the terms of a charitable trust when the original objectives of the person creating the trust were impossible, impracticable or illegal to perform.

Current Criticism

Since the cy pres doctrine was first introduced into class action litigation in the 1970s, federal courts have approved cy pres awards in thousands of class action cases. Despite this precedent, cy pres awards in class actions have recently attracted multi-faceted attacks ranging from constitutional challenges and ethical concerns to criticism of cy pres awards to particular recipients.

Indeed, a few law professors have generated a wave of articles arguing cy pres awards are unconstitutional or violate federal statutes or court rules—arguments not accepted by the courts. Critics point again and again to the few cases in which district court judges allegedly abused the doctrine as proof cy pres awards invite corruption into the judicial process and should be avoided in all class actions. This discourse drastically overstates the problem.

It is no surprise some awards have been reversed on appeal. But such reversals are the result of generally dubious settlements or awards misapplying the doctrine within the particular circumstances of the case. These few cases do not reflect a general problem with cy pres awards. Federal courts have remained firm that the cy pres doctrine, when used properly, is valid in class action litigation.

The key to avoiding problems is not to discourage cy pres awards, but to follow a few best practices from court decisions throughout the country.

First, courts should generally require class members be compensated first where feasible and, if excess funds remain after an initial distribution, such funds should be redistributed to other class members—even those in different subclasses. Second, if the maximum recovery or any excess funds are so small an initial or further class member distribution is not feasible, courts should use their discretion to order a cy pres distribution. Third, the cy pres recipient should reasonably approximate the interests of the class; should not be an organization in which counsel, the judge or a party has some interest; should ideally be selected by the parties, rather than the judge; and should reflect the geographic make-up of the class. In a national class action at least a portion of the cy pres award should be to national organizations.

Appropriate Recipients

A trend has recently developed, particularly in the Ninth Circuit, toward limiting cy pres awards to the specific subject matter of the class action. For example, in a class action regarding fraudulent utility bills, the Ninth Circuit might require the cy pres award go to a utilities users' advocacy group. That approach is so narrow as to be impracticable; after all, how many effective nonprofit utilities users' advocacy groups exist in the United States? As a practical matter, limiting the awards to groups matched to the claims in the lawsuit may diminish a defendant's enthusiasm to settle, because such an award may appear to be admitting liability and would provide funds to an organization that will target the defendant in the future.

The best way to address the Ninth Circuit's and Chief Justice Roberts' concerns and avoid random cy pres awards to unrelated organizations or targeted awards that diminish the desire to settle is to direct cy pres awards to legal services organizations. Federal and state courts have long recognized organizations that provide access to justice for disadvantaged people as appropriate cy pres recipients.

At least 15 states have adopted statutes or court rules which require part of any excess funds in all class action settlements be directed to legal services organizations. Such awards are based on one of the common underlying premises for all class actions: to make access to justice a reality for people who otherwise would not be able to obtain the protections of the justice system.

An interest of every class member in any class action is access to justice for a group of litigants who, on their own, would not realistically be able to seek recovery, either because it would be too inefficient to adjudicate each individual's claim separately or because it would be cost prohibitive for each individual to pursue separate claims. In this context, the class action provides access to justice, just as legal services groups do in a broader setting.

The cy pres doctrine is a well-recognized device and a necessary tool for parties who need to resolve complex disputes. Cy pres awards should not be abandoned or significantly limited. Instead, judges should follow the best practices described above and should recognize it is appropriate to approve cy pres awards to legal services organizations.

The Recorder *welcomes submissions to Viewpoint*. Contact James Cronin at jcronin@alm.com.

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