



# BAR JOURNAL

OF THE CLEVELAND METROPOLITAN BAR ASSOCIATION

VOL. 1 NO. 9 | DECEMBER 2008

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# Creative Philanthropy for Attorneys

## Using the *cy pres* doctrine for charitable purposes

by Melanie Shakarian

**LAST NOVEMBER,** an article in *The New York Times* prompted consternation among certain circles in the legal profession. Adam Liptak's "Doling Out Other People's Money" called attention to the law of charitable trusts, specifically the doctrine of *cy pres*. Liptak's article suggested abuses of judicial power regarding *cy pres*, and did little to highlight the positive aspects of the ancient legal doctrine's modern-day applications. Here, we'll examine the roots of the *cy pres* doctrine, its evolution and how *cy pres* can be an instrument of justice and community development tool for Northeast Ohio attorneys and judges.

### What is "cy pres"?

*Cy pres* is from the French term "*cy pres comme possible*," or "as near as possible." It is a term used in the law of charitable trusts. For instance, if a charity that was specified in a will no longer exists, the law can allow the estate's money to be used for a similar cause under the *cy pres* doctrine. In class action lawsuit, if there is to be a payment of damages to class members, a fund is created. After class members' claims are paid, there is often an amount remaining. In the context of class action litigation, *cy pres* is a court approved method of distributing a damage fund when the original purpose cannot be achieved. Judges and class counsel can recommend that residual funds be distributed to the "next best" use.

It is also common for the *cy pres* remedy to be used for the entirety of the statutory damage award when the amount of damages to each class member is too small to warrant distribution. Or, the parties may agree that a case should be settled through payment to a representative third party (i.e., a charity).

Ohio Rules of Civil Procedure and Ohio Law do not codify the uses of *cy pres* funds from class action lawsuits, but there is precedent for and examples of *cy pres* distributions in Ohio. Recently,

the largest *cy pres* distribution in U.S. history was granted through a Northeast Ohio court: a \$52 million class action settlement provided \$14 million in *cy pres* funding for various charities. (see photo and sidebar: "Largest *Cy Pres* Award in US History")

### Evolution of *cy pres*

*Cy pres* has evolved rapidly in the context of class action lawsuits (also known as the "fluid recovery doctrine"). The courts have broadened their discretionary powers beyond the narrow limits of a "next best use" notion. Today, courts allow distribution of *cy pres* funds for a wide variety of charitable or justice-related causes. *Cy pres* is also been expanded and used in the context of injunctive relief or punitive damages.

For leftover funds in a class action lawsuit, there are four choices a judge can make with the remaining funds:

- extra money is given back to defendants
- extra money goes to the government
- those who had claims who were located could receive a bit extra
- leftover funds could be designated to charitable programs that would indirectly help the entire class

### Cy Pres: Instrument of Justice

Liptak's *New York Times* article questioned the actions of Judge Harold Baer Jr., who oversaw \$6 million of unclaimed funds from a settlement of an antitrust class action lawsuit. *Masters v. Wilhelmina Model Agency, Inc.* involved thousands of fashion models. The settlement of \$22 million was from modeling agencies that allegedly violated laws against price fixing by adopting uniform commissions. According to court document, fewer than five percent of class members eligible for settlement moneys submitted claims. Judge Baer had to make a decision: should be funds be given back to the defendant, the government, the five percent of the class that

filed claims or charity? Judge Baer elected the charity option, and focused the funds on charities familiar to the modeling world (eating disorders, substance abuse, etc.)

Liptak and others can have a good chuckle at Baer's "next best use" – but as a legal community, we need to focus on the importance of this gesture to the preservation of justice.

Broad discretion as to the distribution of *cy pres* funds have significant societal benefits. Most importantly, the deterrence goals of the law are met. Additionally, through the court, the defendant should not be unjustly enriched, and the defendant should be required to pay the entire liability regardless of the number of class members who are located.

Therefore, with leftover funds designated to charitable programs, there is a societal benefit which develops for those class member who were entitled to the money which constitutes the residual fund, even though they could not be located.

The Supreme Court of California in *State v. Levi Strauss & Co.*, 715 P.2d 564 (Cal. 1986), discussed the *cy pres* doctrine as a means to distribute litigation benefits to a class. As to residual funds, the court suggested that the best method of distribution would be to establish a consumer trust fund "which would engage in consumer protection projects, including research and litigation." This method would put the funds to their "next best" use by providing indirect benefits to silent class members while promoting the statute under which the suit was brought. The court did recognize, however, that establishing and administering such a trust fund would be costly and that some courts avoided these costs by distributing residual money to established private organizations.<sup>1</sup>

The *Levi Strauss* Court recognize the important policy concerns favoring the use of *cy pres*:

Fluid recovery may be essential to ensure that the politics of disgorgement or deterrence are realized. [citation omitted.] Without fluid recovery, defendants may be permitted to retain ill-gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.

The *Levi Strauss* holding was later codified, and expanded in California Code of Civil Procedure.<sup>2</sup>

Since *Levi Strauss*, millions of dollars have been distributed to charitable programs through *cy pres* distributions. Additionally, some states have adopted legislation directing *cy pres* awards to be distributed to indigent criminal and civil legal services.<sup>3</sup>

### Cy Pres in Northeast Ohio

The Legal Aid Society of Cleveland has benefited from some significant *cy pres* awards, and works continually to educate the bench and bar about the impact these awards have on the community.

*Cy pres* funds directed to Legal Aid or other justice-related programs in Northeast Ohio support the unknown victims of the class action litigation and supports programming which benefits Legal Aid's larger client-base. Legal Aid's clients are low-income individuals. Low-income people are often victims of unfair, deceptive, discriminatory or predatory consumer practices. Legal Aid protects the elderly, immigrants, the working poor and other vulnerable populations against fraud and abuse. Legal Aid advises low-income people about their rights and responsibilities as consumers, and promotes fair banking and credit practices as well as investment in disadvantaged communities.

*Cy pres* distributions to Legal Aid highlight justice issues and the benefit to the community is lasting. Over the next few months, Legal Aid will be doing more community education and outreach about *cy pres* models, charitable causes benefiting from *cy pres*, and how *cy pres* helps the community.

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<sup>1</sup>Forde, "What Can a Court Do with Leftover Class Action Fund? Almost Anything!" *The Judges' Journal*, vol. 35, no. 3 (Summer 1996).

<sup>2</sup>Seligman, Brad and Jocelyn Larkin. "Fluid Recovery and *Cy Pres*: A Funding Source for Legal Services." *The Impact Fund*, 2000.

<sup>3</sup>For example, the North Carolina General Assembly adopted legislation in 2005. Illinois passed legislation in 2007.

## Largest Cy Pres Award in US History

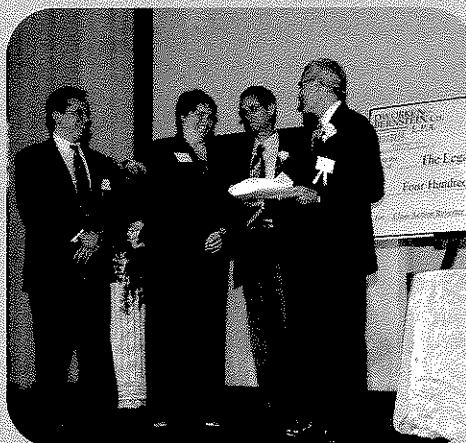
This summer, Legal Aid received an unexpected and extremely generous *cy pres* award, through a case handled by Dworken & Bernstein. The award was from a class action settlement with Grange Mutual Insurance Company. In this case, \$14 million of the \$51 million award went to charities. Legal Aid was one of 34 selected charities which received gifts ranging from \$221,500 to more than \$440,000.

Dworken & Bernstein partner Patrick Perotti explains: "Deciding who will receive *cy pres* is challenging, but knowing the work done by Legal Aid made the decision easy. It is probably no surprise that the highest percentage of persons victimized by abuse, fraud, mistreatment, and discrimination are the poor, uneducated and elderly. The court system exists to prevent these things, but people in these groups cannot afford to retain an attorney to access the court system. The problems these individuals face, left unresolved, can result in loss of housing, continued violence, and safety. Serving thousands of people, Legal Aid lawyers and volunteers fight domestic violence, consumer fraud, protect the rights of children and the elderly, and provide access to justice, regardless of the ability to pay. With this track record, Legal Aid is a logical choice for a *cy pres* award."

Executive Director Colleen Cotter and Board President Edward Icove accepted the check at a July 18th luncheon hosted by Dworken & Bernstein at Cleveland's Renaissance Hotel.

"This gift was totally unanticipated and we are very grateful," said Ms. Cotter. "This donation not only helps support the work of Legal Aid, but is a very meaningful confirmation that the parties, counsel and court involved in this suit recognize that we all have responsibility to ensure that people have access to justice."

Dworken & Bernstein will continue to use their initiative, Ohio Lawyers Give Back, to promote the use of *cy pres* in class action settlements. For details on the program and to watch a video about the gift to Legal Aid, visit: [www.ohiolawyersgiveback.org](http://www.ohiolawyersgiveback.org).



Edward Icove, Esq. and Colleen Cotter, Esq. (Legal Aid) accept the *cy pres* award from Howard Rabb, Esq. and Patrick Perotti, Esq. (Dworken & Bernstein).