

**“CY PRES” AWARDS:
IS THE END NEAR FOR A LEGAL REMEDY
WITH NO BASIS IN LAW?**

by
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INTRODUCTION

Substantive law does not vest the United States judiciary with the power to take money away from injured litigants and give it to bystanders. Nevertheless, courts routinely do exactly this when fashioning so-called cy pres remedies. “Cy pres” is a French term that roughly translates to “as near as possible.” Courts employ cy pres remedies in the settlement context when—even with no opposition—class counsel cannot or will not identify the class members to whom “damages” are owed. Cy pres thus exists almost solely in litigation situations where the plaintiffs could never have proven who was actually injured, and by how much, by whatever the defendant allegedly did. In such cases, courts often assert control over missing class members’ shares of settlements, seizing these funds and awarding them to third parties—mostly charities—that were not damaged by the defendants and therefore have no legal right to any recovery.

But the era of such judicial overreach may be drawing to a close. The United States Supreme Court has recently taken interest in whether cy pres awards have any

legal basis. In *Marek v. Lane*,¹ the Court denied *certiorari* in an appeal from the particular features of a cy pres award in a class action settlement. Concurring in that result, Chief Justice Roberts wrote separately to alert the bench and bar that the Court might well have been interested in that case, had the objectors to the settlement challenged the validity *vel non* of cy pres remedies, rather than the case-specific attributes of a single award:

Granting review of this case might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a cy pres remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on. This Court has not previously addressed any of these issues.²

An opening thus exists for possibly ending cy pres as courts now use it, thereby holding class action plaintiffs to their burden of proving causation and damages. As explained below, the proliferation of cy pres and its recent use by judges make this practice ripe for review of the “fundamental concerns” to which Chief Justice Roberts alluded.

I. BACKGROUND: THE EVOLUTION OF CY PRES

Cy pres (in full: “cy pres comme possible”) originated as a solution for testamentary bequests that could not be completed because of changed

¹ 134 S. Ct. 8 (2013).

² *Id.* at 9 (statement of Roberts, C.J. concurring).

circumstances; for example, a bequest to a charity that no longer existed. The concept was exported to the class action field in the 1970s, after being proposed in a 1972 law review student comment.³ Cy pres has since become a mechanism for pursuing class action litigation on behalf of purported classes whose remotely situated members either cannot possibly be identified or whose identification would be more expensive than any potential recovery would warrant.⁴

The cy pres mechanism has been invoked in federal court class actions with increasing frequency.⁵ In these situations, the court-awarded funds are donated to one or more charities supposedly relevant in some way to the basis of the lawsuit. In certain instances, the relief is given in the form of what is known as “fluid class recovery,” where compensation is made in the form of either future reductions in costs or the provision of future benefits to those similarly situated to the allegedly injured victims. Both cy pres and fluid class recovery are linked by the fact that relief is given to individuals or institutions other than those who were supposedly injured by the unlawful conduct with which the defendants were charged. Because class counsel are currently compensated solely on the basis of the total amount awarded or agreed upon in settlement, they have no incentive to insure that funds go to

³ Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972).

⁴ See generally, Martin H. Redish, et al., *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative & Empirical Analysis*, 62 FLA. L. REV. 617 (2010).

⁵ *Id.* at 620 (documenting the “dramatic turn in modern class actions toward the use of cy pres relief”).

persons actually injured. Indeed, giving settlement dollars to charity means less work for them. Thus, increasingly, class action settlements are diverted to recipients who were never injured by the defendants' claimed behavior.

Cy pres and fluid class recovery are controversial doctrines in the class action context.⁶ No jurisdiction generally, and few if any statutes, substantively authorize distributions to non-class-members in class action proceedings. "Rule 23(e) does not mention the district court's discretion—or even its authority—to extinguish the right of recovery of identified class members through a later cy pres order."⁷ Courts resorting to cy pres either assert vague "equitable" judicial powers or resort to the tautology that cy pres powers exist because the settling parties created them by contract, even though disadvantaged class members were not party to the negotiations that transferred their property to others. As an unauthorized extension of judicial power, cy pres raises significant legal and constitutional concerns.

II. LEGAL AND CONSTITUTIONAL CONCERNS

A. The "Case or Controversy" Requirement of Article III of the Constitution

By compensating entities that have suffered no legally cognizable injury, cy pres distributions raise significant constitutional questions regarding Article III's case-or-controversy requirement. The potential availability of a cy pres award invites

⁶ See concurring opinion of Chief Judge Jones in *Klier v. Atochem North America, Inc.*, 658 F.3d 468, 480 (5th Cir. 2011).

⁷ *All Plaintiffs v. All Defendants*, 645 F.3d 329, 333-34 (5th Cir. 2011).

certification of class action settlements where from the outset everyone recognizes that the supposed class members are so remotely situated that meaningful relief for them will be impossible even if the action is successful. Absent cy pres, these actions would not be viable because, even assuming liability, proof of causation and damages is impossible. Whenever a court resorts to “fluid recovery” or cy pres, it is a tacit admission that the suit, in class form, is incapable of achieving its goal of compensating actually injured victims.

Similarly, resort to cy pres indicates that a damages class cannot be certified. For class actions seeking damages, common issues must “predominate” over case-specific ones, but cy pres is employed where it is impossible or too expensive to prove causation and damages as to the absent class members. By definition, these issues cannot be proven on a class-wide basis with the class representative’s proof serving as proof for the rest of the class. In these circumstances, due to the impossibility or expense, individualized causation and damages issues necessarily predominate and preclude class certification.⁸ Cy pres has thus become a method for glossing over Rule 23’s requirements, and thus facilitating attenuated class action litigation that the Rule otherwise prohibits. Courts violate the Rules Enabling Act when they award damages to non-class-members by relaxing the restrictions of substantive law.⁹

⁸ See *Comcast v. Behrend*, 133 S. Ct. 1426 (2013).

⁹ 28 U.S.C. § 2072. See Redish, *supra* note 4, at 664-67 (discussing substantive effects of cy pres on the underlying law).

B. Separation of Powers

Because cy pres distributes class action funds to entities other than members of the class, it is an exercise of undue judicial power without any check or balance from the other co-equal branches of government. Our tripartite system of government charges the legislative branch with enacting laws and the executive branch with enforcing them. Rare is the statute that permits a private entity to be liable to another private entity in the absence of injury and causation. The government can impose civil or criminal fines for illegal conduct, but such fines ordinarily are owed to the government itself. Courts have no statutory authorization to redistribute money among private entities without proof of causation and damages. Cy pres encourages courts to disregard the boundaries inherent in our system of checks and balances and allows judges to allocate private parties' funds in a vacuum devoid of judicial standards. The result transforms judges into what Justice Cardozo once called "knights errant," attempting to use litigation to solve societal problems that neither the legislature nor the executive branch has seen fit to address.¹⁰

C. Cy Pres Creates a "Back Door" to Punitive Damages

Most civil litigation is based upon the notion of compensation for injury suffered. Some statutory claims add a legislatively authorized punitive element, such as treble damages, but these remedies require actual damages for multiplication.

¹⁰ See BENJAMIN N. CARDOZO, NATURE OF THE JUDICIAL PROCESS, 141 (1921).

Thus, even punitive statutory remedies place the burden on a plaintiff to prove some actual harm caused by the defendant. Cy pres awards, by contrast, constitute punishment rather than compensation.¹¹ They involve a judicial determination that the defendant allegedly violated the law and should not be allowed to profit from that wrongdoing. In the absence of statutory authorization, imposing punishment for private wrongs is not a proper power of the judicial branch. Punishment is a creature of the criminal or administrative law, and such fines are paid to the government, not to uninjured private entities.

In civil litigation, a plaintiff cannot receive a punitive damages award without meeting strict standards of proof. Such awards are also constrained, both constitutionally and as a matter of substantive law, by the requirement that they bear a numerical relationship to compensatory damages. Cy pres awards circumvent these requirements by imposing what can only be categorized as punishment in favor of non-party recipients who, by definition, were not injured.

D. Cy Pres Awards Risk Conflicts Of Interest

Cy pres awards create the potential for conflicts of interest between class counsel and inaccessible class members.¹² Funds awarded as cy pres remedies have

¹¹ *E.g., In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (excusing cy pres on the basis of “deterrent effect”); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (“There is no indirect benefit to the class from the defendant’s giving the money to someone else. In such a case the “cy pres” remedy . . . is purely punitive”).

¹² *Baby Prods.*, 708 F.3d at 173 (“inclusion of a cy pres distribution may increase a settlement fund, and with it attorneys’ fees, without increasing the direct benefit to the class”); *Id.* at 179 (“class counsel, and not their client, may be the foremost beneficiaries of the settlement”).

been included, just like money in the pockets of class members, in the “common fund” from which counsel’s fees are calculated.¹³ In many class actions, identification of absent class members with tenuous ties to the litigation is possible but is expensive. In such cases, a cy pres remedy creates financial incentives for class counsel to avoid the expense of proving causation and damages by asserting that such proof is too difficult, or to erect barriers to class members’ participation in settlement programs. The victims are injured members of the class deprived of damages they are entitled to collect,¹⁴ so cy pres necessarily creates conflicts with class counsel’s obligation to provide legal representation to the entire class.

Potential conflicts also loom in the selection of cy pres award recipients. Courts have generally required that non-class-member recipients have some logical nexus to the subject matter of the litigation, but the only current avenue for enforcing this limitation is the uncertain course of appellate review. There are no mandatory conflict-of-interest provisions concerning the selection of cy pres recipients, and nothing in Rule 23 governs cy pres distributions. This lack of institutional oversight invites questionable conduct by encouraging lawyers to find charities of special interest to themselves or to the judge presiding over the class

¹³ *Mirfasihi*, 356 F.3d at 785 (cy pres settlement to avoid litigation expense and gain a fee “sold [the class] claimants down the river”).

¹⁴ *Baby Prods.*, 708 F.3d at 169-70 (14% of settlement funds to be paid to actual class members); *Dennis v. Kellogg Co.*, 697 F.3d 858, 863 (9th Cir. 2012) (8% of settlement to be paid to actual class members); *Mirfasihi*, 356 F.3d at 783-84 (none of settlement funds paid to members of one class).

action proceeding,¹⁵ using cy pres awards as a form of patronage.

Finally, some court decisions permitting cy pres payments have allowed, or even required, such payments to be made to organizations that encourage additional litigation, that pursue “research” intended for use in future litigation, or, even, for political advocacy purposes.¹⁶ The class action mechanism should not be used to fund the litigation industry.

III. RECENT TRENDS

A. Recent District Court Decisions

In the district courts, abusive use of cy pres, either by giving money to general legal organizations with no relationship to the class or by giving money to organizations to support additional litigation, continues to increase.¹⁷

¹⁵ See *Kentucky Bar Ass’n v. Chesley*, 393 S.W.3d 584, 598 (Ky. 2013) (disbarring attorney in part for diverting class settlement funds to phony cy pres charity controlled by attorney); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011) (cy pres distribution to Federal Judicial Center Foundation reversed as unrelated to litigation); cf. *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36 (1st Cir. 2009) (allowing cy pres distribution despite class counsel sitting on the board of the recipient charity).

¹⁶ See *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 186 (2d Cir. 1987) (reversing cy pres arrangement that would have allowed use of cy pres funds for “political advocacy”); *Jones v. Nat’l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (donating cy pres funds to legal aid to “help[] those needing legal assistance”); *In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1198 (N.D. Cal. 1998) (distributing cy pres funds to a “clearinghouse” for publicizing securities litigation).

¹⁷ See, e.g., *Vandervort v. Balboa Capital Corp.*, ___ F. Supp. 2d ___, 2014 WL 1274049, at *4 (C.D. Cal. Mar. 27, 2014) (cy pres award to Public Citizen for litigating similar lawsuits); *McDaniels v. Westlake Services, LLC*, 2014 WL 556288, at *11-12 (D. Md. Feb. 7, 2014) (entire unknown amount of settlement residue awarded to Legal Aid); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 456 (E.D. Cal. 2013) (cy pres award to completely extraneous charity); *Zimmerman v. Portfolio Recovery Associates, LLC*, 2013 WL 6508813, at *5 (S.D.N.Y. Dec. 12, 2013) (in single-state class action, giving cy pres award, over defendant’s objection, to national organizations dedicated to fomenting similar litigation); *Weeks v. Kellogg Co.*, 2013 WL 6531177, at *20 (C.D. Cal. Nov. 23, 2013) (giving cy pres award to Public Justice litigation group); *Boring v. Bed Bath & Beyond of California LLC*, 2013 WL 6145706, at *7 (N.D. Cal. Nov. 21, 2013) (cy pres award to general legal services group);

One court recently rejected the argument that cy pres was justified because it facilitated settlements that were otherwise elusive. In *In re Hydroxycut Marketing & Sales Practices Litigation*,¹⁸ the court found use of cy pres abusive because so little of the settlement was going to a disadvantaged subclass. The court noted that it “doubt[ed] that causing a benefit in the form of facilitating settlement in this action or the separate personal injury actions is the type of “indirect benefit” that cy pres remedies [were] meant to provide.” However another court adopted the same bootstrap rationale.¹⁹

In *Better v. YRC Worldwide Inc.*,²⁰ lack of appropriate procedures governing what the court concluded was an ill-thought-out cy pres settlement led to its rejection. The court explained:

Here, the proposed settlement provides no information regarding the proposed cy pres recipient. It provides only that lead plaintiffs will choose the beneficiary subject to Court approval. When the selection of cy pres beneficiaries is not tethered to the nature of the lawsuit and the interests of absent class members, the selection process may answer to the whims and self-interests of the parties, counsel or the Court. By not identifying the proposed cy pres recipient, the parties have restricted the Court’s ability to conduct the searching inquiry

Klewinowski v. MFP, Inc., 2013 WL 5653402, at *2-3 (M.D. Fla. Oct. 15, 2013) (entire settlement awarded to local legal services organization with no connection to the subject matter of the suit); *Decohen v. Abbasi, LLC*, 2014 WL 1603735, at *3-4 (D. Md. Apr. 17, 2014) (cy pres awards to two litigation groups); *Hull v. Owen County State Bank*, 2014 WL 1328142, at *1 (Mag. S.D. Ind. March 31, 2014) (cy pres awards to one litigation group and one completely extraneous charity).

¹⁸ 2013 WL 6086933, at *3 (S.D. Cal. Nov. 19, 2013).

¹⁹ See *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 946 (N.D. Cal. 2013) (“it is evident that absent availability of a cy pres component, it simply might not have been feasible to settle this action, a result which plainly would conflict with the strong policy favoring settlements”).

²⁰ 2013 WL 4482922 (D. Kan. Aug. 19, 2013).

required to approve such a distribution. In addition, the failure to designate a proposed cy pres recipient deprives class members of notice and the ability to object.²¹

In footnote 2 of its opinion, the *Better* court notes, but does not address, the controversy over whether cy pres is ever appropriate.

B. Recent Appellate Decisions: Reasons for Optimism

Recent appellate opinions foster the hope that the cy pres era may draw to a close soon. In *Holtzman v. Turza*,²² the U.S. Court of Appeals for the Seventh Circuit rejected a judge's unilateral decision (without consent of the parties) to seize the residue of a settlement and give it to Legal Aid as "cy pres." The court held:

[Defendant] did not agree to give up his interest in money unclaimed by class members. The stakes . . . are large enough to make a second round of distribution feasible. And the Legal Assistance Foundation of Metropolitan Chicago does not directly or indirectly benefit [class members]. The Foundation is a worthy organization, but many courts have expressed skepticism about using the residue of class actions to make contributions to judges' favorite charities.²³

Within the past month, Judge Richard Posner, also of the Seventh Circuit, condemned the inclusion of sums not actually received by members of the class in order to inflate the denominator used in the calculation of attorneys' fees. While not strictly a cy pres decision, the opinion in *Redman v. RadioShack Corp.*,²⁴ applies with equal force to the inclusion of cy pres awards in the "lodestar" for calculation of

²¹ *Better*, 2013 WL 4482922 at *10.

²² 728 F.3d 682 (7th Cir. 2013).

²³ *Id.* at 689.

²⁴ ___ F.3d ___, 2014 WL 4654477 (7th Cir. Sept. 19, 2014).

counsel fees, since such awards likewise are not received by the class. The *Redman* settlement included coupons. Refusing to credit the full face value of coupons distributed to class members, the court reasoned:

[W]hile we don't know how much \$830,000 of coupons would be worth to the class, we can be confident that it would be less than that nominal amount, doubtless considerably so. And we note that were the value only \$500,000—and it may indeed be no greater—the agreed-upon attorneys' fee award would be the equivalent of a 67 percent contingency fee.

Id., 2014 WL 4654477 at *7. Nor could the settlement inflate the fee request denominator by including “administrative costs.” *Id.* at *5. Such costs were not properly considered for the same reason—administrative costs did represent any “value received” by the class:

[T]he roughly \$2.2 million in administrative costs should not have been included in calculating the division of the spoils between class counsel and class members. Those costs are part of the settlement but not part of the value received from the settlement by the members of the class. The costs therefore shed no light on the fairness of the division of the settlement pie between class counsel and class members.

Id. As with *cy pres*, treating “every penny” of administrative costs as “value” to the class was “perverse,” and created improper incentives. “[It] eliminated the incentive of class counsel to economize on that expense—and indeed may have created a perverse incentive; for higher administrative expenses make class counsel’s proposed fee appear smaller in relation to the total settlement than if those costs were lower.”

Id. As discussed above, *cy pres* awards have been criticized for creating identical incentives.

Judge Posner concluded that the only sums properly included in the denominator for purposes of determining the reasonableness of a class action fee request are “benefit to the class,” meaning “what the class members received”:

The ratio that is relevant to assessing the reasonableness of the attorneys’ fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received. At most they received \$830,000. That translates into a ratio of attorneys’ fees to the sum of those fees plus the face value of the coupons computed in a responsible fashion by substituting actual for face value, the ratio would have been even higher because 83,000 \$10 coupons are not worth \$830,000 to the recipients.²⁵

Under the reasoning in *Redman*, cy pres awards are *per se* improper, at least to the extent that their value is included in the denominator of a fee calculation.

As discussed above, Chief Justice Roberts has alluded to the United States Supreme Court’s “fundamental concerns” about cy pres, and has signaled the Court’s receptiveness to an appeal that allows it to confront these concerns.²⁶ Despite criticism, the practice of giving settlement funds to non-class-members continues to be widespread. Perhaps, on the horizon, the practice of cy pres—unauthorized by rule or statute and often representing unfettered abuse of judicial authority—will meet its end, either directly or else by removal of the “perverse” incentives that today encourage it.²⁷

²⁵ *Id.*

²⁶ *Marek v. Lane*, 134 S. Ct. 8 (2013).

²⁷ The Advisory Committee on Civil Rules of the Judicial Conference of the United States has stated its intent to re-examine Fed. R. Civ. P. 23, beginning in 2015. To that end proposals have been submitted that would abolish, or significantly restrict, the availability of cy pres as an allowable remedy in class action settlements. One such proposal would, as Judge Posner held in *Redman*,

CONCLUSION

When used in class actions—the litigation context in which it is almost exclusively seen today—instead of meaning “as near as possible,” “cy pres” should translate to “this action should never have been brought.” Such awards are included in class action settlements because they are expedient. They do not require class counsel to invest the time and expense necessary to identify the class members who should benefit from the settlement; nevertheless, they do not reduce (and may well increase) the size of these attorneys’ fees. If not prohibited in their entirety, cy pres awards should be limited to those expressly permitted by statute. Class action settlements belong, if they should be awarded at all, to class members, and it is class members, not unrelated third parties, who should receive them.

preclude consideration of cy pres sums in the calculation of counsel fees. *See* 2014 Civil Rules Suggestions, No. 14-CV-F (Aug. 9, 2014 submission of Lawyers for Civil Justice).