The Cy Pres Doctrine: “A Settling Concept”

By Calvin C. Fayard, Jr. and Charles S. McCowan, Jr.

Following a class-action or mass-joinder settlement, certain funds often cannot be distributed to individual class members. For instance:

► class members do not come forward to file the necessary proof of claim to qualify for an allocation and distribution;
► the allowed claims do not equal the available settlement funds, reserves or allocations for class costs, and expenses are not exhausted;
► distributions of monies to individual class members have been found impracticable because the amounts owed to each individual plaintiff are exceedingly small; and/or
► calculation of the amount due each individual would be excessively difficult and costly.

In such situations, many Louisiana state and federal courts have employed the “Cy Pres Doctrine,” an equitable remedy intended to put the residual funds to a worthy purpose in accordance with their availability.

In December 2010, the Louisiana Bar Foundation (LBF) received a $38,600 cy pres distribution from a class settlement in the “In Re: Vulcan Litigation April 2001 incidents” lawsuit. From left, Bradley C. Myers, with Kean, Miller, Hawthorne, D’Armond, McCowan & Jarman, L.L.P., representing Vulcan Materials Company; Philip Bohrer, with Bohrer Law Firm, representing the plaintiffs; Mathile W. Abramson, LBF vice president; and Andrew P. Sellers, Jr., with Powers, Sellers, Mixon & Chapoton, L.L.P., representing Industrial Coating Contractors, Inc.
In 1985, Judge Gordon E. Causey (now deceased) was innovative in his use of the concept as a basis to foster the settlement in the Livingston train derailment class action. As part of the settlement, $1 million was allocated to the Environmental Division of the Louisiana Attorney General’s Office, and several millions more, plus residual and unclaimed funds, were allocated to the Livingston Intergovernmental Commission to provide environmental monitoring at the site of the derailment and to construct a facility to provide medical services and annual physical examinations for affected class members. These programs have subsequently been supplemented by other cy pres awards and are still in existence and functioning today.

Judge Eldon E. Fallon of the United States District Court for the Eastern District of Louisiana explained:

In class action suits filed in federal court, the district court’s ability to determine the use of unclaimed funds derives from the court’s inherent power to manage its own docket and its power under Rule 23(d) of the Federal Rules of Civil Procedure to make such orders as necessary to manage the class action. When a class action settlement agreement is silent as to the distribution of excess funds, or when there is an adjudicated aggregate class recovery that results in unclaimed funds, the district judge must make the determination about the appropriate distribution of the surplus. See, 3 Newberg and Conte, Newberg on Class Actions § 10.15 (4th ed. 2002); see also, In re Lease Oil Antitrust Litigation (No. II), 2007 WL 4377835, *16 [2007 U.S. Dist. LEXIS 91467] (S.D. Tex. Dec. 12, 2007); see also, Wilson v. Southwest Airlines, Inc., 880 F.2d 807, 811 (5th Cir. 1989).

This distribution is usually done according to the tenets of the cy pres doctrine. This doctrine has its origin in Roman law. The term translated loosely means: as near as possible. The doctrine was first used in the charitable trust field when courts took steps to prevent the failure of trusts. In re Lease Oil Antitrust Litigation (No. II), [supra at *20]; see also, Note, Damage Distribution in Class Actions: The Cy Pres Remedy, 39 U. Chi. L. Rev. 448, 452 (1972). For example, where a testator attempted to create a perpetuity — which is prohibited in civil law — the courts, instead of entirely voiding the bequest, would explain the will in such a way as to carry out the testator’s general intention as far as the rule against perpetuities would allow. The cy pres doctrine has migrated and appeared with increased vigor in class-action/multi-district litigation milieu. As used in this context, a court should endeavor to distribute unused funds in a manner most consistent and compatible with the issues which gave rise to the lawsuit which created the fund.

The cy pres doctrine has been described as the “disposition of funds that have not been individually distributed, by distributing them for the next best use which is for indirect class benefit.” In re Lease Oil Antitrust Litigation (No. II), [supra at *20]. Under the cy pres doctrine, the courts, guided by the parties’ original purpose, direct that the unclaimed funds be distributed for the indirect prospective benefit of the class. Powell v. Georgia-Pacific Corp., 119 F.3d 703 (8th Cir. 1997) (citations omitted); see also, In re Lease Oil Antitrust Litigation (No. II), [supra at *20].

The practical value of the use of a cy pres residual settlement award is illustrated by retired 18th Judicial District Court Judge Jack T. Marianneux’s comments in approving a distribution to the Greater New Orleans Area Foundation to establish a multi-million-dollar environmental fund following a state court class-action settlement:

It’s been a learning experience for me. I’m not the oldest guy on the bench. I’ve been here about eight years, but there’s always room to learn. I’m particularly proud that the money will go to a lot more than four or five packs of cigarettes per person . . . so much more can be done to help the people.[]

With this observation, Judge Marianneux approved the settlement of the largest certified Louisiana individual member class resulting from a 1981 discharge into the Mississippi River, causing the water supply in Orleans and Jefferson parishes to smell bad and requiring residents to buy water from alternative sources. The parties agreed that, after the payment of the individual class members’ documented expenses for purchasing water from other sources, the remainder of the settlement proceeds would be allocated to the Greater New Orleans Foundation as an environmental Field of Interest Fund for Orleans and Jefferson parishes.

The original cy pres award of $6 million has grown to $10 million. The endowment’s perpetual goal is to encourage ecological, economic and cultural vitality, resilience and sustainability through environmentally focused policies, programs and projects. The Foundation partners with environmental experts and community leaders to set goals and chart effective strategies to support work critical to the health and resiliency of the class area.

Other Louisiana state and federal courts have concluded class-action litigation through the use of a cy pres distribution with respect to some of the settlement funds. Parties involved in class actions have increasingly seen the wisdom of consolidating remaining settlement payments into a community foundation or other nonprofit educational or charitable organization. By use of cy pres, funds that are not allocated to or are unclaimed by a specific class member can benefit the whole affected defined class in a way that addresses the issue which gave impetus to the suit. The following Louisiana cases illustrate the parameters that federal and state courts have used to test the propriety and benefit of cy pres settlements.

**Cy Pres Cases**

Southeastern Louisiana University was awarded a cy pres grant of $4.5 million as
one of the conditions of settlement in the In Re: Combustion, Inc. class action.8 This initial award was used as seed money to obtain additional millions of dollars from federal and state governments which funded acquisition of property and construction and staffing of the first phase of a literacy and technology center campus. In this case, more than 10,000 eligible class members sued more than 150 defendants and their insurers for damages emanating from a waste oil recycling and reclamation facility in Livingston Parish, previously designated as a Superfund site. A settlement was reached, proof of claim forms submitted, and, in due course, individual allocations, fees and expenses were approved and paid. Remaining monies from the settlement’s reserve, contingency funds and unclaimed allocations were awarded as cy pres grants to fund the Livingston Parish Literacy and Technology Center, partnered by Southeastern Louisiana University and the Livingston Parish School Board. Under cy pres, the grants were awarded based on the theory that the site caused a severe inconvenience and problems to the residents of the class area. The resulting facility provides vocational, educational and technological programs to residents in the class area and, as a result, has helped to increase high school graduation rates and the number of class area residents entering the work force and higher education. Thus, the court found that the cy pres awards in In Re: Combustion, Inc. were of benefit to the entire class area and the class members.

Judge Richard T. Haik Sr. said, “Education is the most important legacy a society of human beings can leave to the next generation. It is the first and foremost business of government.”99

Numerous other Louisiana cases,10 involving both tort and commercial causes of action, have employed cy pres residual distributions to a variety of nonprofit, public service and educational organizations.

One case of particular interest to the Louisiana Bar Foundation and the Louisiana State Bar Association is In Re: Eunice Train Derailment.11 In this case, Judge Richard T. Haik, Sr. awarded:

- $20,000 to Acadiaia Legal Services Corp., dedicated for use in the class area for providing legal services for civil litigation;
- $20,000 to the Louisiana Bar Foundation, dedicated for long-term investment to provide an annual income stream to fund and coordinate a pro bono panel utilizing attorneys in St. Landry Parish; and
- $80,000 to the Tri-Parish Health Center for the use and benefit of working and nonworking underinsured in the class area.

Additional examples of cases using the cy pres doctrine include: In Re: Matter of the Complaint of Ingram Barge Co. (Judge John V. Parker);12 Lincoln v. Shell Pipeline (Judge Carl J. Barbier);13 Accounting Outsourcing, L.L.C. v. Verizon Wireless Personal Communications, L.P. (Judge James J. Brady);14 Accounting Outsourcing v. Kappa Publishing Group, Inc. (Judge James J. Brady);15 Baumann v. D&J Fill, Inc. (Judge Pegram J. Mire Jr.);16 and Survey Communications, Inc. v. Corporate Express (Judge James J. Brady).17

The cy pres alternative is not without question18 and limitations.19 For instance, in Cavalier v. Mobil Oil Corp.,20 a refinery had an accidental airborne release that allegedly impacted the surrounding neighborhoods. Separate lawsuits were filed in Orleans and St. Bernard parishes. All cases were consolidated. Resolution was achieved, with various geographic boundaries established for a class area, notice was given, a consolidated fairness hearing was held, and the trial court approved the class-action settlement. Eventually, a disagreement arose between the parties and the special master concerning certain cy pres designations for a project that had no connection to the class action or the beneficiaries of the class actions. The special master contended that the trial court had vast discretion in allocating cy pres funds to community-based charities located anywhere and was not required to allocate cy pres funds for projects only within artificially drawn geographical boundaries. The court disagreed and found instead:

The equitable doctrine of Cy Pres permits distribution of excess class action damage or settlement funds to the “next best” class, in order to parallel the intended use of the funds as nearly as possible. This distribu-

In this particular case, residual funds were available from class actions that were filed because of the ill effects of chemical releases that impacted the lower end of Algiers in the City of New Orleans. Although all previous allocations of these funds were made to community service projects that directly benefited those persons impacted by the chemical releases, the March 26, 2004, order allocated 20% of the final disbursement (approximately $47,200.00) to . . . a project which provides services to residents and citizens of the lower ninth ward of the City of New Orleans, an area not involved in this class action settlement . . . [W]e agree with Plaintiffs’ argument that the trial court apparently believed that one of the companion cases to the Civil District Court cases involved New Orleans residents in the lower ninth ward, and merely erred in allocating funds to an organization outside the geographical boundaries of these class action settlements.21

The geographic limitation has, however, been subject to additional interpretation in Turner v. Murphy Oil USA, Inc.,22 which confirms that if there is actual benefit to the class area, an award is proper even though the award is not to an organization actually located within the class area. In Turner, the court determined that the surplus funds could be used in a cy pres distribution to
confer a benefit to the class as a whole:

After examining the purpose of the fund and whom it was to benefit, as well as the purpose of the litigation, this Court has concluded that the funds should be used for the redress of the destruction and damage throughout St. Bernard Parish. The Court would not be in favor of use of the funds for beautification outside of the Parish. However, these funds can be used outside of the class area in a way that benefits the class. Whether damaged by water or oil, much of the area has been devastated, and the development of part of the Parish is linked to the recovery of the entire community. Many parts of St. Bernard Parish that are out of the area defined by the class serve as the gateway to the class area. The proposed use of a portion of the excess funds will serve to increase the tax base of the Parish and will inure to the benefit of the class members.23

Conclusion

The use of cy pres distributions for residual or unclaimed class-action funds provides a beneficial method for case conclusion. Often, if an additional distribution were required to individual class members, the extra expenses would likely be disproportionate to the individual amount distributed. The equitable remedy of cy pres offers a solution: a court can, with creativity and cooperation, endeavor to distribute unused funds in a way that most consistently benefits the class (and often the surrounding community) as a whole.

As illustrated above, the cy pres doctrine also has been used as the basis to encourage settlement in non-class/mass-joinder cases.

From community centers to educational outreach programs, from environmental protection funds to legal aid and assistance programs — in short, all benefit from cy pres distribution.

FOOTNOTES

3. The Louisiana train derailment occurred in Livingston, La., and involved more than 3,500 class members. It was certified as a class action and settled during jury selection for nearly $40 million.
5. Id., at 3–4.
6. For the settlement portions of the decision, see Ellis v. Georgia-Pacific Corp., 550 So.2d 1310 (La. App. 1 Cir. 1989); Ellis v. Georgia-Pacific, Inc., 536 So.2d 1217 (La. 1989); Ellis v. Georgia-Pacific Corp., 559 So.2d 121 (La. 1990). The cy pres order was not appealed and can be found in the record of Iberville Parish, 18th Judicial District Court, Div. “D,” Nos. 26328, 26574.
11. CA 00-1267, United States District Court, Western District of Louisiana.
12. CA 97-226, United States District Court, Middle District of Louisiana, where a cy pres award of remaining funds was made to Southern University, Baton Rouge Area Foundation, Baton Rouge Community College and Louisiana State University for the “common benefit of the Settlement class members and all others in the geographic area who were potentially affected by the incident . . . that gave rise to this litigation.” Document 4303, filed 10/13/2006.
14. CA 03 CV 161, United States District Court, Middle District of Louisiana, cy pres awards were made to Baton Rouge Marine Institute, Baton Rouge Bar Foundation, Boys and Girls Club of Baton Rouge, Louisiana Arts and Science Center, O’Brien House, Louisiana Coalition Against Domestic Violence, Southern University Law Center, LSU Foundation and Adult Literacy Advocates, totaling $1,648,135.
15. CA 03 CV 169, United States District Court, Middle District of Louisiana, where cy pres awards were made to Southeastern Development, Southern University Law Center, LSU Law Center, Louisiana Bar Foundation, Greater Baton Rouge Food Bank, American Red Cross and Capital Area CASA, totaling $431,262.
16. No. 82-488, 23rd Judicial District Court, Ascension Parish, where a cy pres award was made to a volunteer fire department located in the class area.
17. CA 05-40, United States District Court, Middle District of Louisiana, where cy pres awards were made to Our Lady of the Lake Foundation, Louisiana Disaster Recovery Foundation and Mary Bird Perkins Cancer Center.
20. 2004-1543 (La. App. 4 Cir. 3/2/05), 898 So.2d 584.
21. Id., at 588 (citations omitted).
23. Id. (citation omitted).

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