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Conference Session Recap: Mass Torts Settlement

By Bonnie Mayfield

During the Litigation Section's Annual Conference, a select panel presented "Disaster Averted, Mass Tort Resolved—Settling Mass Tort Disaster Cases." The panel covered many key mass torts issues, including *cy pres*. This doctrine, evoked when literal compliance is impossible, derives its name from English law and was originally a borrowing from the Norman-French "*cy près comme possible*," as close as possible.

Cy Pres Awards in Mass Tort Settlement

As the panel noted, the distribution of unclaimed settlement funds under the *cy pres* doctrine is important in the mass tort context. Panelist Adam Levitt of Grant & Eisenhofer called the group's attention to the Third Circuit's recent limit on *cy pres* distributions in *In re Baby Products Antitrust Litigation*, 708 F.3d 163, 174 (3rd Cir. 2013). The court noted that "[b]arring sufficient justification," *cy pres* distributions "should generally represent a small percentage of total settlement funds." Levitt believes that a problem with *cy pres* distributions has been that "*cy pres*, which should be viewed, when possible, as a secondary, rather than a primary option, has too often become the proposed relief of first resort. Coupling that with courts' increasing demand to link proposed *cy pres* recipients to the interests of the settlement class members presents several traps to plaintiffs' lawyers trying to get settlements approved."

Indeed, the Third Circuit noted that the reality of a *cy pres* distribution can result in too high a percentage of settlement funds being allocated to *cy pres* recipients rather than those actually injured:

> Young's overarching concern, and ours as well, is that the settlement has resulted in a troubling and, according to the counsel for the parties, surprising allocation of the settlement fund. *Cy pres* distributions, while in our view permissible, are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action—to compensate class members. Though the parties contemplated that excess funds would be distributed to charity after the bulk of the settlement fund was distributed to class members through an exhaustive claims process, it appears the actual allocation will be just the opposite. Defendants paid $35,500,000 into a settlement fund. About $14,000,000 will go to class counsel in attorneys' fees and expense. Of the remainder, it is expected that roughly $3,000,000 will be distributed to class members, while the rest—approximately $18,500,000 less administrative expenses—will be distributed to one or more *cy pres* recipients.

In re Baby Products Antitrust Litigation, *supra* at 169–170.

What about defense counsel? Once the settlement has been struck, should the allocation of settlement funds be of little or no interest to the defense? As panelist Dan Stephenson of the Dykema Gossett law firm noted, defense counsel should be concerned about *cy pres* distributions of excess settlement funds. According to Stephenson: "Companies are much more willing to have settlement funds go to legitimately injured plaintiffs than to an entity that isn't even involved in the litigation."

This writer, who was the moderator of the panel discussion, agrees, because *cy pres* distributions are a matter of concern for all involved in the settlement process. For example, defendants should be concerned because they may seek a refund of undistributed settlement funds, if they have not waived their right to do so, and can argue that a return of the remainder to the defendants is a better approach than applying *cy pres*. As Chief Judge Edith H. Jones of the Fifth Circuit Court of Appeals stated in her concurring opinion in *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011):

> In the ordinary case, to the extent that something must be done with unclaimed funds, the superior approach is to return leftover settlement funds to the defendant. This corrects the parties' mutual mistake as to the amount required to satisfy class members' claims. Other uses of the funds—a pro rata distribution to other class members, an escheat to the government, a bonus to class counsel, and a *cy pres* distribution—all result in charging the defendant an amount greater than the harm it bargained to settle. Our adversarial system should not effectuate transfers of funds from defendants beyond what they owe to the parties in judgments or settlements.

Klier, *supra* at 482; *but see In re Baby Products Antitrust Litigation*, *supra* at 172. ("Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement.")

A court, in exercising its oversight and approval responsibilities, and the plaintiffs' counsel, operating as fiduciaries for all the plaintiffs, also should be concerned about whether a settlement containing a *cy pres* distribution constitutes an unfair, unreasonable, inappropriate, or inadequate allocation of the settlement fund that will and/or should be approved and upheld on appeal or tossed and remanded along with a vacation and/or reduction of the award of attorney fees and costs. Because a settlement may no longer be in effect, defense counsel has further reason, other than obtaining a potential reversion of settlement funds, to be concerned at the outset about *cy pres* distributions in the settlement plan. *See In re Baby Products Antitrust Litigation*, *supra* at 177.

Ethics and Mass Tort Negotiation and Settlement
Panelist Magistrate Judge Sidney Schenkier, United States District Court, Northern District of Illinois, and panelist Francis McGovern, Professor of Law, Duke University Law School, as well as panelists Levitt and Stephenson, believe that ethical considerations can arise during the negotiation and settlement of mass tort matters.

Indeed, the Third Circuit noted that, depending upon the circumstances, a *cy pres* distribution may create an ethical issue that triggers increased scrutiny.

> *Cy pres* distributions also present a potential conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing benefit to the class. Where a court fears counsel is conflicted, it should subject the settlement to increased scrutiny.

In re Baby Products Antitrust Litigation, supra at 173 (footnote omitted).

The parties, their lawyers, and the court all should be on the lookout for ethical considerations and the lines that should not be crossed during the negotiation and/or settlement of mass torts. Noteworthy events occurring during Fen-Phen diet-drug litigation illustrate how ethical lines can be crossed and some of the penalties for doing so. For example, the *ABA Journal* reported that mass tort lawyer Stan Chesley was recently permanently disbarred and ordered to pay restitution in the amount of $7.5 million and costs of $88,579.62 for his misconduct related to that litigation. Shirley Cunningham Jr. and William Gallion, two prominent attorneys who represented the plaintiffs in the litigation, were sentenced to "decades in prison" after being "convicted of taking millions of dollars from their former clients." *Kentucky Bar Association v. Chesley*, 393 S.W.3d 584 (Ky 2013).

> Shirley Cunningham, Jr., and William Gallion were two of three Kentucky lawyers who represented several hundred Kentucky clients in a mass-tort action against the manufacturer of the defective drug "fen-phen." They settled the case for $200 million, which entitled them under their retainer agreements to approximately $22 million each in attorney fees. But rather than limit themselves to what they had contractually earned, Cunningham and Gallion concocted a fraudulent scheme to take from their clients almost twice that amount. The scheme did not work out as planned: Cunningham and Gallion were caught, subsequently disbarred from practicing law in Kentucky, and indicted on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 1343 and 1349.

U.S. v Cunningham, 679 F.3d 355, 363 (6th Cir. 2012); *see also Cunningham v. Kentucky Bar Association*, 266 S.W.3d 808 (Ky. 2008); *Gallion v. Kentucky Bar Association*, 266 S.W.3d 802

(Ky. 2008); *Kentucky Bar Association v. Mills*, 318 S.W.3d 89 (Ky. 2010); *Kentucky Bar Association v. Helmers*, 353 S.W.3d 599 (Ky. 2011).

The wake of the Fen-Phen settlement also resulted in the disbarment of former Kentucky Judge Joseph Bamberger who, among other misdeeds, was discovered "entering . . . numerous orders containing false statements of fact, conducting secret proceedings, sealing the court record, failing to review any documentation of the allocation of settlement funds, and personally benefitting from the fraud[ulent scheme]." *Kentucky Bar Association v. Bamberger*, 354 S.W.3d 576, 580 (Ky. 2010).

In sum, ethical obligations and *cy pres* distributions can raise major considerations during the negotiation and settlement of mass tort cases. Neither should be ignored by any player in the negotiation and/or settlement process.

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