The Next Best Thing

Unclaimed funds from class action settlements could benefit low-income consumers by deposits in the State Bar of Michigan Access to Justice Development Fund.

By Bradley A. Vauter

The cy pres rule of construction and the fluid recovery doctrine, known best by the probate bar and class action bar respectively, could well help Michigan do more for vulnerable citizens in need of legal services. These doctrines, which arise from the equitable powers exercised by the court, could benefit consumer organizations, legal service organizations, and charities.

Michigan practitioners, aware of the potential application of these doctrines in class action litigation, have suggested that the State Bar of Michigan Access to Justice Fund be a repository for unclaimed class action settlement funds. By so doing, the fund could directly finance designated legal service groups or organizations having the greatest affinity to the members of the class members in question or could help build on the strength of the many legal services organizations serving the poor and near poor in Michigan.

The cy pres rule concerns itself with the next-best use of gifts or the closest comparable alternative under a will or trust when the testator or donor expresses a charitable intent. In order to avoid a failure of the trust or bequest, courts apply the cy pres rule of construction to determine if the dominant purpose behind the gift can be carried out even though incidental details or requirements surrounding the gift had become impossible or impractical.

The fluid recovery doctrine arises in settlements and awards in class action suits. In some class actions, distribution of the damages awarded to all the class members can be impractical, inappropriate, or impossible. Fluid recovery holds that when direct distribution is not feasible, the fund distribution can be made in the next best fashion in order to benefit the intended class as closely as possible and to avoid retention of ill-gotten gains by defendants.

Thus, after such awards as can be made have been distributed, the remainder or "fluid" recovery can be awarded to a consumer group, legal services program, or government program likely to benefit class members. While the difficulty in fluid recovery may seem manifest, Michigan courts have held that fluid recovery is appropriate under the right circumstances.[1]

In Michigan and elsewhere, cy pres and fluid recovery doctrines have been used almost interchangeably in the context of class action suits. Around the country, these awards have increasingly been used to fund advocacy work on behalf of a wide range of consumers. Indeed, to make sure that members of bench and bar are advised of these possibilities a concerted effort in the state of Washington has been made to inform judges and lawyers that legal services organizations may be appropriate recipients of unclaimed class action proceeds through exercise by the courts of its cy pres power. And in California, a statute provides that any unpaid proceeds of a class action suit be distributed "in any manner the court determines is consistent with the objectives and purposes of the underlying cause of action, including to . . . the California Legal Corps." Cal. Civ. Proc. Code § 384(b) (West Supp. 1997).

In class action consumer cases in particular, judges are often faced with practical distribution problems. While wrongdoers should not escape liability simply because they harmed many individuals (albeit for smaller individual amounts) the difficulties of identifying the entire class and then reimbursing class members found usually means that a portion of the class award will not be distributed. The costs of locating individuals, so that a small award can be made, is also a concern to defendants, the court, and plaintiffs.[2]

Rather than suggesting coupons or like offers as a form of settlement (redemption rates for coupon settlements tend to be quite low—often less than 15 percent of the affected class) some commentators and groups have suggested that earmarking funds for advocacy groups, consumer education efforts, legal services programs, and endowments surrounding legal services make more sense.[3]

Accordingly, funding advocacy seems, in light of some of the class action difficulties, to be a fair use of the fluid recovery funds. Either direct funding of legal services organizations helping Michigan's most vulnerable residents or directing funds to the State Bar of Michigan's Access to Justice Development Fund seems appropriate when the majority or entire class resides in Michigan.

If absent class members will benefit indirectly by deposits to the fund, the nexus between the proposed use of the fund and indirect benefit to absent class members can be argued. In a like matter, actions brought under various statutes often provide a nexus for deposits of funds into advocacy efforts (in housing litigation for instance, grants to groups advocating for housing rights, or providing tenants with representation they could not otherwise afford).[4]

Most courts have held that the broad discretionary powers they have in shaping equitable decrees need be guided only by the objectives of the underlying statutes and interests of class members who are silent. For instance, in the case of *Vasquez v Avco Financial Services of Southern California* (Los Angeles Superior Court Case No. NCC-11833B) of a 2.5 million dollar award, almost a million dollars was distributed to affected Avco customers

throughout California, and 1.5 million dollars was used to endow a credit and finance project at the west coast regional office of Consumers Union.

Law schools with securities programs have benefited as a result of securities class litigation and more than three million dollars in undistributed residue from credit card related litigation in a California case was used for consumer advocacy, a computerized complaint tracking system, and donations to legal service programs and foundations. In Illinois, the Chicago Bar Foundation and the Chicago Lawyers Committee for Civil Rights split the unclaimed residue from a case brought by the state against a coal and oil company.

One of the most far-reaching instances of the cy pres distribution scheme occurred in Illinois in 1993.[5] In that case, U.S. District Court Judge Will invited applications for grants on unclaimed funds of approximately two million dollars in an antitrust case. Fifteen organizations, including a number of legal service programs, a museum, the National Association for Public Interest Law, and the AIDS Legal Council of Chicago, received awards after presenting their "case" to the court in a hearing and by submission of supplemental materials.

In his opinion, Judge Will noted cases outlining the doctrines he used as a basis for his planned distribution. He not only funded current program operations but in a few instances also created or added to some program endowments. The judge noted that he, himself, had served on the boards of a number of charitable and educational organizations and thus the court was "cognizant of the advantage of having endowment income as well as current contributions with which to finance operations."

Michigan's Access to Justice Development Fund is just such an endowment. The ATJ Fund is managed and distributed by the Michigan State Bar Foundation, a 501(c)(3) public charity, and is able to receive awards for use as appropriate legal aid grants. More information about cy pres and fluid recovery can be obtained from the Impact Fund in Berkley, California or by visiting their website at www.impactfund.org. More information about Michigan's Access to Justice Development Campaign can be found by visiting the State Bar of Michigan website, www.michbar.org, or by calling Candace Crowley at the State Bar of Michigan. ✦

Bradley A. Vauter is Senior Director, Service Delivery, Access to Justice of the State Bar of Michigan. He appeared before Judge Will in the Superior Beverage *case in 1993.*

FOOTNOTES

1. *Cicelski v Sears, Roebuck & Co,* 132 Mich App 298, 384 NW2d 685 (1984).
2. Churchill, Martha, "Fluid Recovery: Not a Class Act," 72 MBJ 1184.
3. "Fluid Recovery and Cy Pres: A Funding Source for Legal Services,'' www.impactfund.org/CyPres2000FED.html (visited May 2001).
4. Shepherd, Damage Distribution in Class Actions: The Cy Pres Remedy (1972), 39 U Chi L Rev, 448.
5. *Superior Beverage Co v Owens-Illinois, Inc,* 827 F Supp 477 (ND Ill 1993).