



*The Florida Justice Reform Institute
Opposes HB 409 and
Use of the Cy Pres Doctrine to Distribute
Unclaimed Damages Awards to Third Parties*

Committee Substitute for House Bill 409 would provide that in all civil actions, the court may apply the doctrine of cy pres—a doctrine which refers to a court’s equitable power to redistribute unclaimed or nondistributable assets to another beneficiary—as deemed appropriate under the circumstances or by agreement of the parties. A court would also be granted the discretion to approve the timing and method of the cy pres distribution and to approve the recipient of such funds, including one or more nonprofit, tax-exempt organizations. Under CS/HB 409, such recipients would be limited to nonprofit, tax-exempt legal service organizations providing civil legal services to the poor or providing funding or support for the provision of civil legal services to the poor.

Cy pres began as an equitable doctrine used in trusts and estates to effectuate a charitable intent that would otherwise go unfulfilled; under the doctrine, a court essentially rewrites a written instrument so that a gift that cannot be fulfilled may instead be given to a charity that serves a purpose as close to the donor’s original charitable purpose as possible. *Christian Herald Ass’n v. First Nat’l Bank of Tampa*, 40 So. 2d 563, 568 (Fla. 1949); *Cy Pres*, Black’s Law Dictionary. The Florida Legislature has codified the cy pres doctrine in the trust context in section 736.0413, Florida Statutes, but the cy pres doctrine does not otherwise apply outside of the trusts and estates context in Florida. See *In re Amends. to Fla. R. Civ. P. 1.220*, 271 So. 3d 936 (Fla. 2019).

Some courts have expanded use of the cy pres doctrine to the litigation context, including in class actions. A class action often ends with a class-wide settlement or class-wide damages award, with the class members compensated out of a fund that is established with the defendant’s money. In some cases, much of the fund remains unclaimed because it is too difficult to locate class members or because class members do not opt into receiving their part of the settlement, which may be worth only a few cents or a few dollars.

Enterprising plaintiffs’ attorneys are invoking the cy pres doctrine to distribute unclaimed class-wide awards and settlements to charitable entities that often only have a weak relationship to the subject matter of the litigation. The result is that uninjured third parties are able to reap substantial awards intended for purportedly injured class members. This is contrary to the very foundation of our civil justice system, which is that a plaintiff who is injured can seek and receive compensation for his or her injuries. Using civil litigation to redistribute wealth to charities turns that fundamental goal on its head and serves to unnecessarily penalize defendants without benefit to the injured class members. As Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit recognized, because “[t]here is no indirect benefit to the class from the defendant’s giving the money to someone else,” the use of cy pres in these instances “is purely punitive” to the defendant. *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

The use of the cy pres doctrine in class action litigation also creates perverse incentives for plaintiffs' attorneys. The size of class counsel's attorneys' fees award is almost always tied to the size of the entire class settlement, including any cy pres distribution. Extension of the cy pres doctrine to class action litigation would provide class counsel with an easy way to generate high fees without having to devise settlements that confer actual benefits on the absent class members. It would also diminish any incentive to identify class members since class counsel will receive the same amount of fees regardless. Thus, extension of cy pres to the class action context in particular "threatens to undermine the due process interests of absent class members by disincentivizing the class attorneys in their efforts to assure the class-wide compensation of victims of the defendant's unlawful behavior." Martin H. Redish *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 666 (2010).

For all these reasons, the Institute urges the Legislature to reject CS/HB 409 and extension of the cy pres doctrine to litigation contexts outside of trusts and estates.