

# TRIAL 2019 LAWYERS INC.



UPDATE: CY PRES



## ABOUT THE AUTHOR



**James R. Copland** is a senior fellow at the Manhattan Institute and director of legal policy. In those roles, he develops and communicates novel, sound ideas on how to improve America's civil- and criminal-justice systems. Copland has testified before Congress as well as state and municipal legislatures, and he has authored many policy briefs, book chapters, articles, and opinion pieces in a variety of publications, including the *Harvard Business Law Review*, *Yale Journal on Regulation*, *Wall Street Journal*, *National Law*

*Journal*, and *USA Today*. Copland speaks regularly on civil- and criminal-justice issues; has made hundreds of media appearances in such outlets as PBS, Fox News, MSNBC, CNBC, Fox Business, Bloomberg, C-SPAN, and NPR; and is frequently cited in news articles in the *New York Times*, *Washington Post*, *The Economist*, and *Forbes*. In 2011 and 2012, he was named to the National Association of Corporate Directors "Directorship 100" list, which designates the individuals most influential over U.S. corporate governance.

Prior to joining MI, Copland was a management consultant with McKinsey and Company in New York. Earlier, he was a law clerk for Judge Ralph K. Winter on the U.S. Court of Appeals for the Second Circuit. Copland has been a director of two privately held manufacturing companies since 1997 and has served on many public and nonprofit boards. He holds a J.D. and an M.B.A. from Yale, where he was an Olin Fellow in Law and Economics; an M.Sc. in the politics of the world economy from the London School of Economics; and a B.A. in economics from the University of North Carolina at Chapel Hill, where he was a Morehead Scholar.

2 Introduction

3 The Origins of *Cy Pres* in Class Actions

5 *Cy Pres* Today

8 Legal Challenges to *Cy Pres*

10 Endnotes

# GIVING AWAY OTHERS' MONEY

## Lawyers Inflate Their Fees with Abusive *Cy Pres* Class Settlements

Internet search engines have revolutionized the way that people obtain information. When connecting searchers to websites, Google and its competitors share information, including search terms. In 2010, a handful of attorneys hypothesized that such information-sharing might harm Google's users. The attorneys then found three people who agreed to claim that they had been harmed; the attorneys also told the courts that there were millions of additional victims.

Google ultimately agreed to pay \$8.5 million to settle these class-action claims. Yet the actual settlement—an example of what the Manhattan Institute has dubbed “Trial Lawyers, Inc.”—may surprise nonlawyers: \$5.3 million went to charities designated by the plaintiffs' attorneys; just under \$3.2 million went to pay the plaintiffs' attorneys fees and administrative costs; three \$5,000 “incentive” payments went to the three individuals whose names were attached to the lawsuit; and exactly \$0 went to the additional millions of Google search-engine users whose alleged victimhood formed the basis of the claim.<sup>1</sup>

The abuse-prone aspect of class-action litigation involved in the Google case is known as the “*cy pres*” settlement, which pays significantly more settlement money to lawyers—both in fees and in donations directed to their favorite charities—than to their clients. (The six charities that received settlement donations from Google included the plaintiffs' lawyers' alma maters and the AARP, formerly known as the American Association of Retired Persons.)<sup>2</sup>

Though *cy pres* settlements are now common in class-action disputes, they have never been authorized by Congress and have never been approved by the U.S. Supreme Court. But that may change: on October 31, 2018, the Supreme Court heard oral arguments in *Frank v. Gaos*, a lawsuit challenging the legality of the Google settlement.<sup>3</sup>



# THE ORIGINS OF *CY PRES* IN CLASS ACTIONS

Class-action lawsuits aggregate claims with common characteristics.<sup>4</sup> (As a matter of judicial economy, it makes sense not to litigate hundreds, thousands, or millions of similar claims in separate trials.)<sup>5</sup> Modern class-action lawsuits were created in federal law through amendments adopted by the U.S. Supreme Court, in 1966, to the Federal Rules of Civil Procedure. These amendments allow lawyers to bring class-action lawsuits on behalf of “lead” or “named” plaintiffs—with anyone who is in the defined class presumed to be a part of the lawsuit, unless he opts out of the litigation. (Previously, individual plaintiffs had to opt in to be a part of a class-action lawsuit.)<sup>6</sup>

The creation of opt-out class-action lawsuits engendered a legal business in which large-scale lawsuits are initiated and managed by the attorneys who bring the suit.<sup>7</sup> Typically, the lawyers themselves conceive of a purported injury and then reach out to individuals who serve as named plaintiffs for the class.

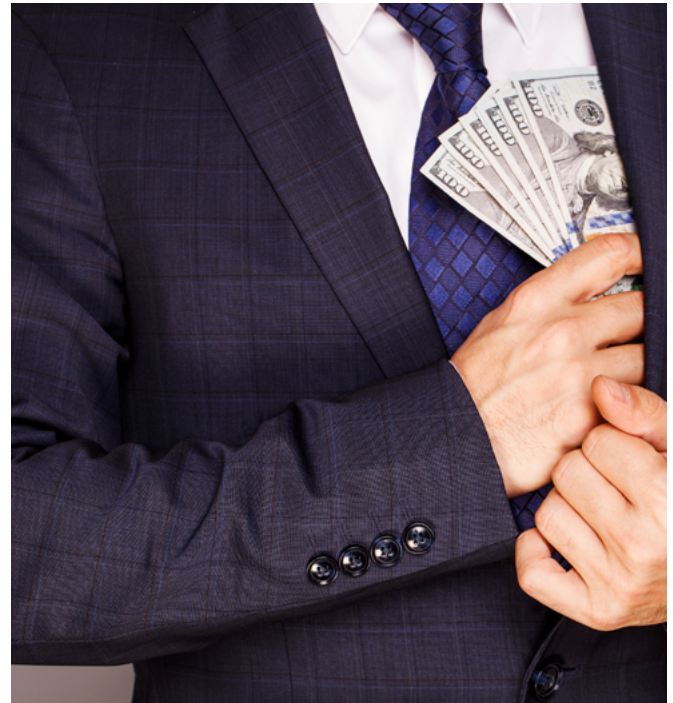
Plaintiffs’ alleged injuries in modern class-action suits tend to be small. As a result, no individual plaintiff has much incentive to supervise his or her attorneys. Bill Lerach, once America’s most successful securities class-action attorney, boasted: “I have the greatest practice of law in the world. I have no clients.”<sup>8</sup> (Lerach ultimately was disbarred and went to federal prison after being convicted of paying kickbacks to individuals who agreed to be his named plaintiffs;<sup>9</sup> but his statement accurately describes how class actions work.)



Bill Lerach ©AP Images

Because class-action attorneys are not supervised by clients, they have a strong incentive to negotiate settlements that maximize their own fees—at their clients’ expense.<sup>10</sup> (Defendant companies have an incentive to minimize total payouts, without regard for who gets the money.) In theory, plaintiffs in class-action lawsuits can, as noted, opt out of any settlement that they deem unfair, thereby preserving their ability to file an

individual lawsuit. But the typically small proceeds from class-action settlements make it infeasible to hire an attorney for advice.



## ARE CLASS-ACTION *CY PRES* AWARDS LEGAL?

Congress has given federal courts the power to adopt procedural rules governing litigation. But only Congress may change the substantive rights (which include remedies for a law’s violation) given to parties to litigation under federal law.

In 1997, the Supreme Court disallowed a nationwide claims-settlement facility that a federal court had fashioned to handle all asbestos-related claims.<sup>23</sup> Whether or not the court’s proposed remedy was a good one to handle such complex litigation, the Court opined that “Congress... has not adopted such a solution.”<sup>24</sup> Congress has also not adopted a *cy pres* remedy for distributing unclaimed or difficult-to-administer funds in class-action settlements. Thus, at least for class-action lawsuits brought in federal courts under federal law, *cy pres* remedies may not be legal.<sup>25</sup>

Further, many plaintiffs are unaware that a settlement even exists: in the *Frank* case, individual class members were not contacted directly and would have known about the settlement only if, say, they saw a website created for the case or read a press article about it.

In recognition of this problem, the Federal Rules of Civil Procedure require<sup>11</sup> judges to review class-action settlements and to reject settlements that are not “fair, reasonable, and adequate.”<sup>12</sup> Yet judges are ill-equipped to review settlement terms, too, particularly given that attorneys on both sides of the settlement support the settlement (if both sides didn’t support the settlement, there would be no settlement). Class-action lawyers have also developed various ways to obscure the fact that they often receive significantly more settlement money, in aggregate, than their clients. Among these sleights of hand are *cy pres* awards.

The *cy pres* doctrine is a long-standing feature of the Anglo-American law of charitable trusts, with roots dating to the sixth-century Byzantine emperor Justinian and his eponymous code.<sup>13</sup> In the law of trusts, *cy pres* is now codified in the statutes of 46 U.S. states.<sup>14</sup> Derived from the medieval French expression *cy pres comme possible* (“as near as possible”), the doctrine enables charitable trustees to change a trust’s terms if doing so is consistent with a donor’s intent; and if changed law or circumstances have made fulfilling the original terms of the trust impossible.

For example, in 1867 the Massachusetts Supreme Court permitted trustees to revise an abolitionist trust to allow the trust to fund efforts to fight poverty among freed slaves.<sup>15</sup> Similarly, in 1938, President Franklin Roosevelt founded the National Foundation

for Infantile Paralysis—now the March of Dimes Foundation—to combat polio; the *cy pres* doctrine allowed the foundation to adjust its mission after the Salk vaccine largely eliminated the disease less than two decades later.<sup>16</sup>

In 1971—six years after opt-out class-action lawsuits were established under federal rules—a law student at the University of Chicago, in a student-edited law review, suggested importing the *cy pres* doctrine to class-action settlements.<sup>17</sup> The student noted that, in some cases, “the inaction of class members” could allow defendants to retain “uncollected damages,” resulting in “the effective exclusion of a substantial number of small claimants from the benefits of any class action, the dilution of the deterrent effect of a recovery on behalf of the class, and the unjust enrichment of the defendant.”<sup>18</sup> To remedy this, the student proposed allowing class-action attorneys to distribute their clients’ cash to charities that would benefit the plaintiffs’ interests.

Congress enacted no law—and federal courts adopted no rule—that allowed plaintiffs’ proceeds to be distributed to charities in this way. Nevertheless, shortly after the student law review note was published, judges began rubber-stamping class-action settlements that distributed proceeds to charities rather than to plaintiffs, beginning with a New York City federal district court decision in 1974.<sup>19</sup> Since 1978, federal courts have discussed the *cy pres* doctrine in at least 1,333 cases, predominantly in class-action settlements.<sup>20</sup> In 1986, California’s supreme court also embraced *cy pres* distributions in class-action lawsuits under state law,<sup>21</sup> a position since endorsed by several other state courts.



# CY PRES TODAY

The incidence of *cy pres* class-action settlements has been growing (Figure 1). In 2010, law professor Martin Redish and other researchers published a study examining 120 class-action *cy pres* settlements that were affirmed by federal district courts in published opinions between 1974 and 2008.<sup>26</sup> About 90% of *cy pres* awards were granted after 1990, and some 68% were granted during 2001–2008.<sup>27</sup>

A large and growing fraction of *cy pres* class-action settlements involve what Redish calls “faux class actions”—those, such as the Google settlement in *Frank v. Gaos*, in which the size of the class is deemed so large relative to the average award as to make distributing the settlement funds to the class unmanageable. During 1974–2000, 47% of all *cy pres* class-action settlements involved faux class actions; during 2001–2008, 65% involved faux class actions (Figure 2).<sup>28</sup>

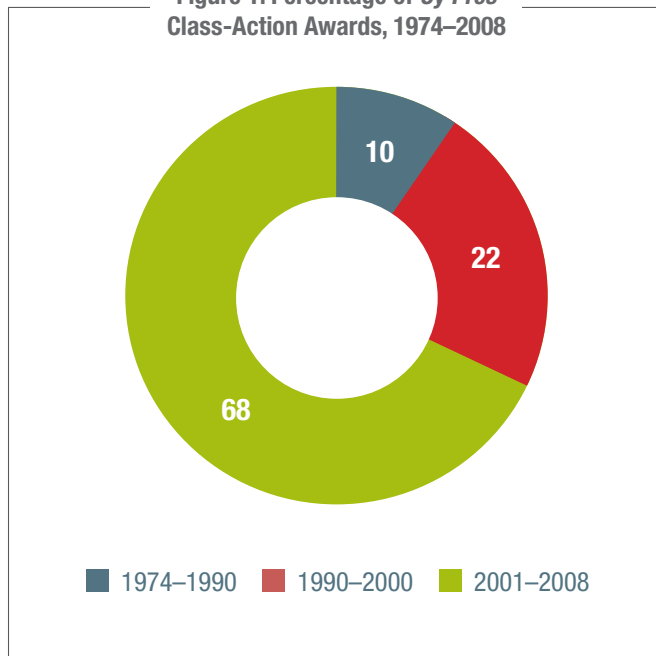
In about 25% of cases, the settlement allocated funds to charities before any effort was made to compensate class members.<sup>29</sup> *Cy pres* awards allow lawyers to inflate settlement levels, thus justifying

higher fees: the average *cy pres* award has totaled more than \$5.8 million, and, in settlements utilizing the *cy pres* mechanism, such awards have averaged more than 30% of all settlement dollars.<sup>30</sup>

Beyond enabling class-action lawyers to inflate their fees, *cy pres* awards turn some of these lawyers into major “philanthropists”—with money that theoretically belongs to their clients (see sidebar, **The Cy Pres Philanthropists**). Having significant sums of money available for distribution also puts judges in the ethically dubious position of overseeing charitable distributions. David Levi, a former federal judge, observed: “It made me more than a little uncomfortable that groups would solicit me for consideration as recipients of *cy pres* awards.”<sup>37</sup> Says NYU law professor Samuel Issacharoff, “It [*cy pres* awards] is an invitation to wild corruption of the judicial process.”<sup>38</sup>

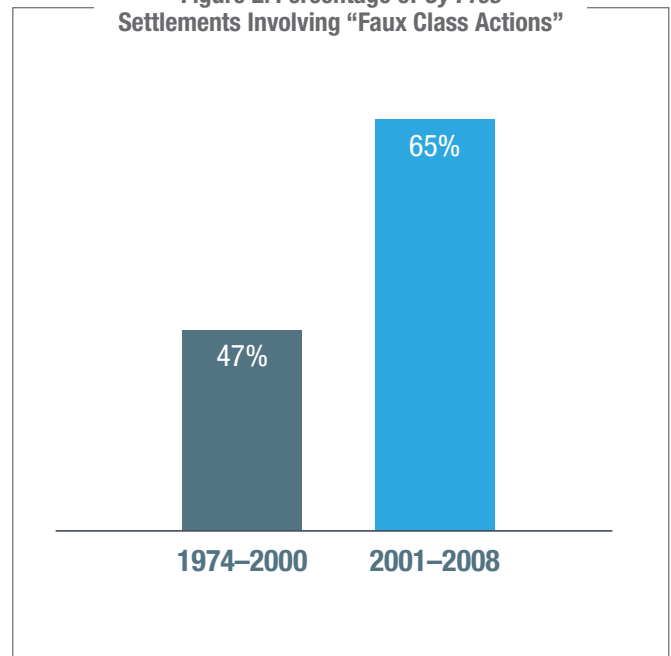
Highlighting Issacharoff’s fear of corruption when judges act as grant administrators is the fen-phen mass-tort settlement reached between plaintiffs’ lawyers and American Home Products (now Wyeth), which included a \$20 million diversion to charity—part

Figure 1. Percentage of *Cy Pres* Class-Action Awards, 1974–2008



Source: Redish et al.

Figure 2. Percentage of *Cy Pres* Settlements Involving “Faux Class Actions”



Source: Redish et al.

## THE *CY PRES* PHILANTHROPISTS

Ohio plaintiffs' firm Dworken & Bernstein funnels *cy pres* settlement dollars into its charitable arm, Ohio Lawyers Give Back, "to pour unclaimed settlement dollars," the firm's website states, "back into the community."<sup>31</sup>

Dworken & Bernstein lawyer Patrick Perotti has aggressively developed the firm's *cy pres* class-action practice to "[make] sure that money awarded for corporate wrongdoing is delivered to deserving hands."<sup>32</sup> Recognized as one of America's most feared plaintiffs' lawyers,<sup>33</sup> Perotti regularly promotes his efforts to redistribute his clients' money to charity as a beneficent philanthropic endeavor:

If there's anybody in the audience who has any type of an organization you think would be helpful to the community, have them go on the website, open that link called "suggest a charity" and get in touch with us... And we can then look into them and see if they're actually a legitimate charity, and then we can try to put them on one of the cases that we have coming up in the future.<sup>34</sup>

Perotti claims the largest *cy pres* distribution in U.S. history—some \$14 million.<sup>35</sup> The firm's website also states: "Under the aegis of Ohio Lawyers Give Back, Dworken & Bernstein has been responsible for the distribution of over \$37 million to many deserving communal organizations since 2003."<sup>36</sup>



Patrick Perotti ©Roger Mastroianni

of a scheme that ultimately led to multiple indictments and prosecutions.<sup>39</sup>

Among others: the judge who approved the settlement, Joseph Bamberger, sat alongside three of the plaintiffs' attorneys on the board of the charity established in the litigation, with each pocketing tens of thousands of dollars in directors' fees;<sup>40</sup> and \$1 million of settlement proceeds went to endow a professorial chair at Florida A&M University—subsequently filled by one of the plaintiffs' lawyers, Shirley Cunningham Jr., who was paid a six-figure annual salary. A subsequent university audit found that Cunningham did no work in the position.<sup>41</sup>

Although there is little evidence of a class-action *cy pres* settlement

involving corruption on that scale, the current system encourages lawyers to funnel money to charities that benefit their personal interests. In one antitrust class-action settlement, more than \$5 million of settlement proceeds went to create a new Center for Competition Law at George Washington University Law School—the alma mater of the lead plaintiffs' attorney, Michael Hausfeld.<sup>42</sup> In addition to allowing Hausfeld to benefit as a major alumnus donor, the center would advocate for and facilitate further litigation that undergirded Hausfeld's legal business.

Other beneficiaries in that settlement included Public Citizen, the NGO founded by Ralph Nader that has long supported plaintiffs' litigation, including through its own litigation group.<sup>43</sup> Public





David Levi ©Duke University School of Law



Shirley Cunningham Jr. ©AP Images



Michael Hausfeld ©Getty Images

Citizen is a regular beneficiary of *cy pres* settlement funds: its website expressly thanks 35 lawyers for directing *cy pres* monies to the organization in recent years.<sup>44</sup> Yet another beneficiary was the Impact Fund, an organization with an anodyne name that was set up by class-action lawyer Brad Seligman expressly to underwrite left-leaning “public interest” litigation.<sup>45</sup>

Charities receiving *cy pres* funds have typically been engaged in promoting or underwriting additional litigation or have had some ties to the lawyers for the plaintiffs or defendants—or both. In addition to Public Citizen and the Impact Fund, pro-litigation groups receiving class-action settlement dollars in recent years include Public Counsel, Public Justice, Consumers Federation of America, National Consumer Law Center, and Consumer Action. Many such groups now have grant officers dedicated to handling *cy pres* awards.<sup>46</sup> Little surprise, then, that some of these organizations filed briefs in *Frank v. Gaos* defending *cy pres* settlements, as did the American Association for Justice, a lobby group for plaintiff lawyers.<sup>47</sup>

Class-action settlement monies also commonly flow to universities—often those with ties to the lawyers for the plaintiffs, the defendants, or both. (Three of the four universities receiving the Google settlement funds—Harvard, Stanford, and the Chicago-Kent College of Law—were alma maters of the plaintiffs’ attorneys.) Many left-leaning charities with broader missions also regularly receive sizable allocations in *cy pres* distributions, such as AARP, American Civil Liberties Union, and Equal Justice Foundation. None of the 65 organizations that the Manhattan Institute identified in its survey of *cy pres* recipients had a right-leaning orientation (**Figure 3**).

**Figure 3. Select Recipients of *Cy Pres* Awards**

10+ Law Schools/University Centers	Equal Justice Foundation
AARP	Impact Fund
Alabama Civil Justice Foundation	Legal Foundation of Washington
American Civil Liberties Union	Minnesota Legal Aid Foundation
Bet Tzedek	National Consumer Law Center
Center for Democracy and Technology	Native American Agriculture Fast Track Fund
Centro Legal de la Raza	Ohio Lawyers Give Back
Chicago Bar Foundation	Public Citizen
Consumer Action	Public Counsel
Consumers Federation of America	Public Justice
Digital Trust Foundation	Public Law Center
	World Privacy Forum

# LEGAL CHALLENGES TO *CY PRES*

As noted, even though federal judges must sign off on class-action settlements, they are ill-equipped to evaluate settlements agreed to by both parties. Judges typically question settlements only when a member of the plaintiff class objects to the settlement terms—a rare occurrence, given the sizable costs involved and the low expected payoff.<sup>48</sup>

In 2009, Ted Frank—the named plaintiff in *Frank v. Gaos*—formed the nonprofit Center for Class Action Fairness<sup>49</sup> to fight such



Ted Frank ©Competitive Enterprise Institute

lopsided class-action settlements. Frank has since repeatedly challenged class-action settlements with *cy pres* awards. By establishing a position as a “repeat player” in the class-action game—and structuring his effort as a nonprofit entity committed to resisting lucrative fee offers to accept unfair settlement terms—Frank has persuaded many courts to overturn many unfair *cy pres* settlements and to modify the rules used to handle *cy pres* class-action awards.

One of Frank’s early wins was in *Nachshin v. AOL*,<sup>50</sup> a 2011 decision by the U.S. Court of Appeals for the Ninth Circuit. The decision overturned a class-action settlement between the technology company and plaintiffs’ lawyers, who alleged that AOL’s use of promotional materials in customers’ e-mail footers was illegal.<sup>51</sup> The class of plaintiffs included users of the AOL e-mail system—an estimated 66 million users at the time—but distributed *cy pres* funds to beneficiaries (mainly, Los Angeles-based charities) unrelated to the underlying claim (“relating to AOL’s provision of commercial e-mail services”).<sup>52</sup>

The court criticized the practice of allocating “*cy pres* distributions to myriad charities which, though no doubt pursuing virtuous goals, have little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved”.<sup>53</sup>

When selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self-interests of the parties, their counsel, or the court. Moreover, the specter of judges and outside entities dealing in the distri-

bution and solicitation of settlement money may create the appearance of impropriety.<sup>54</sup>

The court observed that “the donations were made on behalf of a nationwide plaintiff class,” yet the distributions went “to geographically isolated and substantively unrelated charities,” including the Legal Aid Foundation of Los Angeles, the Boys and Girls Clubs of Santa Monica and Los Angeles, and the Federal Judicial Center Foundation.

In 2013, Frank won another major victory, in the U.S. Court of Appeals for the Third Circuit, in *In Re: Baby Products Antitrust Litigation*.<sup>55</sup> The case involved a claim that BabyBjörn AB and Babies“R”Us had been setting illegal price floors, in violation of antitrust laws. The resulting \$35 million settlement allocated \$14 million in fees to the plaintiffs’ attorneys and only \$3 million to the plaintiff class, with the remaining \$18 million going to charities through a *cy pres* award.

The Third Circuit decided that *cy pres* awards may sometimes be appropriate but that “direct distributions to the class are preferred over *cy pres* distributions.”<sup>56</sup> The court noted that *cy pres* distributions “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 the direct benefit to the class.”<sup>57</sup> The Third Circuit observed that, in this case, the district court appeared not to give sufficient scrutiny to the terms of the settlement, which offered claimants a mere \$5, when actual injuries per plaintiff were \$50, according to the legal theory underpinning the case.<sup>58</sup>

In 2013, the Supreme Court declined to consider a case, *Marek v. Lane*, in which the Ninth Circuit had approved a settlement bearing striking similarities to that in *Frank v. Gaos* (all settlement proceeds went to the plaintiffs’ lawyers and *cy pres* charities, apart from modest incentive payments to the named plaintiffs).<sup>59</sup> The claim involved Facebook’s Beacon program, which published Facebook members’ Internet commercial activity on third-party websites, unless individuals opted out. The case was settled for \$9.5 million, with \$6.5 million going to charity and the rest to the plaintiffs’ lawyers, apart from \$39,000 in incentive payments to the named plaintiffs.<sup>60</sup>

Where did the charitable proceeds go? To a newly created “privacy foundation,” the directors of which would be selected by Facebook and the plaintiffs’ lawyers. In a fiery dissent, Judge Andrew Kleinfeld noted: “In this case, the process has failed.”<sup>61</sup>

Although the Supreme Court did not take up *Marek v. Lane*

because of idiosyncrasies in the settlement and legal challenge, Chief Justice John Roberts noted that “[in] a suitable case ... [the Court] may need to clarify the limits on the use of [*cy pres* remedies].”<sup>62</sup> According to Roberts, important unresolved issues include:

- “when, if ever, [*cy pres*] relief should be considered”
- “how to assess its fairness as a general matter”
- “whether new entities may be established as part of such relief” [and]
- “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”<sup>63</sup>

*Frank v. Gaos* appeared to be the vehicle that Justice Roberts had in mind when the Supreme Court opted to hear the case in 2018. At oral argument, however, Justices Neil Gorsuch and Elena Kagan asked whether the plaintiffs in the case had legal standing to bring

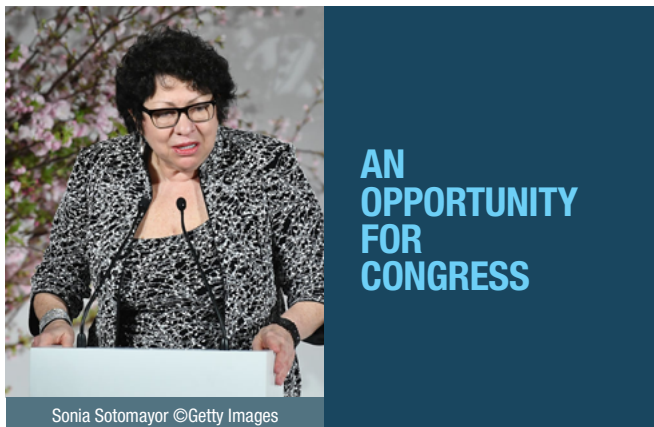
the case, which involved no clearly articulated theory of actual injury.<sup>64</sup> The justices also asked the parties to the case to submit additional briefs on this question, which may delay a high court ruling on *cy pres* awards in class-action settlements.

Nevertheless, the Supreme Court appears poised to issue judgment on class-action *cy pres* remedies in the near future—unless Congress takes corrective action before then (see sidebar,

**An Opportunity for Congress**). In the meantime, expect Trial Lawyers, Inc. to continue funneling money to its favorite charities as a way to generate profits from its class-action line of business.



John Roberts ©AP Images



Sonia Sotomayor ©Getty Images

At oral argument in *Frank v. Gaos*, Justice Sonia Sotomayor asked why the court should not wait for Congress to fix the *cy pres* class-action mess.<sup>65</sup> To some extent, that’s an unfair dodge: Congress never authorized class-action *cy pres* distributions. Indeed, federal courts have likely exceeded their authority in permitting class-action settlements to distribute plaintiffs’ proceeds to unrelated charities (see sidebar, on page 3, **Are Class-Action *Cy Pres* Awards Legal?**). However, Congress *should* clarify the extent to which *cy pres* distributions are permitted under federal class-action procedures.<sup>66</sup>



Jeff Sessions ©Getty Images

On June 7, 2017, then–attorney general Jeff Sessions announced a significant policy change: the Department of Justice would no longer enter into settlements requiring the targets of civil and criminal investigation to make payments to third parties that were not directly harmed by the alleged conduct being investigated.<sup>67</sup> The Obama administration regularly used such settlements to direct companies’ monies to allied community groups, such as the National Urban League and the National Council of La Raza,<sup>68</sup> as well as to finance initiatives that Congress refused to fund.<sup>69</sup> The Justice Department’s decision is commendable: executive-branch diversion of settlement dollars to favored charities is a clear end run around Congress’s appropriations power. Alas, a future administration may reverse course and reinstitute the practice.

The author thanks the Manhattan Institute's Rafael Mangual, Moshe Nightingale, and Nicholas Roberti for their research assistance.

1. *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), cert. granted sub nom. *Frank v. Gaos*, No. 17-961, 2018 WL 324121 (U.S. Apr. 30, 2018).
2. *See id.*
3. Adam Liptak, *Supreme Court Weighs Google Settlement That Paid Class Members Nothing*, N.Y. TIMES (OCT. 31, 2018), at B3.
4. *See* Fed. R. Civ. P. 23.
5. *See* Richard A. Epstein, *Class Actions: The Need for a Hard Second Look*, Leg. Pol'y Rep. No. 4 (Manh. Inst. for Pol'y Res., March 2002).
6. *See supra* note 4 at Notes of Advisory Committee on Rules.
7. *See, generally*, James R. Copland, *Trial Lawyers, Inc.: Class Actions and Mass Torts* (Manh. Inst. for Pol'y Res., January 2016).
8. Neil Weinberg, *Shakedown Street*, FORBES.COM (FEB. 11, 2008).
9. *See* Michael Parrish, *Leading Class-Action Lawyer Is Sentenced to Two Years in Kickback Scheme*, N.Y. TIMES (FEB. 12, 2008).
10. *See, e.g.*, Ted Frank, *Class Actions, Arbitration, and Consumer Rights*, Leg. Pol'y Rep. No. 16 at pp. 6–11 (Manh. Inst. for Pol'y Res., February 2013); Lester Brickman, *LAWYER BARONS* 335–72 (Cambridge U. Press, 2011); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1347–48 (1995); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991). *See also* Andrew Rosenfeld, *An Empirical Test of Class-Action Settlement*, 5 J. LEGAL STUD. 113, 115–17 (1976).
11. Fed. R. Civ. P. 23(e) (“The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval”).
12. Fed. R. Civ. P. 23(e)(2).
13. *See* 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, 625 (2010) (citing Edith L. Fisch, *THE CY PRES DOCTRINE IN THE UNITED STATES* § 1.00 (Bander, 1950)).
14. *Id.* at 628 & n. 59.
15. *Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867).
16. *See* William P. Barrett, *March of Dimes' Second Act*, FORBES.COM (NOV. 19, 2008).
17. Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1971).
18. *Id.* at 448.
19. *Miller v. Steinbach*, 268 F. Supp. 255 (S.D.N.Y.1974).
20. *See, generally*, Brief for Manh. Inst. for Pol'y Res. as Amicus Curiae, *Frank v. Gaos*, No. 17-691 (argued Oct. 31, 2018).
21. *State v. Levi Strauss & Co.*, 41 Cal. 3d 460 (S. Ct. Cal. 1986).
22. *See* Rules Enabling Act, Pub. L. 73-415, 48 Stat. 1064 (1934), codified at 28 U.S.C. § 2072.
23. *AmChem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).
24. *Id.* at 629.
25. *See* Manh. Inst. Brief, *supra* note 20.
26. *See* Redish, *supra* note 13, at 652.
27. *Id.* at 653.
28. *Id.* at 656.
29. *Id.* at 656–57.
30. *Id.* at 658.
31. *See* *Ohio Lawyers Give Back*, Dworken & Bernstein, LPA.
32. *See Team: PATRICK PEROTTI*, Public Justice.
33. *See* *Attorneys: Patrick J. Perotti*, Dworken & Bernstein, LPA.
34. *See* Emily White, *The Battle for the Next Best Thing*, OHIO SUPER LAWYERS (JANUARY 2014).
35. *See* PEROTTI, *supra* note 32.
36. *See* White, *supra* note 34.
37. *See* Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (NOV. 26, 2007).
38. *Id.*
39. *See* Ted Frank, *Fen-Phen Zen*, THE AMERICAN (APR. 4, 2007).
40. Ted Frank, *Cy Pres Settlements*, Class Actions 2011, American Bar Association, at D-15.
41. *See* Jill Krueger, *Ex-Dean Luney to Get Hearing over Firing from FAMU*, ORLANDO BUSINESS JOURNAL (JAN. 16, 2006) (“The action against Luney was prompted by a payroll audit that revealed Kentucky attorney Shirley Cunningham Jr. donated \$1 million to the FAMU law school in return for a \$100,000-a-year job that didn’t require him to teach on-site”).
42. *Diamond Chemical Co. v. Akzo Nobel Chemicals B.V.*, 517 F. Supp. 2d 212 (D.D.C. 2007) (“Diamond I”); *Diamond Chemical Co. v. Akzo Nobel Chemicals B.V.*, 2007 WL 2007447 (D.D.C. July 10, 2007); press release, George Washington University, “GW Law School Receives \$5.1 Million Cy Pres Award” (July 11, 2007).
43. *See* James R. Copland, *Trial Lawyers, Inc.: K Street—A Report on the Litigation Lobby*, at p. 10 (Manh. Inst. for Pol'y Res., January 2010).

44. *See Cy Pres Awards*, Public Citizen.
45. *See About Us*, Impact Fund.
46. *See, e.g., Cy Pres Awards*, Public Justice.
47. *See* Brief of Amicus Curiae American Association for Justice in Support of Respondents, *Frank v. Gaos*, No. 17-691 (argued Oct. 31, 2018).
48. *See* Fed. R. Civ. P. 23(e)(5). Some professional objectors have long challenged settlements with the desire to be “bought off” by the settling parties—agreeing to receive legal fees to restructure a settlement modestly (i.e., essentially, getting fees on top of the ordinary lawyers’ fees).
49. *See Class Action Fairness*, Competitive Enterprise Institute. Frank was an adjunct fellow of the Manhattan Institute during 2010–13.
50. *See Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011).
51. *Id.* at 1040–41.
52. *Id.* at 1040.
53. *Id.* at 1039.
54. *Id.*
55. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013).
56. *Id.* at 173.
57. *Id.*
58. *Id.* at 176.
59. *Marek v. Lane*, 134 S.Ct. 8 (Mem) (2013) (Roberts, C. J.).
60. *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012).
61. *Id.* at 830.
62. *Marek v. Lane*, at 9.
63. *Id.*
64. *See* Transcript of Oral Argument, at 15, 18, *Frank v. Gaos*, No. 17-961 (argued Oct. 31, 2018).
65. *See id.* at 12.
66. *See, generally*, Brief for the Cato Inst. and Americans for Prosperity as Amicus Curiae, *Frank v. Gaos*, No. 17-691 (argued Oct. 31, 2018).
67. *See* press release, Department of Justice, Office of Public Affairs, “Attorney General Jeff Sessions Ends Third Party Settlement Practice” (June 7, 2017).
68. *See* Sari Horwitz, *Sessions Prohibits Settlement Agreements That Donate Money to Outside Groups*, WASH. POST (JUNE 7, 2017).
69. Tatiana Schlossberg & Hiroko Tabuchi, *Settlements for Company Sins Can No Longer Aid Other Projects, Sessions Says*, N.Y. TIMES (JUNE 9, 2017).



**MANHATTAN**  
INSTITUTE

