



## Rejected Settlement Agreement in *Hawes v. Macy's, Inc.* Provides Valuable Lessons on Cy Pres Provisions

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### KEY TAKEAWAY:

To pass muster with the court, the recipient of a cy pres award in a proposed class action settlement should be closely related to the action or the injury suffered by class members.

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Cy pres provisions are often used in class action settlement agreements. Under such provisions, settlement funds that go unclaimed by class members are distributed to one or more third parties, usually a charity, legal-services organization, or other entity with some relation to the underlying dispute. Such provisions can be useful and laudable but, if not carefully designed, can also upset the settlement-approval process.

A recent decision out of the Southern District of Ohio, *Hawes v. Macy's Inc.*,<sup>[1]</sup> illustrates the issue. In *Hawes*, the court rejected a proposed nationwide class settlement agreement due to the terms of a cy pres provision—specifically, over concerns that the proposed recipient was not closely related to the underlying dispute.

The *Hawes* plaintiffs alleged that consumers overpaid for bedsheets they bought at Macy's due to a misrepresentation about thread count.<sup>[2]</sup> Macy's agreed in a proposed settlement to pay \$10.5 million and revise the sheets' packaging.<sup>[3]</sup> The proposed agreement provided that funds not claimed by class members would be distributed as a cy pres award to the Public Interest Research Group ("PIRG"), a nonprofit organization whose purpose, according to the *Hawes* plaintiffs, is "the advancement of consumer protections and rights."<sup>[4]</sup>

As noted, cy pres provisions are common in class action settlements, and serve to distribute leftover settlement funds to a third party (often a charitable organization), rather than have those funds revert to the defendant, escheat to the state, or increase the payments to the remaining claimants.<sup>[5]</sup> And, under the right circumstances, courts around the country have endorsed the use of cy pres provisions. However, "cy pres," which originates from the French expression, "cy pres comme possible," and translates to "as near as possible," must be awarded to the "next best class of beneficiaries."<sup>[6]</sup> As explained by the *Hawes* court, cy pres provisions are only "fair" under Rule 23(e) (2) if they qualify as "the next best use for indirect class benefit."<sup>[7]</sup> Thus, the use of the funds must be "consistent with the nature of the underlying action," and the recipient of the funds must "relate[] directly to the injury alleged in [the] lawsuit."<sup>[8]</sup> Stated simply, cy pres awards are appropriate only if they direct the leftover funds to recipients with a nexus to the action, such as a party related to the class or to the nature of the injury suffered.



Applying the “next best use” rule, the *Hawes* court found PIRG was an impermissible intended beneficiary of the cy pres agreement. The court found that PIRG “does no work addressing false or misleading labeling for bed sheets, textiles more generally, or even false advertising as a category.”<sup>[9]</sup> In addition, the court was unconvinced by a declaration from PIRG indicating that PIRG was committed to using the funds “to promote accurate and truthful labeling and advertising,” and found it troubling that PIRG often donates to other organizations.<sup>[10]</sup> The court also criticized the settlement notice for failing to mention both the existence of a cy pres award and the name of the recipient.<sup>[11]</sup> Thus, it held, “the Settlement Agreement’s cy pres award unfairly and unreasonably diverts class funds to an unrelated organization that does not benefit the class.”<sup>[12]</sup> The court thus rejected the proposed settlement, leaving it to the parties whether to appeal to the Sixth Circuit Court of Appeals, or to amend the settlement agreement to include an appropriate cy pres recipient and amend the class notice.<sup>[13]</sup> \_

*Hawes* illustrates the scrutiny that courts apply to cy pres provisions. And courts are not the only ones scrutinizing such provisions—numerous settlement approvals have been appealed in recent years by organized objectors that take issue with cy pres provisions. Settling parties would be advised to try to ensure that their chosen cy pres recipient bears some direct relationship to the harm alleged in the case and/or to the members of the settlement class. Doing so may save parties the aggravation and expense of revising a proposed settlement agreement and class notice.

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[1] *Hawes v. Macy’s Inc.*, No. 1:17-cv-754, 2023 WL 8811499 (S.D. Ohio Dec. 20, 2023).

[2] *Id.* at \*1.

[3] *Id.* at \*2.

[4] *Id.* at \*13.

[5] Gregory A. Markel and Giovanna Ferrari, Practice Note, *Cy Pres Provisions in Settlement Agreements*, Settling Class Actions: Process and Procedure.

[6] *Id.*

[7] *Hawes*, 2023 WL 8811499, at \*15 (quoting *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1067 (8th Cir. 2015)).

[8] *Id.*

[9] *Id.* at \*16.

[10] *Id.*

[11] *Id.* at \*4.

[12] *Id.* at \*10.

[13] *Id.* at \*18; see also *id.* at \*17 (suggesting the National Advertising Division of the Better Business Bureau as a hypothetical cy pres recipient).

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