

Charities reaping lawsuit dividends IIT, U. of C. receive \$5 million each from diabetes drug case

By [Ameet Sachdev](#) and Chicago Tribune Staff Reporter
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Ed Kraus has quietly toiled for the last eight years as a public-interest lawyer at Chicago-Kent College of Law, helping less-fortunate individuals with medical disabilities obtain federal benefits.

He has turned away too many potential clients to remember because their cases would have been too expensive for his no-frills health law clinic to pursue. But his practice has received a boost from an unexpected source: Madison County in Downstate Illinois. The law school's parent, the Illinois Institute of Technology, was one of five recipients to share in a \$20 million jackpot, unclaimed money from a \$60 million class-action settlement involving the diabetes drug Rezulin.

The payout highlights one of the rarely publicized potential benefits of consumer class-action suits, which have been criticized in recent years for bringing little economic value to victims while enriching trial lawyers.

Madison County, in particular, has been a lightning rod for criticism. Business groups, as part of a larger campaign to protect themselves against lawsuits, have vilified judges there for being too friendly to plaintiff lawyers and rubber-stamping cases as class actions on shaky grounds.

In settlements that involve thousands of potential members, it's nearly impossible to find every individual who should receive a cash payout. In those cases, the unclaimed funds can be donated to charity under a legal doctrine known as "cy pres," which indicates the next best use of funds.

And that's how IIT and Kraus ended up benefiting from Madison County's largess. IIT will distribute its \$5 million gift to the law school and to the department of biomedical engineering to further diabetes research. Kraus will receive some money to focus on providing free legal services to diabetics on a range of issues, from denial of insurance to discrimination.

"Since I've been here, this is the first grant that I'm aware of," Kraus said "It's great to take out of the equation the issue of having to generate attorney's fees and just focus on assisting the client."

Increasingly, legal-aid groups are counting on cy pres awards to fill gaps in their budgets as federal and state funding of such organizations shrinks. Last week, Illinois Gov. Rod Blagojevich signed a law to mandate that up to half of any leftover money in class actions go toward organizations that improve access to the legal system for low-income Illinois residents.

Traditionally cy pres funds have been used to benefit groups related to the purpose of the litigation instead of returning the leftover money to defendants. But lawyers and judges also have broadly interpreted the doctrine to give money to their favorite charities or law schools, leading to allegations of abuse.

The Chicago Bar Foundation, which has been on the receiving end of cy pres gifts, championed the new Illinois law, which takes effect in July 2008. It awards more than \$1 million in grants each year to Chicago-area legal-aid and public-interest law organizations, but its donations still fall far short of the need, said Bob Glaves, the foundation's executive director. He said the law is consistent with the purposes of class actions, which are often brought on behalf of consumers who have been victimized by deceptive corporate practices.

"The law was the best way we knew to raise awareness of the issue that there is this huge unmet need for legal assistance, which directly impacts the justice system," Glaves said. "Because of a lack of awareness among lawyers, they don't even think to do something like [use cy pres to make donations to public-interest groups]."

Glaves called Kraus' clinic a perfect example of the kind of organization the law is intended to benefit.

Kraus, an associate professor, represents individuals who have medical disabilities that prevent them from being able to work. He helps them fill out paperwork so they can be eligible for Social Security disability insurance benefits and other subsidized health insurance. Sometimes he has to attend administrative hearings.

He works on contingency, meaning he takes a cut of any benefits his clients win. Kraus also supervises six to eight students every semester who assist him in the 50 to 60 Social Security cases he's usually working on at any given time. Of those clients, he said, about a third of them have Type 2 diabetes, the adult-onset form of the disease.

"One of the observations I have made is that a lot of people who have diabetes wouldn't be disabled if they had access to appropriate care and treatment," Kraus said.

The cy pres grant will help him take on coverage disputes diabetics have with their insurers as well as tackle discrimination issues that some still face in being allowed to use needles in schools, prisons and public places. He still doesn't know how much money his clinic will receive from the cy pres gift. IIT received the \$5 million in the past few weeks and is in the process of distributing it, said Harold Krent, dean of the law school.

Krent first heard about the gift last year from an attorney at the law firm that represented the class of Rezulin users in Illinois, Korein Tillery in St. Louis. The law firm has one of the most active class-action practices in the nation, filing suits against many companies, from tobacco to telecom.

Rezulin was voluntarily withdrawn from the market in March 2000 after it was linked to liver-failure deaths. Korein Tillery filed a class-action suit against the owner of the drug, Pfizer Inc., in 2002 under the theory that patients who didn't suffer side effects still should be compensated because the economic value of the drug had been diminished. The class sought a refund for all the Rezulin tablets that had been purchased in Illinois, an amount that could have cost the company hundreds of millions of dollars.

Pfizer settled in May 2004 for \$60 million without admitting wrongdoing. The parties agreed that any unclaimed money, up to \$20 million, would be donated to programs for diabetes research or treatment.

Both sides anticipated there would be a large sum of money leftover because it would be difficult to find the thousands of Rezulin users in the state, said lead plaintiffs' lawyer Stephen Tillery.

The cy pres gifts took months to negotiate, Tillery said, as each side had ideas about where the money should go. The \$20 million that was unclaimed is one of the largest cy pres awards that several lawyers interviewed by the Tribune could recall.

Tillery said he pressed for the University of Chicago Hospitals to receive some money. The Hyde Park medical center has been a leader in diabetes research since the early 1900s. But he doesn't remember who suggested IIT.

A Pfizer spokesman said only that the firm and plaintiffs' lawyers individually submitted recommendations, and finalists were agreed upon jointly.

Three institutions received \$5 million: IIT, University of Chicago Hospitals and the Centers for Disease Control. United Way of Metropolitan Chicago received \$3 million, and a Jewish community organization, Lubavitch Chabad of Illinois, received \$2 million. Krent said he does not care what kind of horse trading went on behind closed doors. He's happy that someone "recognized our good work in the area."

Even cy pres skeptics have a hard time criticizing how the \$20 million was distributed. But at least one objects to the fees the plaintiffs' lawyers received. One-third of the settlement, or \$20 million, went to attorneys' fees and the administrative costs of processing the settlement, Tillery said.

"This is a very inefficient way to get Pfizer to donate money to charity," said Ted Frank, a resident fellow at the American Enterprise Institute, conservative think tank. "The lawyers got \$20 million to give \$20 million to charity. That's a pretty big commission." Tillery defended the attorneys' fees. "This was a case where we worked longhand hard,"

he said. “The awards speak for themselves in terms of their benefit to society.”

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Use of ‘cy pres’ doctrine

WHAT: The term “cy pres” is derived from cy pres comme possible, meaning in French “as near as possible.”

HOW IT WORKS: Adapted from trust and estate law, cy pres allows for distribution of unclaimed damage awards in class-action lawsuits where it isn’t possible to determine each plaintiff’s actual damages or when plaintiffs fail to collect their portion of the award. Under the doctrine, courts may order leftover funds to be put to the “next best use,” allocating funds to those linked to the subject of the suit or causes that indirectly benefit the class.

BROADER USE: On Aug. 27, Illinois Gov. Rod Blagojevich signed Senate Bill 486, which establishes a presumption that any unclaimed funds remaining from a class-action award would go toward organizations that improve access to the justice system for low-income Illinois residents. The law gives courts discretion to award up to 50 percent of the leftover funds to other organizations that serve the public good if the court finds good cause to do so. The law takes effect July 1.