CY PRES DISTRIBUTIONS IN CLASS ACTION SETTLEMENTS

Sam Yospe*

---

* J.D. Candidate 2010, Columbia University School of Law; B.A. Politics and Economics, 2007, Brandeis University. The author wishes to thank Professor Edward Morrison for his guidance, and Angela Shannon, Corey Miller, and the staff of the Columbia Business Law Review for their excellent editing assistance.

I. INTRODUCTION

In 1979, the plaintiffs and defendants agreed to a settlement in *In re Folding Carton Antitrust Litigation*, the largest antitrust settlement of its time.[1] As a result of the settlement between a nationwide class of purchasers of folding cartons, the defendants agreed to contribute approximately $200 million to a settlement fund to be distributed in accordance with an agreed upon "plan of distribution."[2] Once the plaintiff class recovered, approximately $6 million was left in the fund—"a result of various factors including high investment yield on the settlement fund, exceptionally low per dollar administration expenses and a small and dwindling number of late claims filed."[3] After determining that neither the defendants nor the plaintiff class had any right to the residual funds under the terms of the settlement agreement, the court was left with what it called a "novel administrative problem"—what to do with these excess funds.[4]

While the *Folding Carton* court faced the "novel" problem of how to appropriately distribute the remaining funds, this is no longer a unique situation.[5] Once settlement payments have been made, there are often residual funds—funds left over after each class member has been compensated.[6] Residual funds can remain, for example, when class members do not submit claims, cannot be located, or fail to

---

[1] 557 F. Supp. 1091, 1097 (N.D. Ill. 1983), *rev'd in part,* 744 F.2d 1252 (7th Cir. 1984).

[2] *Id.* at 1093–94.

[3] *Id.* at 1099.

[4] *Id.*

[5] *See In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1393 (N.D. Ga. 2001) (noting that "[i]t is not uncommon in consumer class actions to have funds remaining after payment of all identifiable claims").

[6] *See* 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 10.14 (4th ed. Supp. 2009) (discussing reasons that courts are unable to process all potential claims in large class actions, resulting in residual funds).

cash their settlement checks.[7] For example, in a recent case, a group of defendant modeling agencies settled a lawsuit filed by a class of models for violating antitrust law and overcharging their clients.[8] Despite efforts of class counsel to distribute the settlement amongst models who were overcharged by the defendants, many potential class members did not submit claims, and $6 million remained in the fund.[9] In another case, the defendants were sued for allegedly fixing prices of NASCAR souvenirs.[10] As part of the settlement the defendants paid $5.6 million into a fund. After the claiming deadlines passed, "[c]laims were submitted for substantially less than the cash amount of the settlement" and over $2 million remained in the fund.[11]

In some cases, parties contemplate the possibility of residual funds in the settlement agreement. In these cases, judges simply allocate the residual funds in the manner that the parties agreed.[12] However, if the parties do not contemplate how the funds should be allocated, the judge has a great amount of discretion. Most courts recognize four options: the court can (a) order that the funds be returned to the defendant; (b) apply the funds prospectively for the indirect benefit of the class; (c) distribute the funds pro rata

[7] *See, e.g.*, *In re* Airline Ticket Antitrust Litig., 268 F.3d 619, 621 (8th Cir. 2001) (out of 25,082 settlement checks mailed out in an $86 million dollar settlement, some checks were returned as undeliverable and some were never cashed, resulting in about $600,000 in unclaimed funds).

[8] Fears v. Wilhelmina Model Agency, Inc., No. 02 Civ. 4911, 2005 U.S. Dist. LEXIS 7961, at *21 (S.D.N.Y. May 5, 2005), *vacated sub nom.* Masters v. Wilhemina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007).

[9] *Id.* at *32 n.12.

[10] Motorsports Merch., 160 F. Supp. 2d at 1393.

[11] *Id.* at 1393.

[12] *See generally* Shawn M. Raiter & Kelly A. Swanson, *Cy Pres Doctrine on Distributing Unclaimed Settlement Funds*, LEXIS EMERGING ISSUES ANALYSIS, Feb. 13, 2008, at 1912 (giving examples of clauses that can be inserted into settlement agreements to allocate residual funds); *see also* cases cited *infra* note 150.

to the class members; or (d) declare that the funds escheat to the state or to the United States treasury.[13]

This note will be primarily concerned with the most controversial of these options, applying the funds prospectively for the indirect benefit of the class. This is called the *cy pres* doctrine, an equitable doctrine that has its origins in trust law. As one treatise says:

> "Cy pres" is an equitable doctrine, designed to save testamentary charitable trusts that would otherwise fail because the objects of their beneficence were no longer capable of receiving the funds the trust held for them. The cy pres doctrine allows trust funds to be applied to the next best use that would most closely satisfy the testator's intent. When a court applies the cy pres doctrine to unclaimed class funds, the court must distribute those funds for a purpose that as nearly as possible reflects the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of persons who are similarly situated to class members.[14]

While courts have wide latitude to determine how to distribute *cy pres* money, the most common method is to give the residual funds to a third party, generally a charity.[15]

This note will argue that, while *cy pres* is a valuable process, the discretion afforded judges often makes distributions arbitrary and unpredictable. Part II provides an overview as to the discretion afforded to judges, with a focus on a recent case, *Diamond Chemical Co. v. Akzo Nobel Chemicals B.V.*[16] Part III addresses two broad problems with the current approach. Often, the *cy pres* approach suffers

---

[13] *See* 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 10.17 (4th ed. Supp. 2009); *see also* Powell v. Georgia-Pacific Corp., 119 F.3d 703, 706 (8th Cir. 1997) (stating that "[t]here are four ways in which courts have distributed unclaimed funds of this sort").

[14] 5 JEROLD S. SOLOVY ET AL., MOORE'S FEDERAL PRACTICE § 23.171 (3d ed. Supp. 2009).

[15] *See* 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 10.17 (4th ed. Supp. 2009).

[16] No. 01-2118, 2007 U.S. Dist. LEXIS 49406 (D.D.C. July 10, 2007).

from distribution problems: the lack of "nexus" between the chosen *cy pres* beneficiaries and the underlying litigation, and the potential for bias that exists when judges have complete discretion. Additionally, this note will argue that the *cy pres* approach, as currently implemented by the courts, often causes efficiency problems. Part IV discusses the limitations on judicial discretion, focusing on the rare circumstances in which district courts are overturned for abuse of discretion. Finally, Part V proposes some solutions to the current situation. These solutions include using the other distributive mechanisms at the court's disposal, limiting the role of the judge to that of an arbiter, limiting the role of the lawyers involved in the process, and encouraging parties to contemplate residual funds in their settlement agreements. An additional solution is that Congress could enact a statute to control *cy pres* procedure, modeling the statute after one of the several state statutes that have recently been enacted.

II. HOW MUCH DISCRETION DO JUDGES HAVE? A RECENT CASE STUDY

When the parties do not include a *cy pres* recipient in their settlement, judges have broad discretion in identifying appropriate charities. However, as the Second Circuit has noted, "Cy pres means 'as near as possible'" and "the purpose of Cy Pres distribution is to 'put[] the unclaimed funds to its *next best* compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'"[17] Put another way, "unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit."[18] Thus, for a *cy pres* distribution to be an appropriate use of judicial discretion, there must be a "nexus" between the injury sustained by the class and the

[17] Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007) (quoting 2 HERBERT V. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 10.17 (4th ed. 2002)).

[18] *In re* Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 682 (8th Cir. 2002).

prospective benefit that the class obtains through the distribution of residual funds to *cy pres* beneficiaries.[19]

In *Diamond Chemical Co.*,[20] the plaintiff filed a motion asking the judge to approve a *cy pres* distribution of residual settlement funds to the George Washington University School of Law ("GW Law School") in order to develop a Center for Competition Law ("Center"). The underlying settlement involved allegations that sellers engaged in price fixing of sodium monochloroacetate in violation of the Sherman Antitrust Act. Plaintiffs argued that the Center, which would study antitrust law, "'has a much closer and stronger nexus to the underlying litigation than many other awards that have been approved by courts' in similar situations, and that the 'proposed award will benefit the plaintiff class and similarly situated parties by creating a Center that will help protect them from future antitrust violations and violations of other competition laws.'"[21] Plaintiffs provided details about how the Center would be operated, including a list of legal scholars at GW Law School who would be involved with the Center and a declaration from the dean of GW Law School, stating that the school would provide additional support for the Center if the *cy pres* award was granted.[22]

In opposing the *cy pres* recipient, the defendant argued that there was not a strong nexus between the underlying lawsuit and the Center because the lawsuit concerned specialty chemicals, not antitrust law.[23] The court stated that its analysis required it to "consider (1) the objectives of the underlying statute(s), (2) the nature of the underlying suit,

---

[19] *See* Robert E. Draba, Student Article, *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near as Possible,"* 16 LOY. CONSUMER L. REV. 121, 133–40 (2004) (discussing the "nexus" requirement).

[20] Diamond Chem. Co., v. Akzo Nobel Chems. B.V., No. 01-2118, 2007 U.S. Dist. LEXIS 49406 (D.D.C. July 10, 2007).

[21] *Id.* at *5 (quoting Plaintiff's Supplemental Memorandum in Support of its *Cy Pres* Award Recipient).

[22] *Id.* at *9–10.

[23] *Id.* at *12 (discussing Defendant's Reply to Class Plaintiff's Supplemental Memorandum, at 4–5).

(3) the interests of the class members, and (4) the geographic scope of the case."[24] The judge approved the *cy pres* distribution, stating that since the underlying lawsuit involved a multinational cartel to fix prices, the "proposed *cy pres* recipient is closely tailored to the nature of the underlying lawsuit, even though it does not relate to the specific subject of the alleged price fixing."[25]

It is difficult to ascertain exactly how the class[26] will reap substantial benefit from an academic institute studying antitrust law. The primary beneficiary appears to be the George Washington Law School itself. The court never directly indicates how this award prospectively benefits the plaintiff class, except to note that the Center will promote antitrust enforcement.[27] Assuming that the Center effectively advocates for greater antitrust enforcement, this will benefit every potential buyer of any good that is subject to antitrust law.[28]

---

[24] *Id.* at *7 (internal citations omitted).

[25] *Id.* at *12–13.

[26] The class is: "All persons or entities who directly purchased Monochloroacetic Acid in the United States or for delivery in the United States from any Defendant or their co-conspirators from September 1, 1995 through August 31, 1999. Excluded from the class are all governmental entities, Defendants, their co-conspirators and their respective subsidiaries and affiliates." Diamond Chem. Co. v. Akzo Nobel Chems. B.V., 205 F.R.D. 33, 34 (D.D.C. 2007).

[27] *See Diamond Chem. Co.*, 2007 U.S. Dist. LEXIS 49406, at *13 (concluding that Center would study important new issues).

[28] It should be noted that this is not the first antitrust case in which money was allocated to create a center to study antitrust law. More than 20 years earlier, the Seventh Circuit reversed a district court's award of $6,000,000 in residual funds to establish a private Antitrust Development and Research Foundation, whose purpose would have been "to promote the study of complex litigation and various substantive and procedural aspects of antitrust law." *In re* Folding Carton Antitrust Litig., 744 F.2d 1252, 1253 (7th Cir. 1984). The court's rationale was that such a center was not needed, and that creating it would not benefit the plaintiff class. The court stated:

> After careful consideration, we conclude that the establishment of the proposed Foundation would be carrying coals to Newcastle. There has already been

The facts of this case were discussed, not because this case is unique, but because it is illustrative of the broad issue that is the focus of this note. Is this a fair way to use settlement funds that were obtained as part of a settlement for a specific class of plaintiffs, i.e. purchasers of sodium monochloroacetate? Is it sufficient that the court was able to identify a nexus, even if it is somewhat attenuated, between the plaintiff class and the *cy pres* recipient? Or, is there a fundamental problem with courts exercising this type of discretion? Additionally, is it relevant that plaintiffs' class counsel is an alumnus of GW Law School?[29] This note considers these questions and proposes ways that courts could develop methodologies of distributing residual funds that are legitimate in the eyes of all constituencies—the plaintiff class, the defendant, the recipient, and the judicial system itself.

III. PROBLEMS WITH CURRENT *CY PRES* APPROACH

Many seem uncomfortable with the notion that judges have near complete discretion to make *cy pres* distributions to charities. As one federal judge noted:

> Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more "deserving" of limited funds than others; and we do not have the

---

voluminous research with respect to multidistrict antitrust litigation and the substantive and procedural aspects of the antitrust laws by judges, lawyer specialists, law schools, bar associations, Congressional committees, the Department of Justice and the Federal Trade Commission, and it is a continuing project of all those concerned. In our view, establishing an *unneeded Foundation* for these purposes from the reserve fund *would be a miscarriage of justice and an abuse of discretion. Id.* at 1254–55 (emphasis added).

[29] *See* discussion *infra* Section III.A.2.

> institutional resources and competencies to monitor that "grantees" abide by the conditions we or the settlement agreements set.[30]

Currently, there is not much academic literature describing the problems with the *cy pres* approach.[31] Most of the criticism—levied in the popular press and in court opinions—can be placed in two general categories: distributional problems and efficiency concerns.

A. Distributional Problems

The distributional problems hinge on the notion that the purpose of the *cy pres* doctrine is to put the residual funds to the "aggregate, indirect, prospective benefit of the class."[32] Many of the recent cases have been controversial precisely because they have failed to meet this foundational premise.[33]

---

[30] *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 236 F.R.D. 48, 53 (D. Me. 2006).

[31] Much of the criticism come from the popular press; *see, e.g.*, articles discussed *infra* note 35. However, *cy pres* in class action lawsuits has recently emerged as a topic discussed in law journals. *See* Martin Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. (forthcoming 2010) (draft of Aug. 7, 2009, at 5, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485047) (noting that "there has been only occasional concern expressed, either by courts or scholars, about the dramatic turn in modern class actions towards the use of cy pres relief"); Goutam U. Jois, *The Cy Pres Problem and the Role of Damages in Tort Law*, 16 VA. J. SOC. POL'Y & L. 258, 259 (2008).

[32] Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007) (quoting 2 NEWBERG ON CLASS ACTIONS § 10.17 (4th ed. 2002)).

[33] This is a foundational premise, at least in the context of *cy pres*, because the concept derives from the law of estates, in which courts attempt to follow the intentions of the testator as closely as possible. *See* 5 WILLIAM J. BOWE, DOUGLAS H. PARKER & JEFFREY SCHOENBLUM, PAGE ON WILLS § 41.29 (perm. ed. rev. 2003) (discussing origins of *cy pres* doctrine in English trust law). One can argue that absent class members should not be given any deference by the courts because they failed to identify themselves and have effectively abandoned any claims to the settlement. This is certainly a persuasive argument in some cases, and perhaps should result in using a different approach, such as returning the funds to the defendant. However, in a large class of cases, the absent class members

As one commentator recently noted, "the system is ad hoc, unpredictable, and generally unprincipled."[34] While there are many ways to characterize the distributional issues that have been seen in many of the recent cases, the concerns can generally be characterized into two broad categories: a lack of nexus between the class and beneficiaries, and concerns about biases amongst the judicial participants that push funds towards certain beneficiaries.

1. Lack of "Nexus" Between Plaintiff Class and Residual Fund Beneficiaries

The most common criticism of the *cy pres* approach is that many *cy pres* beneficiaries are unrelated to the settling class.[35] As the Ninth Circuit has noted, "[t]he district court's choice among distribution options should be guided by the objectives of the underlying statute and the interests of the

---

are not present because they could not be identified or could not be located, through no fault of their own.

[34] Jois, *supra* note 31, at 259.

[35] *See, e.g.*, Adam Liptak, *Sidebar: Doling out Other People's Money*, N.Y. TIMES, Nov. 26, 2007, at A14 ("Judges all over the country have gotten into the business of doling out leftover class-action settlement money, sometimes to organizations only tangentially related to the subject of the lawsuit."); George Krueger & Judd Serotta, *Our Class-Action System is Unconstitutional*, WALL ST. J., Aug. 6, 2008, at A13 (criticizing courts that use residual funds to "distribute the money, in an ad hoc manner, to people who are not even in the class, who would not have had standing to sue, and who were never even alleged to have been wronged. This alternative remedy is known as *cy pres*, which translates to 'as near as possible,' and in theory is supposed to benefit class members. But often these windfalls go to charities with little or no relationship to what was at issue in the original dispute."); Editorial, *When Judges Get Generous; A better way to donate surpluses from class-action awards*, WASH. POST, Dec. 17, 2007, at A20 (arguing that "[f]ederal judges are permitted to find other uses for excess funds, but giving the money away to favorite charities with little or no relation to the underlying litigation is inappropriate and borders on distasteful. In all but the rarest of circumstances, those funds should be made available to individual plaintiffs and not to outside organizations—no matter how worthy").

silent class members."[36] This criticism is readily apparent in antitrust cases. When residual funds remain after the class has been compensated, it is difficult to find a charity that indirectly benefits potential class members. For example, in *Diamond Chemical Co.*, as discussed above, it is difficult to ascertain how the plaintiff class members benefited from the creation of an academic center at GW Law School. Similarly, in *In re Infant Formula Multidistrict Litigation*,[37] the district court approved a settlement under the Sherman Act involving price fixing of infant formula. Over $1,000,000 in residual money was distributed by the judge, *sua sponte*, to the American Red Cross for Hurricane Katrina Relief.[38] In describing the nexus between the subject of the class action settlement (unfair pricing of infant formula) and the *cy pres* recipients, the court stated:

> The complaint in this case therefore alleged injury to consumers of infant formula, through alleged unfair pricing. Likewise, one of the challenges faced by rescue workers in the areas affected by Hurricane Katrina is providing essential food and drink to the victims of the storm. In fact, the provision of infant formula is one of the chief priorities of rescue officials.[39]

Clearly, while the nexus is attenuated, the judge faced a challenge in picking a recipient, since none of the parties to the litigation were involved in the distribution decision.[40] Such a distribution would likely survive appellate review because, as one commentator noted, "most courts generally

---

[36] Six Mexican Workers v. Ariz. Citrus Growers, 904 F. 2d 1301, 1307 (9th Cir. 1990).

[37] No. 4:91-cv-00878-MP, 2005 U.S. Dist. LEXIS 32957 (N.D. Fla. Sep. 8, 2005).

[38] *Id.* at *2.

[39] *Id.* at *8.

[40] *Id.* at *2 (noting that the "matter is before the Court *sua sponte*" and that since the settlement date, "this Court has periodically revisited this matter in an effort to determine what entity or entities should be the beneficiary of these funds").

operate on the proposition that a nexus may be remote but not absent."[41]

While some judges, such as the judge in *Infant Formula,* attempt to justify the nexus between the subject of the lawsuit and the *cy pres* beneficiary, other judges do not engage in this analysis. In another antitrust case, *Superior Beverage Co, Inc. v. Owens-Illinois*, the court solicited *cy pres* proposals from the public.[42] The judge approved *cy pres* grants to 15 beneficiaries, ranging from schools, to the Legal Aid Bureau, to an art museum. In explaining these eclectic choices, none of which seemed to have a close nexus to the underlying lawsuit, the judge stated that such a nexus is not necessary:

> [W]hile use of funds for the purposes closely related to their origin is still the best cy pres application, the doctrine of cy pres and courts' broad equitable powers now permit the use of funds for other public interest purposes by educational, charitable, and other public service organizations, both for current programs or, where appropriate, to constitute an endowment and source of future income for long-range programs to be used in conjunction with other funds raised contemporaneously.[43]

This seems to be a revolutionary step away from the very purpose of *cy pres*, which is to "distribute those funds for a purpose that as nearly as possible reflects the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of persons who are similarly situated to class members."[44] More recent cases have expanded upon the *Superior Beverage Co.*, holding that there

---

[41] *See* Draba, *supra* note 19, at 134.

[42] Superior Beverage Co. v. Owens-Illinois, Inc., 827 F. Supp. 477, 478 (N.D. Ill. 1993).

[43] *Id.* at 479.

[44] 5 JEROLD S. SOLOVY ET AL., MOORE'S FEDERAL PRACTICE § 23.171 (3d ed. Supp. 2009).

is no nexus requirement at all.[45] In a recent case, District Judge Jan E. DuBois explained the current state of the law:

> In applying the *cy pres* doctrine to distribute remaining class funds, many courts choose charitable organizations based on consideration of whether the distribution furthers the objectives underlying the original lawsuit.... Other courts, however, have expanded the *cy pres* doctrine to permit distributions to charitable organizations whether or not such organizations have *any direct or indirect* relationship to the specific law or subject matter of the litigation.[46]

Courts that fit into this second category of permitting distributions without any relationship between the charities and the litigation appear to have complete discretion in choosing charities as beneficiaries. As one commentator recently noted, courts distribute residual funds to "charities which are in some loose manner connected to the substance of the case . . . [and] seem to feel no need to find a form of relief that will ultimately have the effect of indirectly compensating as-yet uncompensated class members."[47]

---

[45] For example, in *In re Motorsports Merchandise Antitrust Litigation*, 160 F. Supp. 2d 1392 (N.D. Ga. 2001), the court had residual funds to distribute from a settlement involving price-fixing of NASCAR race souvenirs. The court noted that it had "attempted to identify charitable organizations that may at least indirectly benefit the members of the class of NASCAR fans." *Id.* at 1395. However, the court noted that "[c]ourts have expanded the *cy pres* doctrine to also permit distributions to charitable organizations not directly related to the original claims." *Id.* at 1394 (citing *Superior Beverage Co.*, 827 F. Supp. at 478–79). The charities chosen by the judge included the Make-A-Wish Foundation, The American Red Cross, Race Against Drugs, Childrens' Healthcare of Atlanta, The Atlanta Legal Aid Society, The Georgia Legal Services Program, Kids' Chance, Duke Children's Hospital and Health Center, The Lawyer's Foundation of Georgia, and the Susan G. Komen Breast Cancer Foundation.

[46] *In re* Linerboard Antitrust Litig., No. 1261, 2008 U.S. Dist. LEXIS 77739, at *10–11 (E.D. Pa. Oct. 3, 2008) (emphasis added).

[47] Redish et. al. *supra* note 31, at 23–24.

2. Biases when Judges are Given Complete Discretion

Discretion and the limited appellate review process[48] of *cy pres* distributions lead to questions of bias. While it is difficult to empirically determine the role of bias in distributions, anecdotal evidence indicates that not all charities are treated equally by courts. For example, many *cy pres* distributions are made to legal aid societies or charitable arms of bar associations.[49] Surely these are deserving charities, and this is not an attempt to argue that legal aid societies are unworthy of consideration for any charitable gift. However, assuming that the purpose of *cy pres* is to indirectly benefit potential class members, it seems unlikely that legal aid societies are a strong choice, given the many worthwhile charitable organizations that exist.[50] Rather, donating to legal aid societies seems to indicate the preference of the judge and the lawyers involved in the settlement. These individuals, who are heavily involved in the legal community, have a vested interest in assuring

[48] *See infra* Part IV for a discussion about the limitations of judicial discretion in *cy pres* cases.

[49] *See, e.g.*, *In re* Motorsports Merchandise Antitrust Litig., 160 F. Supp. 2d 1392 (N.D. Ga. 2001); Superior Beverage Co. v. Owens-Illinois, Inc., 827 F. Supp. 477 (E.D. Ill. 1993); *In re* Linerboard Antitrust Litig., No. 1261, 2008 U.S. Dist. LEXIS 77739 (E.D. Pa. Oct. 3, 2008); Lessard v. City of Allen Park, 470 F. Supp. 2d 781 (E.D. Mich. 2007); Rosenau v. Unifund Corp., No. 06-cv-1355, 2009 U.S. Dist. LEXIS 69454 (E.D. Pa. Aug. 10, 2009).

[50] The idea that class members do not ordinarily benefit from distributions to legal aid organizations has been recognized in at least one case. In *Moore v. California*, a district court judge rejected the plaintiffs' proposal to allocate a *cy pres* distribution to the Legal Aid Society—Employment Law Center. No. CIV. S-94-153, 2005 U.S. Dist. LEXIS 29092, at *6 (E.D. Cal. Nov. 21, 2005). In deciding that the residual funds should escheat to the state, the court did not directly state that plaintiff's proposal was biased, but seemed to rely on a nexus theory, stating that "a distribution to the LAS-ELC would not likely benefit class members in any reasonably direct fashion." *Id.* at *6.

access to justice for all, a function that legal aid societies play an important role in realizing.[51]

Judges often use their discretion to approve charities proposed by class counsel. As one court recently noted, "many cy pres distributions are channeled to organizations that support the work done by plaintiffs' attorneys, thus, indirectly benefiting the plaintiffs' attorneys."[52] For example, as discussed above, George Washington Law School was the recipient of a *cy pres* distribution in *Diamond Chemical Co.*[53] The class lawyer, Michael Hausfeld, is an alumnus of the school.[54] Clearly, the Center has merit; as the plaintiffs argued before the settlement of the case:

> In furtherance of these cy pres principles and given the composition of the class injured by Defendants' anticompetitive conduct, Plaintiff's counsel recommend, cy pres distribution to a newly created endowment fund at The George Washington University Law School. This endowment fund shall provide financial support for the academic and clinical programs in The George Washington University Law School that are designed to ensure the effective private enforcement of antitrust and competition laws within the United States and around the world. In particular, the fund will benefit individuals and classes in matters relating to anticompetitive business practices, such as unlawful

[51] *See generally* ABA MODEL RULES OF PROFESSIONAL CONDUCT § 6.1 (2002) (stating that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay" and that "a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means").

[52] SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009).

[53] Diamond Chem. Co. v. Akzo Nobel Chems. B.V., No. 01-2118, 2007 U.S. Dist. LEXIS 49406 (D.D.C. July 10, 2007).

[54] GW News Center, GW Law School Receives $5.1 Million *Cy Pres* Award, http://www.gwu.edu/~newsctr/pressrelease.cfm?ann_id=25908 (last visited Dec. 2, 2009).

> monopolization, tie-ins, exclusive dealings, and price-fixing.[55]

However, despite the positive attributes that the class lawyer mentions in his brief, it is almost certain that the *cy pres* distribution would not have gone to GW Law had it not been for the relationship that the class lawyer had with the school.

Although not discussing *Diamond Chemical Co.*, a recent case, *In re Linerboard Antitrust Litigation*, implicitly criticized it by taking contrary action.[56] In *Linerboard*, the court rejected proposed *cy pres* distributions to the Public Interest Law Center of Philadelphia ("PILCOP") and to the Camden Center for Law and Social Justice. Noting that PILCOP is a "well respected public legal services organization" that is "a deserving recipient of *cy pres* funds," the court stated that since an attorney who was associated with the case serves a lead role at PILCOP, "the Court does not deem it appropriate to direct any of the *cy pres* distribution to PILCOP."[57] For similar reasons, the court declined to give money to the Camden Center for Law and Social Justice.[58] The results of *Linerboard* and *Diamond Chemical* are inconsistent because of differing opinions as to whether lawyers should be able to direct residual funds to charities or organizations with which they are associated.[59]

---

[55] Class Plaintiff's Memorandum Supporting Motion to Distribute Settlement Proceeds to Final Claimants and to Authorize Distribution of Remaining Settlement Proceeds to *Cy Pres* Recipient, Feb. 12, 2007, at 10–11.

[56] *In re* Linerboard Antitrust Litig., No. 1261, 2008 U.S. Dist. LEXIS 77739, at *14–15 (E.D. Pa. Oct. 3, 2008).

[57] *Id.* at *15.

[58] *Id.*

[59] *See generally In re* Compact Disc Minimum Advertised Price Antitrust Litig., No. 1361, 2005 U.S. Dist. LEXIS 11332, at *4 (D. Me. June 10, 2005) (after parties proposed *cy pres* beneficiaries, the judge noted that "the parties have certified that these organizations have no ties to the parties or the lawyers and that each, respectively, is a tax-exempt organization"); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b. (Proposed Final Draft) (2009) (stating that "a cy pres remedy should not be ordered if the court or any party has any significant prior

An additional type of bias that can occur in class actions is geographic bias. Although many class actions are national in scope, reported cases indicate that there is a tendency for charities located near the district in which the class action was filed to benefit disproportionately from *cy pres* distributions.[60] For example, *In re Motorsports Merchandise Antitrust Litigation*[61] was litigated in the Northern District of Georgia. The case was a consolidated class action, transferred to the Northern District of Georgia by the Judicial Panel on Multidistrict Litigation.[62] The allegation in

affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits").

[60] Some judges have viewed geographic bias as a problem and have addressed the issue. In *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. 1361, 2005 U.S. Dist. LEXIS 16468 (D. Me. Aug. 9, 2005), the judge allowed the lawyers to submit proposals for *cy pres* distributions for the case, a class action in which the class members were music club members. In describing the interests of the plaintiff class, the judge noted that "the membership of the class is not restricted to any geographic area, but is nationwide." *Id.* at *4 (citing Order of June 10, 2005). In rejecting two of the proposed charities, the judge noted that they "devote their activities primarily to the New York City area" and that "[g]iven the scope of the music club membership, the plaintiff class in this lawsuit, I conclude that a program with a more national scope is preferable." *Id.* at *8. Similarly, in *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574 (E.D. Pa. 2005), the court rejected a proposal to provide *cy pres* distributions to the University of Pennsylvania Law School Clinical Education Program and to a high school scholarship program for Philadelphia middle school students. The court noted that "while the class and geographic scope of the law suit is nationwide, the relief proposed by the plaintiffs would be limited to organizations based in the Philadelphia area." *Id.* at 577. Even more explicitly, the court stated that "[i]n connection with the University of Pennsylvania, the Court is sensitive to the appearance of conflict in selecting as the beneficiary of the fund an institution with long-established ties to the Eastern District Bench." *Id.* at 577 n.2. Additionally, in *In re Wells Fargo Securities Litig.*, 991 F. Supp. 1193, 1197 (N.D. Ca. 1998), the court rejected a distribution to the Bar Association of San Francisco, in part because it "serves a city in which most class members do not live."

[61] 160 F. Supp. 2d 1392 (N.D. Ga. 2001).

[62] *In re* Motorsports Merchandise Antitrust Litig., 112 F. Supp. 2d 1329 (N.D. Ga. 2000) (district court decision approving the settlement).

the case was that the defendants engaged in price fixing for merchandise sold at NASCAR Winston Cup events, "an annual series of more than 30 races held at speedways in and around the country."[63] Despite the nationwide scope of the class members and potential class members, seven of ten *cy pres* beneficiaries were Georgia charities or Georgia branches of national charities.

B. Efficiency Concerns

The manner in which class action settlements are distributed post-settlement can affect the incentives of all of the constituents involved, including those of class action plaintiff lawyers and charities.[64] This section addresses concerns that the *cy pres* system may have undesirable effects on both of these constituencies. It is beyond the scope of this note to discuss the general efficiency criticisms of the class action system, such as the commonly made criticism that class actions subvert the interest of the class to those of plaintiff class action lawyers.[65] However, given the possibility that there may be residual funds remaining after a

[63] *Id.* at 1330.

[64] Furthermore, the current system may strain judicial resources, as judges have to vet charities and ensure that they are appropriately using their *cy pres* distributions. As one judge recently noted, "[d]istributing grants and reviewing the effectiveness of their use is not an appropriate use of judicial resources and transforms courts into eleemosynary institutions." SEC v. Bear, Stearns & Co., 626 F. Supp. 2d. 404, 415 (S.D.N.Y. 2009).

[65] *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1347–48 (1995) (noting that "[i]f not actually collusive, non-adversarial settlements have all too frequently advanced only the interests of plaintiffs' attorneys, not those of the class members"); *see also* George Krueger & Judd Serrota, *Our Class-Action System is Unconstitutional*, WALL ST. J., Aug. 6, 2008, at A13 (arguing that there is a "hidden tax" imposed on American corporations that "takes the form of certain class-action attorneys who, like a roving shadow, look for any opportunity to claim that a business did something wrong . . . without concern for whether any member of the public actually thinks he or she was harmed").

settlement, parties have strong incentives to take this into account ex ante.

1. The Incentives of Class Counsel

Some class actions—particularly consumer class actions with large classes of people, each of whom allegedly suffered relatively small amounts of damages—are likely to have residual funds if the settlement amount is calculated on the assumption that all of the injured consumers will submit their claims. This can create concerns about the incentives of class counsel, both in the choice to file the lawsuit and the manner in which the settlement negotiations are conducted. Consider a hypothetical consumer class action in which the defendant, a manufacturer of consumer products, is accused of violating antitrust laws, resulting in customers overpaying $5 for every product purchased. Assume that 10 million products were sold, resulting in damages of $50 million. For simplicity, let us assume that there are no attorney fees or other costs (such as notifying class members about the settlement). If this case were to settle, recovery for each plaintiff would be $5. This case is particularly ripe for plaintiff's counsel to predict ex ante that residual funds will remain. It is likely that some of the class members may not be found, or that some of the notified plaintiffs will not submit their claim forms. Class counsel could plan to direct the settlement money to organizations of their choice from the onset.

In recognition of this concern, some courts have held that a class cannot be certified if it is clear from the onset that damages will have to be distributed via *cy pres*.[66] The most notable case on this point is *Eisen v. Carlisle & Jacquelin*,[67] in which the Second Circuit reversed the district court's class certification. The plaintiff had filed suit on behalf of all

[66] *See* Schwab v. Philip Morris USA, Inc. 449 F. Supp. 2d 992, 1251–73 (E.D.N.Y. 2006) (Weinstein, J.), *rev'd sub nom.* McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008) (discussing the state of the law in the circuits on this point).

[67] 479 F.2d 1005 (2d Cir. 1973).

buyers and sellers of odd lot shares on the New York Stock Exchange over a four year period, a class that consisted of approximately 6 million people.[68] However, only about 2 million members of the class could be easily identified, and the average alleged damage to each potential class member was just $3.90.[69] Recognizing that it was unlikely that many people would come forward and prove their damages, the district court decided to calculate the class' damages in the aggregate, based on defendants' records.[70] Thus in certifying the class, the district court determined that any recovery would be "fluid."[71] The court stated:

> To emphasize individual recovery is to unduly stress considerations not totally relevant to the conditions of this case, especially the small amounts of potential recoveries by most class members, which, absent the class device, would effectively bar suit by the majority of odd-lot investors. Perhaps fortuitously, the repetitive activity of the principals in odd-lot transactions makes it possible to fashion a procedure which will assure that the benefits of any recovery will flow in the main to those who bore the burden of defendants' allegedly illegal acts.[72]

The district court said that this fluid recovery—*cy pres* by another name[73]—could be "fashioned to substantially benefit the entire class," such as by creating a fund that would benefit future traders, a group including class members that continue to trade.[74] The Second Circuit reversed this

---

[68] *Id.* at 1008.

[69] *Id.* at 1010.

[70] Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 261–62 (S.D.N.Y. 1971).

[71] *Id.* at 264.

[72] *Id.*

[73] There are differences between the terms "*cy pres*" and "fluid recovery," but they are not significant for the purposes of this note. *See* Redish et al., *supra* note 31, at 4–5, 59–63 (describing the two terms as "being treated by courts and commentators as fungible" although there are "subtle but significant differences").

[74] *Eisen*, 52 F.R.D. at 265.

certification on many grounds, primarily as a violation of Fed. R. Civ. P. 23. In de-certifying the class, the Second Circuit emphasized that the large class size and the small individual damages were unmanageable for the district court, necessitating a reversal. The court stated:

> As soon as the evidence on the remand disclosed the true extent of the membership of the class and the fact that Eisen would not pay for individual notice to the members of the class who could be identified, and the evidence further disclosed that the class membership was of such diversity and was so dispersed that no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class, a ruling should have been made forthwith dismissing the case as a class action.[75]

Furthermore, the Second Circuit specifically stated that the fluid recovery proposal was "illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."[76]

Eisen, which is still law in the Second Circuit, effectively forecloses courts from certifying classes if it is clear that direct recovery will not be possible.[77] Thus, under *Eisen*, it is not possible for class counsel to file suit with the intention of directing the settlement to a particular charity. However, this rule only applies in the most egregious of cases—those in which individual recoveries are so small that it is clear from the outset that the class members will not recover. The cases that have been analyzed thus far do not fall under *Eisen*; rather, in the cases discussed, some of the class members recovered and residual funds remained. It is likely that some cases will arise that share the *Eisen* feature of predictability at the onset of litigation that residual funds

[75] Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1017–18 (2d Cir. 1973).

[76] *Id.* at 1018.

[77] *See, e.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008) (reversing a class certification in part on fluid recovery grounds).

will remain, but that are not covered by *Eisen's* limited reach. It is not possible to predict how often plaintiffs lawyers take into account the possibility of controlling residual funds when they file class action lawsuits and conduct settlement negotiations, as this determination would require knowledge of the subjective intent of the lawyers involved in class actions. Thus, the limited claim here is that it is possible that in some circumstances, directing residual funds that are predicted to remain after a settlement may influence litigation strategies. This behavior shifts the incentives away from benefiting the class that the lawyer represents, and may play a role in the filing of frivolous lawsuits that are likely to have pools of uncollected damages if lawyers think that the cases will quickly settle and that they will control the distribution of the residual funds.[78]

2. The Creation of a *Cy Pres* "Industry"

As a result of some of the high profile *cy pres* cases, groups have begun lobbying for *cy pres* awards. For example, the New York Bar Association recently published a manual promoting the use of *cy pres* and appointed a working group "to develop an effective educational and marketing strategy" with the goal of steering money towards the bar association's legal services departments, which according to the bar association would "provide significant opportunities to further advance the goal of access to justice."[79] The Chicago Bar Foundation, in requesting lawyers engaged in class

[78] Furthermore, it is possible that the availability of *cy pres* will sway judges to certify a class action in borderline cases in which certification might contravene *Eisen*. *See* Redish et al., *supra* note 31, at 31 (arguing that while judges may be disinclined to certify class actions in cases in which it is not "all that difficult for a certifying court to determine at the outset that it is highly unlikely that resolution of the suit would result in significant transfer of damages from defendant to its victims," it is possible that "the availability of a possible cy pres award to a worthy charity might well alter the situation sufficiently, in the court's mind, to justify certification").

[79] Kathryn Grant Madigan, *President's Message*, 79 N.Y. ST. B.J. 5, 5 (Aug. 2007).

action settlements to direct residual funds to the association, advertises to lawyers that:

> The Chicago Bar Foundation is an ideal place to direct cy pres awards and other awards of residual funds. . . . The CBF puts cy pres awards and other awards of residual funds immediately to use in our community. These awards have made it possible for the CBF to significantly increase its annual grants to more than 40 pro bono and legal aid organizations and related initiatives, helping tens of thousands of vulnerable Chicagoans each year. In addition, cy pres awards have provided the "venture capital" for a number of groundbreaking special projects and initiatives that have made lasting improvements to our justice system, and the CBF's continued receipt of these awards makes it possible for the CBF to maintain our support for these projects for the long term.[80]

Additionally, California Rural Legal Assistance, Inc. advertises that it "welcomes nominations for cy pres awards."[81]

The current state of the law encourages this type of lobbying behavior. The undesirability of this behavior stems from the inefficiency that the *cy pres* doctrine encourages. Charities and organizations realize that judicial discretion sometimes results in arbitrary distributions. Thus, they "fundraise" by advocating for residual funds. This is perfectly rational behavior, from the point of view of each charity. However, from a societal point of view, it is not clear that this lobbying is the most efficient use of resources.

---

[80] The Chicago Bar Foundation, Cy Pres and the CBF, http://www.chicagobarfoundation.org/cy-pres-awards/cy-pres-and-the-cbf (last visited Dec. 2, 2009).

[81] California Rural Legal Assistance, Inc., Nominate CRLA for a Cy Pres Award, http://www.crla.org/index.php?page=cy-pres-award (last visited Dec. 2, 2009).

IV. LIMITS OF DISCRETION UNDER CURRENT LAW

The foregoing discussion might lead an observer to believe that district courts have unbridled discretion in allocating residual funds to *cy pres* recipients. Judges often do not explain or justify their *cy pres* decisions and there are very few instances in which *cy pres* distributions have been overturned on appeal. As a judge recently noted: "It is a curious feature of our judicial system that discretionary decisions, which are the least explained of all judicial decisions, are accorded . . . extraordinary deference on appeal. The enormously broad range of discretionary decisions, combined with this standard of review, gives trial judges enormous power."[82] The rule in the *cy pres* context might be stated as follows: "*cy pres* recipients should have a close nexus to the underlying class action, unless the district judge decides that another charity is appropriate." Clearly, this "rule" is no rule at all. However, there are a few reported cases in which the federal courts of appeals have reversed a district court's *cy pres* decision, remanding with new instructions.

One example is *Fears v. Wilhelmina Model Agency, Inc.*[83] In that case, the district court designated millions of dollars of residual funds to various hospitals that support women's health. The plaintiff class in the suit consisted of models who settled with defendant modeling agencies for violating antitrust laws by conspiring to fix commissions charged to the plaintiff models. Thus, the "nexus" in this case was that models are primarily women, and are likely to be concerned

[82] The Honorable Rosemary Barkett, *Dunwood Distinguished Lecture in Law: Judicial Discretion and Judicious Deliberation*, 59 FLA. L. REV. 905, 920 (2007).

[83] No. 02 Civ. 4911, 2005 U.S. Dist. LEXIS 7961 (S.D.N.Y. May 5, 2005), *vacated sub nom.* Masters v. Wilhemina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007), *modified on remand sub nom.* Fears v. Wilhemina Model Agency Inc., No. 02 Civ. 4911, 2007 U.S. Dist. LEXIS 48151 (S.D.N.Y. July 5, 2007), *vacated,* 315 Fed. Appx. 333 (2d Cir. 2009).

with women's health issues. The Second Circuit vacated and remanded the *cy pres* distributions.[84]

The Second Circuit did not reverse because of disagreement with the district court's choice of a *cy pres* recipient. Rather, the Second Circuit expressed concern that the court may not have properly considered distributing the residual funds in another manner, namely as treble damages to class members. The Second Circuit stated:

> While it is true that the Settlement Agreement reposes discretion in the District Judge as to the disposition of Excess Funds, that discretion is not absolute. Where we find an abuse of discretion in our review of the allocation of funds derived from class settlements, the scheme adopted by the District Court will not be upheld .... We are not yet prepared to say that the District Court abused its discretion in allocating the Excess Funds under the Cy Pres Doctrine. It does appear, however, that the District Court was not aware of the extent of its discretion, failing to recognize that it was empowered to allocate funds to the members of the class as treble damages.[85]

The Second Circuit, while being careful to note that the district court had not abused its discretion, strongly hinted that the district court should reconsider its *cy pres* distribution plan. The Second Circuit stated:

> In the case before us, neither side contends that a Cy Pres distribution is appropriate because it would be onerous or impossible to locate class members or because each class member's recovery would be so small as to make an individual distribution economically impracticable. We are confident that the district court, fully aware of the breadth of its discretion, will see to an appropriate distribution of

[84] Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007).

[85] *Id.* at 435.

> the funds remaining after the models have been compensated for their actual losses.[86]

On remand, the district court took into account "the spirit of the Second Circuit's directive" and allowed late-filing class members to be paid a distribution and directed class counsel to send a final letter to claimants who had provided insufficient information for their claim to be processed.[87] However, despite the Second Circuit's instruction to consider treble damages, the district court reinstated its original decision to award the residual funds to charity.[88]

The Eighth Circuit took an even stronger position in *In re Airline Ticket Commission Antitrust Litigation*.[89] In this case, the district court approved a settlement between the plaintiff class of thousands of travel agencies located throughout the country and the defendants, major airlines who allegedly cut commissions to travel agencies in violation of federal antitrust laws. Using similar language as the Second Circuit in *Wilhelmina*, the Eighth Circuit reversed a *cy pres* distribution to several organizations, including educational and charitable institutions in the vicinity of Minneapolis, Minnesota, because the district court had not "carefully weighed all of the considerations" necessary to tailor an award to the parties' original intentions.[90] The Eighth Circuit remanded the case for "a distribution or distributions more closely related to the origin of this nation-wide class action case."[91] The district court once again gave the funds to a

---

[86] *Id.* at 436.

[87] Fears v. Wilhelmina Model Agency, Inc., No. 02 Civ. 4911, 2007 U.S. Dist. LEXIS 48151, at *26–27 (S.D.N.Y. July 5, 2007).

[88] *Id.*, *vacated*, Fears v. Wilhelmina Model Agency, Inc., 315 Fed. App'x. 333, 334 (2d Cir. 2009) (vacating the distribution on other grounds, and noting that "the district court did not err in awarding the residual funds to charities rather than to the plaintiffs as treble damages or pursuant to the plaintiffs' other alternatives").

[89] 268 F.3d 619 (8th Cir. 2001) (*Airline Ticket Commission I*).

[90] *Airline Ticket Commission I,* 268 F.3d at 626.

[91] *Id.*

charity, the National Association for Public Interest Law.[92] Once again, the Eighth Circuit reversed and remanded, finding that "the district court did not fully carry out our mandate."[93] On the second remand the Eighth Circuit essentially removed the district court's discretion, instructing the lower court to award the *cy pres* money to travel agencies in Puerto Rico, even though they were not members of the class:

> Travel agencies in Puerto Rico and the U.S. Virgin Islands, although not members of the class, were subject to the same allegedly unlawful caps. A *cy pres* distribution to these agencies would relate directly to the antitrust injury alleged in this lawsuit and settled by the parties. In contrast, as the district court appeared to recognize, NAPIL cannot claim any relation to the substantive issues in this case. Under these circumstances, following the equitable considerations underlying the *cy pres* doctrine and our prior mandate in this case, the district court should have ordered the unclaimed funds distributed, in the first instance, to the travel agencies proposed by ASTA.[94]

While the Eighth Circuit was careful to emphasize that it was leaving "the details of the distribution to the district court,"[95] this appears to be the clearest removal of discretion that a court of appeals has exercised. While this case can be viewed as significant for its impact on judicial discretion, it has not had a large impact on the doctrine. In the seven years since *Airline Ticket Commission II*, only one federal court of appeals has cited it for any proposition at all.[96] The

---

[92] 307 F.3d 679, 682 (8th Cir. 2002) (*Airline Ticket Commission II*), *reh'g denied by* No. 02-1639, 2002 U.S. App. LEXIS 23672 (8th Cir. Nov. 18, 2002).

[93] *Id.* at 683.

[94] *Id.* at 683–84.

[95] *Id.* at 684.

[96] *See In re* Holocaust Victim Asset Litig., 424 F.3d 132, 147–48 (2d Cir. 2005) (distinguishing both *Airline Commission Ticket I* and *Airline*

Eighth Circuit's willingness to remove discretion from the district court is clearly an outlier in *cy pres* jurisprudence.

V. SOLUTIONS

Trial judges play a much larger role in approving class action settlements than they do in settling standard cases in which each plaintiff has his own representation.[97] The reason for this disparity is that individual class members need somebody to look out for their best interests. A class lawyer may have other incentives—such as reaching a quick settlement and obtaining a fee—that may create a conflict between the class lawyer's own interests and those of the class. As we have seen, the role of the trial judge extends post-settlement to the distribution of residual funds. The primary problem is that the federal courts have not developed a standard as to what the role of the court should be in approving distributions of residual funds. If followed, the "nexus" standard seems entirely reasonable. However, many trial judges do not believe that the nexus requirement is obligatory, and no circuit court of appeals has explicitly identified the extent or scope of the relationship that must exist between the underlying litigation and a *cy pres* beneficiary.[98] This section presents several approaches that

Commission Ticket II from the facts present in this case, involving settlements to Holocaust victims).

[97] *See* FED. R. CIV. P. 23(e)(2) (after the class settles, "[i]f the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate").

[98] In the few cases in which courts of appeals have reversed *cy pres* distributions, they have not done so on "nexus" grounds. For example, in *Wilhelmina*, the Second Circuit's remand required the district court to expand the scope of its analysis and reconsider whether it would use *cy pres* at all. Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007). The nexus between the plaintiff class of models and the charities chosen was not questioned. In the *Airline Ticket Litigation* cases discussed *supra*, the Eighth Circuit, while noting that "NAPIL did not . . . draw any connection between its purposes and the subject matter of this class action lawsuit," did not go further in developing a nexus theory. *Airline Ticket Commission II*, 307 F.3d 679, 681–82 (8th Cir. 2002).

courts could adopt, each of which would ensure that judicial discretion does not result in judicial arbitrariness.

A. Solutions Involving Alternatives to *Cy Pres* Distributions

The most obvious possibility is to eliminate the *cy pres* doctrine entirely. Courts consistently recognize that they are not obligated to distribute residual funds to charities.[99] Surely these alternatives, particularly reversion to defendant and pro rata distribution to class members are appropriate in some circumstances. However, in many circumstances, these alternatives are themselves troublesome.

1. Reversion to Defendant

Defendants commonly argue that residual funds should be returned to the defendants. As the defendants argued in *Diamond Chemical*, the defendants "paid their respective settlement funds for the sole purpose of compensating the class and with the expectation that class compensation would exhaust the fund."[100] Since the defendants over-funded the settlement fund, the residual money should be returned to the defendants. Similarly, the defendants in *In re Motorsports* argued that the residual funds should be returned to the defendants because "the Plaintiffs have been overcompensated and that use of the settlement funds to make charitable contributions is patently unfair."[101]

Most courts squarely reject this argument. According to *Newberg on Class Actions*:

---

[99] *See, e.g.*, *In re* Lease Oil Antitrust Litig., No. 1206, 2007 U.S. Dist. LEXIS 91467, at *65–66 (S.D. Tex. Dec. 12, 2007) (noting the court's alternatives to *cy pres* include pro rata distribution, reversion to defendants, distribution to class counsel, and escheat), *rev'd sub nom.* Poyner v. Chesapeake Ltd. P'ship, 570 F.3d 244 (5th Cir. 2009).

[100] Diamond Chem. Co. v. Akzo Nobel Chems. B.V., 517 F. Supp. 2d 212, 218 (D.D.C. 2007).

[101] *In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1394 (N.D. Ga. 2001).

> [I]t is probably the prevailing view that defendants who have paid their judgments into escrow have no claim to the return of any unclaimed monies which belong to parties not before the court, and in the absence of alternative arrangements those monies will properly escheat or otherwise be distributed in the sound discretion of the court if they remain unclaimed.[102]

After all, when parties settle a case, they disclaim each other from future liability and are bound to the bargain. As the court stated in *In re Motorsports*:

> Despite the Defendants' attempt to characterize themselves as unwitting participants in the settlement agreements, they undoubtedly entered into them willingly. The Defendants may not now assert that they did not agree with the settlement. Additionally, the Defendants did not receive nothing for something. In exchange for the settlement amount, Defendants obtained release from liability with respect to the class members . . . The settlement not only compensated those Plaintiffs who made claims to the fund, but also relieved Defendants of liability from Plaintiffs' individual claims. Presumably, the cost of avoiding even longer and more protracted litigation was also factored into the settlement agreement. For these reasons, the remaining funds should not revert back to the defendant.[103]

Crucial to this analysis is the notion that when litigating parties enter into settlements, they compromise on the value of the claim, taking a multitude of factors into account. Defendants are never forced to agree to a settlement that overcompensates the plaintiffs, and defendants always maintain the right to go to trial.

---

[102] 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 10.24 (4th ed. Supp. 2009).

[103] *In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. at 1395.

Additionally, returning the money to the defendant is often contrary to the purpose of the statute in the underlying litigation. As the court stated in *Diamond Chemical*:

> [R]eversion to Defendants appears inappropriate in the instant situation because the settlement was based on allegations that Defendants violated Section 1 of the Sherman Antitrust Act which, in addition to compensatory elements, has punitive and deterrence goals. Thus, when faced with statutes that have deterrence as a goal, courts have declined to allow reversion of unclaimed settlement funds to a settling defendant.[104]

Particularly in antitrust settlements, courts are extremely reluctant to order reversion to the defendant.[105]

However, in certain cases—particularly those litigated under statutes in which Congress has not elucidated a strong rationale of deterrence—it may be appropriate for a judge to consider reversion. For example, in *Wilson v. Southwest Airlines Inc.*,[106] the Fifth Circuit invalidated a *cy pres* distribution and ordered the residual funds to be returned to the defendant. The Fifth Circuit emphasized that the underlying litigation was under Title VII, and that the "basic purpose of this fund was to 'make whole' victims of unlawful employment discrimination in accord with the compensatory purposes of Title VII."[107] In finding that all potential class members were compensated and there were no outstanding claims, the Fifth Circuit determined that the defendant had an equitable right to the residual funds.[108]

---

[104] *Diamond Chem. Co.*, 517 F. Supp. 2d at 218 (internal citations omitted).

[105] *See, e.g.*, *In re* Compact Disc Minimum Advertised Price Antitrust Litig., No. 1361, 2005 U.S. Dist. LEXIS 16468, at *3–4 (D. Me. Aug. 9, 2005).

[106] 880 F.2d 807, 816 (5th Cir. 1989).

[107] *Id.* at 812.

[108] *Id.* at 812–13.

2. Distribute Remaining Funds Pro Rata to Class Members

Another option that courts have—yet rarely exercise—is to distribute the residual funds pro rata to already compensated class members. This is generally not thought to be a good solution because it over-compensates those who have already received payment. As one court noted, "[t]his method provides no benefit to nonclaiming or unidentified class members, who would appear to have superior equitable interests in the remaining fund."[109] Similarly, another court has stated that "it is apparent that a further distribution to class members who voluntarily settled their claims for the substantial amount they have already received, would be an undeserved windfall."[110]

Just as courts are reluctant to return money to the defendants who bargained for the settlement agreement, they are hesitant to compensate individual plaintiffs in excess of their actual damages. As Stewart R. Shepard notes:

> [T]his method expressly contemplates that silent class members will not receive any compensation, even indirectly. The claims of the silent class members would be expropriated and a windfall might result for those who appeared and collected their share of the damages. Consequently, this procedure might encourage the bringing of class actions likely to result in large uncollected damage pools. It also raises serious questions as to the adequacy of representation where the interests of the named plaintiffs lie in keeping the other class members uninformed. In sum, the deficiencies of this method

---

[109] Powell v. Georgia-Pacific Corp., 843 F. Supp. 491, 496 (W.D. Ark. 1994), *aff'd*, 119 F.3d 703 (8th Cir. 1997).

[110] *In re* Folding Carton Antitrust Litig., 557 F. Supp. 1091, 1107 (N.D. Ill. 1983); *but see In re* Wells Fargo Sec. Litig., 991 F. Supp. 1193, 1197 (N.D. Ca. 1998) (holding that the class plaintiffs were entitled to pro rata shares when most of the residual funds were the result of accrued interest occurring in the administrative account, but ordering some of the residual fund to be paid to a *cy pres* recipient when it would not be administratively feasible to send a check to particular class members).

> of distribution make it a generally unacceptable alternative.[111]

Rather than distributing residual funds pro rata, courts are much more likely to try to find additional compensable class members. In one notable exception, the Second Circuit in *Wilhelmina*, as discussed above, instructed the district court to consider providing the residual funds to class members who had already submitted claims.[112] In declining to exercise its discretion to award treble damages, the district court found that "to impose treble damages here would be analogous to awarding punitive damages to a plaintiff without requiring that the money come from defendants—thus obviating the underlying rationale behind punitive damages, and in effect granting a 'windfall' rather than punishing a wrongdoer."[113] The court allowed late filers to obtain a share out of the residual damages (thus meeting the goal of actually compensating victims), but declined to award additional damages to previously compensated class members.[114]

3. Escheat

An additional option that courts consider is to turn over the funds to the Federal Treasury or to the state.[115] In an

---

[111] Stewart R. Shepard, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 453 (1972).

[112] Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007) (reversing and remanding a *cy pres* distribution and instructing the district court that it was within its discretion to pay treble damages).

[113] Fears v. Wilhelmina Model Agency, No. 02 Civ. 4911, 2007 U.S. Dist. LEXIS 48151, at *30 n.23 (S.D.N.Y. July 5, 2007), *vacated,* No. 07-3119-CV, 2009 U.S. App. LEXIS 5430 (2d Cir. Mar. 16, 2009).

[114] *Id.* at *27–28, 37.

[115] *See* 28 U.S.C. §§ 2041, 2042 (2006). Section 2042 provides:

> In every case in which the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of

early *cy pres* case, the Seventh Circuit overturned a *cy pres* distribution and ordered escheat.[116] Concurring in the judgment but dissenting as to the escheat, Judge Flaum described the manner in which 28 U.S.C. § 2042, the federal statute used by the majority to order the escheat, functions in class action settlements:

> The United States government cannot obtain title to the money. Section 2042 operates only to change the depositary of unclaimed funds; it is not a federal escheat statute. It does not operate to change the ownership of the funds; even though the money is deposited 'in the name and to the credit of' the United States, the United States obtains no beneficial interests in the funds but merely holds the money as trustee for the rightful owners.[117]

Courts rarely use this option, but it may have validity in certain cases, particularly when it is possible that additional class members may file claims after the deadline. For example, one court rejected class counsel's *cy pres* proposal and ordered escheat to the state, noting that "permitting the funds to escheat to the State offers the distinct possibility that the funds eventually will be claimed by the class members who own the funds."[118] As the United States has "no beneficial interest" in funds procured under § 2042, courts may want to consider this underutilized method when it is likely that there will be future claims, and individuals who were actually harmed will thereby be able to obtain actual compensation. However, in cases in which finding additional plaintiffs is unlikely, or in which judges wish to

---

> the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

[116] *In re* Folding Carton Antitrust Litig., 744 F.2d 1252, 1256 (7th Cir. 1984).

[117] *Id.* at 1257 (Flaum, J., concurring in part and dissenting in part).

[118] Moore v. California, No. CIV. S-94-153, 2005 U.S. Dist. LEXIS 29092, at *5–6 (E.D. Cal. Nov. 21, 2005).

follow strict filing deadlines, this method will not be effective.[119]

B. Improving *Cy Pres*

While courts should certainly consider alternatives to *cy pres*, there will be instances in which reversions to the defendant, pro rata distributions, and escheat are not effective solutions. In these situations, *cy pres* may be the best option. By definition, *cy pres* is not the absolute best use for settlement funds.[120] Furthermore, as discussed above, *cy pres* is marred by distribution and efficiency problems. The following proposals will not individually create a perfect doctrine. However, if courts are guided by at least some of them, the result will be a more transparent process that is likely to lead less arbitrary outcomes.

1. Limitation of the Judicial Role—Judge as the Arbiter

Many of the controversial reported cases stem from judges unilaterally picking *cy pres* recipients.[121] Limiting the judicial role from a position of absolute discretion to that of an arbiter would reduce the judicial bias problem. Presumably, class counsel is in a better position than the judge to know the needs of class members and prospective class members. Defense counsel—which holds an interest in a fair distribution since the funds are coming from the

---

[119] *Cf.* Jois, *supra* note 31 (proposing that damages escheat to the state to be distributed proportionately to all the citizens in tort cases in which there are residual funds).

[120] *See* 4 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 10.17 (4th ed. Supp. 2009) (stating that "[t]he cy pres approach . . . puts the unclaimed fund to its next best compensation use").

[121] *See, e.g.*, Fears v. Wilhelmina Model Agency, Inc., No. 02 Civ. 4911, 2005 U.S. Dist. LEXIS 7961 (S.D.N.Y. May 5, 2005), *vacated sub nom.* Masters v. Wilhemina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007), *modified on remand sub nom.* Fears v. Wilhemina Model Agency Inc., No. 02 Civ. 4911, 2007 U.S. Dist. LEXIS 48151 (S.D.N.Y. July 5, 2007), *vacated,* 315 Fed. Appx. 333 (2d Cir. 2009).

defendant—would provide a balancing role, presumably disputing biased distributions. The judge, while no longer maintaining complete discretion, would hear arguments from both sides about to whom the funds should be distributed, and make a determination based on the competing proposals. Better yet, the judge should encourage the parties to mutually agree on appropriate recipients, approving the parties' mutual proposal as long as it is appropriate in light of the underlying litigation. However, even if the parties cannot agree, under this model the judge would not be able to choose *cy pres* recipients unilaterally.

This model—the judge as the arbiter—has been used in many of the cases discussed. While many of these cases suffer from the same distributional problems common to all *cy pres* cases (bias, lack of nexus), a reading of the opinions seems to indicate a greater level of thoughtfulness by the judges. In these cases, the judges are more inclined to analyze the proposals critically. This approach tends to result in a diminished "nexus" problem, as judges seem much more inclined to choose the charity most closely related to the underlying litigation—even if that charity happens to be selected by the defendant.

The court used this method in *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, a case in which the class members were purchasers of music. After the settlement, the judge ordered the following:

> There is no way economically to distribute this amount to the class, given the huge size of the class, and the Settlement Agreement accordingly does not provide for distribution. . . . Therefore, by April 28, 2005, the parties shall propose, separately or collectively, music charities that should be the beneficiaries of this money, including an explanation of why each charity should benefit, a description of the organization, and a certification that it is a tax-exempt nonprofit organization with no ties to the

> parties or the lawyers. The parties may, but are not required to, suggest appropriate amounts.[122]

After the parties proposed three charities,[123] the court then ordered even more information from the parties:

> (1) A brief proposal how the organization will use the funds in a way that is related to the interests of music club members, including specification of what portion will go to administrative costs;
>
> (2) how that proposal, if funded, will result in additional benefit to those interests, and not just replace other monies;
>
> (3) a commitment to implement the proposal if awarded the funds;
>
> (4) a description of how and when the organization will report on use of the funds; and
>
> (5) a commitment to report to the Court.[124]

After receiving the reports, the judge carefully considered the proposals, noting that none were a "perfect fit for the purposes of the music club antitrust class action settlement."[125] The judge then analyzed the reports submitted by each charity, emphasizing the benefits the class would receive. Assuming that increasing access to music and development of musical talent would indirectly benefit the class of music purchasers, the court made distributions to WCKR-FM, a radio station at Columbia University, to buy equipment to furnish a studio to house the best in analog equipment to play back historic recordings in

---

[122] *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 370 F. Supp. 2d 320, 323 (D. Me. 2005).

[123] An objector proposed an additional charity. *In re* Compact Disc Minimum Advertised Price Antitrust Litig., No. 1361, 2005 U.S. Dist. LEXIS 11332, at *4 (D. Me. June 10, 2005).

[124] *Id.* at *9.

[125] *In re* Compact Disc Minimum Advertised Price Antitrust Litig., No. 1361, 2005 U.S. Dist. LEXIS 16468, at *4 (D. Me. Aug. 9, 2005).

their original medium.[126] WKCR-FM would post music online for anyone to hear, which the court noted would benefit all the class members who can listen to the recordings on the Internet.[127] A distribution was also made to the National Guild of Community Schools of the Arts, an organization which would use the money to provide resources to arts schools across the country.[128] The judge determined the class members would indirectly benefit from the development of future musical artists.[129] The judge rejected two proposed distributions—to Jazz at Lincoln Center and to Youth Foundation—because he determined that they are not national in scope, reflecting his concern with geographic bias.[130]

In re Compact Disc Minimum Advertised Price Litigation is a model as to how *cy pres* distributions can be done appropriately and legitimately.[131] The judge's methodology—

[126] *Id.* at *3–5.

[127] *Id.* at *6.

[128] *Id.* at *8–9.

[129] *Id.* at *9.

[130] *Id.* at *8.

[131] Other courts have used this method as well. For example, in *Schwartz v. Dallas Cowboys Football Club*, 362 F. Supp. 2d 574 (E.D. Pa. 2005), both class counsel and defendants submitted proposals. In the case, a settlement alleging antitrust violations on behalf of a class of 1.8 million purchasers of "NFL Sunday Ticket," a satellite television package, the plaintiff class proposed that the residual funds be distributed to a reminder publication notice of alternative programming, University of Pennsylvania Law School's Clinical Education Program, and a high-school scholarship program for Philadelphia middle-school students. *Id.* at 575–76. Defendants proposed that the money be distributed to NFL Youth Education Town ("YET") Centers, an organization located in many cities that has a goal of "enhancing educational and vocational opportunities for children in low-income neighborhoods." *Id.* at 576. The court first addressed plaintiffs' proposals, finding that they did not promote the policy of the underlying litigation under federal antitrust law, are not football or sports related (the underlying litigation), and are not national in scope. *Id.* at 577. The court ultimately accepted defendant's proposal; while it did not meet every criteria that the court considered, and was "far from a perfect fit under *cy pres* principles," the court decided that "[u]nder the circumstances and given the alternatives presented to the Court, the Court concludes that the NFL YET Centers best satisfy *cy pres* principles."

requiring the parties to submit charities, considering the proposals, and accepting or rejecting proposals based on the benefit to the class—increases the likelihood of achieving an appropriate result. Of course, methodology alone did not lead to the result; over the course of several written orders, the judge clearly contemplated this issue in great detail.[132] Furthermore, this method does not guarantee success. For example, in *Diamond Chemical Co.*, only the plaintiff submitted a *cy pres* proposal (to the Center for Competition Law at George Washington Law School), while the defendant merely opposed the distribution.[133] Thus, in this case, both parties took opposing sides as to whether George Washington Law School should receive the distribution, placing the judge in the traditional role as arbiter of the

Id. at 577. Another example of effective judicial decision-making over competing *cy pres* proposals is *Powell v. Georgia-Pacific Corp.*, 843 F. Supp. 491 (W.D. Ark. 1994), *aff'd*, 119 F.3d 703 (8th Cir. 1997). In this case, the settlement involved a class of African-American employees and applicants for employment at Georgia-Pacific Corporation in Crossett, Arkansas who suffered racial discrimination in employment decisions. *Id.* at 492–93. The settlement contemplated that residual money should be disbursed by the court. *Id.* at 493. The plaintiffs requested that the court allow the named plaintiffs to create a tax exempt, non-profit scholarship fund with the additional funds. *Id.* The Union asked for the money to be distributed to the class members. *Id.* at 494. The defendant, Georgia-Pacific, proposed that the funds be transferred to the Georgia-Pacific Foundation, which would invest the funds for the purpose of funding scholarships to provide educational opportunities for African-Americans to allow them to obtain the educational backgrounds to fill supervisory, managerial, and technical positions with Georgia-Pacific. *Id.* The plaintiffs strongly opposed Georgia-Pacific having control of the funds, and listed eight objections to this proposal. *Id.* at 495. The court settled the dispute in favor of Georgia-Pacific, disbursing the funds to the Georgia-Pacific Foundation and instructing the parties to work together. *Id.* at 500.

[132] *Cf. In re* Linerboard Antitrust Litig., No. 1261, 2008 U.S. Dist. LEXIS 77739, at *12–14 (E.D. Pa. Oct. 3, 2008) (accepting class counsels' recommendation that residual funds be distributed to the Philadelphia Bar Foundation and the Camden Center for Law and Social Justice, a distribution that arguably suffers from a lack of nexus to the underlying litigation and several biases).

[133] Diamond Chem. Co. v. Akzo Nobel Chems. B.V., No. 01-2118, 2007 U.S. Dist. LEXIS 49406, at *4–5 (D.D.C. July 10, 2007).

dispute. As discussed above, the court ultimately awarded the residual funds to George Washington Law School. It is open to debate whether the Center benefits the class and was an appropriate use of the funds. Perhaps had defendants' counsel proposed a recipient,[134] the court might have been in a better position to determine if other charities or organizations would have provided a greater benefit to the class.

2. Limitation of the Lawyers' Role

The proposal discussed in the preceding section, while effective in limiting judicial bias, relies heavily on plaintiff class counsel and the defendant's lawyers. In theory, biases are checked by the judge, but as the discussion above suggests, this is not always the case. Furthermore, certain biases, such as geographic bias and bias towards legal related charities, would remain. Expanding the process of identifying appropriate charities beyond the primary participants (the lawyers and the judge) may help limit some of the *cy pres* problems.

One possibility that has been used in several cases is to provide public notice that residual funds are available. This allows charities to apply directly for *cy pres* grants, expanding the scope of possible beneficiaries beyond charities with which the judge and the lawyers happen to be familiar. In effect, this democratizes the process and works to reduce the effects of both the bias and nexus concerns. This also helps solve the efficiency problem, in that lawyers will not be incentivized by the possibility of residual funds *ex ante*.

In *Superior Beverage Co.*,[135] the court invited applications for *cy pres* grants. Notice was published in a variety of ways, including in the Wall Street Journal. The court received fifteen applications and held hearings for an entire day,

[134] In their brief, defendants' asked for a refund of half of the residual funds and opposed plaintiff's proposed recipient. *Id.* at *2.

[135] Superior Beverage Co. v. Owens-Illinois, Inc., 827 F. Supp. 477 (N.D. Ill. 1993).

during which representatives of each applicant and other interested parties had the opportunity to be heard.[136] The court also considered letters in support of the applications.[137] While the *Superior Beverage Co.* decision is notable for its holding that there is no "nexus" requirement,[138] the court's interpretation of the *cy pres* doctrine should not obfuscate the result in this case—the court granted fifteen *cy pres* distributions to organizations including legal aid organizations, colleges, a museum, and a television station. In the written opinion, the court carefully considered each charity and organization, referencing specific information about what each organization promised to do with the grant money.[139] While this case is problematic because the court's "nexus" holding resulted in many of the charities selected by the court bearing no relation to the underlying litigation, the process of holding open hearings and inviting applications could serve as a model to other courts.

The *Superior Beverage Co.* court's approach effectively removed some of the bias problems, although not completely, as legal-related charities were still overrepresented. Speculatively, it is possible that this occurred because legal entities are more attuned to the judicial system and had a greater awareness that the court was accepting applications. Thus, this approach is not without problems of its own; if courts open up the *cy pres* process to the public, lawyers are in the best position to benefit, contributing to the bias problem. As noted above, the manner in which courts have distributed *cy pres* funds has resulted in the creation of an "industry" in which bar associations lobby for funds to be distributed to legal charities. While there is nothing inherently wrong with supporting this type of charity, it is questionable whether distributions to legal organizations generally support the underlying litigation.

---

[136] *Id.* at 478.

[137] *Id.*

[138] *See* discussion *supra* Section IIIA1.

[139] *Superior Beverage Co.*, 827 F. Supp. at 480–87.

To solve this problem, courts can consider creating independent committees to recommend *cy pres* beneficiaries.[140] As long as the members of the committee are independent and composed from a broad mix of society (including non-lawyers), the bias problems should be greatly diminished. Furthermore, plaintiff class counsel and defense counsel should also have a voice on the committee, ensuring that all constituencies are accounted for. In *Folding Carton*, the district court appointed an "Administration Committee" composed of two counsel for the plaintiff class, one counsel for the defendant, and an independent fourth member.[141] While the Seventh Circuit ultimately reversed the district court's adoption of the committee's proposal as an abuse of discretion, this seems like an effective procedural mechanism to minimize the *cy pres* problems.[142]

3. Contemplation in the Settlement

Perhaps the most obvious solution is for courts to strongly encourage parties to look ahead and contemplate the *cy pres* issue in the settlement itself. Especially in large class actions where courts have to set aside money from the settlement fund for administrative costs before distributing the money, it is almost inevitable that some residual funds will remain. If the parties address this in the settlement agreement, the residual funds automatically go to the agreed-upon charity and there is no need for judicial discretion. As one commentator explains, "prudent parties will anticipate the possibility of residual class action funds during settlement negotiations and will provide for distribution of such funds in

---

[140] *See In re* Folding Carton Antitrust Litig., 744 F.2d 1252, 1253 (7th Cir. 1984) (creating a committee); Turner v. Murphy Oil USA, Inc., No. 05-4206, 2009 U.S. Dist. LEXIS 50509, at *61 (E.D. La. May 27, 2009) (same).

[141] *In re* Folding Carton Antitrust Litig., 744 F.2d at 1253.

[142] *See supra* note 28 for a discussion of this rejection. The committee recommended, and the district court accepted, a proposal to use the residual funds to create a tax-exempt research organization to study antitrust law. The Seventh Circuit determined that the plaintiff class would not benefit from this proposal.

the settlement agreement."[143] For example, parties could include the following clause in their settlement agreement:

> All funds remaining in the Settlement Fund following the completion of the allocation process as set forth in this Agreement are to be designated as a Cy Pres Fund, with such funds to be distributed equally to the following non-profit charitable organizations . . . subject to the Courts [sic] approval.[144]

Since class action settlements require judicial approval, judges could even require the parties to include a clause explaining how residual funds will be allocated. This may be ideal, as it would remove the question as to whether *cy pres* should be used in the first place. Parties could contemplate in their agreement that residual funds will be distributed through the use of *cy pres*, but they would also be able to agree that residual funds will be returned to the defendant, be distributed pro rata, or escheat to the treasury.

It is not clear why parties would ever leave this issue open in high stakes cases with large settlements. One commentator suggests that the failure to address the disposition of residual funds in a settlement "may be the result of an oversight or in some cases is intentional because the parties hope to make the settlement payout look larger with no stated reversion to the defendant."[145] Some settlement agreements are silent on the issue of residual funds, while others state that the court can use its discretion to distribute the funds under the *cy pres* doctrine, but are silent as to who the recipients should be. Perhaps in the latter situation, plaintiff counsel may choose not to address the issue because, assuming that there will be residual funds, he wishes to steer them to a charity of his choice later. Plaintiff counsel may know that the defendant will not agree

[143] Raiter & Swanson, *supra* note 12, at 1912 (giving examples of clauses that can be inserted into settlement agreements to allocate residual funds).

[144] *Id.*

[145] *Id.*

to support his charity of choice *ex ante* and does not want to complicate settlement efforts. Since many of the reported cases show a strong role for plaintiff counsel in advising the judge as to possible charities, deciding to leave *cy pres* recipients out of the settlement agreement may be a deliberate choice.

In re Microsoft I-V Cases,[146] a California appellate case, illustrates the certainty that prior contemplation in the settlement agreement affords. In this case, the parties negotiated a settlement agreement specifically designating a detailed *cy pres* program. The residual money would benefit low-income schools in California.[147] In upholding this agreement over a challenge by an objector, the court noted:

> The trial court was not called upon to fashion a *cy pres* distribution of residue, but rather it was called upon to approve a distribution the parties fashioned through extensive negotiated compromise. [Appellant] has cited no authority that explicitly imposes on the trial court a duty to compare a settlement agreement's proposed *cy pres* distribution with other possible distributions when assessing the fairness of that agreement.[148]

Nowhere does the court state that the *cy pres* distributions contemplated in the settlement represent the best use of the residual fund. However, the court found that the trial court did not abuse its discretion by declining to consider alternative distributions.[149] At the very least, prior contemplation removes uncertainty and arbitrariness from the process.[150]

---

[146] 37 Cal. Rptr. 3d 660 (Cal. Ct. App. 2006).

[147] *Id.* at 665–67.

[148] *Id.* at 674.

[149] *Id.*

[150] *See, e.g.*, Bourlas v. Davis Law Assoc., No. CV 05-4548, 2006 U.S. Dist. LEXIS 61854, at *27 (E.D.N.Y. Aug. 30, 2006) (approving a settlement agreement that states that residual funds will be paid in equal parts to the Neighborhood Economic Development Advocacy Project in New York City and the Empire Justice Center in Albany, New York); Hopson v. Hanesbrands, Inc., No. CV 08-0844, 2009 U.S. Dist. LEXIS

4. Statutory Mechanisms

A final solution to the *cy pres* problem is statutory. Since the U.S. Supreme Court has never ruled on the validity of *cy pres* distributions, congressional action would serve the purpose of ensuring uniformity in the principles that courts apply.[151] Potential legislation could take many different forms, depending on the policies that Congress wishes to mandate. For example, a statute could completely ban *cy pres* distributions to any organization affiliated with a lawyer in the case, or could contain strong "nexus" language, effectively preventing courts from making distributions like those in *Superior Beverage Co.*[152] Recently, the American Law Institute ("ALI") expressed its policy position in

33900, at *27 (N.D. Cal. Apr. 3, 2009) (approving a settlement agreement which named the United Way and a legal aid society as *cy pres* recipients, despite a finding that "the nexus between the charities and the injured Class is somewhat attenuated"); *In re* Dep't of Veterans Affairs Data Theft Litig., No. 06-0506, 2009 U.S. Dist. LEXIS 83113, at *3 (D.D.C. Sept. 11, 2009) (settlement agreement named the Intrepid Fallen Heroes Fund and the Fisher House Foundation as *cy pres* recipients, "both not-for-profit charitable organizations that help military personnel, veterans, and their families").

[151] While beyond the scope of this note, a recent article argues that *cy pres* distributions are unconstitutional, as violations of the case-or-controversy requirement of Article III, the Due Process Clause of the Fifth Amendment, and of separation of powers. *See* Redish et al., *supra* note 31, at 32–46. This argument, if accepted by the courts, could potentially undermine the *cy pres* doctrine entirely, and would result in the unconstitutionality of any potential federal *cy pres* statute. However, the argument that *cy pres* is unconstitutional is weaker in the cases discussed in this note—in which it is unclear ex ante that residual funds will remain and courts are tasked with distributing a small percentage of the total fund. The constitutional problems appear to be stronger in cases, such as *Eisen*, where it is clear at the outset that the majority of class members will not be able to be compensated; as Redish et al. note: "[b]y creating the illusion of compensation, cy pres effectively facilitiates the litigants' ability to certify classes where all involved should know from the outset that the plaintiff class exists in theory only." *Id.* at 32.

[152] *See supra* notes 42–44 and accompanying text.

"Principles of the Law of Aggregate Litigation."[153] The ALI proposal reflects the opinion that *cy pres* should be used sparingly, favoring distributing residual funds pro rata to class members in many situations. While the analysis above indicates that this is not the best policy, the ALI draft is one example of how a statute could endorse a particular *cy pres* policy.

Additionally, some states have statutes addressing *cy pres* distributions in state courts.[154] Notably, many of the

---

[153] PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 (Proposed Final Draft 2009). The ALI approved the following final draft at its 2009 meeting (although the language is subject to change prior to publication):

> The court must apply the following criteria in determining whether a cy pres award is appropriate:
>
> (a) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members.
>
> (b) If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.
>
> (c) If the court finds that individual distributions are not viable based upon the criteria set forth in subsections (a) and (b), the settlement may utilize a cy pres approach only if the parties can identify a recipient involving the same subject matter as the lawsuit that reasonably approximates the interests being pursued by the class.

[154] A search yielded five states that address *cy pres* distributions in class actions by statute or in their rules of civil procedure: Illinois,

statutes require that a percentage of residual funds go to legal aid societies, effectively codifying the bias problem discussed above into law. Under North Carolina law:

> It is the intent of the General Assembly to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action or to promote justice for all citizens of this State. The General Assembly finds that the use of funds collected by the State courts pursuant to this section for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.[155]

Despite this broad introductory language, the statute requires the court, unless it orders otherwise, to direct the

---

Massachusetts, North Dakota, North Carolina, and Washington. However, there is little evidence of their effectiveness, as all the laws were enacted in the past several years. There have not been any reported cases under these laws of any relevance to the issues being considered. Furthermore, since many nationwide class actions are litigated in federal court, the actual effect of these laws on the large class actions that have been discussed throughout the note is likely to be minimal. This trend is likely to continue because Congress passed the Class Action Fairness Act (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), in 2005, increasing the jurisdiction of federal courts to hear class action lawsuits. *See* 28 U.S.C. § 1332(d)(2) (2006) (providing original jurisdiction to the district court in cases "in which the matter in controversy exceeds the sum or value of $5 million, exclusive of interest and costs, and is a class action in which--(A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state"); *see generally* Emery G. Lee III & Thomas E. Willging, Federal Judicial Ctr., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf /$file/cafa0408.pdf (finding a "dramatic increase" in diversity class actions filed in district courts post-CAFA).

[155] N.C. GEN. STAT. § 1-267.10(a) (2009).

defendant to pay the residual funds to the Indigent Person's Attorney Fund and to the North Carolina State Bar for legal services for the indigent.[156] A Washington state statute has similar policy goals:

> In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents of Washington State. The court may disburse the balance of any residual funds beyond the minimum percentage to the Legal Foundation of Washington or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.[157]

Thus, while North Carolina creates a default rule that residual funds are donated to legal aid societies, the Washington legislature mandates that a percentage of the residual funds go to the Legal Foundation of Washington.[158] Although the North Carolina rule actually permits more discretion than the Washington rule—since North Carolina courts can opt out of the default rule—the legislature expressed a strong policy preference that all residual funds be directed to legal aid societies.

Illinois takes a different approach, providing more deference than Washington by not mandating that a percentage of the funds go to a particular charity, but

---

[156] N.C. GEN. STAT. § 1-267.10(b) (2009).

[157] WASH. R. SUPER. CT. CR 23(f).

[158] South Dakota takes a similar approach to Washington. *See* S.D. CODIFIED LAWS § 16-2-57 (2008) (providing for the distribution of any residual funds to the Commission on Equal Access to Our Courts, but allowing fifty percent of the residual funds to be distributed to "one or more other nonprofit charitable organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of the settlement").

proscribing in-depth procedural instructions to the court, and establishing criteria for eligible charities.[159] For example, in order to be an "eligible organization" and receive funds, a charity must (a) have been in existence for at least three years; (b) have been tax exempt for at least three years; (c) be in compliance with registration and filing requirements under applicable laws; and (d) have a "principal purpose of providing services" that would be eligible for funding under applicable Illinois law.[160] The Illinois law provides discretion to judges, stating that "up to 50% of the residual funds may be distributed to one or more other nonprofit charitable organizations or other organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of a settlement."[161]

From a policy perspective, the Massachusetts statute comes closest to mandating a "nexus" requirement and, based on the foregoing discussion, provides the best model if the goal is to increase legitimacy and remove arbitrariness. Under the Massachusetts Rules of Civil Procedure:

> In matters where the claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, or to the Massachusetts 1OLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts.[162]

While the Massachusetts rule codifies the nexus requirement, it suffers from the same bias problems as the other state statutes, explicitly directing judges that they can

[159] 735 ILL. COMP. STAT. ANN. 5/2-807 (2009).

[160] 735 ILL. COMP. STAT. ANN. 5/2-807(a)(i)-(iv) (2009).

[161] 735 ILL. COMP. STAT. ANN. 5/2-807(b) (2009).

[162] MASS. R. CIV. P. 23(e).

distribute residual funds to the 1OLTA Committee. Despite this bias problem, Congress may wish to consider the Massachusetts rule when contemplating a federal *cy pres* statute. While it does not completely eliminate the problems associated with *cy pres*, the Massachusetts rule, at minimum, provides a greater explanation of the "nexus" requirement than is provided by the other state statutes and many federal court *cy pres* decisions. Given that some federal courts do not accept the basic notion that there must be a nexus between the underlying litigation and the charity chosen to receive the residual funds, the Massachusetts rule would be an improvement over the current *ad hoc* approach.

VI. CONCLUSION

The common feature of most of the controversial *cy pres* distributions is that all can be traced to judicial discretion. If there were more rules guiding the *cy pres* process—either those adopted by an appellate court or through statutory mechanisms—it is likely that the problem would diminish. Today, courts are in the unenviable position of taking the amorphous language of the few circuit court opinions on this subject and trying to determine what charities are appropriate for *cy pres* distributions. This results in huge disparities. Some courts adopt the proposals provided by class counsel, effectively exercising no discretion other than approving a recommendation.[163] Others effectively turn the court into grant administrators, requiring proposals and reports as to how the funds have been utilized as a condition of receiving the balance of the grant.[164] None of the solutions

[163] *See, e.g.*, Diamond Chem. Co. v. Akzo Nobel Chems. B.V., No. 01-2118, 2007 U.S. Dist. LEXIS 49406 (D.D.C. July 10, 2007); Jones v. Nat'l Distillers, 56 F. Supp. 2d 355 (S.D.N.Y. 1999).

[164] *See, e.g.*, Superior Beverage Co. v. Owens-Illinois, Inc., 827 F. Supp. 477, 487 (N.D. Ill. 1993) (noting that "each applicant upon receipt of the grant funds will agree to provide the court with a report at the end of six months from the date of receiving the funds detailing the use of any funds expended, the arrangements made for holding and investing unexpended funds and the results accomplished. Six months thereafter a further report will be filed with the court and annually thereafter so long

proposed will completely eliminate arbitrariness in *cy pres* distributions. After all, the underlying purpose of the doctrine is to put the funds to their "next best use,"[165] and so no matter who receives the funds, there will always be debate as to which recipient is the best. Rather, the proposals presented would go a long way toward improving procedures and increasing the legitimacy of the difficult choices that must ultimately be made when courts distribute residual funds through the *cy pres* doctrine.

as the grant funds or the income therefrom are being utilized by the grantee"). *See also* Jois, *supra* note 31, at 267–68 (discussing the Illinois and Washington statutes and noting that "[a]t least two states have embraced the idea of 'courts as grant administrators'").

[165] 5 JEROLD S. SOLOVY ET AL., MOORE'S FEDERAL PRACTICE § 23.171 (3d ed. Supp. 2009).