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Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions

Wilber H. Boies

McDermott Will & Emery LLP, bboies@mwe.com

Latoria Haney Keith

Concordia University School of Law, lkeith@cu-portland.edu

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CLASS ACTION SETTLEMENT RESIDUE AND *CYPRES* AWARDS:
EMERGING PROBLEMS AND PRACTICAL SOLUTIONS

Wilber H. Boies*
Latonia Haney Keith**

ABSTRACT

Class action settlements often present the court and parties with the practical problem of disposing of residual funds that remain after distributions to class members. The cy pres doctrine is a well-recognized device that permits the court to designate suitable organizations to receive such funds. Recently, academics, judges, practitioners, and professional objectors have mounted a multi-faceted attack on this device, ranging from constitutional and ethical concerns to appeals challenging specific awards. This Article first describes the use of cy pres awards in class action settlements and explains why the constitutional, statutory, and ethical objections are unfounded. This Article then addresses other concerns that have been raised about particular awards by suggesting a principled and practical approach to cy pres awards. Finally, this Article explains why public interest and legal services organizations—organizations focused on providing access to the justice system for disenfranchised individuals—are appropriate cy pres recipients and avoid many of the problems raised by other potential recipients.

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* Wilber H. Boies is a partner at McDermott Will & Emery LLP, whose practice focuses on business disputes counseling and business litigation, including defense of consumer, securities and employee benefits class actions throughout the country. Bill serves as chair of the Chicago Bar Foundation’s *cy pres* award initiative.

** Latonia Haney Keith is McDermott Will & Emery LLP’s Firm-Wide Pro Bono Counsel. She manages the firm’s *pro bono* practice and represents charitable organizations and disadvantaged individuals and families. She also serves as president of the Association of Pro Bono Counsel, a membership organization of over 125 attorneys and practice group managers who oversee *pro bono* practices in 85 of the world’s largest law firms.

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INTRODUCTION

Class action litigation settlements commonly include a settlement fund provided by the settling defendants to be distributed among class members. The distribution by a class action administrator often leaves a residue of undistributed funds, and consequently, the practical question of what to do with those residual funds. The standard solution is a court order for a *cy pres* award providing that the residual funds will be distributed to charities or other nonprofit organizations proposed by the parties and approved by the court.

In recent years, *cy pres* awards in class actions have attracted multifaceted attacks from academics, judges, practitioners, and professional objectors, ranging from constitutional challenges to ethical concerns. Additionally, there has been considerable criticism of *cy pres* awards to particular recipients. Part I of this Article provides an overview of the historical roots and application of the *cy pres* doctrine in class action settlements. Part II addresses the constitutional and statutory arguments against the *cy pres* doctrine in the class action arena. Part III discusses criticisms of problematic *cy pres* awards, identifies categories of concerns with the awards, and suggests solutions to avoid potential problems, including making *cy pres* awards to public interest and legal aid organizations.

I. *CY PRES*—ITS ORIGINS & APPLICATION IN CLASS ACTION SETTLEMENTS

Cy pres awards are distributions of the residual funds from class action settlements or judgments (and occasionally from other proceedings, such as probate and bankruptcy matters) that, for various reasons, are unclaimed or cannot be distributed to the class members or

other intended recipients. The term *cy pres* derives from the Norman-French phrase, *cy pres comme possible*, meaning “as near as possible.”¹ Originating at least as early as sixth-century Rome, the *cy pres* doctrine has its roots in the laws of trusts and estates, operating to modify charitable trusts that specified a gift that had been granted to a charitable entity that no longer existed, had become infeasible, or was in contravention of public policy.² In such instances, courts transferred the funds to the next best use that would satisfy “as nearly as possible” the trust settlor’s original intent.³

When class actions are resolved through settlement or judgment, it is not uncommon for excess funds to remain after a distribution to class members. Residual funds are often a result of the inability to locate class members or class members failing or declining to file claims or cash settlement checks.⁴ Such funds are also generated when it is “economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed.”⁵

In these circumstances, three primary options exist for distributing the remaining funds: (i) reversion to the defendant, (ii) escheat to the state, or (iii) a *cy pres* award.⁶ In recent years, courts have consistently (and understandably) preferred the distribution of residual funds through *cy pres* awards over the other options. Reversion to the defendant undermines the deterrent effect of class actions. While escheat to the state overcomes this concern, it benefits only the local government rather

¹ EDITH L. FISCH, *CY PRES DOCTRINE IN THE UNITED STATES* 1 (1950).

² *Id.* at 3; 3 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 10:17 (4th ed. 2012) [hereinafter *NEWBERG ON CLASS ACTIONS*].

³ FISCH, *supra* note 1, at 1.

⁴ This is an indirect result of the 1966 amendments to the Federal Rule of Civil Procedure 23, which altered class action practice by adopting automatic inclusion in, rather than exclusion from, a non-mandatory class for class members who do not opt out of a class. *See* FED. R. CIV. P. 23. Those amendments increased the number of class actions in which courts and counsel are faced with how to handle residual funds from class awards and settlements.

⁵ *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013).

⁶ Courts have consistently rejected a fourth option of awarding unclaimed residual funds to already fully compensated class members. *See* *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) (“Where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so, except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution.”); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34–36 (1st Cir. 2009) (rejecting the argument that claimants are entitled to receive a windfall of any unclaimed residual money regardless of whether they have already been compensated for their losses).

than the class of persons with claims in the class action.⁷ *Cy pres* awards, on the other hand, preserve the deterrent effect and allow courts to distribute residual funds to charitable causes that reasonably approximate the interests pursued by the class action for absent class members who have not received individual distributions.⁸

II. GETTING PAST THE SMOKE SCREEN—*CY PRES* AWARDS IN CLASS ACTIONS ARE CONSTITUTIONAL

The *cy pres* doctrine was first introduced into the class action context in 1974 in *Miller v. Steinbach*.⁹ It is now well-established that a federal district court “does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury.”¹⁰ Despite such precedent, certain academics and practitioners have questioned the constitutionality of *cy pres* awards in the class action context and argued that using the *cy pres*

⁷ *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 172. Moreover, state seizure of class action residue would complicate resolution of class actions by restricting the options available to parties attempting to resolve complex disputes. The Texas Supreme Court recently heard oral argument in an appeal from an order allowing the State of Texas to intervene to invalidate, and assert an interest in, a *cy pres* component of a class action settlement agreement. The state argued that the residue should be reserved for class members in the Texas Unclaimed Property Fund for three years, after which it would escheat to the state. *State v. Highland Homes, Ltd.*, No. 08-10-00215-CV, 2012 WL 2127721 (Tex. App. Jun. 13, 2012), *appeal granted*, No. 08-10-00215-CV (Tex. Aug. 23, 2013).

⁸ *Cy pres* awards may be granted to an organization with a mission directly tied to the underlying statutes at issue in the class action. In a case where AOL allegedly inserted footers containing promotional messages in its e-mails, the Ninth Circuit referenced “non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance” as appropriate *cy pres* recipients. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1041 (9th Cir. 2011). Courts may also grant *cy pres* awards to legal services and public interest organizations. *See* discussion *infra* Part III.F.

⁹ *Miller v. Steinbach*, No. 66 Civ. 356, 1974 U.S. Dist. LEXIS 12981, at *3-4 (S.D.N.Y. Jan. 3, 1974) (approving the parties’ settlement agreement in a case that alleged the terms of a merger were unfair and acknowledging that the court was “applying a variant of the *cy pres* doctrine at common law”).

¹⁰ *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 172; *see also* *Lane v. Facebook, Inc.*, 696 F.3d 811, 817–18 (9th Cir. 2012) (affirming trial court’s distribution of settlement funds to entities that promoted online privacy and security in response to plaintiffs’ allegations of privacy violations); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 33–36 (holding the trial court did not abuse its discretion in approving a settlement that would distribute excess funds to charitable organizations funding cancer research or patient care); *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989) (recognizing that the court has broad discretion in identifying appropriate uses of *cy pres* distribution of residual settlement funds).

doctrine in class actions violates Article III of the United States Constitution, the Rules Enabling Act, and procedural due process.¹¹ These arguments have not fared well in the courts.

A. ARTICLE III CASE-OR-CONTROVERSY REQUIREMENT

Opponents of *cy pres* distributions in class actions argue that a court-imposed payment of unclaimed class funds from one private party to another party whose rights are not being adjudicated in the lawsuit violates the case-or-controversy requirement set forth in Article III of the United States Constitution.¹² The supposed violation occurs because the redistribution of unclaimed funds to charities transforms “the judicial process from a bilateral private rights adjudicatory model into a trilateral process . . . wholly unknown to the adjudicatory structure contemplated by Article III.”¹³

Arguing that *cy pres* distributions impermissibly forge a trilateral relationship mischaracterizes what actually happens in class action settlements. In order to resolve class action litigation, district courts must first approve the settlement and then oversee the distribution of settlement funds. Whether such funds are distributed back to the defendant, to the state or to charitable recipients, a court tasked with distributing residual funds merely performs an administrative act to finally resolve a dispute between adverse parties by ordering the distribution of such funds.¹⁴

¹¹ The most notable opponents to the application of the *cy pres* doctrine in the class action context are Professor Martin H. Redish of Northwestern University School of Law and legal activist Ted Frank, who is the founder of the Center for Class Action Fairness.

¹² U.S. CONST. art. III, § 2.

¹³ Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 641 (2010); see Joshua L. Gayl, *The Question Facing Class Action Defense Counsel: To Cy Pres or Not to Cy Pres?*, FOR THE DEFENSE, Nov. 2011, at 16, 18–20.

¹⁴ See generally FED. R. CIV. P. 23; MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.1 at 167–82 (2004); NEWBERG ON CLASS ACTIONS, *supra* note 2, § 10:16; see also Ira Holtzman, *C.P.A. v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013) (remanding the district court’s order of a *cy pres* award as premature, but stating that “[o]nce the court knows what funds are available for distribution, it should (if necessary) reconsider how any remainder will be applied,” including potentially ordering and distributing a *cy pres* award); *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 172–74 (stating “[s]ettlements are private contracts reflecting negotiated compromises. The role of a district court is not to determine whether the settlement is the fairest possible resolution The Court must determine whether the compromises reflected in the settlement—including those terms relating to the allocation of settlement funds—are fair,

The only judicial recognition of this academic argument is in a concurring opinion in a Fifth Circuit case where the majority ordered changes to the *cy pres* award but did not reject using the device. In that concurrence in *Klier v. Elf Atochem North America, Inc.*,¹⁵ Judge Edith H. Jones raised the concern that *cy pres* distributions may implicate Article III's standing requirements because distributions to non-parties to the "original litigation may confer standing to intervene in the subsequent proceedings should the distribution somehow go awry."¹⁶ The obvious response is that a charitable recipient of a *cy pres* award obtains a vested interest in such funds. Once this interest is established, the charitable organization should be entitled to participate in any court action that would affect its expected receipt of the funds. Accordingly, the recipient organization would have standing to contest any action affecting its claim, and the case-or-controversy requirement would be fully satisfied (if necessary).¹⁷ In any event, Judge Jones' concern was not shared by the other judges in *Klier*—or by other courts.

Notably, academics advancing challenges to the application of the *cy pres* doctrine in class actions on constitutional grounds generally admit that those challenges are of no concern in the settlement context. As acknowledged by Professor Martin H. Redish, "[w]hen *cy pres* relief is voluntarily imposed by the parties themselves . . . it is not properly attributable to the class action court and therefore Article III's

reasonable, and adequate when considered from the perspective of the class as a whole," and holding that "a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party").

¹⁵ 658 F.3d 468, 480–82 (5th Cir. 2011).

¹⁶ *Id.* at 481.

¹⁷ As mentioned in Section I, the *cy pres* doctrine originated in the laws of trusts and estates, where courts recognize the standing of claimants. See NEWBERG ON CLASS ACTIONS, *supra* note 2, § 11:20. In the charitable trust arena, courts acknowledge the standing of potential beneficiaries when they must determine whether to exercise their *cy pres* power. See, e.g., *In re Trustco Bank*, 929 N.Y.S.2d 707, 711 (N.Y. Sup. Ct. 2011) ("[T]he issue of standing and who has the right to appear and participate as a party in any given case is commonly addressed at the outset of the litigation . . . to protect the interests of all parties, [and] to avoid prejudice. . . . This approach is all the more appropriate in *cy pres* proceedings, where the issues of whether to apply *cy pres* and how to apply it are interrelated."). Similarly in class actions, courts typically allow *cy pres* award recipients and claimants to participate in proceedings regarding the award. See Motion for Leave to File a Request for Designation of a *Cy Pres* Distribution, *In re Motorola Sec. Litig.*, No. 03 C 287 (N.D. Ill., Mar. 5, 2013), and Application of Illinois Bar Foundation for a *Cy Pres* Award, *In re Motorola Sec. Litig.*, No. 03 C 287 (N.D. Ill., Mar. 5, 2013), for an example of *cy pres* award recipients participating in the proceedings before the award and the court's subsequent opinion, *In re Motorola Sec. Litig.*, No. 03 C 287, slip op. at 2 (N.D. Ill., Mar. 5, 2013).

requirements are not implicated.”¹⁸ In other words, class action settlement agreements fashioned by the parties that select appropriate charitable organizations as *cy pres* recipients of any unclaimed funds circumvent the case-or-controversy argument because the parties, and not the court, establish the interests of the third parties.¹⁹

The Article III concerns and challenges raised by Professor Redish and Judge Jones are theoretical arguments repeated in other recent articles about a device used in hundreds of cases every year. No federal district court has rejected a class action settlement or a proposed *cy pres* distribution because of purported issues related to the interplay between the Article III case-or-controversy requirement and *cy pres* distributions. We are aware of no district court that has even found it necessary to justify its approval of a class action settlement by addressing these professed issues. What initially appears to be one-sided support for these Article III arguments in recent articles is, in reality, only the sound of one hand clapping. The absence of counterarguments against Article III criticisms of class action *cy pres* distributions in actual court opinions does not demonstrate court acceptance of these arguments. It simply demonstrates that federal courts have not found such arguments of concern.

B. RULES ENABLING ACT

The Rules Enabling Act prohibits courts from using a rule of procedure to abridge, modify, or enlarge a substantive right.²⁰ Applied in the class action context, rules of civil procedure therefore cannot grant a class more rights than its members would have had if they had filed individual lawsuits. Opponents of *cy pres* awards argue that a court-imposed payment of unclaimed settlement funds from a defendant to a third party transforms the class members’ private cause of action into a civil penalty.²¹ Stated another way, they argue that a class award becomes a civil penalty that modifies the substantive right contained in the underlying cause of action, if and when an unclaimed award is

¹⁸ Redish et al., *supra* note 13, at 643.

¹⁹ Interestingly, critics of *cy pres* awards do not advance Article III violation arguments when contemplating unclaimed funds escheating to the state; their primary concerns with that option are that escheat to the state is “tantamount to fining the defendant,” and there is no guarantee that the state will “necessarily use funds obtained by escheat for purposes reasonably related to the subject matter of a lawsuit, or for compensating the silent class members.” Gayl, *supra* note 13, at 21 (citing Redish et al., *supra* note 13, at 639, 665).

²⁰ 28 U.S.C. § 2072 (2006) (providing that the “Supreme Court shall have the power to proscribe general rules of practice and procedure and rules of evidence for cases in the United States district courts[,] . . . [and] [s]uch rules shall not abridge, enlarge or modify any substantive right”).

²¹ See Redish et al., *supra* note 13, at 644–46; Gayl, *supra* note 13, at 19.

distributed to a third party. In this way, class action *cy pres* awards supposedly violate the Rules Enabling Act.

Courts have rejected this argument. Congress has approved the aggregation of private causes of action in class actions to allow plaintiffs to recover compensatory damages for their injuries.²² *Cy pres* distributions serve that purpose—albeit imperfectly—by substituting other relief for that direct compensation²³ and are, in practice, only a device for the court to administer the last stage of the settlement of a complex case.²⁴ As the Third Circuit noted:

Because “a district court’s certification of a settlement simply recognizes the parties’ deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action,” we do not believe the inclusion of a *cy pres* provision in a settlement runs counter to the Rules Enabling Act.²⁵

In other words, no Rules Enabling Act issues arise when a district court merely orders that the parties comply with the terms of their settlement agreement.

There are broader problems with the Rules Enabling Act attack. Even ardent opponents of class action *cy pres* awards concede that, rather than transforming underlying substantive law claims into a civil fine, the disposition of unclaimed property is a “legal issue wholly distinct from the substantive law enforced in the suit that [gives] rise to the unclaimed award in the first place.”²⁶ Moreover, the courts have gained comfort from the guidelines established by the American Law Institute, which both respect the Rules Enabling Act as the “ever-antecedent and overarching limitation on class-action litigation,”²⁷ and

²² See *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) (citation omitted).

²³ See *id.* at 169.

²⁴ See generally *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir. 1989) (treating *cy pres* distribution as a matter of the federal court’s inherent equitable discretion); *Van Gemert v. Boeing Co.*, 739 F.2d 730, 737 (2d Cir. 1984) (stating as support for its decision to make a *cy pres* distribution of unclaimed class action award that “trial courts are given broad discretionary powers in shaping equitable decrees”).

²⁵ *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173 n.8 (citation and quotations omitted).

²⁶ See Redish et al., *supra* note 13, at 646.

²⁷ *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011).

conclude that *cy pres* distributions are permissible when it is not feasible to make distributions to the class.²⁸

C. CONSTITUTIONAL DUE PROCESS

Critics of *cy pres* awards also argue that attorneys' fees based, in part, on the amount of any *cy pres* distribution²⁹ threaten to "unconstitutionally undermine[] the due process obligation of those representing absent class members to vigorously advocate on their behalf and defend their legal rights."³⁰ *Cy pres*, as the argument goes, "creates an insidious incentive for class counsel to shirk their responsibility" and therefore "encourages exorbitant fees for class counsel at the expense of the absent class members, who are left with zero compensation."³¹

No one disputes that there have been class actions in which district court fee awards to plaintiffs' counsel have not been in the best interest of plaintiff class members, but few of those cases involve *cy pres* awards. For example, the Ninth Circuit recently vacated a district-court approved settlement, in part because attorneys' fees that likely amounted to 38.9% of the total class settlement fund were "excessive."³² The court noted that the true valuation of a settlement "must be examined with great care to eliminate the possibility that it serves only the 'self-interests' of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious."³³ Likewise, in *In re Dry*

²⁸ PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. a (2010) [hereinafter ALI PRINCIPLES].

²⁹ Critics of *cy pres* awards argue that "whenever a settlement agreement includes a *cy pres* component, the fees awarded to class counsel should be tied to the value of money and benefits actually redeemed by the injured class members—not the theoretical value of the *cy pres* remedy." John H. Beisner et al., *Cy Pres: A Not So Charitable Contribution to Class Action Practice*, U.S. CHAMBER INST. FOR LEGAL REFORM 19, (2010), available at http://ilr.iwssites.com/uploads/sites/1/cypres_0.pdf.

³⁰ Redish et al., *supra* note 13, at 650; *see also* Gayl, *supra* note 13, at 20 (arguing that even if plaintiffs' lawyers fulfill their ethical obligations to advocate for compensation of individual class members, the mere "temptation to ignore their responsibilities still violates due process").

³¹ Beisner et al., *supra* note 29, at 18; *see also* Gayl, *supra* note 13, at 17 ("Plaintiffs' counsel often misuse the *cy pres* doctrine to generate large attorneys' fees and positive publicity, bastardizing the purpose of the doctrine.").

³² *Dennis v. Kellogg Co.*, 697 F.3d 858, 867–68 (9th Cir. 2012) (finding \$2 million in attorneys' fees excessive where such fees would be drawn from a settlement fund that totaled \$5.14 million).

³³ *Id.* at 868; *see also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011) (vacating the district court's approval of a settlement agreement which included \$1.6 million in attorneys' fees on a fee application

Max Pampers Litigation,³⁴ the Sixth Circuit reversed the district court's approval of a settlement agreement that provided unnamed class members a "medley of injunctive relief," while awarding class counsel a fee of \$2.73 million, despite the fact that the counsel "did not take a single deposition, serve a single request for written discovery, or even file a response to [Proctor & Gamble's] motion to dismiss."³⁵ The Sixth Circuit held that the settlement agreement gave "preferential treatment" to class counsel "while only perfunctory relief to unnamed class members."³⁶ These opinions correctly stress that which is patently obvious: such legal fee awards should not be approved and are subject to objections and reversal on appeal. But a few outlier cases and bad actors should not taint all class actions, which are an invaluable tool for parties who need to resolve complex disputes.

As to *cy pres* awards and plaintiffs' attorneys' fees, critics argue that *cy pres* "eliminat[es] the allegedly injured class members' rights to recover compensation directly, most likely without their knowledge."³⁷ One important corrective for this supposed problem is adequate notice to class members. Federal Rule of Civil Procedure 23(c)(2)(B) requires district courts to "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."³⁸ For an opinion directly addressing this notice issue, see *In re Vitamin Cases*,³⁹ where the court held that *cy pres* distribution of the entire class action award to charitable organizations did not violate the procedural due process rights of the plaintiff class members.⁴⁰ The court explained that "[procedural due process] does not guarantee any particular procedure but . . . require[s] only notice reasonably calculated to apprise interested parties of the pendency of the action affecting their property interest and an opportunity to present their objections."⁴¹

with "duplicative entries, excessive charges for most categories of services, a substantial amount of block billing, and use of an inflated hourly rate . . .").

³⁴ 724 F.3d 713 (6th Cir. 2013).

³⁵ *Id.* at 718.

³⁶ *Id.* at 721 (quoting *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 755 (6th Cir. 2013)).

³⁷ Gyl, *supra* note 13, at 20.

³⁸ FED. R. CIV. P. 23(c)(2)(B).

³⁹ 132 Cal. Rptr. 2d 425 (Cal. Ct. App. 2003).

⁴⁰ *Id.* at 432.

⁴¹ *Id.* (citations and internal quotation marks omitted); see also *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 191 (S.D.N.Y. 2012) ("[A] Rule 23 Notice will satisfy due process when it describes the terms of the settlement generally, and informs the class about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing." (internal quotations and citations omitted)); *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir. 1985)

As to the specific question of counting *cy pres* distributions in the calculation base for legal fee awards to plaintiffs' counsel, the misuse of the *cy pres* doctrine to justify higher attorneys' fees for plaintiffs' lawyers than the actual recovery for the class might suggest is rare. The courts have procedures in place to evaluate the reasonableness of attorneys' fees,⁴² and if necessary, the power to decrease a requested fee award where there is "reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class."⁴³ And if the presiding judge fears or observes that class counsel may lack incentive to vigorously pursue individualized compensation for absent class members, she "should subject the settlement to increased scrutiny,"⁴⁴ and may reject the proposed settlement agreement. Such safeguards protect against any inclination of class counsel to maximize their own financial gain at the expense of the class.

As with the Article III attacks, critics mounting due process attacks seem to concede that their arguments do not really apply to class actions that are settled. Such critics acknowledge, for example, that "[i]f *cy pres* is to have any application in class action cases, it should only be available in the settlement context"⁴⁵ As the application of the *cy pres* doctrine occurs overwhelmingly in the settlement rather than the judgment context, this concession cannot be overlooked because it demonstrates that concerns as to the constitutionality and procedural validity of the *cy pres* doctrine in class actions are often overstated and a distraction from the more significant discussion about the appropriate application of the doctrine (as discussed in Part III below).⁴⁶

("[N]otice 'must be such as is reasonably calculated to reach interested parties' and 'apprise [them] of the pendency of the action.'" (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 318 (1950)) (second alteration original)).

⁴² Courts regularly use one of two methods (and sometimes both as a cross-check) to ensure the reasonableness of attorneys' fees: a percentage-of-recovery method or a lodestar method. The lodestar method provides a convenient measurement for reasonableness, "calculat[ing] fees by multiplying the number of hours expended by some hourly rate appropriate for the region and for the experience of the lawyer." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 176 (3d Cir. 2013) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819 n.37 (3d Cir. 1995)).

⁴³ *Id.* at 178 (suggesting the metric for determining attorneys' fees for class counsel should not include monetary amounts that do not directly benefit plaintiff class members).

⁴⁴ *Id.* at 173.

⁴⁵ *Beisner et al.*, *supra* note 29, at 19.

⁴⁶ *See Redish et al.*, *supra* note 13, at 661 ("[S]ince 2000, the majority of class action *cy pres* awards are associated with cases that were certified solely for the purposes of settlement."); *Beisner et al.*, *supra* note 29, at 15 ("[T]he use of *cy*

III. USING THE *CYPRES* DOCTRINE—BAD EXAMPLES AND BEST PRACTICES

In addition to constitutional and statutory arguments, academics, practitioners, and the general media have expressed skepticism about how the *cy pres* doctrine is being used in the class action context. Critics consistently argue the following:

[C]y pres settlements do not compensate class members; they are used as a means to justify attorneys' fees for the plaintiffs' lawyers; they invite judges to abuse their authority by enriching nonprofits with which they have personal ties at the expense of the allegedly injured class members; and they permit plaintiffs' lawyers and defendants to collude to ensure that the plaintiffs' lawyers get paid, while permitting the defendants to limit their liability by not paying the purportedly injured class members.⁴⁷

The critics point to the few cases in which certain district courts misapplied or allegedly abused the doctrine as proof that *cy pres* is “an invitation to wild corruption of the judicial process”⁴⁸ and is “an abused concept”⁴⁹ that should be avoided in class actions.⁵⁰ Much of the discourse, however, misconstrues the case law by viewing reversals on

pres has generally been restricted to the class action settlement context (in part because few class actions have historically been tried to verdict).”).

⁴⁷ David L. Balsler et al., *Are Cy Pres Settlements Really 'Faux Settlements'? Analyzing Recent Criticism of Cy Pres Funds in Class Settlements*, 13 CLASS ACTION LITIG. REP. (BNA) 1080, 1081 (2012); see also Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 12, 2013, http://www.nytimes.com/2013/08/13/us/supreme-court-may-hear-novel-class-action-case.html?_r=2& (quoting David B. Rivkin, Jr., the lead lawyer on the petition for certiorari to the United States Supreme Court in *Lane v. Facebook* as stating “Cy pres awards only increase the risk of collusion, because they facilitate settlements that are cheaper and easier for defendants, still provide high fees for class attorneys, but sell class members down the river.”).

⁴⁸ Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES, Nov. 26, 2007, http://www.nytimes.com/2007/11/26/washington/26bar.html?_r=0.

⁴⁹ Jessie Korkda Kamens, *Class Action Objectors Defend Their Role in Settlement Process at ABA Conference*, 80 U.S. LAW WK. (BNA No. 15) 534, 535 (Oct. 25, 2011) (quoting Darrell Palmer, a serial objector and panelist on a panel entitled “Class Action Objectors – Are They Protectors of Absent Class Members or Merely Gadflies?” held during the American Bar Association’s 15th Annual National Institute on Class Actions).

⁵⁰ See Liptak, *supra* note 48, (characterizing court-ordered *cy pres* distribution of unclaimed class action awards as “[a]llowing judges to choose how to spend other people’s money . . .”); Gayl, *supra* note 13, at 20 (asserting that *cy pres* makes bad doctrine for class actions).

appeal of a few dubious *cy pres* awards as evidence that *cy pres* is “bad doctrine for class actions.”⁵¹

The application of the *cy pres* doctrine in class actions, as with any other doctrine throughout legal history, has evolved as courts have faced complex and unique facts and circumstances in each particular case. As such, it is of no surprise and certainly not unusual that some awards have been reversed on appeal. The vast majority of such reversals are not for “abusing” the *cy pres* doctrine (i.e., using *cy pres* for personal gain for counsel or judges). Rather, most reversals are due to the misapplication of the doctrine within the particular circumstances of the case (e.g., failure to compensate class members or misalignment between the interests of the class members and the interests of the *cy pres* recipients). While addressing these problems, federal courts have remained firm that the *cy pres* doctrine is valid in the class action context.⁵² The American Law Institute’s Principles of Law of Aggregate Litigation (“ALI Principles”) agrees and provides key guidance on the application of *cy pres* awards in class actions, which is respected and generally followed by the courts.⁵³ The ALI Principles acknowledge that “many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members.”⁵⁴ The question

⁵¹ Gayl, *supra* note 13, at 20.

⁵² See, e.g., *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (“[A] district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury.”); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 38–39 (1st Cir. 2012) (affirming class action *cy pres* distribution to charitable recipient); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (“In the context of class action settlements, a court may employ the *cy pres* doctrine to put the unclaimed fund to its next best compensation use” (citation and internal quotations omitted)); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 n.15 (5th Cir. 2011) (“[C]*y pres* awards are appropriate only when direct distributions to class members are not feasible” (citation and internal quotations omitted)); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (“[T]he purpose of *Cy Pres* distribution [in the class action context] is to put the unclaimed fund to its *next best* compensation use” (emphasis in original) (citation and internal quotations omitted)).

⁵³ ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. a; see also NEWBERG ON CLASS ACTIONS, *supra* note 2, § 10.17; *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 172–73; *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d at 32; *Klier*, 658 F.3d at 474 n.14.

⁵⁴ ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. a; see also NEWBERG ON CLASS ACTIONS, *supra* note 2, § 10.17 (“When all or part of the common fund is not able to be fairly distributed to class members, the court may determine to distribute the unclaimed funds with a *cy pres* . . . approach.”).

then becomes how to appropriately apply the *cy pres* doctrine in any given case.⁵⁵ The answer can be found in a few best practices that have emerged from court decisions addressing *cy pres* awards.

A. COMPENSATION OF CLASS MEMBERS SHOULD COME FIRST

With respect to funds left over after a first-round distribution to class members (from uncashed checks, for example), the ALI Principles express a policy preference that residual funds should be redistributed to other class members until they recover their full losses, unless such further distributions are not practical:

If the settlement involves individual distributions to class members and funds remain after distribution (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.⁵⁶

As the ALI Principles recognize, when further distributions to class members are not feasible, the court has discretion to order a *cy pres* distribution, which puts the settlement funds to their next-best use by providing an indirect benefit to the class.⁵⁷ Based on this guidance, many

⁵⁵ Chief Justice John Roberts recently raised this question in a statement published with the order denying certiorari in a class action where the Ninth Circuit upheld a settlement agreement that provided no individual recovery, but rather a significant *cy pres* remedy whereby Facebook would establish a new charitable foundation focused on funding organizations dedicated to educating the public about online privacy. *Lane v. Facebook, Inc.*, 696 F. 3d 811 (9th Cir. 2012), *cert. denied*, *Marek v. Lane*, 134 S. Ct. 8 (2013). Chief Justice Roberts was critical of the parties' approach: "Facebook thus insulated itself from all class claims arising out from the Beacon episode by paying plaintiffs' counsel and the named plaintiff some \$3 million and spending \$6.5 million to set up a foundation in which it would play a major role." *Marek*, 134 S. Ct. 8 (statement of Roberts, C.J.). His statement suggested the Supreme Court should, in a suitable case, address fundamental issues about *cy pres* remedies in class action litigation, including: "when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; [and] how closely the goals of any enlisted organization must correspond to the interests of the class." *Id.*

⁵⁶ ALI PRINCIPLES, *supra* note 28, § 3.07(b).

⁵⁷ *Id.* at § 3.07 cmt. a; NEWBERG ON CLASS ACTIONS, *supra* note 2, § 10.17.

courts have articulated a reasonable requirement: that a *cy pres* distribution of residual funds to a third party is permissible only when it is not feasible to make distributions to class members in the first instance or to make further distributions to class members.⁵⁸

Appellate courts have appropriately reversed district court grants of *cy pres* awards that fail to make feasible payments to class members first. In *Klier v. Elf Atochem North America, Inc.*, for example, the Fifth Circuit held that a district court abused its discretion by approving a class action settlement that included a *cy pres* distribution of unused funds to charities instead of distributing such funds to the members of the class.⁵⁹ In that case, the plaintiffs alleged that they were exposed to toxic chemicals emitted by an agrochemicals plant owned by the defendant.⁶⁰ Eventually, the parties reached a settlement under which the defendant would pay \$41.4 million to three subclasses of individuals: those who lived or worked near the plant and suffered from at least one specified health malady (Subclass A); those who were exposed to the toxins but had not yet manifested any health problems (Subclass B); and those who experienced a diminution in the value of their property proximate to the plant (Subclass C).⁶¹ After distributing the funds to the subclasses, approximately \$830,000 of Subclass B funds went unused.⁶² After the parties agreed that it was not economically feasible to distribute the remaining unused funds to Subclass B, the defendant proposed the court issue a *cy pres* award to various entities, including five local charities.⁶³ A member of Subclass A opposed the defendant's proposed *cy pres* distribution, arguing that the remaining Subclass B funds should be distributed to members of Subclass A, "whose members

⁵⁸ ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. a; *see, e.g., Lane*, 696 F.3d at 821 (acknowledging objectors' concession that direct monetary payments to the plaintiff class of the remaining settlement funds would be *de minimis*, and therefore infeasible); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 35 (1st Cir. 2009) (noting that "few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery" and endorsing the district court's insistence that the "settlement pay class members treble damages [as provided by the underlying antitrust statute] before any money is distributed through *cy pres*" (quoting PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (Apr. 1, 2009) (proposed final draft))); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 812–13 (5th Cir. 1989) (finding class members could not assert an equitable claim to unclaimed settlement funds because all class members who came forward had been paid the full amount of their liquidated back-pay damages).

⁵⁹ *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 479 (5th Cir. 2011).

⁶⁰ *Id.* at 471–73.

⁶¹ *Id.* at 472.

⁶² *Id.*

⁶³ *Id.* at 473.

were the most grievously injured and had not been fully compensated.”⁶⁴ The district court disagreed.

On appeal, the Fifth Circuit reversed, holding that the district court abused its discretion by issuing a *cy pres* award rather than distributing the funds to Subclass A.⁶⁵ Relying primarily on the ALI Principles, the Fifth Circuit concluded that because the settlement agreement contained no provision allowing a *cy pres* distribution, such a distribution is permissible “only if it is not possible to put those funds to their very best use: benefitting the class members directly.”⁶⁶ Thus, “Subclass B’s failure to fully draw down the medical-monitoring fund did not constitute an abandonment or relinquishment by the class of its property interest in the settlement,” and as it was feasible to make a further distribution to Subclass A, a *cy pres* distribution was inappropriate.⁶⁷

While often cited by critics of *cy pres* distributions, the *Klier* opinion did not reject *cy pres* awards in class actions. Rather, the court clearly acknowledged that “[i]n the class-action context, a *cy pres* distribution is designed to be a way for a court to put any unclaimed settlement funds to their ‘next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.’”⁶⁸ Moreover, the *Klier* court did not “[hold] that settling defendants have a more equitable right to unclaimed funds than a charity when the property-interest-defining settlement agreement doesn’t include a contrary directive.”⁶⁹ Rather, the court noted that, absent any provision to the contrary in a settlement agreement, the defendant “would appear to have a greater claim to the funds than a charity,”⁷⁰ because the overriding objective to any class settlement is to compensate the class members.⁷¹ The conclusion of the *Klier* court was not that *cy pres* distributions have no role in class actions, but rather that “there is no occasion for charitable gifts, and *cy pres* must remain offstage” if it is feasible to provide further distributions to the class.⁷²

⁶⁴ *Id.* at 476.

⁶⁵ *Id.* at 480.

⁶⁶ *Id.* at 475.

⁶⁷ *Id.* at 479.

⁶⁸ *Id.* at 474.

⁶⁹ Gayl, *supra* note 13, at 17.

⁷⁰ *Klier*, 658 F.3d at 477 (emphasis added).

⁷¹ *Id.*

⁷² *Id.* at 479; *see also* Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004) (rejecting a settlement because it was feasible to compensate class members individually). *But see* *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) (stating that *cy pres* distributions are “most appropriate where further individual distributions are economically infeasible[.]” but refusing to hold that such distributions are only appropriate in this context).

B. CYPRES RECIPIENTS SHOULD REASONABLY APPROXIMATE THE INTERESTS OF THE CLASS

Once *cy pres* is onstage, the question becomes how to determine which charitable entities are appropriate recipients of a *cy pres* distribution. The ALI Principles state that recipients should be those “whose interests reasonably approximate those being pursued by the class,” and if no such recipients exist, “a court may approve a recipient that does not reasonably approximate the interests” of the class.⁷³

Courts evaluate whether distributions to proposed *cy pres* recipients “reasonably approximate” the interest of the class members by considering a number of factors, including:

the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reason why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the *cy pres* recipient.⁷⁴

Applying this reasonable approximation test, the First Circuit upheld a *cy pres* distribution approved by a district court in *In re Lupron* by noting that the settlement agreement expressly contemplated a *cy pres* distribution and holding that the *cy pres* beneficiary—a prostate cancer research and treatment center—was an appropriate recipient because the alleged wrongdoing the plaintiffs sought to correct in the class action was overcharging cancer patients for the drug Lupron.⁷⁵

In perhaps a narrower interpretation of the reasonable approximation test, the Ninth Circuit has stated that *cy pres* distributions must be “guided by the objectives of the underlying statute and the interests of the silent class members.”⁷⁶ The Ninth Circuit has enforced this interpretation in several recent cases where rationale for the proposed *cy pres* recipients seemed attenuated or otherwise questionable.⁷⁷ In

⁷³ ALI PRINCIPLES, *supra* note 28, § 3.07(c).

⁷⁴ *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012).

⁷⁵ *Id.* at 36–37.

⁷⁶ *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

⁷⁷ *See, e.g., Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (reversing the district court-approved settlement, in part because the proposed *cy pres* distribution to a charity that feeds the indigent had little or nothing to do with the consumer protection laws at issue in the lawsuit); *Six Mexican Workers*, 904 F.2d at 1301, 1304, 1308–09 (invalidating a *cy pres* distribution to the Inter-American Fund for “indirect distribution to Mexico,” because the distribution

Nachshin v. AOL, LLC,⁷⁸ the Ninth Circuit addressed whether a district court abused its discretion by approving a class settlement that allowed AOL to make contributions to several charities in lieu of any compensation to the class members for allegedly inserting footers containing promotional messages in its e-mails.⁷⁹ Under the settlement agreement, AOL would alter its allegedly improper practices and contribute \$25,000 apiece to the Federal Judicial Center Foundation, the Legal Aid Foundation of Los Angeles, and the Boys and Girls Club of America (split between the Los Angeles and Santa Monica chapters).⁸⁰

After the district court approved the settlement and the *cy pres* distributions, a class member appealed, arguing that the *cy pres* recipients were not reasonably related to the issue in the case.⁸¹ The Ninth Circuit agreed. According to the Ninth Circuit, the *cy pres* awards were not appropriately aligned with the objectives of the underlying statutes on which the plaintiffs based their claims, namely “breach of electronic communications privacy, unjust enrichment, and breach of contract, among others, relating to AOL’s provision of commercial e-mail services.”⁸²

While the *Nachshin* court rejected the proposed *cy pres* awards, it did so because the parties and the district court had selected, in its view, inappropriate *cy pres* beneficiaries—not because *cy pres* relief is improper in the class action context. To the contrary, the Ninth Circuit clearly acknowledged that a *cy pres* distribution would be appropriate if the “selection of *cy pres* beneficiaries [were] tethered to the nature of the lawsuit and the interests of the silent class members.”⁸³

C. CY PRES AWARDS ARE APPROPRIATE WHERE CASH DISTRIBUTIONS TO CLASS MEMBERS ARE NOT FEASIBLE

The *Nachshin* decision is also important because it approved application of the *cy pres* doctrine in class actions in which plaintiffs allege that defendants engaged in misconduct on a wide scale, which resulted in only *de minimis* damages to individual class members but significant damages in the aggregate. The *Nachshin v. AOL* settlement was structured so that AOL would not pay any money to the approximately 66 million class members.⁸⁴ Because AOL’s maximum

failed to “serve the goals of the statute and protect the interests of the silent class members” who were undocumented workers).

⁷⁸ 663 F.3d 1034 (9th Cir. 2011).

⁷⁹ *Id.* at 1036, 1040.

⁸⁰ *Id.* at 1040.

⁸¹ *Id.* at 1037–38.

⁸² *Id.* at 1040.

⁸³ *Id.* at 1039.

⁸⁴ *Id.* at 1037.

liability if the class were certified and a judgment entered was \$2 million, each class member would be entitled only to approximately three cents, which the Ninth Circuit described as “a cost-prohibitive distribution to the plaintiff class.”⁸⁵

Similarly, in *Lane v. Facebook, Inc.*, the Ninth Circuit upheld a class settlement agreement which involved a significant *cy pres* remedy (with no individual class recovery) whereby Facebook would establish a new charitable foundation dedicated to educating the public about online privacy.⁸⁶ The use of the *cy pres* award in these situations benefited both the defendants and the class members, as it permitted the defendants to cost-effectively resolve a case that would have been expensive to defend and allowed class plaintiffs to force the defendants to change its allegedly improper practices and pay a penalty for engaging in those practices.

Moreover, the Seventh Circuit recently reversed and remanded a district court’s decertification order in a consumer class action case on the grounds that while the class recovery is small, this alone is not sufficient grounds to deny class certification.⁸⁷ The court explained that a case in which the individual claim is small is “the type of case in which class action treatment is most needful”; and a *cy pres* award “would amplify the effect of the modest damages in protecting consumers.”⁸⁸

These opinions contradict critics’ assertions that *cy pres* “facilitates ‘faux’ class actions,” in which “injured victims do not receive compensation, but the victims’ lawyers and the representative plaintiffs are rewarded qui tam action-style creating the illusion of compensation to the injured class.”⁸⁹ Settlements with *cy pres* awards can and should be used to resolve class actions in which defendants allegedly engage in wide-scale misconduct that results in only *de minimis* damages to the individual class members. In this context, the ALI Principles recognize that courts do approve class action settlements that provide for cash payments to third parties with no direct cash recovery to class members.⁹⁰

⁸⁵ *Id.*

⁸⁶ *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), *cert. denied*, *Marek v. Lane*, 134 S. Ct. 8 (2013).

⁸⁷ *Hughes v. Kore of Ind. Enter., Inc.*, No. 13-8018, 2013 WL 4805600, at *3, *5 (7th Cir. Sept. 10, 2013).

⁸⁸ *Id.*

⁸⁹ *Gayl*, *supra* note 13, at 19.

⁹⁰ ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. a.

D. CYPRES DISTRIBUTIONS SHOULD RECOGNIZE THE FORUM AND THE GEOGRAPHIC MAKE-UP OF THE CLASS

Nachshin also illustrates that the geographic make-up of the class is important (and appropriately so) in determining valid *cy pres* recipients. The *Nachshin* court expressed concern that “[a]lthough the class include[s] more than 66 million AOL subscribers throughout the United States, two-thirds of the donations [would have been] made to local charities in Los Angeles, California.”⁹¹ It therefore held that the *cy pres* distribution “fail[ed] to target the plaintiff class, because it d[id] not account for the broad geographic distribution of the class.”⁹²

In multi-state or national class actions, failure to take into account the geographic composition of the class is a valid concern. While a class action is typically certified, administered, and resolved in one particular location, for reasons related to the case subject matter or the parties, it is important to ensure that the remainder of a national class is likewise considered in the distribution of the *cy pres* award. A reasonable approach is to ensure that a portion of the *cy pres* distribution in a multi-state or national class action is awarded to national organizations and the remainder to charities in the local jurisdiction.⁹³

E. CONFLICTS OF INTEREST AND THE APPEARANCE OF IMPROPRIETY SHOULD BE AVOIDED

Perhaps because of the history of debatable *cy pres* awards discussed above, the Ninth Circuit has cautioned that “[w]hen selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self-interests of the parties, their counsel, or the court.”⁹⁴

⁹¹ *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011). It is important to note that the *Nachshin* court did not hold that a legal aid organization is *per se* an improper *cy pres* recipient. Rather, it said that in this instance there was no indication that “the small percentage of plaintiffs located in Los Angeles . . . would benefit from donations to the Boys and Girls Club of Los Angeles and Santa Monica or Los Angeles Legal Aid.” *Id.* This illustrates the necessity for counsel and potential legal aid and public interest *cy pres* recipients to be mindful of and address directly the tests for *cy pres* awards in the class action context.

⁹² *Id.*

⁹³ This approach is further supported by state statutes and court rules requiring that a certain percentage, typically up to fifty percent, of any residual funds in a class action case must go to organizations that promote or provide access to justice for low-income *local* residents in the state where the case is filed. See discussion *infra* Part III.F; see, e.g., *In re Motorola Sec. Litig.*, No. 03 C 287, slip op. at 2 (N.D. Ill., March 5, 2013).

⁹⁴ *Nachshin*, 663 F.3d at 1039.

Critics have gone further, arguing that these legitimate concerns give rise to something more sinister and underhanded:

[C]y pres proponents should not receive the same folkloric benefit as Robin Hood stealing from the rich and giving to the poor. Instead, we should denounce applying the *cy pres* doctrine to class action settlements as walking a very thin ethical line because, in most cases, it steals from corporation, awards funds to uninjured parties, confiscates injured parties' due process rights, lines the pockets of plaintiffs' lawyers, and places courts in precarious positions.⁹⁵

Such rhetoric inflates and overstates the concerns of the Ninth Circuit, which are easily addressed through reasoned criteria and established procedures.

Counsel, courts, and scholars have appropriately recognized that a potential conflict of interest exists between class counsel and their clients because *cy pres* distributions may increase a settlement fund, and subsequently the attorneys' fees, without increasing the direct benefit to the class.⁹⁶ As discussed above,⁹⁷ however, a straightforward solution exists to address this issue: if the presiding judge fears or observes that class attorneys may lack incentive to vigorously pursue individualized compensation for absent class members, the court can and "should subject the settlement [and the distribution process] to increased scrutiny."⁹⁸

There is also a legitimate concern that the lure of *cy pres* distributions can improperly motivate lawsuit parties and defense or plaintiffs' counsel to steer unclaimed awards to recipients that advance their own agendas.⁹⁹ To deal with this concern, courts should take a hard look at *cy pres* beneficiaries and evaluate whether they meet the criteria discussed above and whether any of the parties involved in the litigation has significant affiliations with or would personally benefit from the distribution to the proposed *cy pres* recipients. Such an analysis is not unduly burdensome or challenging for the court to undertake and should address this concern about abuse of the doctrine.

⁹⁵ Gayl, *supra* note 13, at 20.

⁹⁶ *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013).

⁹⁷ See discussion *supra* Part II.C.

⁹⁸ *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173.

⁹⁹ See *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 38 (1st Cir. 2012); *Nachshin*, 663 F.3d at 1039; see also Gayl, *supra* note 13, at 20; Beisner et al., *supra* note 29, at 13.

Commentators have also expressed concerns that “judicial involvement in *cy pres* awards can . . . invite unseemly interactions between charitable organizations and judges”¹⁰⁰ and lead to active lobbying of judges by charities.¹⁰¹ In legal ethics terms, “the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.”¹⁰² Again, this concern is easily addressed. First, it is preferable that the parties (rather than the court) select the charities that will receive a *cy pres* distribution and ideally articulate such selection clearly in any settlement agreement. If, however, the parties fail to select the beneficiaries and the judge selects the charities, so long as the beneficiaries are chosen according to the criteria noted above¹⁰³ and their missions relate to the underlying lawsuit or the interests of the class members, these concerns over impropriety should abate.

While it is possible that a potential conflict of interest could arise between the presiding judge and the class members, such conflict of interest is unlikely if the safeguards are in place, as noted above. Critics claim that parties “often” include a *cy pres* award to a charity with which the judge or his or her family is affiliated.¹⁰⁴ Once again, this is an overstatement, and protections exist to address any instances of impropriety on this score. As an illustration of this concern of “judicial bias,” John H. Beisner, for example, points to Judge Christina A. Snyder’s refusal to recuse herself when reviewing and approving the settlement agreement in *Nachshin* because her husband was a board member of Legal Aid Foundation of Los Angeles (LAFLA), one of the proposed *cy pres* recipients.¹⁰⁵ The Ninth Circuit however disagreed with the appellant who objected on this very issue. As articulated by the Ninth Circuit, the test for recusal under 28 U.S.C. § 455(a) is “whether a reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned.”¹⁰⁶ In this instance, despite Judge Snyder’s husband’s LAFLA board membership, the Ninth Circuit was clear that several points heavily weighed against Judge Snyder’s recusal and obviated any appearance of impropriety:¹⁰⁷

¹⁰⁰ Beisner et al., *supra* note 29, at 14.

¹⁰¹ Liptak, *supra* note 48.

¹⁰² *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011).

¹⁰³ When applying the *cy pres* doctrine in the class action context, parties and courts should (i) compensate class members first; (ii) select *cy pres* recipients that reasonably approximate the interests of the class; (iii) ensure *cy pres* distributions reflect both the forum and the geographic make-up of the class; and (iv) avoid conflicts of interest and the appearance of impropriety.

¹⁰⁴ Beisner et al., *supra* note 29, at 13.

¹⁰⁵ *Id.* at 13–14.

¹⁰⁶ *Nachshin*, 663 F.3d at 1041.

¹⁰⁷ “A *cy pres* remedy should not be ordered if the court . . . has *significant* prior affiliation with the intended recipients that would raise substantial questions

(i) a mediator, not Judge Snyder, with no encouragement from Mr. Snyder or LAFLA, recommended LAFLA as one of three beneficiaries; (ii) no indication existed that LAFLA board members, which include roughly fifty attorneys representing law firms, corporations, and community organizations, received financial compensation or any other remuneration for their service; and (iii) no evidence existed that the donation would benefit Mr. Snyder in any way other than allowing LAFLA to continue to provide access to justice to the indigent in Los Angeles.¹⁰⁸ Carefully read, *Nachshin* is another demonstration that sufficient safeguards already exist to address any ethical concerns with the application of the *cy pres* doctrine in the class action context.

*F. PUBLIC INTEREST AND LEGAL SERVICES ORGANIZATIONS ARE
APPROPRIATE CYPRES RECIPIENTS*

Organizations with objectives directly related to the underlying statutes at issue in the relevant class action are appropriate *cy pres* recipients. In *Nachshin*, for example, the Ninth Circuit spoke of “non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance” as appropriate *cy pres* recipients in a case involving AOL’s alleged insertion of footers containing promotional messages in its e-mails.¹⁰⁹ But narrowly limiting the scope of appropriate *cy pres* recipients to the precise claims in the class action (e.g., online malfeasance) has its own problems, both theoretically and practically.

As to theory, such a limited approach takes too literal a view of the *cy pres* doctrine in the class action context. The use of the *cy pres* doctrine to distribute class action residue is really just a convenient analogy. In a class action settlement, there is no underlying trust that a deceased settlor has created for a specified purpose that has become unfeasible. Rather, the *cy pres* doctrine has been borrowed as a device to facilitate the administration of complex class actions. As the Seventh Circuit pointed out in *Mirfasihi v. Fleet Mortgage Corp.*, the *cy pres* device is used in class actions “for a reason unrelated to the trust doctrine . . . to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement[.]”¹¹⁰

The practical problem with limiting *cy pres* awards to the specific claims in a class action is that a narrow focus on the subject matter of the case can unnecessarily complicate the socially desirable settlement of

about whether the selection of the recipient was made on the merits.” ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. b (emphasis added).

¹⁰⁸ *Nachshin*, 663 F.3d at 1041–42.

¹⁰⁹ *Id.* at 1036–37, 1041.

¹¹⁰ 356 F.3d 781, 784 (7th Cir. 2004).

large class action disputes. In actual practice, class action plaintiffs' counsel and a defendant (usually a corporation) are resolving a complex dispute by a settlement in which the defendant denies all liability, and the disposal of residual funds is typically a detail in a larger resolution. While some court opinions speak loosely of residual funds as "penalties" or "recoveries" for violations of the law, settling defendants usually see themselves as making a pragmatic business decision that specifically avoids any admission that they violated the law. Moreover, settling defendants have a practical interest in how residual funds are used. In the real world, the settling defendant in a case about telephone services pricing may be understandably unenthusiastic about a *cy pres* award to an organization that campaigns against high telephone bills.

One recognized solution to the related problems of awards to dubious recipient organizations and awards that seem to "target" the settling defendants or diminish the desire to settle is directing *cy pres* awards to public interest and legal services organizations. Federal and state courts throughout the country have long recognized organizations that provide access to justice for low-income, underserved, and disadvantaged people as appropriate beneficiaries of *cy pres* distributions from class action settlements or judgments.¹¹¹ Such awards are granted based on one of the common underlying premises for all class actions: to make access to justice a reality for people who otherwise would not be able to obtain the protections of the justice system.¹¹² The access to

¹¹¹ See, e.g., *Lessard v. City of Allen Park*, 470 F. Supp. 2d 781, 783–84 (E.D. Mich. 2007) ("The Access to Justice fund is the 'next best' use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters." (citation omitted)); *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (listing multiple cases where a class action *cy pres* distribution designed to improve access to legal aid was appropriate); *In re Folding Carton Antitrust Litig.*, MDL No. 250, 1991 U.S. Dist. LEXIS 2553, at *7-8 (N.D. Ill. Mar. 5, 1991) (approving *cy pres* distribution of the class action "Reserve Fund" to establish a program that would, *inter alia*, increase access to justice "for those who might not otherwise have access to the legal system"); see also Thomas A. Doyle, *Residual Funds in Class Action Settlements: Using "Cy Pres" Awards to Promote Access to Justice*, FED. LAW., July 2010, at 26, 27 (providing examples of approved class action settlements with *cy pres* distribution components that improved access to justice for indigent litigants).

¹¹² Bob Glaves & Meredith McBurney, *Cy Pres Awards, Legal Aid and Access to Justice: Key Issues in 2013 and Beyond*, 27 MGMT. INFO. EXCH. J., 24, 25 (2013) ("[L]egal aid or [Access To Justice] organizations are always appropriate recipients of *cy pres* or residual fund awards in class actions because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system."); Doyle, *supra* note 111, at 27 (stating that the myriad of state statutes and rules enacted to "require

justice nexus falls squarely within ALI Principles' guidance that "there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests."¹¹³ One interest of every class member in any class action in any area of the law is access to justice for a group of litigants who, on their own, would not realistically be able to seek court relief, either because it would be too inefficient to adjudicate each injured party's claim separately or because it would be cost prohibitive for each injured party to file individual claims.¹¹⁴

In addition to the case law supporting the use of *cy pres* awards to advance access to justice, a growing number of states have adopted statutes or court rules codifying the principle that *cy pres* distributions to organizations promoting access to justice are *always* an appropriate use

residual funds to be distributed, at least in part, to legal aid projects . . . provide[s] evidence of a public policy favoring *cy pres* awards that serve the justice system").

¹¹³ ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. b.

¹¹⁴ Class action *cy pres* distributions to legal aid or public interest organizations are widely recognized as an appropriate mechanism to further access to justice. *See, e.g.*, Daniel Blynn, *Cy Pres Distributions: Ethics & Reform*, 25 GEO. J. LEGAL ETHICS 435, 438 (2012) (mentioning that *cy pres* distributions that have flowed to specific legal aid organizations have advanced the legal field); Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: "A Settling Concept,"* 58 LA. B.J. 248, 251 (2011) (discussing how *cy pres* awards made to local legal aid organizations will promote access to civil litigation, in part, by funding and coordinating a pro bono panel utilizing local attorneys); *Cy Pres Nets \$162,000 for Justice Foundation*, MONT. LAW., May 2005, at 24, 24 (noting that a significant *cy pres* distribution to the Montana Justice Foundation will help fund legal aid for indigent individuals); Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 TENN. B.J. 12, 13–14 (2009) (identifying legal aid organizations which have received residual *cy pres* funds because of the indirect benefit they provide to class members, which is similar to the central purpose for which FED. R. CIV. P. 23 was designed—access to justice); Nina Schuyler, *Cy Pres Awards—A Windfall for Nonprofits*, S.F. ATT'Y, Spring 2007, at 26, 27–28 (lauding the charitable efforts the Volunteer Legal Services has provided to low-income residents); Bradley A. Vauter, *The Next Best Thing: Unclaimed Funds from Class Action Settlements Could Benefit Low-Income Consumers by Deposits in State Bar of Michigan Access to Justice Development Fund*, 80 MICH. B.J. 68, 69 (2001) (advocating for Michigan's Access to Justice Fund as a recipient of unclaimed class action settlements because it benefits low-income consumers in Michigan); Robert E. Draba, Note, *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near As Possible,"* 16 LOY. CONSUMER L. REV. 121, 122 (2004) (recognizing that the rationale for approving *cy pres* distributions to two legal aid organizations, like the purpose of the class action device, is "to protect the legal rights of those who would otherwise be unrepresented").

of residual funds in class action cases.¹¹⁵ The state courts and legislatures begin with the premise that *cy pres* distributions of residual funds resulting from a class action settlement or judgment are proper and valid. From there, these state courts and legislatures specify appropriate *cy pres* recipients: charitable entities that promote access to legal aid for low-income individuals. Finally, most of these courts and legislatures then mandate a minimum baseline distribution to the pre-approved category of recipients, usually either twenty-five or fifty percent of the unclaimed class action award.¹¹⁶ Because such statutes and court rules establish a

¹¹⁵ See, e.g., CAL. CIV. PROC. CODE § 384 (2002) (permitting payment of residual class action funds to nonprofit organizations that provide civil legal services to low-income individuals); HAW. R. CIV. P. 23(f) (granting a court discretion to approve distribution of residual class action funds, specifically to nonprofit organizations that provide legal assistance to indigent individuals); 735 ILL. COMP. STAT. 5/2-807 (2008) (requiring distribution of at least fifty percent of residual class action funds to organizations that improve access to justice for low-income Illinois residents); IND. R. TRIAL P. 23(F)(2) (requiring distribution of at least twenty-five percent of residual class action funds to the Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its *pro bono* districts); KY. R. CIV. P. 23.05(6) (requiring distribution of at least twenty-five percent of residual funds to the Kentucky IOLTA Fund Board of Trustees to support activities and programs that promote access to civil justice for low-income Kentucky residents); MASS. R. CIV. P. 23(e) (permitting distribution of residual class action funds to nonprofit organizations that provide legal services to low income individuals consistent with the objectives of the underlying causes of action on which relief was based); N.M. DIST. CT. R. CIV. P. 1-023(G)(2) (permitting payment of residual class action funds to nonprofit organizations that provide civil legal services to low income individuals); N.C. GEN. STAT. § 1-267.10 (2005) (requiring equal distribution of residual class action funds between the Indigent Person's Attorney Fund and the North Carolina State Bar for the provision of civil services for indigents); PA. R. CIV. P. 1716 (directing distribution of at least fifty percent of residual class action funds to the Pennsylvania IOLTA Board to support activities and programs which promote the delivery of civil legal assistance, permitting distribution of the balance to an entity that promotes either the substantive or procedural interests of the class members); S.D. CODIFIED LAWS § 16-2-57 (2008) (requiring at least fifty percent of residual funds be distributed to the Commission on Equal Access to Our Courts); TENN. CODE ANN. § 16-3-821 (2009) (creating the Tennessee Voluntary Fund for Indigent Civil Representation and authorizing the fund to receive contributions of unpaid residuals from settlements or awards in class action litigation in both federal and state courts); WASH. SUPER. CT. CIV. R. 23(f)(2) (requiring distribution of at least twenty-five percent of residual class action funds to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents).

¹¹⁶ See HAW. R. CIV. P. 23(f); 735 ILL. COMP. STAT. 5/2-807 (2008); IND. R. TRIAL P. 23(F)(2); KY. R. CIV. P. 23.05(6); PA. R. CIV. P. 1716; S.D. CODIFIED LAWS § 16-2-57 (2008); WASH. SUPER. CT. CIV. R. 23(f)(2). Importantly, these statutes and rules do not require that one hundred percent of the residual funds go to *local* legal services organizations. In national class actions, state court

presumption that any residual funds in class action settlements or judgments will be distributed to public interest or legal aid organizations, they make clear that legal services organizations are distinct from other charitable causes that have drawn legitimate concerns regarding a lack of nexus with the interests of the class members. In other words, the statutes and rules recognize the connection between access to justice through legal aid and through class action procedures.

CONCLUSION

Class action litigation has become an important device for resolving a wide range of disputes between individual plaintiffs and corporate defendants. *Cy pres* awards of undistributed class action settlement residue are an important part of the settlement process. Distributing funds to appropriate recipients is a practical variant of the *cy pres* device long recognized in trust law and is generally accepted as preferable to returning undistributed funds to the settling defendants or escheat of those funds to the state.

Critics of *cy pres* awards in class actions have raised several arguments that are often overstated and have not been recognized by the courts. *Cy pres* awards do not violate the case-or-controversy requirement in Article III of the U.S. Constitution. They do not violate the Rules Enabling Act. And they do not infringe constitutional due process rights of class members. Though potential for misapplication of the doctrine and abuse exists, legitimate concerns can be addressed through recognized court procedures.

There has also been considerable recent criticism of specific *cy pres* awards, and several awards have been reversed on appeal. As discussed in this Article, problems concerning specific awards can be anticipated and avoided by following a few simple rules: (1) compensation of class members should come first; (2) *cy pres* recipients should reasonably approximate the interests of the class; (3) *cy pres* awards are appropriate where cash distributions to class members are not feasible; (4) *cy pres* distributions should recognize the geographic make-up of the class; (5) conflicts of interest and the appearance of impropriety should be avoided; and (6) public interest and legal services organizations should be considered as appropriate *cy pres* recipients. Following these simple rules should minimize controversies about an effective and important mechanism for class action administration.

judges are free to grant at least a portion of the *cy pres* award to appropriate *national* organizations, such as national public interest or legal services organizations, thereby avoiding the problem raised in *Nachshin* of inappropriate *cy pres* awards to local organizations in national class actions. See discussion *infra* Part III.D.

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