April 7, 2015

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Rules Committee Support Office
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E. Room 7-240
Washington, D.C. 20544

Dear Ms. Wolmeldorf:

My name is Christine Pedigo Bartholomew, and I am an associate professor at SUNY Buffalo School of Law. I have noted the Rule 23 Subcommittee’s Report for the April 9-10th, 2015 Civil Rules Committee meeting. The report includes a discussion of proposed changes to Rule 23 addressing *cy pres* settlements.

On April 1, 2015, I forwarded members of the Rule 23 Subcommittee a draft copy of an article I wrote last summer, providing an in-depth analysis of such settlements. The article, *Saving Charitable Settlements*, is not yet available in final print as it is forthcoming this May in the Fordham Law Review. In response to my correspondence, Professor Marcus suggested submitting a copy to the Rules Committee Support Office, so it can be included with other suggestions and commentary on the proposal.

The article provides a framework for analyzing different types of charitable distributions in class actions. Consequently, it overlaps with issues addressed by the Subcommittee’s report. It also proposes some revisions to the judicial review of such settlements that may be of interest as the Subcommittee continues fleshing out the draft amendment.

Thank you for considering my input on this issue and posting my article online. I will forward a final version when it becomes available. Additionally, I am available to provide further comment or testimony should the Subcommittee find such participation useful.

Sincerely,

Christine Pedigo Bartholomew
Associate Professor of Law
SAVING CHARITABLE SETTLEMENTS

Christine P. Bartholomew*

This Article defies the conventional wisdom that all charitable distributions from a class action settlement fund are types of cy pres. Instead, it proposes a radical delineation between “cy pres remainders” (meaning settlement funds left over after individual monetary distributions) and “charitable settlements” (meaning money initially distributed to charities as part of class action settlements). While both have cy pres roots, these two settlement structures have been conflated, jeopardizing the potential utility of charitable settlements. After articulating more precise nomenclature for these distinct distribution methods, this Article justifies why we must preserve charitable settlements. This defense is particularly timely, as charitable settlements face growing attacks spurred by Chief Justice Roberts’s comments in the 2014 Marek v. Lane appeal. Once unchained from the strictures of the cy pres doctrine, charitable settlements become a tool to promote the larger regulatory objectives underlying class action procedures, including access to justice and deterrence.

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INTRODUCTION

The next frontier of class action reform pits a legal favorite against a legal villain. Charities have long been judicial darlings. By contrast, recent decisions demonstrate a clear disdain for class actions and the lawyers who bring them. The two intersect in charitable class action settlements, often called cy pres.

Charitable distributions equitably solve settlement disbursement problems, particularly in cases where administrative costs exceed individual compensation. Take, for example, a small-stakes class action settlement where individual class members stand to recover $3. Because some class members are difficult to locate or forego making claims, significant settlement funds may be leftover. What should be done with the money? To date, the standard solution is to distribute the remainder to a non-profit or charity. In approving such distributions, courts use the cy pres doctrine, an equitable concept that allows a court to modify trust funds used for a specific charitable purpose when the trust is no longer viable.

Now, take a slightly different scenario. What if the parties anticipated the low claims rate from the outset? Since the administrative costs for distributing settlements often range from $5 to $10 per class member, such

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2. See, e.g., Muehler v. Land O’Lakes, Inc., 617 F. Supp. 1370, 1375 (D. Minn. 1985) (“The judiciary have not always been receptive to creative and efficient ways to vindicate the rights of large groups of victims. We have now seen that many judges openly and on the record have suspicion and disdain for class actions as a means of redress.”); Jean Macchiarelli Eggen, The Synergy of Toxic Tort Law and Public Health: Lessons from a Century of Cigarettes, 41 CONN. L. REV. 561, 606 (2008) (discussing how current class action reform “demonstrat[es] the suspicion and even disdain with which the class action device is viewed in some circles”).
3. John C. Coffee, Jr., Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 COLUM. L. REV. 669, 671–72 n.3 (1986) (“[I]t is interesting to note the frequency with which judicial opinions favoring new restrictions on the availability of class actions or other remedies criticize the plaintiff’s attorney.”); J. Thomas Rosch, Comm’r, FTC, Promoting Innovation: Just How “Dynamic” Should Antitrust Law Be? 19 (Mar. 23, 2010) (discussing how “recent Supreme Court precedent . . . has shown a disdain for the private class action bar”).
costs could exhaust a substantial portion of the settlement fund. To solve this problem, the parties negotiate a settlement agreement that from its inception distributes the money to a related charity or non-profit.

This type of settlement is now in jeopardy. Just last term, in Marek v. Lane—an appeal stemming from a class action over Facebook’s “Sponsored Stories” feature—Chief Justice Roberts signaled his interest in removing such settlements from the judicial toolkit. The appeal challenged a settlement directing Facebook to distribute $6.5 million to create a non-profit organization that provides online privacy education. Because of settlement pay-out complications, the distribution was in lieu of any monetary payment to class members. After approval from the trial court and Ninth Circuit, objectors appealed to the U.S. Supreme Court.

The Supreme Court denied the petition but not before Justice Roberts used the petition to issue a public statement against charitable class action settlements. Such a statement accompanying a certification denial is rare—particularly for Justice Roberts. Justice Roberts described what he characterized as the “disconcerting feature[]” of the settlement. Citing legal scholarship critical of class actions, Justice Roberts left little doubt about his skepticism of such settlements, noting his fundamental concerns surrounding the use of such 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; how closely the goals of any enlisted organization must

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7. Id. at 8–9.
8. Id. at 9.
9. Id.
11. Lane v. Facebook, Inc., 696 F.3d 811, 816 (9th Cir. 2012), reh’g en banc denied, Lane v. Facebook, Inc., 709 F.3d 791 (9th Cir. 2013).
13. Id., 134 S. Ct. at 8.
14. Id.
15. Robert M. Yablon, Justice Sotomayor and the Supreme Court’s Certiorari Process, 123 YALE L.J. FORUM 551, 551–52 (2014) (noting such statements are issued just a “handful of times each year,” most frequently by Justice Sotomayor, not Justice Roberts).
correspond to the interests of the class; and so on. This Court has not previously addressed any of these issues.\textsuperscript{18}

Roberts’s shot across the bow is hardly the first attack on class actions. Procedural gatekeeping in class actions is on the rise.\textsuperscript{19} Private enforcement of business torts is significantly more difficult than a decade ago.\textsuperscript{20} However, the “open invitation for objectors to bring a better case before the court” is the Court’s first strike at class actions’ settlement approval stage.\textsuperscript{21}

Given the Facebook settlement in \textit{Lane} and Roberts’s accompanying call to arms, questions about charitable class action settlements are ripe for scholarly examination. To date, however, no scholarship or jurisprudence has distinguished between various charitable distribution structures; instead, the trend is to conflate multiple, distinct methods under the generic rubric of \textit{cy pres}.\textsuperscript{22}

Scholars and the judiciary have explored arguments for and against \textit{cy pres} remainders, i.e., charitable distributions of leftover settlement funds.\textsuperscript{23}

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\textsuperscript{20} Myriam Gilles & Anthony Sebok, \textit{Crowd-Classing Individual Arbitrations in a Post-Class Action Era}, 63 DePaul L. Rev. 447, 457 (2014) ("Over the past decade, the Supreme Court and a number of influential circuit courts have revealed deep-seated skepticism (and hostility) to class action litigation, finding doctrinal and policy-based rationales to support cutting back on this potent procedural device."); see also Dodson, supra note 19 ("The Supreme Court’s 2010 Term in particular evinces both skepticism of and hostility to class actions.").


\textsuperscript{23} See, e.g., Boies & Keith, supra note 23, at 269–70; DeJarlais, supra note 23; Fitzpatrick, supra note 22, at 2080; Johnston, supra note 23, at 290; Barnett, supra note 23, at 1596–1600. In fact, the Civil Rules Advisory Committee has recognized the debate and is currently exploring potential options regarding such settlements. See Advisory Comm. on
However, distributions as in *Lane*, where an earmarked portion of a settlement went to a charity, have yet to be specifically analyzed. In this particular form, settlements are consciously structured for exclusive distribution to third parties: charitable distributions are not reserved for unclaimed funds but instead substitute for distributions to class members.24 This Article coins a new term—"charitable settlements"—to describe such distributions.

Distinguishing between *cy pres* remainders and charitable settlements is not merely an exercise in semantics. Charitable settlement challenges raise basic questions about whether the purpose of a damages class action is compensation or social justice. Borrowing from *cy pres* doctrine requirements, some contend monetary class action settlements must always first attempt a distribution to class members.25 This position bars most charitable settlements. In small stakes cases, individual distribution is often costly if not impossible.26 Some critics already have submitted draft legislation prohibiting all charitable distributions.27

Questions about the propriety of charitable settlements impact more than just the settlement approval phase of class actions. Challenges to such settlements now bleed into the class certification process, with courts entertaining arguments that class actions should not be certified if only a charitable settlement is likely.28 For example, in *Ramirez v. Dollar Phone Corp.*,29 Judge Weinstein denied class certification for a group of low-

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25. See, e.g., Boies & Keith, supra note 22, at 281 ("[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.").

26. See *Fitzpatrick*, supra note 22, at 2079; see also Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 393 (1999) ("Sometimes funds remain undistributed because the costs of distribution outweigh the individual share to which each . . . group member is entitled."); Goutam U. Jois, *The Cy Pres Problem and the Role of Damages in Tort Law*, 16 V.A.J. SOC. POL'Y & L. 258, 264 (2008) ("[T]he costs of identifying and notifying the class members may be higher than the amount of their potential recovery, such that notifying the members would deplete the entire fund.").

27. Lawyers for Civil Justice's draft legislation aims to limit charitable settlements by attacking them on two fronts. See *LAWYERS FOR CIVIL JUSTICE, TO RESTORE A RELATIONSHIP BETWEEN CLASSES AND THEIR ACTIONS: A CALL FOR MEANINGFUL REFORM OF RULE 23 (2013)*, available at http://www.reedsmith.com/files/uploads/DrugDeviceLawBlog/LCJ%20Comment_Class%20Action%20Reform_8-9-13.pdf. The first proposal would flatly prohibit any settlement that distributed funds to non-class members. Id. at 8–9. In the alternative, the legislation pushes for extreme reform by denying class attorneys compensation for funds given to nonclass members, thus undercutting the likelihood that small-stakes cases will be brought in the future. Id. at 23.


income, non-English-speaking, immigrant calling card consumers.\textsuperscript{30} Individually, alleged damages were minimal—making this a case well-suited for a charitable distribution in place of direct compensation. However, the court held that because consumers suffered only small individual damages, a class action was not superior to other avenues of redress, such as legislative reform.\textsuperscript{32} Accordingly, resolving how charitable settlements provide class members valuable relief is imperative for settlement approval and for class certification inquiries.

This Article sounds a different note, demonstrating how taking charitable settlements off the table would effectively gut the use of class actions for private enforcement of laws designed to protect consumers.\textsuperscript{33} The Article proceeds as follows. Part I details judicial response to cy pres remainders and charitable settlements, explaining their shared origin, but more importantly, exploring the practical and conceptual differences between the two. It proposes the term “charitable settlements” to highlight these important differences. Part II defends charitable settlements, detailing their equitable and theoretical justifications. In doing so, Part II details, and then debunks, criticism of such settlements. With the theoretical roadblocks cleared, Part III identifies discrete and practical alterations to judicial evaluation of charitable settlements. These revisions strike a balance between saving charitable settlements and maintaining rigor in the settlement approval process under Federal Rule of Civil Procedure 23(e).

\section{Charitable Settlements in Class Actions}

Understanding charitable settlements requires some background on the cy pres doctrine and class action settlements. This part discusses: (1) the rise of charitable distributions and (2) judicial evaluation of charitable settlements.

\subsection{The Rise of Charitable Distribution}

Like many other areas of law, class actions are likely to settle before trial.\textsuperscript{34} All federal class action settlements are evaluated by the same standard, Federal Rule of Civil Procedure 23(e), which requires “fair, reasonable, and

\begin{thebibliography}{99}
\bibitem{30} Id. at 467.
\bibitem{31} Id. at 450 (noting the named class representative’s claim would be for approximately $2).
\bibitem{32} Id. at 468 (“In the present case, the only adequate and appropriate way to protect the rights of the Rule 23(b)(3) class is through regulation and enforcement by a federal administrative agency.”).
\bibitem{33} See, e.g., \textit{In re Serzone Prods. Liab. Litig.}, 231 F.R.D. 221, 240 (S.D. W. Va. 2005) (“A class action significantly reduces the overall cost of complex litigation, allowing plaintiffs’ attorneys to pool their resources and requiring defendants to litigate all potential claims at once, thereby leveling the playing field between the two sides.” (citing \textit{In re Agent Orange Prod. Liab. Litig.}, 597 F. Supp. 740, 842 (E.D.N.Y. 1984))); see also William B. Rubenstein, \textit{A Transactional Model of Adjudication,} 89 Geo. L.J. 371, 433 (2001) (“Class actions can reduce disparities in bargaining power between plaintiffs and defendants.”).
\bibitem{34} \textsc{William B. Rubenstein et al., Newberg on Class Actions} § 13:1 (5th ed. 2014).
\end{thebibliography}
adequate” settlements.35 While courts encourage settlements,36 the approval process is extensive.37 Courts consider: (1) the litigation’s complexity and duration; (2) the class’s reaction to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability and damages; (5) the risks of maintaining a class action; (6) the defendant’s ability to withstand a greater judgment; (7) the settlement’s reasonableness in light of the best recovery; and (8) its reasonableness in light of all the attendant risks of litigation.38

If the proposed settlement satisfies these criteria, the court grants preliminary approval.39 It is then vetted by class members, who are notified of the pending settlement.40 Disgruntled class members must elect one of two options: (1) they can opt out of the settlement, which preserves their due process rights and allows them to bring a subsequent suit for the alleged misconduct; or (2) they can object.41 Once a class member opts out, he loses

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35. See Fed. R. Civ. P. 23(e)(2). This standard equally applies post-certification and to classes certified for settlement purposes.

36. See Rubenstein et al., supra note 33, § 13:1 (noting that there is a “strong judicial policy in favor of class action settlement”) (internal quotation marks omitted); see, e.g., In re HealthSouth Corp. Secs. Litig., 572 F.3d 854, 862 (11th Cir. 2009) (“Public policy strongly favors the pretrial settlement of class action lawsuits.”) (quoting U.S. Oil & Gas Litig., 967 F.2d 489 (11th Cir. 1992)); Robinson v. Shelby Cnty. Bd. of Educ., 566 F.3d 642, 648 (6th Cir. 2009) (“Public policy strongly favors settlement of disputes without litigation . . . . Settlement agreements should therefore be upheld whenever equitable and policy considerations so permit.”) (quoting Ford Motor Co. v. Mustangs Unlimited, Inc., 487 F.3d 465, 469 (6th Cir. 2007)); Macedonia Church v. Lancaster Hotel, LP, No. 05-0153 (TLM), 2011 WL 2360138, at *9 (D. Conn. June 9, 2011) (“Federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain.”).

37. Class actions pursued under Fair Labor Standards Act section 216(b) are beyond the scope of this Article. Section 216(b) does not apply in this case because it deals specifically with claims for minimum wages or overtime pay. See, e.g., Sari M. Alamuddin et al., Differences Between Rule 23 Class Actions and FLSA § 216(B) Collective Actions; Tips for Achieving Class and Collective Action Certification: And Certification Post-Dukes, 890 PRACTISING L. INST. 293 (2012). Unlike compensatory Rule 23 cases, where class members generally are included unless they opt-out of the settlement, section 216(b) claims are described as “opt-in” actions because party plaintiffs must give written consent to become a party in the action. Id. at 301.


40. See Fed. R. Civ. P. 23(e)(1) (requiring the court to direct notice to “all class members who would be bound by the proposal”). The purpose of such notice is to permit absent class members an opportunity to review the settlement terms and be heard if they want to object or respond to the proposed settlement. See, e.g., In re Prudential Ins. Co. Am. Sales Practice Litig., 148 F.3d 283, 326–27 (3d Cir. 1998); Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1407 (9th Cir. 1989).

41. Fed. R. Civ. P. 23(e)(4)–(5). Opt-out numbers matter. First, as part of the settlement approval, courts often inquire about the number of opt-outs as an indicator of the fairness of
standing to object to the settlement. After hearing objections, the court decides whether to grant final approval.

Once the settlement is approved, eligible class members usually stand to receive a monetary distribution. However, given the representative nature of class action suits, many class members cannot be located or are either unable or unwilling to satisfy claim requirements. Some class members never learn of the settlement or forego filing claims. Even with directly mailed settlement checks, some are returned or never cashed. Other times, the claim’s process costs exceed individual settlement amounts. This is particularly true with low individual damage cases (often called “small-stake claims”), where the time and effort involved may not incentivize class members to submit claims.

Hence, distribution of settlement funds is a key issue in any damages class action under Federal Rule of Civil Procedure 23(b)(3). When settlement funds cannot be distributed to class members, courts can return the money to defendants (“reverters”); let the money escheat to the state (“escheatment”); or find an equitable way to distribute the money under the cy pres doctrine.

the settlement. Second, some settlements are structured to include “blow provisions”—meaning if there are too many class members who opt-out, the settlement is no longer binding. See, e.g., Carluv v. Amchem Prods., Inc., 10 F.3d 189, 196 (3d Cir. 1993). Hence, opt-outs serve as a stopgap for potentially problematic settlements.


44. See MARCY HOGAN GREER, A PRACTITIONER’S GUIDE TO CLASS ACTIONS 37 (Supp. 2012).

45. See, e.g., Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1306 (9th Cir. 1990) (“[A] substantial number of class members would never be located for distribution of the damage award.”).


47. See, e.g., All Plaintiffs v. All Defendants, 645 F.3d 329, 330 (5th Cir. 2011) (“The settlement administrator sent checks to the last known addresses of plaintiffs, but many were returned as undeliverable or were never cashed.”); Powell v. Gu.-Pac. Corp., 119 F.3d 703, 707 (8th Cir. 1997) (“[O]ver 125 checks were returned as undeliverable.”).

48. See, e.g., Nachsin v. AOL, LLC, 663 F.3d 1034, 1037 (9th Cir. 2011); Fitzpatrick, supra note 23, at 2080 (“[S]ometimes the amounts class members are entitled to under the judgment are so small that they do not come forward to claim their awards.”).

49. FED. R. CIV. P. 23(b)(3) (setting forth the requirement for a monetary damages class action). The 1966 Amendment to Rule 23 resulted in larger classes, which correspondingly made it more difficult to reach all class members. See Johnston, supra note 23, at 281 (discussing how the 1966 amendments to the Federal Rules resulted in increased use of class action procedures). This amendment resulted in the growth of class actions in the 1970s. Id. It was during the rise of class actions that problems with the one plaintiff/one check settlement model came to light. Id. This Article focuses exclusively on 23(b)(3) class actions.

50. RUBENSTEIN ET AL., supra note 34, § 12:28; see also Six (6) Mexican Workers, 904 F.2d at 1307.
Of these, courts often reject reverters and escheatment.\textsuperscript{51} Reverters undermine class actions’ deterrence goals, while escheatment is overly cumbersome and risks only benefiting local governments rather than advancing the goals of the underlying claims.\textsuperscript{52} Consequently, courts instead approve settlements that provide alternative distributions under an expansive interpretation of the \textit{cy pres} doctrine.\textsuperscript{53}

\textit{Cy pres}, meaning “as near as possible,”\textsuperscript{54} is an equitable doctrine that allows the court to modify trust funds used for a specific charitable purpose when the trust is no longer viable.\textsuperscript{55} \textit{Goree v. Georgia Industrial Home}\textsuperscript{56} provides a discrete example. There, the testator bequeathed money to “the Central Howard Association, an Orphan’s Home located in Macon, Georgia.”\textsuperscript{57} However, no such association existed. Consequently, the court applied the \textit{cy pres} doctrine, modifying the trust to allow the money to help orphaned children in Macon, Georgia.\textsuperscript{58}

While the \textit{cy pres} doctrine originated from trust law over a century ago, it since has been used in a variety of contexts—including class actions.\textsuperscript{59} Courts have used \textit{cy pres} as a shorthand for many different class action settlement structures during the last thirty years. Such options once included price rollbacks, discounts, and coupons.\textsuperscript{60} But these distribution methods fell


\textsuperscript{52} See Boies & Keith, \textit{supra} note 23, at 269; \textit{2 Joseph M. McLaughlin, McLaughlin ON CLASS ACTIONS § 8:15 (10th ed. 2013)} (“[A]n earmarked distribution to the government is cumbersome because it entails government involvement.”).

\textsuperscript{53} See, e.g., \textit{In re Motorsports Merch. Antitrust Litig.}, 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001) (“[T]he substantive policies underlying the statutes upon which the plaintiffs sued would dictate a preference for an appropriate \textit{cy pres} distribution rather than a reversion of undistributed funds to the defendant, the alleged wrongdoer.”) (quoting \textit{Herbert B. Newberg & Alba C. Conte, Newberg ON CLASS ACTIONS § 11.20 (3d ed. 1992)}).


\textsuperscript{55} \textit{Restatement (Third) of Trusts} § 67 (2003).

\textsuperscript{56} 200 S.E. 684 (Ga. 1938).

\textsuperscript{57} \textit{Id.} at 684–85.

\textsuperscript{58} \textit{Id.} at 686.

\textsuperscript{59} See \textit{Restatement (Third) of Trusts} § 67. (“Occasionally, the term ‘\textit{cy pres}’ is casually used to refer to reformations or judicial modifications in other contexts in which some modified effect is given to dispositions that would otherwise exceed what the law allows.”); \textit{cf. Nancy A. McLaughlin, Rethinking the Perpetual Nature of Conservation Easements, 29 Harv. Envtl. L. Rev.} 421, 437 (2005) (applying the \textit{cy pres} doctrine to donated conservation easements).

out of favor because they often advantage defendants by generating new sales out of alleged misconduct.\textsuperscript{61}

Concerns about nonmonetary distributions spurred courts and the judiciary to limit such settlements, particularly for coupon deals. In 2005, the Class Action Fairness Act\textsuperscript{62} (CAFA) created significant obstacles for settlement approval. Because of these restrictions, by 2008 the term \textit{cy pres} generally referenced any settlement where funds went to a charity or a non-profit because of distribution problems—a settlement structure CAFA was notably silent on.

Rather than recognizing different forms of charitable distributions, courts and scholars universally call any class action settlement where money goes to charities or non-profits "\textit{cy pres}." In some instances, courts use \textit{cy pres} to signify the distribution of leftover settlement funds.\textsuperscript{63} Other times, \textit{cy pres} means settlements given entirely to charity.\textsuperscript{64} Still other times, \textit{cy pres} means settlements where the money is split between class members and a designated charity.\textsuperscript{65}

In some ways, this generic phrase makes sense. All these settlements result in third party disbursements, solve distribution problems, and extend from courts’ equitable power. However, in actuality, courts are approving two different types of charitable distributions: (1) \textit{cy pres} remainders; and (2) charitable settlements. Though this Article is the first to make this distinction, the delineation is justified.

\textit{Cy pres} remainders result from settlements where all the funds are intended to be distributed to class members. For example, take a $30 million settlement that gives each of the five million class members $6. In small-stake settlements, roughly 10 percent of class members submit claims.\textsuperscript{66}

\begin{itemize}
  \item \textsuperscript{64} Lane v. Facebook, Inc., 696 F.3d 811, 816 (9th Cir. 2012) \textit{reh'g en banc denied}, 709 F.3d 791 (9th Cir. 2013); \textit{see also} New York v. Reebok Int’l Ltd., 903 F. Supp. 532, 534 (S.D.N.Y. 1995) (settlement distributed to state recreational activities and facilities); \textit{In re Toys R Us Antitrust Litig.}, 191 F.R.D. 347, 353–54 (E.D.N.Y. 2000) (distributing $57 million to charity and schools); \textit{In re Vitamin Cases}, 107 Cal. App. 4th 820, 831–32 (2003) (affirming charitable distribution as entire settlement).
  \item \textsuperscript{66} See, e.g., Walter v. Hughes Commc’ns, Inc., No. 09-2136 SC, 2011 WL 2650711, at *13 (N.D. Cal. July 6, 2011) ("[A]verage claims submission rates in similar class actions are typically ten percent or less."); Declaration of Shannon R. Wheatman, Kendrick v. Standard
Hence, a significant pot of money is leftover—the amount of which varies depending on how many class members make a claim, but here it would be close to $27 million. That leftover pot is then distributed to a charity or nonprofit, a distribution this Article calls a *cy pres* remainder. The settlement attempted to distribute directly to class members, which partly failed, so the court substituted a different recipient using its equitable powers.67 Analogically, this is similar to courts’ power in charitable trusts, thus justifying the *cy pres* label.68

In contrast, charitable settlements involve the settlement itself, not just a remainder, making them analytically distinct from *cy pres*. Severing charitable settlements from *cy pres* recognizes notable differences between the distribution methods.69 Charitable settlements do not rely on failed distributions; rather, the original settlement specifically designates money to go to a non-profit or charity.70 Consequently, charitable settlements are purely a solution to distribution problems and, at most, an extension of the equitable principles underlying the trust doctrine of *cy pres*—rather than an extension of the doctrine itself.


68. See, e.g., *Folding Carton Antitrust Litig.*, 557 F. Supp. 1091, 1109 (N.D. Ill. 1983) (“We note that, because this fund already exists, the analogy between this case and the trust law origins of the *cy pres* doctrine is a particularly close one.”).

69. For example, unlike in *cy pres* settlement, in the charitable settlement context, there is no settlor, meaning there is no one who originally created the fund, with an intent to create a gift at the time of funding. See, e.g., *Quinn v. Peoples Trust & Sav. Co.*, 60 N.E.2d 281, 286–87 (Ind. 1945); *State ex rel. Att’y Gen. v. Van Buren Sch. Dist.*, 89 S.W.2d 605, 608 (Ark. 1936). With *cy pres* settlements, class members had at least an indirect possessory interest in the potential monetary distribution under the terms of the settlement. *Cf. Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980) (“Their right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.”). Thus, they can arguably satisfy the settlor requirement. This is not the case with charitable settlements, where the settlement terms do not provide class members with any possessory interest. While the defendant’s coffers fund the settlement, the defendant does not satisfy this requirement. The settlement represents money allegedly wrongfully obtained from the class, not a charitable donation. Defendants’ funding of the settlement is not wholly voluntary but rather intended to end litigation—thus meaning they lacked the intent to create a true gift. Thus, there is no settlor in the charitable settlement context—further justifying a distinction between the two settlement forms.

Charitable settlements are either earmarked or wholly charitable. Earmarked charitable settlements designate funds for direct distribution to class members and funds to be distributed to a non-profit or charity. For example, the settlement in In re Checking Account Overdraft Litigation included an earmarked settlement—the agreement split the $410 million settlement between class members and charity. In contrast, wholly charitable settlements, like the Facebook settlement that disturbed Justice Roberts, give the entire settlement fund to a non-profit or charity: no settlement portion is directly distributed to class members.

Instead of recognizing these nuances, judicial evaluation of charitable distributions is in a state of chaos. A discussion of judicial review of charitable settlements—and the accompanying confusion—is the focus of the next section.

B. Judicial Evaluation of Charitable Settlements

Rule 23(e) requires no special tests for assessing the fairness of charitable distributions. However, because such settlements can involve significant sums of money—often millions of dollars—judges have generated supplementary common law requirements. These requirements include: a qualifying trigger; sufficient nexus; and lack of collusion. From there, courts also consider how to calculate attorney fees in cases involving charitable distributions. In applying these requirements and quantifying fees, judicial interpretation differs, resulting in confusion and inconsistent outcomes.

First, before permitting an alternative distribution, courts require some problem exist with directly distributing funds to class members, i.e., a
“trigger” requirement. This trigger varies: some courts mandate a direct
distribution be impossible or impracticable while others allow mere
inefficiency to justify charitable distributions.

Generally, cy pres remainders—where leftover funds exist after
distribution to class members—satisfy this trigger, but the trigger for
charitable distributions is unsettled. For net-zero cases, where the
distribution’s administrative costs exceed class members’ individual
monetary distributions, most courts approve charitable settlements.

Courts are uncertain how to apply the trigger to low-sum cases, however,
where costs do not fully exhaust the settlement fund. Some courts define the
trigger requirement to require an attempted class member distribution before
any distribution to a third party can occur. For example, in In re Lupron
Marketing & Sales Practices Litigation, the First Circuit held distributions
to third parties can occur only after meeting “the American Law Institute’s
benchmark of ‘100 percent recovery’ for all class members.” Other courts
have a more generous trigger requirement. For instance, the Second Circuit
upheld a settlement in New York v. Reebok International Ltd. without
demanding any individual distribution prior to creating a charitable
settlement. Rather, it approved a wholly charitable settlement because it
would be “impracticable to distribute the settlement proceeds
among the multitude of unidentified possible claimants” without depleting
the settlement funds. Thus, the trigger for approving a charitable settlement depends on the court.

Second, the common law nexus requirement evaluates the proposed third-party recipients. Most courts evaluate whether the recipient's interests "reasonably approximate those being pursued by the class." The closer the nexus, the more gain for class members. For example, Cohen v. Chilcott involved a $1.5 million charitable settlement from an antitrust class claim against hormonal contraceptive manufacturers who allegedly conspired to deny access to cheaper generics. The settlement required the distribution be given to doctors, university health centers, and charities that provide reproductive health services. In approving the settlement over objections that class members should instead receive money, the court highlighted how the distributions increased access to needed drugs—a societal benefit intended by the underlying antitrust claim.

How the nexus requirement applies varies by court. At least one court has rejected the requirement altogether. Some courts require a close nexus between the asserted claim and the charitable distribution, in terms of purpose and geographic scope of the charitable distribution. Others focus the nexus requirement on the underlying statute’s purpose—not the specific claim asserted—and the charitable distribution. In these courts, it is enough for a

87. Reebok, 96 F.3d at 49.
89. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(c) (2010).
92. Id. at 111.
93. Id. at 112.
94. Id. at 119; accord Albert A. Foer, Enhancing Competition Through the Cy Pres Remedy: Suggested Best Practices, 24 ANTITRUST 86 (2010) ("[B]ecause the funds will be used to promote competition or dissuade the kinds of actions that constituted an antitrust violation, or will benefit society in general, class members who did not assert a claim are indirectly benefited.").
96. See, e.g., In re Airline Ticket Comm’n Antitrust Litig., 268 F.3d 619, 626 (8th Cir. 2001).
97. See, e.g., Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011) (requiring a "driving nexus"); In re Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 33 (1st Cir. 2002).
charitable distribution to advance judicial access or consumer protection research; the distribution’s use need not perfectly align with the specific facts of the case.

A recent Third Circuit opinion has added another wrinkle to the nexus requirement. In *In re Baby Products*, the court interpreted Rule 23 to require a “direct benefit” to class members. The court did not fully explain the rationale behind this requirement beyond saying that “in our view . . . [charitable settlements] are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action—to compensate class members.” Nor did the court clarify how direct a benefit must be, though it explicitly left open the possibility of charitable distributions in lieu of monetary compensation.

The third test (a lack of collusion) also has led to judicial confusion. For this test, courts determine if the charitable settlement demonstrates the parties acted in their own self-interest. Some courts have identified three supposed indicia of collusion. These “red flags” are: (1) a high percentage of the settlement going to charity; (2) clear sailing provisions—whereby defendants agree not to contest fee awards up to a certain monetary value; and (3) reverters, meaning settlements where unclaimed funds return to the defendant. While these red flags may have value for evaluating a *cy pres* remainder, they add little value for a charitable settlement. After all, any charitable settlement would raise the first of these red flags because the bulk of the settlement goes to charity.

Finally, even if a charitable settlement survives this three-prong analysis, courts differ on how to compute attorneys’ fees. As part of the settlement approval process, class counsel submits fee applications to reimburse for the time and expenses spent litigating the class claim. The Federal Rules of Civil Procedure give district court judges the discretion to grant class counsel

98. 708 F.3d 163 (3d Cir. 2013).
99. *Id.* at 181.
100. *Id.* at 169.
101. *Id.*
102. See *id.* at 175; *In re Bluetooth Headset Prods. Liaib. Litig.*, 654 F.3d 935, 946–47 (9th Cir. 2011) (vacating approval of settlement in case with “warning signs” of collusion); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (stating because class actions are “rife with potential conflicts,” district courts must scrutinize a proposed settlement to ensure that class counsel are acting “as honest fiduciaries for the class as a whole”).
103. See *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006); *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (7th Cir. 2000).
104. *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000) (contending clear sailing provisions carry “the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class”); see also *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (“[L]awyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.”).
105. *In re Bluetooth*, 654 F.3d at 947; *Mirfasihi*, 356 F.3d at 785.
106. See *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844, 850 (5th Cir. 1988) (discussing how part of a court’s duty in reviewing the fairness of a proposed settlement is to review a fee request).
a “reasonable fee award for their efforts.” A fee petition’s reasonableness is frequently determined by using the percentage of the settlement fund method, which “resembles a contingent fee in that it awards counsel a variable percentage of the amount recovered for the class.” In calculating settlement values, some courts treat charitable distributions the same as money paid directly to class members, on a dollar-for-dollar basis. But others have discounted charitable distributions in computing attorneys’ fees.

Between Rule 23(e) and the common law trigger, nexus, and collusion tests, the settlement review process appears highly structured. In reality, however, there is still a great deal of judicial discretion, which has led to inconsistent decisions over similar charitable settlements and created openings for objectors to challenge any charitable distribution.

Objections are a double-edged sword. On one side, objectors can provide a check to ensure in-depth judicial evaluation of a proposed settlement. On the other side, objections can result in wasted judicial and attorney resources. As Professor Greenberg cogently explains:

But in reality, all too frequently, objectors and their counsel see an opportunity to extract money from the parties or class counsel, whose efforts brought about the settlement, by threatening to upset or seriously

107. Fed. R. CIV. P. 23(h) (“In a certified class action, the court may award reasonable attorney’s fees . . . .”)
111. See In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) (“Discounting the amount of the cy pres payment in determining its value to the class is consistent with the nature of the indirect benefit cy pres provides to the class.”); AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13 cmt. a (2010) (“Because cy pres payments . . . only indirectly benefit the class, the court need not give such payments the same full value for purposes of setting attorneys’ fees as would be given to direct recoveries by the class.”).
detour the settlement. Objectors make arguments that are groundless yet sufficient to delay the settlement approval process for months or years unless class counsel or the parties agree to “buy off” the objector or the objector’s counsel. Objector tactics can prove lucrative because the other parties may prefer to “buy off” the objectors rather than suffer the delay and additional expense necessary to defeat the objection.\(^{113}\)

At this point, objections are almost pro forma with charitable settlements.\(^{114}\) Objectors have seized on the supplemental requirements for charitable distributions developed by the courts. They challenge whether a distribution is impracticable, the nexus is sufficiently tailored, or the proposed recipient satisfies the nexus requirement.\(^{115}\) They also challenge compensation for class counsel.\(^{116}\) However, the most divisive issue with charitable settlements is whether the parties must first attempt a monetary distribution to class members.\(^{117}\) Using the Third Circuit’s “direct benefit” requirement, objectors and class action critics have attacked the entire concept of charitable settlements.\(^{118}\)

The remainder of this Article deals with these challenges, making the case for charitable settlements and clarifying how to evaluate them under Rule 23(e). Part II responds to the objectors’ argument that one must first attempt a monetary distribution to the class before a charitable settlement can be approved. Part III responds to the objectors’ points regarding the common law requirements and calculating attorneys’ fees.

II. THE CASE FOR CHARITABLE SETTLEMENTS

The defining feature of charitable settlements is also its most contentious: under such settlements class members forego direct compensation. While a cy pres remainder first attempts to distribute settlement funds to class

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115. *See, e.g.*, Dennis v. Kellogg Co., 697 F.3d 858, 863 (9th Cir. 2012) (challenging whether the proposed distribution and recipients were sufficiently tailored); *Lane*, 696 F.3d at 820 (challenging, inter alia, whether distribution was impracticable); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 37 (1st Cir. 2012) (challenging proposed recipient).

116. *See supra* note 109 and accompanying text; *accord In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1361 n.30 (S.D. Fla. 2011) (“[M]ost if not all of the Objections are motivated by things other than a concern for the welfare of the Settlement Class. Instead, they have been brought by professional objectors and others whose sole purpose is to obtain a fee by objecting to whatever aspects of the Settlement they can catch onto.”).

117. *Compare In re Auction Houses Antitrust Litig.*, No. 00 CV 0648, 2001 WL 170792, at *15 (S.D.N.Y. Feb. 22, 2001) (rejecting settlement as unfair for not providing initial direct compensation); *with In re Vitamin Cases*, 107 Cal. App. 4th 820, 832 (2003) (stating there is no requirement “that a settlement allow for individual claims before its fund can be distributed to cy pres relief”).

members, charitable settlements do not. The charitable distribution is in lieu of a payday for class members. Some courts and scholars take issue with this result, arguing charitable settlements are per se invalid because they do not directly compensate class members.¹¹⁹ This part explains why this argument is wrong.

As a starting point, such arguments confuse cy pres remainders and charitable settlements. While both resolve distribution problems, as discussed in Part I, they are distinct settlement structures. Under the cy pres doctrine, courts can substitute payouts to class members with “the next best” recipient, i.e., a charitable organization, but only if the initial distribution to the class fails or becomes impracticable.¹²⁰ In contrast, with charitable settlements, there is no requirement for a preliminary attempt to distribute to class members. That requirement only comes from the cy pres doctrine, not from any explicit requirement under Rule 23(e). Requiring all charitable distributions have an initial unsuccessful attempt to distribute money to class members reflects an unfortunate blurring of two very different settlement structures.

More fundamentally, though, arguing that charitable settlements must fail because they do not distribute money to class members has larger implications for class action jurisprudence. It subtly redefines the goals of class actions, making compensation the only purpose of Rule 23(b)(3). The better view is that compensation is just a by-product of a class action’s regulatory function.¹²¹ A class action is a procedural mechanism that allows individuals to “supplement regulatory agencies both by requiring wrongdoers to give up their ill-gotten gains and by ferreting out misconduct that may have

¹¹⁹. Some argue cy pres still may be an option for a remainder, but others take issue with any charitable distribution—including cy pres. For more ardent critics, only monetary distributions benefit class members. Compare Boies & Keith, supra note 23, at 281 (arguing in favor of cy pres settlements but against charitable settlements), with Redish et al., Cy Pres Relief, supra note 17, at 621–24 (arguing against all charitable distributions). Often, portions of the American Law Institute Principles are cited to support this conclusion. See, e.g., In re Baby Products Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013). However, when read in its entirety, the ALI Principles do not create a presumptive barrier but rather recognize such distributions still may be appropriate for small-stakes cases: 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. Am. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (2010).

¹²⁰. See, e.g., Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012) (“[T]o ensure that the settlement retains some connection to the plaintiff class and the underlying claims, however, a cy pres award must qualify as ‘the next best distribution’ to giving the funds directly to class members.”); Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990) (“Even where cy pres is considered, it will be rejected when the proposed distribution fails to provide the ‘next best’ distribution.”).

¹²¹. See, e.g., Edward F. Sherman, Consumer Class Actions: Who Are the Real Winners?, 56 Me. L. REV. 223, 228 (2004) (“[I]t must be kept in mind that the objective of consumer class actions is not only compensation, but also deterrence and disgorgement of wrongful profits.”).
escaped the regulators’ observance.”

As a result, class actions serve a larger collective good: they allow individuals to vindicate their legal rights and deter wrongdoing, minimizing future harm. Therefore, there are broader regulatory goals, beyond mere compensation, behind the federal system for aggregate litigation.

Assessing class actions with an eye toward their regulatory potential makes particular sense for small-stakes cases. Where individual recovery is minimal, non-compensatory goals rise to the foreground. The focus should not be on whether a class member is compensated for his $2 injury.

Rather, as Justice Berger described:

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Thus, the proper question is whether the relief charitable settlements offer fulfills the regulatory function of class actions. This part explains how the relief charitable settlements provide allows individuals an opportunity to vindicate their rights and deters future wrongdoing.

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122. Stephen C. Yezell, From Medieval Group Litigation to the Modern Class Action 232 (1987). The purpose of class actions have long since been debated, with some arguing that class actions are more about autonomy and efficiency than about regulatory goals. See, e.g., Kenneth W. Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. LEGAL STUD. 47, 49 (1975); see also Edward Brunet, Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention, 74 Tul. L. Rev. 1919, 1939 (2000) (describing competing law and economic class action arguments). However, a more practical approach recognizes both justifications as synergistic rather than in tension. In some cases, class actions are more efficient than multiple potential cases. In other situations, multiple cases are unlikely—particularly when potential damages hardly cover the costs of bringing suit. In those cases, regulatory goals justify a class actions’ utility. See, e.g., Lesczynski v. Allianz Ins., 176 F.R.D. 659, 676 (S.D. Fla. 1997) (“Class actions are particularly appropriate, where, as here, multiple lawsuits would not be justified because of the small amount of money sought by the individual plaintiffs.”). Thus, because charitable settlements primarily arise in small-stakes cases, focusing on class actions’ regulatory function is appropriate.

123. See Arthur R. Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 Harv. L. Rev. 664, 666 (1979) (discussing “the societal benefits derived from deterring socially proscribed conduct and providing small claim rectification” through class actions).

124. See Fitzpatrick, supra note 23, at 2067 (“[I]ndividuals are indifferent between, say a loss of $1 and a 1% chance of losing $100.”).


126. See, e.g., Miller, supra note 123, at 666 (“Even if the negative effects of class actions were assumed, they would have to be balanced against the societal benefits derived from deterring socially proscribed conduct and providing small claim rectification—considerations that thus far have escaped measurement and perhaps always will.”).
A. Charitable Settlements Vindicate Substantive Rights

Charitable settlements serve a valuable purpose, consistent with class action goals, because they preserve putative class members’ ability to assert substantive legal rights. Access to justice—meaning a realistic avenue to air grievances—is an essential component of effective regulation via class actions. As the Advisory Committee for the Federal Rules of Civil Procedure noted, class action mechanisms “provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.” The substantive laws primarily pursued as class actions lack a minimum damages requirement, demonstrating Congress already has decided that even in cases where an individual has little money at stake, he has the right to make a claim. Charitable settlements protect a class member’s ability to effectuate these statutory rights, thus providing the specific relief intended by class action mechanisms—the ability to assert claims. Essentially, charitable settlements promote access to justice by: (1) allowing aggrieved individuals


128. Accord Jay Tidmarsh, Living in CAFA’s World, 32 REV. LITIG. 691, 708 (2013) (“By ‘justice’ I do not mean a fair determination of contested legal rights by a court. Rather, I use justice to refer to any process that commences with aggrieved persons laying their complaints of legal wrongdoing before a neutral party.”); Francisco Valdes, Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective, 24 Ga. St. U. L. Rev. 627, 649 (2008) (“[T]he virtue of the class action was and is in the effort to provide access to justice—to deliver justice to those who don’t have access to justice.”); cf. Benjamin Kaplan, A Prefatory Note, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (explaining the purpose of the 1966 Amendment of Rule 23 was to expand access to justice “even at the expense of increasing litigation”).

129. See Kaplan, supra note 128, at 497.

130. Cf. Max Helveston, Promoting Justice Through Public Interest Advocacy in Class Actions, 60 BUFF. L. REV. 749, 772–73 (2012) (discussing how restricting access to class actions “means that a number of the rights and protections that lawmakers have afforded individuals are essentially unenforceable”); Valdes, supra note 128, at 654–55 (“The class action device does not itself seek to establish or promulgate those substantive policy choices [reflected in substantive law]; the class action instead provides the vehicle to give them some real-world bite. The class action, like other procedures, is a vehicle for the enforcement and vindication of substantive rights and obligations embodied in positive policy choices that pre-exist the class action.”).

131. See Deposit Guaranty Nat’l Bank v. Roper, 445 U.S. 326, 338 (1980) (explaining that “[t]he use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise”); see also Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 809 (1985) (noting that class action suits allow plaintiffs to pursue causes of action that otherwise would not be economical); James M. Finberg, Class Actions: Useful Devices That Promote Judicial Economy and Provide Access to Justice, 41 N.Y.L. SCH. L. REV. 353, 353–54 (1997) (“Even more importantly, [class actions] provide access to justice. Our justice system is not a system only for the rich and powerful. It is also a system for everyday Americans who need legal redress when they have been wronged. Class actions give them that opportunity by allowing them to aggregate their claims and to fight rich and powerful corporations. By aggregating their claims, they can hire the experts and lawyers who can do the analysis that is necessary.”).
to take a stand against alleged wrongdoing; (2) advancing democratic participation; and (3) ensuring financial hurdles do not limit opportunities to air grievances.

First, the ability to assert a right has value independent of whether class members receive direct compensation. Permitting charitable settlements allows class members to “level the playing field” and hold large corporations responsible for wrongdoing that results in small individual damages but large aggregate harm. Taking a public stand matters to class members and is often an overlooked benefit of charitable distributions. Eligible class members can be difficult to locate, sometimes as a result of defendants’ faulty recordkeeping. Even then, administrative costs for individual distribution can exhaust the entirety of the settlement fund. Charitable settlements overcome these issues, ensuring substantive rights are not curtailed due to distribution challenges.

Second, charitable settlements advance democratic participation and protect the perceived fairness of the legal system, as potential claims are not precluded because of distribution problems. Enhancing fairness by


133. See, e.g., Helveston, supra note 130, at 772–73 (discussing how restricting access to class actions “means that a number of the rights and protections that lawmakers have afforded individuals are essentially unenforceable”); Katie Melnick, In Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response to Common Criticisms, 22 ST. JOHN’S J. LEGAL COMMENT 755, 756 (2008).


135. See id.

136. See, e.g., In re Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1354 (S.D. Fl. 2011); cf. Powell v. Ga.-Pac. Corp., 119 F.3d 703, 706 (8th Cir. 1997) (permitting cy pres because class members were no longer readily locatable because a decade passed from the initial distribution).

137. This includes most securities, antitrust, and consumer actions. See Ilana T. Buschkin, The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts, 90 CORNELL L. REV. 1563, 1564 n.3 (2005).


139. Avenues for participation strengthen cooperation with the legal system, which in turn encourages compliance with the legal system. Cf. Donna Sheslow & Jeanne Brett, Disputants’ Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study, 41 CONN. L. REV. 63, 72 (2008) (discussing how parties are more willing to follow procedural requirements when perceived as fair); see also Floyd Feeney, Evaluating Trial Court Performance, 12 JUST. SYS. J. 148, 159 (1987) (describing research suggesting that “decisions perceived as unfair are economically inefficient because
guaranteeing judicial access is a gain separate from (and potentially more important than) monetary compensation—particularly to class members. Claimants privilege fairness of the adjudicative process over monetary results. Ensuring judicial access promotes individual dignity, which is an essential value in democratic societies. “Dignity is most clearly offended when a person believes that she is the victim of governmental arbitrariness or private abuse and is barred at the courthouse door or forced to participate without assistance or resources.” However, these gains are undermined when a swath of otherwise cognizable claims cannot be adjudicated because of distribution problems.

Third, charitable settlements overcome financial obstacles that might otherwise limit access to justice. Often, aggrieved individuals are limited to private litigation to redress alleged wrongdoing, as government agencies rarely pursue small-stakes claims. Charitable distributions mostly occur in cases where financial barriers make individual litigation irrational. Theoretically, an individual has the legal right to assert a claim but “is [often]

of the increased resistance” to them). When procedures are considered fair, people are more likely to “obey the law” and have greater respect for the legal system. See Tom R. Tyler, Why People Obey the Law 368 (1990); Tom R. Tyler, The Psychology of Disputant Concerns in Mediation, 3 Negotiation J. 367, 368 (1987).

140. When court procedures do not prioritize constituents’ larger needs—not just provide monetary compensation—this triggers increased risks of discontent and mistrust of the legal system. See, e.g., Shestowsky & Brett, supra note 139, at 72.

141. See id. at 68–69.

142. Ensuring judicial access advances values of individual dignity, which in turn promotes a primary value of democratic societies. See Walter F. Murphy, An Ordering of Constitutional Values, 53 S. Cal. L. Rev. 703, 745 (1980); Ronald Pennock, Due Process, Fraternity, and a Kantian Injunction, 18 NOMOS 172 (1977) (discussing the importance of the government’s fair treatment of individuals, including instilling dignity and self-respect).


144. See Finberg, supra note 131, at 357 (“[I]f Americans are to have faith in the judicial system, they need to believe that they have access to the courthouse.”); Meili, supra note 134, at 74 (“[M]any named plaintiffs have a broader view of success and fairness, measuring them in terms of achieving social changes that extend beyond the defendant in their particular case.”).


146. See, e.g., Lane v. Facebook, Inc., 696 F.3d 811, 816 (9th Cir. 2012), reh’g en banc denied, 709 F.3d 791 (2013); In re Netflix Privacy Litig., No. 5:11-CV-00379, 2013 WL 1120801, at *1 (N.D. Cal. Mar. 18, 2013); In re EasySaver Rewards Litig., 737 F. Supp. 2d 1159 (S.D. Cal. 2010).
shut out of the courthouse by economic realities." 147 Few class members can afford to undertake years-long litigation on their own, especially when individual recovery is minimal. 148 However, by allowing class counsel to recover attorneys’ fees based on charitable settlements, access to justice is restored. 149 Class counsel are key to assisting aggrieved individuals bring claims. 150 They often “ferret out” the alleged wrongdoing 151 and advance the fees and costs necessary for suit. 152 As the Supreme Court has noted, “[a] class action solves [the] problem” that “small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights” by “aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.” 153 Instead of being fully shut out of the judicial process, aggrieved individuals can instead participate in a representative fashion—whereby class representatives and class counsel work together to vindicate class members’ rights. 154

Charitable settlements also may help overcome financial hurdles to judicial access in subsequent cases. Through the nexus requirement, charitable settlements ensure defendants pay for wrongdoing, then distribute that payment to a charity whose resources and experience are used to advance

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148. See Mathias Reinmann, Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?, 51 AM. J. COMP. L. 751, 817 n.351 (2003) (discussing why the high costs of discovery can work against a plaintiff as “those with small and medium-sized claims” may not be able to fully pursue these claims as the costs of discovery will often outweigh the small sum sought in the recovery); Nina Yadava, Can You Hear Me Now? The Courts Send a Stronger Signal Regarding Arbitration Class Action Waivers in Consumer Telecommunications Contracts, 41 COLUM. J.L. & SOC. PROBS. 547, 554–55 (2008) (“Without the ability to aggregate these small sums, securing legal representation is difficult and the financial incentive of affected individuals to bring action is lacking when attorney’s fees are larger than the amount in controversy.”).

149. See David J. Cook, Class Actions and the Limits of Recovery: The Glass Jaw of Justice (Part 1 of 2), 5 J. LEGAL TECH. RISK MGMT. 1, 21 (2010) (“[C]lass action plaintiffs are heavily dependent upon the class counsel in the overall strategic and tactical management of the case as supervised by the court.”); Samuel Issacharoff & Robert H. Klonoff, The Public Value of Settlement, 78 FORDHAM L. REV. 1177, 1186 (2009) (“For such negative-value suits, the most important element in ensuring justice is making sure that some agent—dare we say, any agent—will rise to the occasion to take up the case.”).

150. See Cook, supra note 149, at 21.

151. See, e.g., FED. R. CIV. P. 23(g) (enumerating criteria courts must consider in appointing class counsel, including work to identify or investigate potential claims).

152. See, e.g., RUBENSTEIN ET AL., supra note 34, § 3:69.


interests aligned with the underlying goals of the class action claim. Recognizing the access to justice purpose behind aggregate litigation, many charitable distributions go directly to non-profit providers of legal services and are dedicated to providing judicial access for those who cannot obtain or afford representation. Consequently, charitable settlements provide two tiers of judicial access: (1) class members receive the benefit of access to justice for the claim generating the charitable settlement, and (2) they (and similarly situated individuals) also can gain from increased access in future cases.

Focusing on compensation as the sole goal of class actions overlooks these gains. Nonetheless, critics often try to redirect arguments about access to justice, pointing out class actions limit participation in comparison to traditional, non-aggregate cases. Because of the representative nature of such cases, these critics are accurate in noting not every class member is equally heard to the same degree as in individual litigation. However, in the context of small-stakes claims where charitable settlements usually occur, the comparison is not between class actions and individual litigation. Rather it is between class actions and no litigation. In fact, as the Manual for Complex Litigation explains, the “[a]dequacy of the settlement involves a comparison of the relief granted relative to what class members might have obtained without using the class action process.” Since charitable settlements provide greater access to justice than otherwise possible, they provide sufficiently valuable relief—even without providing class members monetary compensation.

B. Charitable Settlements Deter Wrongdoing

Charitable settlements also deter wrongdoing, further fulfilling class actions’ regulatory objectives. Class actions are notably different than individual civil litigation, as deterrent potential is a key reason consumers bring aggregate claims. A study of named plaintiffs in class actions bears out

155. See, e.g., In re EasySaver Rewards Litig., 921 F. Supp. 2d 1040, 1052 (S.D. Cal. 2013) (discussing how the proposed charitable settlement advanced “the objectives of the underlying statute(s)’); In re Eunice Train Derailment, No. 00-1267, 2012 WL 70651, at *2 (W.D. La. Jan. 9, 2012) (discussing how the proposed charitable distribution “is intimately connected to the objectives of this suit and the class”).


159. MANUAL FOR COMPLEX LITIGATION, supra note 43, § 21.62 (listing over thirty factors for evaluating a proposed settlement).

how a primary goal of such cases is ensuring that others do not experience the same problems in the future—not just receiving monetary compensation. 161 Focusing on deterrence goals is particularly important for the low individual value claims that most commonly trigger charitable settlements. As Professor Issacharoff stated, “More critical than the limited compensatory relief now offered in these low-value class actions is the prospect that the law would be unable to deter future misconduct absent an effective policing mechanism.” 162

Deterrence is an extension of class actions’ regulatory function. 163 Congress adopted Federal Rule of Civil Procedure 23 to allow individuals to serve as private attorneys general—deterring future wrongdoing through class actions functioning as ex-post regulation. 164 Exposure to potential liability incentivizes actors to avoid wrongdoing 165 and affects widespread change. 166 For example, a company may elect to spend more money testing a new product or invest in more compliance training to minimize potential class action exposure. 167 This deterrent effect applies not only to named defendants but also to other industry members 168 and can extend over

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163. Yeeazell, supra note 122, at 232; see also Lopez v. Youngblood, No. CV-F-07-0474, 2011 WL 10483569, at *14 (E.D. Cal. Sept. 2, 2011) ("[O]ne important purpose of the class action device is that defendants should not benefit from their wrongdoing, and should be deterred from doing so by being vulnerable to class actions to remedy their wrongful conduct."); Abels v. JBC Legal Group, P.C., 227 F.R.D. 541, 546 (N.D. Cal. 2005).
166. This widespread effect is not limited to consumer class actions. See Trevor W. Morrison, Private Attorneys General and the First Amendment, 103 Mich. L. Rev. 589, 590 (2005) (“From school desegregation to fair housing, environmental management to consumer protection, the impact of the private attorney general litigation is rarely confined to the parties in a given case.”).
167. For example, in interviewing corporate representatives in 2000 (when class actions mechanisms were more permissive), the Rand Institute found: “Corporate representatives . . . interviewed said that the burst of new damage class action lawsuits ha[d] . . . cause[d] them to review financial and employment practices. Likewise, some manufacturer representatives noted that heightened concerns about potential class action suits have had a positive influence on product design decisions.” Deborah R. Hensler et al., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMA: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 9 (2000), available at http://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR969.1.pdf; see also Edward F. Sherman, Consumer Class Actions: Who Are the Real Winners?, 56 Mr. L. REV. 223 (2004) (providing a more exhaustive analysis of the Rand report).
multiple years, so long as there is “sustained and repeated enforcement activity.”169

Charitable settlements are aligned with class actions’ deterrence objective and provide class members valuable relief by enhancing public welfare.170 Deterrence gains occur regardless of whether the defendants’ distribution goes to class members or third parties.171 It is the threat of litigation coupled with monetary sanctions that matters.172 Potential monetary exposure raises transactional costs, which motivates avoiding such behavior in the first place.173 This is particularly true for the small individual sum class actions best suited for charitable settlements:

[T]he primary purpose of small claims class actions is not individual plaintiff compensation but rather aggregate deterrence of the defendant’s activities. Compensation is not a primary goal because each class member has been harmed such a small amount that getting those funds to them may be inefficient and/or class members are unlikely to spend time coming forward to claim such small amounts. However, the aggregate effect of the defendant’s actions may be significant and need to be deterred. Creating a fund that truly penalizes the defendant by fully disgorging a significant amount of money serves this deterrent effect regardless of where the funds are sent.174

In fact, charitable distributions’ deterrence value is potentially greater than other nonmonetary relief options. Optimal deterrence does not occur when relief comes in the form of a defendant’s product or a service that can be


170. See Elizabeth Chamblee Burch, Securities Class Actions As Pragmatic Ex Post Regulation, 43 GA. L. REV. 63, 96 (2008) (“[D]eterrence enhances public welfare by preventing unreasonable risks that cost more to incur than to prevent.”); Catherine M. Sharkey, Punitive Damages As Societal Damages, 113 YALE L.J. 347, 365 (2003) (“Social welfare is maximized by minimizing the sum of the costs of (1) losses produced by accidents; (2) defendants’ efforts to exercise care; (3) plaintiffs’ efforts to take precautionary measures; and (4) the costs of administering the torts (or alternative) system.”).

171. See, e.g., In re Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1355 n.24 (S.D. Fl. 2011); Rosenberg, supra note 165, at 1892 (“In seeking to minimize the sum of accident costs, there is no necessary linkage between the determination of liability and the distribution of damages. The two functions are severable and distinct. How damages are distributed among plaintiffs—whether averaged, allotted by need, apportioned according to some other criterion, or not distributed at all—is generally (with the exception of its effect on plaintiff incentives) irrelevant to achieving deterrence.”); cf. David Rosenberg, The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System, 97 HARV. L. REV. 849, 873 (1984).


174. In re Dep’t of Veterans Affairs (VA) Data Theft Litig., 653 F. Supp. 2d 58, 60–61 (D.D.C. 2009); see also Gilles & Friedman, supra note 108, at 105 (asserting that real value of class actions lies not in compensation but in deterring the defendant-wrongdoer by “caus[ing it] to internalize the social costs of its actions”).
offered at little or no opportunity cost, Reverters, which provide no guaranteed payouts, are not better deterrents, nor is injunctive relief. Instead, the potential for real financial exposure, regardless of whether the money goes to class members or a charity or non-profit, achieves more deterrence—a benefit to class members that does not require receiving a $5 check first.

Thus, charitable settlements are essential stopgaps to safeguarding deterrence. They optimize deterrence by ensuring the defendants are exposed to potential litigation for all types of wrongdoing, not just wrongdoing where damages can be efficiently distributed to individual class members. A requirement that all settlements first distribute funds to class members, however, runs the risk of under-deterrence.

Individual recovery and optimal deterrence are conflicting goals. When individual compensation becomes the primary goal, less optimal deterrence results because the threat of litigation disappears if charitable settlements are not

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176. Id.; Isis, supra note 26, at 270 n.41 (“Optimal deterrence is not reached when there are unclaimed coupons (because the tortfeasor only bears a cost if a coupon is cashed in) but that optimal deterrence could be reached when there is undistributed money (because the tortfeasor has already internalized the costs of his tortuous conduct).”).

177. See, e.g., Diamond Chem. Co., Inc. v. Akzo Nobel Chemicals B.V., 517 F. Supp. 2d 212, 218 (D.D.C. 2007) (discussing how reversion does not fulfill deterrence goals); AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 (2010) (“One option is to return the remaining funds to the defendant even when the settlement does not contain a provision for reversion to the defendant. That option, however, would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable.”); Boies & Keith, supra note 23, at 269 (“Reversion to the defendant undermines the deterrent effect of class actions.”).


179. See Burch, supra note 172, at 2551 (discussing the harm resulting from minimizing class actions’ deterrence potential, given “the American system’s heavy reliance on litigation as ex post regulation”).


182. Gilles & Friedman, supra note 108, at 107 (“[T]he introduction of compensationalist norms into class action policymaking not only is gratuitous, but also undermines the efficacy of many rules and practices as deterrents.”); Rosenberg, supra note 165, at 1890 (discussing the conflict between optimal deterrence and compensation in terms of optimal insurance theory).
allowed. Few lawyers would file claims that have no effective resolution prospect. 183

Critics often overlook deterrence gains in challenging charitable settlements. For example, Public Citizen, a repeat objector to cy pres and charitable settlements, took issue with the proposed settlement for antitrust violations in In re Toys “R” Us Antitrust Litigation. 184 The settlement included an earmarked distribution of $36.6 million to Toys for Tots. 185 Public Citizen contended the settlement only provided class members “ephemeral” relief. 186 The court rejected such a narrow definition of benefit:

[I]n claiming that the method of distribution means that consumers will not benefit from the Settlements, [Public Citizen] ignores the deterrent effect that inheres in the defendants’ large payout of toys and cash. The Settlements, with their significant monetary cost to defendants, must be evaluated not only in terms of their direct value to the public but also in terms of their deterrent effect on antitrust violators, an effect of value to consumers. 187

Similarly, objectors in In re Checking Account Overdraft Litigation 188 ignored deterrence gains in attacking an earmarked charitable distribution. 189 There, as described previously, 190 the bulk of a $410 million settlement was dispersed to identifiable class members, with a portion earmarked for distribution to organizations that promote financial literacy. 191 This settlement portion represented the amount allocable to class members who could not be identified because the defendant’s older transaction data was not searchable. 192

183. The economic reality is that if class counsel cannot expect potential recovery for the vast time and monetary outlay associated with pursuing a class claim, attorneys simply will not take the case. See Sofia Adrogué & Hon. Caroline Baker, Litigation in the 21st Century: The Jury Trial, the Training & the Experts, ADVOC., Fall 2011, at 12; Bartholomew, supra note 20, at 2149–50 (discussing how increased risks disincentive counsel from pursuing claims); Melnick, supra note 133, at 776 (discussing how class action attorneys are paid from settlements, thus making the success of the case relevant to an attorney’s decision to undertake representation). As challenges to charitable distributions mount, the safer course for class counsel is to diversify the risk by filing other types of cases, rather than invest limited resources in an uncertain terrain. See Nantiya Ruan & Nancy Reichman, Hours Equity Is the New Pay Equity, 59 VILL. L. REV. 35, 75 (2014) (discussing how greater judicial scrutiny means “fewer private plaintiffs’ attorneys are willing to risk the high costs of these cases”).

185. Id. at 349.
186. Id. at 355.
187. Id. at 356.
188. 830 F. Supp. 2d 1330 (S.D. Fla. 2011).
189. Id. at 1354–57.
190. See supra Part I.B.
191. In re Checking Account, 830 F. Supp. 2d at 1355. This case is another example of a court using the generic term cy pres to discuss a settlement where the charitable distribution is not limited to a remainder. Hence, the charitable distribution involved in the case is more accurately described as an earmarked charitable settlement.
192. Id. at 1354.
In rejecting objectors’ challenges to the settlement, the trial court cited Professor Fitzpatrick’s explanation of charitable settlements’ deterrent value, which echoed Professor Rubenstein:

In small-stakes cases, the most important function of the class action device is not compensation of class members but deterrence of wrongdoing . . . [and] if defendants did not pay someone—even third parties like cy pres charities—for such harms, then defendants would have every incentive to cause such harms in the future . . . . Thus, in such [small-stakes] cases, the most important thing is that the defendant pays for the wrongs it has perpetrated—it is less important who the defendant pays. 193

Stated differently, “ex ante, the individual would rationally prefer a legal system that allocates enforcement resources to prevent unreasonable risk rather than merely to compensate it.” 194 Thus, the more substantiated position recognizes charitable settlements provide valuable deterrence.

In sum, charitable settlements are well-aligned with class actions’ regulatory function. They are an equitable distribution method that furthers individuals’ ability to vindicate statutory rights to regulate behavior, by deterring future wrongdoing and disgorging ill-gotten gains. Thus, theoretical arguments that class actions should be limited to cases where direct monetary payouts to class members are feasible undermine class actions’ larger utility.

C. Collusion and Procedural Concerns Are Unfounded

As detailed above, charitable settlements offer class members valuable relief by promoting access to justice and deterring wrongdoing by using ill-gotten gains to effectuate collective goals. Precluding charitable settlements would significantly undercut class actions’ regulatory enforcement potential.

Nonetheless, challenges to charitable settlements often build on the faulty premise that such settlements do not benefit class members because they do not compensate them. Class action objectors commonly repeat two lines of attack. First, charitable settlements allegedly incentivize class counsel and defendants to “sell out” class members. From there, some critics assert such settlements entice counsel to forego vigorously advocating on behalf of class members—thus raising due process concerns. 195 The remainder of this part focuses on the flaws in these derivative arguments, refuting the remaining theoretical obstacles to judicial approval of charitable settlements.

193. Id. at 1355 n.24 (citing Supp. Decl. of Prof. Brian T. Fitzpatrick, ¶¶ 6, 9).
195. Redish et al., Cy Pres Relief, supra note 17, at 650–51.
1. Collusion Fears Are Overblown

Critics still hold onto a narrow definition of benefit by arguing charitable settlements incentivize class counsel to “sell out” the class.196 This attack recycles an oft-asserted criticism of small-sum class actions: class attorneys receive millions while class members receive little or nothing.197 Assuming a charitable settlement is by definition “selling out,” any such settlement is circumstantial evidence of collusion between class counsel and defendants. Some further claim charitable settlements are “cheaper” for defendants because they avoid payouts to individual class members.198

Such collusion concerns in the charitable settlement context are more perception than reality. While class actions potentially can create conflicts of interest, this does not justify assuming charitable settlements are collusive. A charitable settlement can represent the full, fair value of the class’ claims, especially when administrative costs exceed individual compensation.199 A variety of safeguards already exists to prevent the collusive behavior feared by critics.

First, the process for negotiating attorneys’ fees is the same regardless of the settlement structure. Though no express prohibition against concurrent fee and settlement negotiations exists, in many class actions, the attorneys’ fees discussions are deferred until after all settlement terms are fully negotiated.200 There is no guarantee defendants will agree to generous class


199. See, e.g., Nachshin v. AOL, LLC, 663 F.3d 1034, 1037 (9th Cir. 2011) (describing charitable settlement “[i]n lieu of a cost-prohibitive distribution to the plaintiff class” where defendants’ maximum liability per person would be roughly three cents).

200. See, e.g., In re Oil Spill by Oil Rig Deepwater Horizon, 295 F.R.D. 112, 138 (E.D. La. 2013) (“[T]he parties did not begin to negotiate fees until they had already delivered an otherwise complete settlement agreement to the Court.”); In re Sw. Airlines Voucher Litig., No. 11 C 8176, 2013 WL 4510197, at *2 (N.D. Ill. Aug. 26, 2013) (“It is undisputed that there was no negotiation regarding attorney’s fees until after the parties had reached agreement on settlement of the class members’ claims.”); In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 335 (3d Cir. 1998) (“There is no indication the parties began to negotiate attorneys’ fees until after they had finished negotiating the settlement agreement.”); Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 233 (D.N.J. 2005) (“[T]he parties did
counsel compensation when the settlement includes a charitable distribution. Such settlements are often also overseen by mediators, further offsetting potential collusion concerns.\textsuperscript{201}

Second, courts explicitly evaluate whether the settlement is the product of collusion.\textsuperscript{202} This requirement is hardly pro forma. The district judge acts as a fiduciary of the class; if a trial judge fails in executing his duty, circuit courts will reverse the decision.\textsuperscript{203} Courts have approved settlements and still cut requests for attorney fees, which also minimizes risks of selling out the class.\textsuperscript{204}

Moreover, the approval process is particularly arduous for charitable settlements, which already receive heightened scrutiny.\textsuperscript{205} Objectors in such cases are commonplace, causing courts to provide more exhaustive review given the very likely appeal stemming from any settlement approval.\textsuperscript{206} At the same time, defendants have reason to only promote class settlements that satisfy the Rule 23 settlement approval process. A collusive settlement creates problems with the class’s adequacy of representation—negating the validity of the settlement.\textsuperscript{207} The resources defendants spent reaching an agreeable settlement, litigating the settlement’s preliminary approval, and

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not commence negotiations on the amount of attorneys’ fees and expenses that MassMutual would agree to pay until all material terms of the Settlement had been agreed upon, about one year after settlement negotiations began.”).\textsuperscript{201}

\textsuperscript{202} See, e.g., \textit{In re EasySaver Rewards Litig.}, 921 F. Supp. 2d 1040, 1054 (S.D. Cal. 2013) (“There were numerous settlement proceedings, several of which were presided over by well-respected retired district court judges and magistrate judges. By all accounts, the settlement resulted from an arms-length negotiation process with the benefit of the class members in mind.”).


\textsuperscript{204} See, e.g., Culver v. City of Milwaukee, 277 F.3d 908, 915 (7th Cir. 2002); \textit{In re Cendant Corp. Litig.}, 264 F.3d 201, 231 (3d Cir. 2001); Grant v. Bethlehem Steel Corp., 823 F.2d 20, 22 (2d Cir. 1987); Stewart v. Gen. Motors Corp., 756 F.2d 1285, 1293 (7th Cir. 1985).


\textsuperscript{207} See Debra Lyn Bassett, \textit{The Defendant’s Obligation to Ensure Adequate Representation in Class Actions}, 74 UMKC L. Rev. 511, 539 (2006) (discussing how the Restatement (Second) of Judgments section 41 applies to both defendants and plaintiffs). Professor Bassett goes on to explain why defendants, thus, have an interest in ensuring adequate representation: “[T]he Restatement gives a defendant no place to hide when the defendant knew that the class members were not accorded adequacy of representation—under such circumstances, the judgment is not binding on the inadequately represented class members.” \textit{Id.}
negotiating the settlement notice would be for naught if ultimately disapproved by the court.

Third, collusion assumes agreement between class and defendants’ counsel, at the expense of class members; it takes two to collude. While defendants are motivated to provide the smallest settlement possible, the amount defendants pay is the same whether it is a monetary distribution or a charitable settlement. While charitable settlements minimize administrative costs possibly paid by defendants, defendants still fund the settlement, pay for notice, and pay attorneys’ fees.

Fourth, fears of defendants pushing for charitable settlements over monetary distributions are overblown because not all Rule 23(b)(3) cases qualify for charitable settlements. Such settlements are the exception to the rule. They are limited to cases with distribution problems. While the guidelines for the trigger test can be shored up, as discussed in Part III, even as presently applied, this requirement significantly restrains such settlements’ growth.

Finally, collusion is less likely with charitable settlements than with alternative, nonmonetary distribution options like reverters. Charitable settlements still financially motivate class counsel to push for a high distribution. As the settlement amount rises, so does class counsel’s payday, which is based on the value of the settlement. At the same time, defendants will try to limit the settlement amount. This is unlike reversion provision settlements, where undistributed funds return to the defendants’ coffers. Reverters incentivize the parties to falsely inflate settlement fund values for judicial approval. Such provisions “decouple” class counsel’s incentive to maximize the settlement amount and its corresponding deterrent and disgorgement impact. Hence, charitable settlements actually minimize collusion concerns as compared to other forms of class action settlement.

209. See Jacob Kreutzer, The Difficulties of Encouraging Cooperation in a Zero-Sum Game, 65 ME. L. REV. 147, 159 (2012) (describing “the settlement range [as] the range from the smallest offer the plaintiff should accept and the largest offer the defendant should make”).
210. Cf. Warwick, supra note 208, at 611 (“[F]or collusion to influence the settlement of a class action, the defendant must also be willing to actively participate.”).
211. Thus, in settled class actions, particularly for antitrust and securities claims, “the great bulk of the money received from the defendants actually is distributed to class members.” Miller, supra note 123, at 667.
212. See supra Part I.B (discussing the “trigger” requirement for charitable settlements).
213. See supra note 102 and accompanying text.
215. Such a falsely inflated settlement value was rejected by the District Court of Maine in Sylvester v. CIGNA Corp., 369 F. Supp. 2d 34 (D. Me. 2005). The settlement was presented as a $3.4 million opt-in fund but included a reverter. Id. at 38. As a result of the reverter, class members received $449,159.81 while the defendants would have received $1,644,601.94. Id. at 47. Recognizing such a settlement structure would provide “real value” to defendants and class counsel but provide little deterrent impact, the Court denied the settlement as unfair. Id. at 53.
On the whole, accusations of collusion are almost routine in challenging charitable settlements. Yet fears of “selling out” class members to receive a generous payday have not necessarily materialized into realistic concerns. At the least, objectors and critics should face the burden of coming up with actual proof of collusion before removing this valuable distribution option from the judicial arsenal.

2. Charitable Distributions Do Not Create Procedural Problems

Beyond collusion, some contend charitable settlements violate substantive due process by improperly expanding class members’ substantive rights and foregoing proof of individual damages. This critique focuses on the Rules Enabling Act, which defines the scope of procedural rules the judicial branch may adopt. Since charitable distributions would not occur in individual litigation, allowing them in class actions supposedly makes them more like improper civil fines than true damages. However, this position advances an overly narrow definition of the Rules Enabling Act and fails to acknowledge that charitable settlements do not alter individualized damage calculations.

216. Some critics of charitable settlements also claim failing to provide class members monetary distributions raises procedural due process problems. Redish et al., Cy Pres Relief, supra note 17, at 650 (“[U]se of cy pres relief in class actions also gives rise to fatal violations of procedural due process.”). These challenges are easily dismissed. Procedural due process does not create a mandate for monetary distributions. Rather, it simply requires class members “receive notice plus an opportunity to be heard and participate in the litigation.” Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). A charitable settlement should satisfy procedural due process so long as class members can opt-out and the settlement notice spells out who receives the charitable settlement and for what purpose. See In re Vitamin Cases, 107 Cal. App. 4th 820, 829 (2003) (“The requirements of due process [are] met when, as in this case, the notice explain[s] that the proposed settlement provides solely for the distribution of funds to nonprofit organizations and foundations, states that there will be no payments to individual [California] consumers, and informs the class members of their options of opting out or objecting.”).

217. See, e.g., Redish et al., Cy Pres Relief, supra note 17, at 646.

218. 28 U.S.C. § 2072(a)–(b) (2012) (providing that the “Supreme Court shall have the power to prescribe 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”). As Justice Brandeis stated: “Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.” Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).


220. See Donald L. Doernberg, “The Tempest”: Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: The Rules Enabling Act Decision That Added to the Confusion—But Should Not Have, 44 Akron L. Rev. 1147, 1183 (2011) (discussing arguments that the Rules Enabling Act uses a narrow definition no court has ever adopted); see also Tidmarsh, supra note 18, at 571 (discussing how arguments against class actions rooted in the Rules Enabling Act run contrary to the Act’s current interpretation); ADVISORY COMM. ON CIVIL RULES, supra note 18, at 266 n.36 (explaining that cy pres settlements do “not invent[] a new ‘remedy’ to be used in litigated actions”).
First, Rules Enabling Act arguments face a high bar; the Supreme Court has rejected virtually all such arguments.\(^{221}\) This is not surprising given judicial authority is generously defined to include “the ability to adopt procedural rules that impact the future conduct of lawyers and parties in judicial proceedings.”\(^{222}\) In a recent opinion, Justice Scalia confirmed this broad judicial power, noting how courts can design “[a] judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”\(^{223}\)

The Rules Enabling Act does not prohibit federal judges from fashioning “procedural devices.”\(^{224}\) Judges’ equitable discretion over how to distribute settlement funds is well within the judiciary’s procedure-making power. Such discretion falls within the “justly administering remedy and redress” language—approving a charitable settlement is administering a remedy.\(^{225}\) Moreover, charitable settlements do not “add, subtract, or define any of the elements necessary”\(^{226}\) but rather distribute damages already properly defined under the substantive laws at issue.

Approving charitable settlement distributions under Rule 23 is analogous to other procedural rules that do not violate the Rules Enabling Act. For example, *McCalla v. Royal MacCabees Life Insurance Co.*\(^{227}\) evaluated a Nevada law governing when a litigant may make a motion for prejudgment interest.\(^{228}\) The Ninth Circuit held Federal Rule of Civil Procedure 59(e), not Nevada law, controlled the timing of prejudgment interests—even though it would result in an overall larger amount paid out.\(^{229}\) The court explained the Rule defines “when and how” interest can be reviewed.\(^{230}\) Consequently, it did not violate the Rules Enabling Act “because its application affects only the process of enforcing litigants’ rights and not the rights themselves.”\(^{231}\)


\(^{223}\) See *Shady Grove*, 559 U.S. at 407 (quoting Sibbach, 312 U.S. at 14).

\(^{224}\) See id. at 420. Further, there is no true conflict between the substantive claims and the procedural requirements; thus, unlike many Rules Enabling Act arguments, there are not concerns of conflicting federal procedural requirements and state laws. *Cf. id.* at 400–01 (comparing New York state law prohibiting certain class actions with Fed. R. Civ. P. 23). The underlying state claims now being heard in federal court post-CAFA are primarily silent on questions of charitable distributions. Hence, without an express conflict, there are also no overlapping Rules Enabling Act/Erie-type problems.


\(^{226}\) *McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128, 1135 (9th Cir. 2004).

\(^{227}\) *Id.* at 1135.

\(^{228}\) *Id.* at 1136.

\(^{229}\) *Id.* at 1135 (quoting Freund v. Nycomed Amersham, 347 F.3d 752, 762 (9th Cir. 2003)).

\(^{230}\) *Id.* (internal quotation marks omitted).
Similarly, charitable settlements are concerned with “when and how” damages are distributed, not how damages are quantified, which is properly left to the requirements of the underlying claim. Thus, charitable settlements should not be seen as a violation of the Rules Enabling Act.

Second, and perhaps more importantly, the Rules Enabling Act argument stems from the nomenclature problems that have long since plagued charitable distributions. Not only have cy pres distributions and charitable distributions been conflated, some courts also blur fluid recovery and charitable settlements—adding mud to already murky waters. Fluid recovery is a broad concept that covers both damage calculation and disbursement. It has three steps. The class (1) aggregates a damage calculation for purposes of certification; (2) uses a summary claim procedure; and (3) distributes claims to indirectly benefit class members. The distribution can come in multiple forms, including price rollbacks, coupons, and charitable payouts.

The first step of fluid recovery, aggregating damages, potentially triggers Rules Enabling Act issues. A quick example highlights this problem. Class member A’s and class member B’s damages were $2 and $6 respectively; using fluid recovery would generate aggregate damages of $8, meaning $4 per member. Accordingly, under fluid recovery, critics argue that class member A would be overcompensated at the expense of class member B, thus altering “defendants’ substantive right to pay damages reflective of their actual liability.” Consequently, some jurisdictions reject

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232. See Boies & Keith, supra note 23, at 274.
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.” Id. (quoting Redish et al., Cy Pres Relief, supra note 17). In this way, charitable settlements can be construed as analogous to ancillary relief, like administrative agencies that utilize ancillary remedies. While these remedies are not expressly authorized by statutes, administrative agencies can seek ancillary remedies to justly administer remedy and redress. George W. Dent, Ancillary Relief in Federal Securities Law: A Study in Federal Remedies, 67 Minn. L. Rev. 865 (1983). For instance, like ancillary remedies, charitable settlements deter future violations, help preserve the status quo, and most importantly, benefit social good aimed at fighting violations. This analogy further supports the argument that charitable settlements are procedural rather than substantive and do not disrupt the Rules Enabling Act.


236. See McLoughlin, supra note 52, § 8:16 (“Calculating damages in the aggregate cannot be squared with the Rules Enabling Act where class members’ alleged damages can be reliably quantified only through individualized proof.”).

the first step of fluid recovery or, at a minimum, greatly constrict its application.

However, charitable settlements are distinct from fluid recovery in a simple but important way. They impact disbursement, not damage calculations. Rule 23 requirements are not altered by a charitable settlement. The class is still obligated to show common issues predominate for purposes of certification. As a result, the distribution method does not impact defendants’ obligation to pay a settlement reflective of their actual liability. Rather, as the Third Circuit explains, “a district court’s certification of a settlement simply recognizes the parties’ deliberate decision to bind themselves . . . without engaging in any substantive adjudication of the underlying causes of action.” Hence, arguments that class members cannot show they have suffered damages are red herrings.

Since charitable distributions benefit class members without raising substantiated concerns regarding collusion or due process, no theoretical legal barriers to approving such settlements exist. Given their ability to advance the goals of the underlying substantive claims, charitable settlements are a necessary distribution method for class actions. That said, there are still ways to refine such settlements to provide clearer contours for their application. These refinements are described in Part III.

238. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1008 (2d Cir. 1973) (rejecting fluid recovery); see also Dumas v. Albers Med., Inc., No. 03-0640-CV-W-GAF, 2005 U.S. Dist. LEXIS 33482, at *7 (W.D. Mo. Sept. 7, 2005) (stating fluid recovery “is not appropriate when it is used to assess the damages of the class without proof of damages suffered by individual class members” and class action was otherwise unmanageable); City of Philadelphia v. Am. Oil Co., 53 F.R.D. 45, 72 (D.N.J. 1971). While courts have followed Eisen, the case’s arguments on fluid recovery have been hotly criticized. See, e.g., Managing the Large Class Action: Eisen v. Carlisle & Jacquelin, 87 HARV. L. REV. 426, 453 (1973).

239. For example, in the Ninth Circuit fluid recovery is allowed when “conventional methods of proof are demonstrably unavailable.” Guiterrez v. Wells Fargo & Co., No. C 07-05923 WHA, 2009 WL 1247040, at *3 (N.D. Cal. May 5, 2009); cf. Hilao v. Estate of Marcos, 103 F.3d 767, 782–86 (9th Cir. 1996) (allowing statistical sampling for class damages because of the “extraordinarily unusual nature of the case”).

240. See, e.g., Nat’l Ass’n of Consumer Advocates, Standards & Guidelines for Litigating & Settling Consumer Class Actions, 176 F.R.D. 375, 391 (1997) (“Those issues are very different from the question of cy pres distribution of unclaimed funds, an issue which does not subject defendants to greater liability or alter their substantive rights.”)

241. See FED. R. CIV. P. 23(b)(3) (setting forth predominance requirements for monetary class actions).

242. In re Baby Products Antitrust Litig., 708 F.3d 163, 173 n.8 (3d Cir. 2013) (quoting Sullivan v. DB Inv’n., Inc., 667 F.3d 273, 312 (3d Cir. 2011)).

 III. PROTECTING CHARITABLE SETTLEMENTS THROUGH CLEARER GUIDELINES

Despite the foregoing, some courts reject charitable settlements outright or discourage them by denying accompanying attorneys’ fee applications. While the majority of trial courts have demonstrated a willingness to approve charitable settlements, even these decisions are laden with inconsistent standards. This inconsistency—coupled with Justice Roberts’s call to arms—has emboldened objectors.

Objectors pose a particular problem for charitable settlements. Objector allegations of collusion or unsubstantiated claims that such settlements are inferior to monetary distributions have slowed the settlement approval process and generated unnecessary fees and expenses while wasting judicial resources. In refuting objections to a recent earmarked charitable settlement, Judge Gertner noted:

> [P]rofessional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objects. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose benefit the appeal is purportedly raised, gains nothing.

Rather than endlessly relitigating whether the charitable settlement concept is appropriate, settlement approval should instead focus on the particular proposed distribution. To assist in this evaluation, this part proposes clearer standards for ensuring charitable settlements achieve their fullest regulatory utility. These proposals focus on three aspects of a charitable settlement: (1) the trigger for such a settlement; (2) evaluating the proposed recipient; and (3) computing attorneys’ fees.

Once a charitable settlement and accompanying fee petition meet these guidelines, objections should be limited to a pay-to-play basis. Objectors should be responsible for attorneys’ fees and costs generated responding to

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245. See, e.g., Lane v. Facebook, Inc., 696 F.3d 811, 820 (9th Cir. 2012); In re Netflix Privacy Litig., No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *1 (N.D. Cal. Mar. 18, 2013); In re EasySaver Rewards Litig., 737 F. Supp. 2d 1159 (S.D. Cal. 2010).

246. See, e.g., In re Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1336–37 (S.D. Fla. 2011) (rejecting objectors’ lengthy challenges to the reasonableness of the settlement, the amount of the settlement, settlement notice, the scope’s release, fee petition, and charitable distributions “find[ing] that they are both completely unsupported in the record (no Objector having submitted even a single affidavit to provide facts or expert opinions supporting their position) and unpersuasive as to the substance of their complaints”).

meritless objections. This ensures the settlement approval process does not devolve into unwarranted lengthy satellite litigation.\footnote{248}

A. Clearer Trigger for Impracticability

First, recognizing charitable settlements as the exception rather than the rule begs the question, at what point should the exception apply? Stated differently, what is the “trigger” requirement for a charitable settlement? Clearer, more consistent standards are needed to identify cases where charitable settlements are appropriate.\footnote{249} Net-zero cases, where the administrative costs exhaust the settlement, should regularly trigger charitable distributions.\footnote{250} Yet as mentioned in Part I, objectors routinely challenge such settlements for not distributing funds to class members first.\footnote{251}

Currently, courts import the cy pres standard for all types of charitable distributions, defining the trigger as the point at which a monetary distribution becomes “unlawful, impossible, or impracticable.”\footnote{252} Since, as previously discussed,\footnote{253} charitable distributions are distinguishable from cy pres, importing definitions from the trust context is illogical, but more importantly, provides little concrete guidance. Even in the trust context, there is “significant variance in the degree of impossibility or impracticability

\footnote{248. The torrid procedural history of \textit{Mirfasihi v. Fleet Mortgage Corp.} is a telling example of how objections to charitable settlements can exhaust valuable judicial resources without generating gain. 450 F.3d 745 (7th Cir. 2006). There, plaintiffs alleged the defendant improperly sold mortgage information to third-party companies, which then marketed financial products to two sub-classes of mortgagers. \textit{Id.} at 746–47. The parties eventually negotiated a settlement totaling $2.4 million, whereby one class would receive monetary compensation and the other class’s relief was an earmarked charitable distribution. \textit{Id.} at 747. If distributed to the entire class, the settlement would have amounted to 17 cents per class member. \textit{Id.} The trial court approved the settlement’s fairness, but objectors appealed not once but three times. \textit{Mirfasihi v. Fleet Mortgage Corp.}, 551 F.3d 682, 685 (7th Cir. 2008); \textit{Mirfasihi}, 450 F.3d at 746; \textit{Mirfasihi v. Fleet Mortgage Corp.}, 356 F.3d 781, 782 (7th Cir. 2004). Ultimately, six years after the settlement agreement, in a third opinion, the Seventh Circuit affirmed the charitable distribution, finding it fair and adequate given the significant risks associated with successful prosecution of the underlying claims. \textit{Mirfasihi}, 551 F.3d at 685.}

\footnote{249. Compare McLaughlin, supra note 59, at 465–77 (discussing how clarifying the trigger for when a conservation easement is “impossible or impracticable” would “yield more predictable results”).}

\footnote{250. \textit{See, e.g.}, \textit{In re Netflix Privacy}, 2013 WL 1120801, at *6.}

\footnote{251. \textit{Id.} at *2. For example, in the \textit{In re Netflix Privacy} settlement, the trial court granted preliminary approval of a $9 million wholly charitable settlement stemming from claims that Netflix unlawfully retained and disclosed private customer information. The class constituted approximately 62 million claimants. \textit{See id.} at *1. Thus, the parties argued any distribution of the settlement fund would be de minimis, at best. \textit{See id.} at *7. Nonetheless, objectors challenged the settlement, arguing instead that the settlement should provide individual compensation. \textit{See id.} at *11. Although the court overruled the objections, explaining that no other realistic settlement distribution option existed, objectors forced the court to spend time and money responding to their meritless challenge. \textit{See id.} at *12.}

\footnote{252. \textit{See Restatement (Third) of Trusts} § 67 (2003).}

\footnote{253. \textit{See supra} Part I.A (distinguishing cy pres, earmarked charitable settlements, and wholly charitable settlements).}
required” to trigger cy pres. In fact, commentators do not even agree on whether the cy pres doctrine is expanding or narrowing.

How the terms are used outside the cy pres context is equally unhelpful. For example, in contract law, the doctrine of “impracticability” requires an unforeseen supervening circumstance not within the contemplation of the parties at the time of the contract. This definition is not a workable trigger for charitable distributions because it is known in advance that circumstances will make a distribution to the class members impracticable. The remaining trigger terms, “impossible,” “inefficient,” and “wasteful,” are also plagued by vague, inconsistent definitions.

The lack of an easily transferable, preexisting trigger point for charitable settlements highlights the need for more clarity. To address this need, this Article proposes the following straightforward inequality:

\[ 2(A) > C \]

“A” represents the average cost per class member to administer the settlement fund. This variable is appropriate because it changes depending on the facts of the case, thus reflecting potential distribution problems. If class members are transient or difficult to locate, administrative costs rise. In

254. McLaughlin, supra note 59, at 465–67 (“Decisions regarding whether the charitable purpose of a gift or trust has become ‘impossible or impracticable’ are based on the particular facts of each case, and no precise definition of the standard exists.”).

255. Id. at 467 (“Although some commentators have noted a ‘prevailing conservative mood’ in the approach of the courts to this first step in the cy pres process, others have noted that the trend in the case law has been to broaden the circumstances in which cy pres can be applied.”).


258. In re Wells Fargo Sec. Litig., 991 F. Supp. 1193, 1197 (N.D. Cal. 1998) (“[T]here is an appealing symmetry to the proposition that the cost of the distribution should not be greater than the amount of the distribution itself.”).

259. This formula stems from Judge Walker’s decision in In re Wells Fargo Securities Litigation. Id. The case involved remainder, which could be distributed as a second distribution or as cy pres. In approving a cy pres distribution, Judge Walker compared administrative cost versus individual distribution, permitting a distribution so long as the individual distribution is double the administrative cost. See id. at 1197–98. Professor Brian Fitzpatrick offers an alternative proposal, whereby class counsel receive all settlement distributions in cases involving $100 or less in individual compensation. See Fitzpatrick, supra note 23, at 2067–71. His argument has some allure from a deterrence-insurance perspective. Moreover, the Rule 23 Subcommittee’s recent draft proposed amendments to Rule 23(e), which incorporated the $100 threshold. See ADVISORY COMM. ON CIVIL RULES, supra note 18, at 264–71. But by Professor Fitzpatrick’s own admission, “It goes without saying that it would be politically difficult for judges to award fees equal to 100% of small-stakes class judgments even if they had the legal authority to do so.” Fitzpatrick, supra note 23, at 2075. Thus, this Article’s proposed inequality triggers a more pragmatic proposal.
contrast, clear records facilitating the location of class members lower costs. Multiplying $A$ by two ensures administrative costs are justified when compared to the potential monetary gain of consumers.\textsuperscript{260} “$C$” is the approximate individual consumer distribution. If the settlement is tiered, meaning some class members are eligible for a different distribution amount, the formula should apply per tier. Consequently, some tiers may trigger a potential charitable settlement while others do not.\textsuperscript{261} Assuming the settlement otherwise satisfies Rule 23(e), if $2(A)$ is greater than $C$, a rebuttable presumption exists supporting a charitable distribution.\textsuperscript{262}

For example, take a hypothetical settlement of $250,000 for a class of 30,000 consumers, with an estimated administrative cost of $100,000, roughly $3.34 per class member. Assume administrative costs come from the total settlement fund, leaving $150,000 for distribution. Class members would then receive $5 at an administrative expense of $3.34, creating an inequality of $6.68 > 5$—triggering a charitable settlement.

This formula is a fair trigger point for three reasons. First, it is consistent with a generic definition of efficiency as a system that “exhibit[s] a high ratio of output to input.”\textsuperscript{263} The administrative costs reflect the input while the individual compensation is the output. Multiplying the administrative costs by two ensures the input-to-output ratio is not just marginally greater. It reflects individual distributions where the administrative costs involved are not justified given the negligible monetary gain to consumers.

Second, this formula is consistent with one definition of “wasteful” as meaning a mechanism that is more expensive than an equally beneficial alternative.\textsuperscript{264} The two relevant alternatives are monetary distributions and charitable distributions. The quality of a particular charity can be assessed

\textsuperscript{260} Accord In re Wells Fargo, 991 F. Supp. at 1197 (“The court could simply direct class counsel to pay all claimants who are entitled to more than $5.50 from the residue . . . [but] the claims administrator would spend $5.50 to send Mr. Casagrande a check for fifty-two cents. . . . [Therefore] the line must be set at a higher point than $5.50.”).

\textsuperscript{261} Different tiers of distribution are fairly common in class action settlements, even for cases that do not include sub-classes. See, e.g., Pelletz v. Weyerhaeuser Co., 255 F.R.D. 537, 539 (W.D. Wash. 2009) (involving multi-tiered settlement in a consumer class action); In re Vitamins Antitrust Litig., No. MISC. 99-197 (TFH) MDL 1285, 2001 WL 34312839, at *1 (D.D.C. July 16, 2001) (discussing settlement involving four separate settlement funds for different types of claimants); In re Lease Oil Antitrust Litig. (No. II), 186 F.R.D. 403, 416 (S.D. Tex. 1999) (discussing multiple claimant tiers in antitrust class action settlement).

\textsuperscript{262} The standard for settlement approval goes beyond whether a charitable settlement is appropriate and considers the overall fairness of the settlement. See supra Part I.A (detailing the settlement approval process).


\textsuperscript{264} See Paul E. Kalb, Controlling Health Care Costs by Controlling Technology: A Private Contractual Approach, 99 YALE L.J. 1109, 1113 n.18 (1990) (“In economic terms, a wasteful technology is one whose costs outweigh its benefits or one that is more expensive than an equally beneficial alternative.”).
by its administrative cost ratio, specifically, how much is used for administrative overhead versus how many cents per dollar are used to advance the charity’s work.\textsuperscript{265} For better charities, the ratio is roughly 2:1—meaning approximately 66 cents per dollar are distributed, while 33 cents are used on overhead.\textsuperscript{266}

Building on this, individual distributions in cases that do not satisfy the proposed formula are wasteful compared to a wholly charitable distribution. Take, for example, a $12 settlement where the administrative cost is $6 per consumer and each consumer would only receive $6. Such a settlement does not satisfy the proposed formula—nor should it. If given to an adequate charity, 66 percent of the $12 is used for collective good, meaning roughly $9 rather than $6. Thus, the charitable distribution is a cheaper alternative that provides the class equal deterrence and access to justice.

Third, this formula minimizes the potential waste from limiting charitable distributions to \textit{cy pres} remainders. In class actions where claims rates are low, the leftover funds are usually distributed as \textit{cy pres} remainders, but the \textit{cy pres} amounts are diminished by administrative costs that could have been minimized by using a charitable distribution from the outset.\textsuperscript{267} \textit{Pearson v. NBTY, Inc.}\textsuperscript{268} provides an example of how charitable settlements could prevent waste. There, the parties reached a $14.2 million settlement in a pending consumer class action against Target.\textsuperscript{269} After class notice and completion of the claim process, only $865,284 of the settlement fund was distributed to class members, while notice costs were twice as much as actual class payouts.\textsuperscript{270} Rather than spending over $1.5 million in claims administration, a larger portion of the settlement could have gone directly to a charitable distribution.\textsuperscript{271}

Admittedly, this formula may be criticized for being too generous or not generous enough. Some may squabble that \textit{A} should actually be \textit{3(A)} or \textit{.5(A)}—and such critiques may have merit depending on the case. However, this test provides a brighter line\textsuperscript{272} to assess potential charitable settlements,
while simultaneously maintaining the flexibility courts need to fulfill their equitable function in evaluating settlements. By coupling this formula with a rebuttable presumption, courts can consider the facts of a particular case in evaluating the adequacy of a given charitable settlement. Consequently, adopting this trigger would ensure small-stakes claims, or cases with other distribution challenges, do not generate unnecessarily protracted objections during the settlement approval process.

B. Clearer Nexus Requirement

In addition to trigger requirement challenges, objectors often contest the proposed recipient in charitable settlements. In making this objection, the assault is more destructive than constructive; alternative recipients are rarely proposed. For settlement approval, the test should not be whether the proposed recipient is the best possible option, as this undermines the settlement negotiation process’s integrity and invites subjectivity. Instead, this section clarifies the standard for determining whether a particular organization is the appropriate recipient of a charitable settlement.

To begin, the parties, not the court, should select recipients. This minimizes judicial favoritism and potential conflict of interest challenges.
As Judge Kleinfeld noted, “The rules of judicial ethics have in many forms for over a hundred years prohibited judges from endorsing charities, because of the risk that lawyers and litigants will feel compelled to contribute to them.”

Mostly, this proposal is already in effect for charitable settlements. Unlike cy pres remainders, which are not always anticipated in settlement agreements, charitable settlements are identified by the parties from the outset and should be included in settlement notices.

With this foundational point in place, the question then becomes how to refine the nexus requirement. Most courts ensure the proposed recipient: (1) advances the objectives of the underlying statutes (the “objectives” factor), (2) targets the plaintiff class (the “targets the class” factor), and (3) provides reasonable certainty that any member will be benefitted (the “reasonable certainty” factor). However, how courts apply these factors varies—which allows objectors to test if a particular judge may entertain nexus challenges. Clarifying the three factors would simplify the settlement approval process for charitable settlements and ensure consistency.

First, for the “objectives” factor, courts should define this factor broadly and consider the objectives of class actions, not just the underlying claim.

impropriety.

279. Lane, 696 F.3d at 834.
280. See, e.g., id. at 820–21.
281. See, e.g., Better v. YRC Worldwide Inc., No. CIV.A. 11-2072-KHV, 2013 WL 4482922, at *10 (D. Kan. Aug. 19, 2013) (“By not identifying the proposed cy pres recipient, the parties have restricted the Court’s ability to conduct the searching inquiry required to approve such a distribution.” (citing Dennis v. Kellogg Co., 697 F.3d 858, 867 (9th Cir. 2012))).
282. See, e.g., id. (“If the failure to designate a proposed cy pres recipient deprives class members of notice and the ability to object.”), see also Dennis, 697 F.3d at 867 (discussing the importance of identifying charitable distribution recipient during the settlement approval process). But see In re Baby Products, 708 F.3d at 180 (“Young contends that the settlement notice was inadequate because it did not identify the cy pres recipients who will receive excess settlement funds. His primary concern is that unnamed class members will not have the opportunity to object to the selection of the cy pres recipients, who are intended to serve as proxies for the class members’ interests. While a valid concern, failure to identify the cy pres recipients is not a due process violation.”).
283. Though this list is often written in the disjunctive (“or” instead of “and”), judicial application highlights how all three factors are regularly considered. See, e.g., Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011); Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990).
284. Compare New York v. Dairylea Coop., Inc., No. 81 Civ. 1891 (RO), 1985 WL 1825, at *1 (S.D.N.Y. June 26, 1985) (detailing wholly charitable settlement that was used to fund nutrition-related purposes or programs in the same geographic area as the alleged price fixing among milk wholesalers), with In re Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1394 (N.D. Ga. 2001) (“Courts have expanded the cy pres doctrine to also permit distributions to charitable organizations not directly related to the original claims.”).
285. For example, in Dennis v. Kellogg, consumers claimed Kellogg falsely advertised. Dennis, 697 F.3d at 858. The $5 million proposed settlement included food distributions to...
Courts should be careful not to narrowly fixate on finding the most ideal organization. As discussed in Part I.A, charitable settlements are distinct from *cy pres* in charitable trusts. But even for charitable trusts, from where the *cy pres* analogy is drawn, the Restatement Third of Trusts has moved away from “the next best” substitute requirement. Only “a charitable purpose that reasonably approximates the designated purpose” is required. Courts in the United States and abroad recognize this more liberal construction of the *cy pres* doctrine for trusts. In fact, the current Restatement’s comments support a “more liberal application of *cy pres*” that does not require the “nearest possible” substitute but rather “one reasonably similar.” Thus, holding charitable settlements to a higher standard than *cy pres* trusts is highly questionable.

One alternative is to identify a list of presumptively appropriate recipients, which advances the nexus requirement by ensuring a relationship between the proposed recipient and charitable distribution. Some states already have adopted this approach for *cy pres* remainders. If either the American Law Institute or the Judicial Conference of the United States generated similar lists, parties would have increased certainty about proposed recipients.

Charities dedicated to feeding the hungry. *Id.* at 861. The court noted that “[t]his noble goal [of feeding the indigent], however, has ‘little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved.’” *Id.* at 866 (quoting *Naschin*, 663 F.3d at 1039). The court continued: “Thus, appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising.” *Id.* at 867.


288. *Restatement (Third) of Trusts* § 67 cmt. (d); *see also* *AM. LAW INST., PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS* § 440 (2009).

289. *See e.g.*, *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 946 (N.D. Cal. 2013) (explaining how the nexus requirement ensures the recipients “are not merely ‘worthy’ recipients with ‘noble goals,’ but organizations and institutions with demonstrated records of addressing issues closely related to the matters raised in the complaint”); Six (6) *Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) (detailing how the nexus requirement ensures the settlement is “guided by the objectives of the underlying statute and the interests of the silent class members”).

290. *See e.g.*, *Ind. R. TRIAL P. 23(F)(2) (requiring partial distribution of cy pres remainders to the Indiana Bar Foundation and the Indiana Pro Bono Commission); Ky. R. CIV. P. 23.05(6) (requiring partial distribution of cy pres remainders to the Kentucky IOLTA Fund Board of Trustees); N.C. GEN. STAT. § 1-267.10 (2005) (requiring equal distribution of cy pres remainders to the Indigent Person’s Attorney Fund and the North Carolina State Bar); P.A. R. CIV. P. 1716 (directing partial distribution of cy pres remainders to the Pennsylvania IOLTA Board); WASH. SUPER. CT. CIV. R. 23(f)(2) (requiring distribution of partial cy pres remainders to the Legal Foundation of Washington).

291. In generating a list, a natural starting point is identifying charities that promote judicial access, as that is an underlying policy behind all class actions. *See e.g.*, *Safran v. United Steelworkers of Am., AFL-CIO*, 132 F.R.D. 397, 401 (W.D. Pa. 1989) (“[T]he general theory
Next, to clarify the “targets the class” factor, courts should include an assessment of the class’s geographic distribution. Currently, both the Ninth and Eighth Circuits have expressly incorporated this aspect into their nexus tests. This geographic factor is a functional one, as it does not require the recipient be located in the same place as class members. Rather, it ensures the proposed use of the funds overlaps with the class definition. For example, in a nationwide consumer class, a California-based consumer protection institution can still satisfy the nexus requirement so long as its work has nationwide impact. If, however, the institute only worked on California-related questions, it would not satisfy the nexus test’s geographic factor—not because of its location but because of the limited reach of its work.

A narrower definition of the “targets the class” factor coupled with the broader definition of “objectives” gives courts flexibility in identifying potential recipients while still promoting a nexus between the pending litigation and the resulting benefit.

Last, the “reasonable certainty” factor evaluates the propriety of a proposed charitable recipient. Too often, objectors use this factor as an open invitation to reargue that direct compensation must occur before any

292. Superior Beverage Co., Inc. v. Owens–Ill., Inc., 827 F. Supp. 477, 480 (N.D. Ill. 1993); see also In re Bank of Am. Corp. Sec. Litig., No. 4:99-MD-1264 CEJ, 2013 WL 3212514, at *4 (E.D. Mo. June 24, 2013), vacated and remanded, 775 F.3d 1060 (8th Cir. 2015) (“The geographic scope of the instant case is clear; as lead counsel points out, the multi-district litigation was transferred to this district because much of the harm suffered by the class was felt by individuals in the St. Louis region. Therefore, a cy pres distribution to a regional organization is proper.”).

293. See, e.g., In re Airline Ticket Comm’n Antitrust Litig., 307 F.3d 679, 683 (8th Cir. 2002) (describing the geographic nexus requirement); Powell v. Ga.-Pac. Corp., 119 F.3d 705, 705 (8th Cir. 1997) (describing charitable distribution with appropriate geographic nexus because the settlement program distributed money to the United Negro College Fund for scholarships in the region class members resided).

294. See, e.g., In re EasySaver Rewards Litig., 921 F. Supp. 2d 1040, 1052 (S.D. Cal. 2013) (“On the whole, the location of the recipient is less important than ‘whether the projects funded will provide ‘next best’ relief to the class.’” (quoting In re Lutron Mktg. & Sales Practices Litig., 677 F.3d 21, 36 (1st Cir. 2012))); Lutron Mktg., 677 F.3d 21 at 36, cert. denied, 133 S. Ct. 338 (2012) (“It is not the location of the recipient which is key; it is whether the projects funded will provide ‘next best’ relief to the class.”).

295. Cf. EasySaver, 921 F. Supp. 2d at 1052 (approving San Diego–based recipient in a case involving a nationwide class because “the funds will directly contribute to the national academic dialogue involving internet privacy and security”).

296. Cf. Nachshin v. AOL, LLC, 663 F.3d 1034, 1041 (9th Cir. 2011) (rejecting charitable distribution in a nationwide claim against AOL where the recipient only benefited the Los Angeles area).
charitable distribution. Such arguments should be outright rejected. Instead, this factor should focus on the proposed recipient and its plan for the charitable settlement.

Preference should be given to charities rated by an independent organization. Grades of “C” or lower should be presumptively inadequate for purposes of Rule 23(e). Three well-respected watchdog organizations that provide such ratings are the American Institute of Philanthropy, Better Business Bureau’s Wise Giving Alliance, and Charity Navigator. When a charity grade is unavailable, the charity’s administrative overhead costs should be presented to the court. The court should assess this by considering information on employment compensation and administrative overhead—as these amounts indicate how much money will actually be used to advance the organization’s mission. Consequently, preference will be given to preexisting organizations, since new ones lack data about administrative costs. Thus, in the recent Facebook case, where the proposed recipient was a newly formed organization, the court was correct in noting, “we have never held that charitable distribution funds must go to extant charities in order to survive fairness review.” However, under the principles proposed in this Article, the court should have interrogated why a new organization was warranted.


299. See, e.g., KARL E. EMERSON, STATE SOLICITATION REQUIREMENTS (2006), available at 2006 WL 5839022, at *7 (listing these three organizations as the primary private charity watchdogs); see also Karen Donnelly, Good Governance: Has the IRS Usurped the Business Judgment of Tax-Exempt Organizations in the Name of Transparency and Accountability?, 79 UMKC L. Rev. 163, 168 (2010); Jennifer Miller Oertel et al., Proving That They Are Doing Good: What Attorneys and Other Advisers Need to Know About Program Assessment, 59 Wayne L. Rev. 693, 699–700 (2013) (detailing Charity Navigator’s rating process).

300. This information is publicly available for over 850,000 charities. See GUIDESTAR, www.guidestar.org (last visited Mar. 30, 2015) (providing financial reporting on charities, including overhead costs). If a particular proposed charity is not listed, such information should still be proffered to the court. Charities are interested in receiving charitable settlement funds. They are motivated to provide this information, so obtaining such information should not be particularly onerous.

301. See Roy Lewis, Check Out Your Charity, MOTLEY FOOL (July 18, 2003), http://www.fool.com/personal-finance/taxes/2003/07/18/check-out-your-charity.aspx (describing how to assess how much was spent on program services versus general and administrative costs).

302. This is not intended as an absolute rule, as there could be instances where the preexisting charity has other problems—such as high administrative overhead or too narrow a geographic reach. But if there is an alternative, preexisting charity that does not raise any obvious red flags, the parties should bear a heavier burden to prove distribution to a new organization is warranted. This allows trial courts to consider the organization’s track record, as well as helps to ensure the money received is not exhausted by set-up costs for a new organization.

303. Lane v. Facebook, Inc., 696 F.3d 811, 822 (9th Cir. 2012).
Further, the settlement agreement should lay out how the intended recipient will use the money. To date, courts have been inconsistent on the breadth and detail required. Sometimes generic promises to promote consumer rights or research sufficed.\footnote{See, e.g., In re Google Buzz Privacy Litig., No. C 10-00672 JW, 2011 WL 7460099, at *1 (N.D. Cal. June 2, 2011) (approving settlement with distribution for consumer protection); In re Publ’n Paper Antitrust Litig., No. 3:04MD1631SRU, 2009 WL 2351724, at *2 (D. Conn. July 30, 2009) (approving charitable distribution to “charitable institutions designed to guard against antitrust injury and protect consumers”).} Parties should provide a detailed plan on how to use the money as part of the settlement approval process.\footnote{See, e.g., Lane, 696 F.3d at 822, cert. denied, 134 S. Ct. 8 (2013) (discussing how the settlement agreement articulated “exactly how funds will be used—to ‘fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats’”).} This will help the court evaluate whether the recipient has the experience and know-how to fulfill the distribution’s intended purpose. Minute detail is not needed, but the court should be confident the recipient has a plan and is well-positioned to execute it.\footnote{See, e.g., Diamond Chem. Co., Inc. v. Akzo Nobel Chems. B.V., Nos. 01 2118 (CKK), 02-1018 (CKK), 2007 WL 2007447, at *3 (D.D.C. July 10, 2007) (“In addition to arguing about the hypothetical virtues of the proposed Center, Class Plaintiff provides the Court with significant concrete detail as to both the mission and the nascent plans for the proposed Center.”); accord Foer, supra note 94, at 89 (discussing proposed best practices for antitrust cy pres).}

Further, requiring continued reports to ensure the plan is fulfilled maximizes the benefits derived from charitable settlements.\footnote{See, e.g., In re Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 38–39 (1st Cir.), cert. denied, 133 S. Ct. 338 (2012) (requiring annual reports to the court to “ensure that the cy pres fund is distributed in a way that is both financially sound and comports with the interests of the class and that the auditing function will not fall on the district court”).}

Promotion of a clearer nexus requirement assists courts and class members. These revisions provide courts more information to evaluate proposed charities and distributions. This information then can be passed on to class members in settlement notices, thus averting wasteful objections.

C. Calculating Attorneys’ Fees for Charitable Settlements

Third, objectors often attempt an end-run attack on charitable settlements. In addition to challenging the distributions, objectors regularly challenge fee petitions in charitable settlements, contending money that goes to charity should not be included in calculating attorneys’ fees.\footnote{See, e.g., Spark v. MBNA Corp., 289 F. Supp. 2d 510, 514 (D. Del. 2003) (“The objector’s ‘opposition’ to class counsel’s fee petition appears to be nothing more than an attempt to receive attorneys’ fees.”).} In support, objectors
rly on what some courts have called “red flags”—or factors that suggest a collusive or problematic settlement. As previously listed in Part I,309 these red flags are: (1) a high percentage of the settlement going to charity; 310 (2) clear sailing provisions—whereby defendants agree not to contest fee awards up to a certain monetary value; 311 and (3) reverters, or settlements where unclaimed funds return to the defendant. 312 If successful in convincing the court to reduce the fee award, objectors stand to gain—fee reduction is a basis for objectors to request fees of their own.313 Hence, objectors have financial motivation to recycle claims that charitable settlements are not beneficial to class members.314 As Professor Hay explained, “Among critics, the contention that class members have received too little in a class settlement almost always is accompanied by the corresponding charge that class’[s] counsel has received too much.”315

Rather than fostering such objections, the better course is to clarify how to calculate attorneys’ fees for charitable settlements. To begin, when the revised trigger and nexus requirements are satisfied, the charitable distribution should not alter the attorneys’ fee evaluation. Such settlements should be treated the same as any other monetary settlement. A contrary position risks underenforcement.316 The next step is revising the “red flags” as the current ones do not identify problematic settlements and lead to false positives, thus generating unsubstantiated fears of collusion.

supra note 113, at 950 (detailing meritless objections and the problems they pose to enforcement and deterrence goals).

309. See supra Part I.B.
310. See Murray v. GMAC Mortg. Corp., 434 F.3d 948, 952 (7th Cir. 2006); Crawford v. Equifax Payment Servs., Inc., 201 F.3d 877, 882 (7th Cir. 2000).
311. Lobatz v. U.S. W. Cellular, Inc., 222 F.3d 1142, 1148 (9th Cir. 2000) (detailing the alleged dangers of clear sailing provisions); see Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) (“[L]awyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.”).
313. See Petruzzis’s Inc. v. Darling-Del. Co., Inc., 983 F. Supp. 595, 622 (M.D. Pa. 1996) (using lodestar analysis, the court noted that the objector “will only be compensated for hours which were expended in a manner that benefitted that class as a whole”); cf. In re Cardinal Health, Inc. Sec. Litig., 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008) (“An objector to a class-action settlement is not normally entitled to a fee award unless he confers a benefit on the class.”).
314. See Barnes v. Fleetboston Fin. Corp., No. 01-10395-NG, 2006 WL 6916834, at *3 (D. Mass. Aug. 22, 2006) (“Repeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements.”); Spark v. MBNA Corp., 289 F. Supp. 2d 510, 514 (D. Del. 2003) (stating that groundless objection by serial objector counsel “appears to be nothing more than an attempt to receive attorneys’ fees”); Greenberg, supra note 113, at 963 (“Thus, perversely, professional objectors have purely monetary incentives to find even a quibble to raise in opposition to a settlement—even as class counsel and the court are bound to ensure that the settlement is within the range of reasonableness.”).
315. Hay, supra note 197, at 1433.
316. See, e.g., Henry N. Butler & Jason S. Johnston, Reforming State Consumer Protection Liability: An Economic Approach, 2010 Colum. Bus. L. Rev. 1, 23 (explaining how attorneys’ fees play a role in private enforcement); Fitzpatrick, supra note 23, at 2057 (discussing that fee awards are a necessary aspect of class actions’ deterrence potential).
Fee awards are essential for class actions to supplement enforcement of key substantive laws. The potential to recover fees incentivizes class action attorneys to front fees and expenses and undertake risky, complex litigation. As Judge Manning noted:

If the class members had to file individual suits seeking $100–$1,000 each and had to pay attorneys’ fees for each case, they would likely not bother, and if they did, they would still receive a pittance if they received any money at all. Congress has elected to allow class actions to create an incentive for lawyers to take cases where the recovery of individual class members creates a disincentive to file suit.

This policy goal is particularly applicable to small sum cases, where but for potential fees such claims would likely not be brought. Hence, fees ward against creating an immunity carve-out, whereby defendants could avoid liability simply by keeping individual damages low enough to make litigation unrealistic.

In fact, these policy arguments are partially why most courts, including the Second, Third, and Ninth Circuits, have considered charitable distributions in calculating fee awards. As the Third Circuit recently explained,

We think it unwise to impose, as [an objector] requests, a rule requiring district courts to discount attorneys’ fees when a portion of an award will be distributed [to charity] . . . . Nor do we want to discourage counsel from filing class actions in cases where few claims are likely to be made but the deterrent effect of the class action is equally valuable.

While the Supreme Court has yet to address the question, including charitable distributions in computing settlement values would be a logical extension of prior precedent. In Boeing Co. v. Van Gemert, the Supreme Court affirmed a fee application that used the entire settlement to calculate fees, 322

317. See, e.g., Ressler v. Jacobson, 149 F.R.D. 651, 657 (M.D. Fla. 1992) (“Attorneys who bring class actions are acting as ‘private attorneys general’ and are vital to the enforcement of the securities laws. Accordingly, public policy favors the granting of counsel fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions.”); Laura K. Abel & David S. Udell, If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor, 29 Fordham Urb. L.J. 873 (2002).

318. Murray v. Cingular Wireless II, LLC, 242 F.R.D. 415, 421 (N.D. Ill. 2005). In Murray the court explained: The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not. We side with the circuits that take this approach. Id.; see also Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990) (“Nothing in this case requires departure from the 25 percent standard award.”).

319. See, e.g., AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1760–61 (2011) (Breyer, J., dissenting) (“The maximum gain to a customer for the hassle of a $30.22 dispute is still $30.22. What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?”).

320. See, e.g., Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 437 (2d Cir. 2007). In Masters the court explained: The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not. We side with the circuits that take this approach.


even though part of the settlement reverted to the defendant.\textsuperscript{323} If a reversion can count for calculating fees, a charitable distribution, which is more valuable for class members, should as well.\textsuperscript{324} Hence, in terms of policy and precedent, including charitable settlements for calculating attorneys’ fees is the proper course. This ensures the regulatory enforcement goals of class actions remain at the forefront of Rule 23.

Nonetheless, objectors still rely on red flags to challenge such petitions. Yet, these red flags are just another vestige of conflating \textit{cy pres} and charitable settlements that results in wasteful false-positives. These red flags need substantial revision to effectively identify collusive settlements.

First, objectors often contend charitable distributions result in disproportionate awards to class counsel, when compared to the amount class members receive.\textsuperscript{325} However, a charity receiving a high percentage of the settlement indicates a distribution problem, not collusion. Admittedly, with such settlements, class counsel receive more money than class members.\textsuperscript{326} But, this is also true for non-charitable class action settlements. Only the percentage of the attorneys’ fees compared to the overall settlement value is possible indicia of a problematic fee request.\textsuperscript{327} No evidence suggests that attorneys receive bigger payouts from charitable settlements than other kinds of class action settlements.

Second, the red flags are not particularly helpful in identifying collusion because while a reverter raises the specter of a suspect settlement, a charitable distribution does not. A reverter undermines a defendant’s incentive to support the claims process, which is problematic because defendants often possess the essential information to successfully notify class members of a

\textsuperscript{323} \textit{Id.} at 480–81.

\textsuperscript{324} That said, the Supreme Court has demonstrated a fair bit of animus toward class actions. Hence, it is possible the Court will distinguish \textit{Van Gemert}. As Justice Kagan noted in her dissent to American Express Co. v. Italian Colors Restaurant, “To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.” \textit{See} Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

\textsuperscript{325} \textit{See}, e.g., \textit{Lane} v. Facebook, Inc., 696 F.3d 811, 820–21 (9th Cir. 2012), \textit{cert. denied}, 134 S. Ct. 8 (2013); \textit{In re Vitamin C Antitrust Litig.}, No. 06-MD-1738 (BMC) (JO), 2012 WL 5289514, at *8 (E.D.N.Y. Oct. 23, 2012).

\textsuperscript{326} \textit{See}, e.g., \textit{Lane}, 696 F.3d at 820–21.

\textsuperscript{327} For example, in \textit{In re Bluetooth}, the court vacated an attorney fee award in an amount eight times the charitable distribution. \textit{In re Bluetooth}, 654 F.3d 935 (9th Cir. 2011). Even there, however, there was reason to assume collusion. The court vacated the settlement and attorney fee approval, directing the trial court to further evaluate the equity of the settlement. In doing so, the court did acknowledge that the trial court ultimately approved the award, noting it “express[ed] no opinion on the ultimate fairness of what the parties have negotiated.” \textit{Id.} at 930.
pending settlement. Moreover, reverters have no deterrence benefits. In contrast, with a charitable distribution, parties do not gain by weakening the settlement notice process and such distributions support deterrence. Consequently, the red flags are suspect because they incorrectly treat charitable settlements and reverters as equally questionable. Instead, charitable distributions should be included in fee award calculations.

Third, clear sailing provisions—agreements by the parties not to challenge class counsels’ fee petition—are not necessarily problematic. When fee arrangements are negotiated, after settlement resolution and in the presence of an experienced mediator, concerns of collusion dissipate. Instead, it is the presence of a reverter that again raises concerns. As the Ninth Circuit explains, “The clear sailing provision reveals the defendant’s willingness to pay, but the [reverter] deprives the class of that full potential benefit if class counsel negotiates too much for its fees.” The mere “willingness to pay,” signaled by the clear sailing provision, is not particularly helpful for the court’s assessment of a fee petition, as it invites baseless objections.

Hence, the current red flags do not necessarily help courts identify suspect fee requests. Rather, they provide objectors a legal hook to raise red herring arguments. A better alternative is using preexisting, well-established criteria for fee awards in class actions generally. These include: (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiff’s counsel; and (7) the awards in similar cases. Charitable distributions should be counted in calculating

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328. Many criticisms of class actions focus on class action lawyers, without discussing the role of defendants. While defendants do not owe a duty to class members, by the time a settlement is reached, both class counsel and defendants’ counsel should have a shared incentive to promote the settlement. Cf. Bassett, supra note 207, at 539 (discussing how the Restatement (Second) of Judgments section 41 applies to both defendants and plaintiffs).


330. See supra Part II.B (discussing why collusion fears are overblown).

331. See, e.g., Sylvester v. CIGNA Corp., 369 F. Supp. 2d 34, 45 (D. Me. 2005) ("Specifically, the Court remains troubled by the combination of the reverter clause and the clear sailing provision. In concert, the Court believes that these two provisions give rise to inferences that there was a lack of arm’s length negotiations and a lack of zealous advocacy for the Class by Plaintiffs’ counsel."); Ralph C. Ferrara & Riva Khoshaba Parker, Tontine or Takeback: Reversion Provisions in Class Action Settlement Agreements, 62 BUS. LAW. 971, 979 (2007) (discussing the troublesome “interrelation of the reversion and clear sailing provision").

332. In re Bluetooth, 654 F.3d at 949.

333. See, e.g., In re Diet Drugs Prod. Liab. Litig., 582 F.3d 524, 541 (3d Cir. 2009); Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007); In re AT&T Corp., 455 F.3d 160, 165 (3d Cir. 2006) (noting these factors overlap with the criteria for evaluating the
the size of the fund and should not alter these other criteria so long as: (1) the trigger and nexus requirements are met; (2) no reverter is involved; and (3) fees are agreed upon after settlement fund negotiations are complete and in the presence of a mediator.

Though modest in design, the proposed alterations to judicial review provide substantial teeth for evaluating charitable settlements, thus maintaining the integrity of Rule 23(e) while avoiding further inconsistency. When the revised trigger, nexus, and fee guidelines are fulfilled, objectors should have to pay to play, making them responsible to reimburse the parties’ time and expenses incurred in responding to generic challenges.

CONCLUSION

This Article confronts the erosion of class action procedures. It takes a stand to protect against an attack on settlement procedures that further aggregate litigation’s regulatory purpose. Charitable settlements offer efficient, equitable solutions for cases where individual distributions are problematic. Denying charitable settlements runs the risk of strangle small-stakes cases in their cradle: there is little reason to file a claim if there is no realistic way to bring the case to conclusion.

The case for charitable settlements advanced in this Article accepts the assumption that one purpose of class action damages under Rule 23(b)(3) is to provide class members individual monetary distributions—but that is hardly the sole purpose of class actions. The argument here is one based in reality rather than the abstract. Sometimes individual distributions simply make little sense. Recognizing this, charitable settlements’ judicial access and deterrence gains far outweigh any imagined theoretical challenges against them.

This Article provides the necessary starting point for saving charitable settlements. Distinguishing charitable settlements from cy pres remainders advances scholarly evaluation of these distinct settlement structures. When viewed in isolation, charitable settlements’ utility becomes apparent. Through minor modifications to the criteria for evaluating such settlements and accompanying fee petitions, courts can clear the path for charitable settlements—a path that saves not only charitable settlements but also preserves class actions’ larger regulatory goals.

adequacy of a settlement); Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 121 (2d Cir. 2005); In re Synthroid Mktg. Litig., 264 F.3d 712, 719 (7th Cir. 2001).