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Advisory Committee on Civil Rules
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To the Members of the Advisory Committee on Civil Rules and the Rule 23 Subcommittee:

I have enclosed an article I recently published entitled, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97 (2014) (available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413951), which I hope will be useful to you as you consider whether to propose an amendment to Rule 23 to address class action settlements that contemplate *cy pres* distributions.

Here's the summary paragraph from the abstract: "To minimize over-reliance on *cy pres* distributions and to tailor them to serve the best interests of the class, the article makes four pragmatic recommendations. First, to align the interests of class counsel and the class, courts should presumptively reduce attorneys' fees in cases in which *cy pres* distributions are made. Second, to ensure that class members, potential objectors, and courts have the information they need to assess the fairness of a settlement that contemplates a *cy pres* distribution, class counsel should be required to make a series of disclosures when it presents the settlement for judicial approval. Third, to inject an element of adversarial conflict into the fairness hearing and to ensure that the court receives the information needed to scrutinize the proposed *cy pres* distribution, the court should appoint a devil's advocate to oppose the settlement in general and the *cy pres* distribution in particular. Finally, the court should be required to make written findings in connection with its review of any class action settlement that contemplates a *cy pres* distribution."

Thank you for your consideration.

Sincerely,

Rhonda Wasserman
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# CY PRES IN CLASS ACTION SETTLEMENTS

RHONDA WASSERMAN*

*Monies reserved to settle class action lawsuits often go unclaimed because absent class members cannot be identified or notified or because the paperwork required is too onerous. Rather than allow the unclaimed funds to revert to the defendant or escheat to the state, courts are experimenting with cy pres distributions—they award the funds to charities whose work ostensibly serves the interests of the class "as nearly as possible."*

*Although laudable in theory, cy pres distributions raise a host of problems in practice. They often stray far from the "next best use," sometimes benefitting the defendant more than the class. Class counsel often lacks a personal financial interest in maximizing direct payments to class members because the fee is just as large if the money is paid cy pres to charity. And if the judge has discretion to select the charitable recipient of the unclaimed funds, she may select her alma mater or another favored charity, thereby creating an appearance of impropriety.*

*To minimize overreliance on cy pres distributions and to tailor them to serve the best interests of the class, this Article makes four pragmatic*

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* Professor of Law and Buchanan, Ingersoll & Rooney Faculty Scholar, University of Pittsburgh School of Law. I would like to thank Sam Issacharoff, John Leubsdorf, Michael Morley, Marty Redish and Jay Tidmarsh for their helpful and insightful comments on an earlier draft of this Article; Bernadette Bollas Genetin for helpful references to relevant materials; and Ian Everhart and Carter Cristopher Hoel for invaluable research assistance. I am grateful for the many constructive comments I received when presenting this paper at faculty colloquia at the University of Akron School of Law and the University of Pittsburgh School of Law. Finally, I dedicate this Article with much love and great pride to my youngest son, Benjamin Wasserman Stern, on the occasion of his graduation from high school.

*recommendations. First, to align the interests of class counsel and the class, courts should presumptively reduce attorneys' fees in cases in which cy pres distributions are made. Second, to ensure that class members, potential objectors, and courts have the information they need to assess the fairness of a settlement that contemplates a cy pres distribution, class counsel should be required to make a series of disclosures when it presents the settlement for judicial approval. Third, to inject an element of adversarial conflict into the fairness hearing and to ensure that the court receives the information needed to scrutinize the proposed cy pres distribution, the court should appoint a devil's advocate to oppose the settlement in general and the cy pres distribution in particular. Finally, the court should be required to make written findings in connection with its review of any class action settlement that contemplates a cy pres distribution.*

## I. INTRODUCTION

A group of Facebook users filed a class action lawsuit against the social media giant because its short-lived Beacon program exposed personal information about them without their permission.[1] Lawyers for the parties eventually negotiated a $9.5 million settlement.[2] Here's the odd part: not a single penny went to the absent class members.[3] Not even the class members who had prospective claims under federal law for statutory damages in the amount of $2500 received any money.[4] So what happened to the $9.5 million? The lawyers representing the class received about $3 million and the rest went to a brand-new organization called the Digital Trust Foundation.[5] Why wasn't the money paid to the class members, you may ask? Because distributing it among the class members would have been economically infeasible given how small their pro rata shares were relative to the costs of administration. Who ran the Digital Trust Foundation, you may ask? Facebook's Director of Public Policy was one of its three directors, and Facebook's attorney, together with class counsel, made up its board of legal advisors.[6] So by paying a big chunk of money to class counsel and a bigger chunk of money to an organization over which it

1. Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012), *cert. denied sub nom.* Marek v. Lane, 134 S. Ct. 8 (2013) (mem.). See *infra* Part VI.B for a more complete discussion of the case.

2. *Id.* at 817.

3. *Id.*

4. *See id.* at 824 ("Objectors are no doubt correct that the [Video Privacy Protection Act] claims of some class members might prove valuable if successful at trial."). Consumers may claim $2500 in liquidated damages for violations of the Act. *Id.* at 822.

5. *Id.* at 817.

6. *Id.* at 817–18.

exerted significant control, Facebook was able to secure the release of *all* of the claims against it arising out of the challenged Beacon program.

If this sounds fishy to you, you are not alone. While Chief Justice John Roberts agreed with the Supreme Court's denial of certiorari in the case, he issued a separate statement in which he voiced "fundamental concerns surrounding the use of [cy pres] remedies"[7]—that is, payments of settlement funds to charities in lieu of payments to individual class members. Roberts suggested that "[i]n a suitable case, this Court may need to clarify the limits on the use of such remedies."[8] This Article seeks to offer analysis and pragmatic recommendations that might inform regulation of cy pres remedies by the Court and others.

Cy pres remedies are an increasingly common feature in class action settlements.[9] Although in the Facebook case no effort was made to pay even a portion of the settlement fund to the absent class members, more commonly courts use cy pres to distribute monies that remain unclaimed following efforts to pay class members their respective shares.[10] Rather than return the unclaimed monies to the defendant or pay them to the government, settling parties typically propose, and reviewing courts typically acquiesce, to pay the unclaimed monies to charities that will serve the interests of the absent class members "as near as possible."[11]

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7. Marek v. Lane, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari). Linda Greenhouse, former Supreme Court correspondent for the New York Times, wrote that Chief Justice Roberts's statement, "while not an everyday occurrence at the court, isn't all that rare, either." Linda Greenhouse, Op-Ed., *Bring Me a Case*, N.Y. TIMES (Nov. 13, 2013), http://www.nytimes.com/2013/11/14/opinion/bring-me-a-case.html.

8. *Marek*, 134 S. Ct. at 9 (Roberts, C.J., respecting the denial of certiorari).

9. Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 653, 661 (2010) (finding, on the basis of an empirical analysis of cases decided between 1974 and 2008, that the use of cy pres awards "accelerated sharply after 2000" and concluding that "the prevalence of class action cy pres awards has increased steadily by decade since the 1980s and has accelerated noticeably after 2000").

10. *Id.* at 620.

11. Another controversial remedy, fluid recovery, typically "involves the distribution of funds to present individuals who occupy more or less the same position as the victims of the defendant's past wrongdoing; for instance, if the defendant cheated past consumers on their credit card transactions, relief might be given to the present credit card holders as an approximation." Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 769 n.5 (2014). *See also* A.L.I., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. a (2010) [hereinafter ALI PRINCIPLES] (discussing the use of cy pres and fluid recovery); Redish, Julian & Zyontz, *supra* note 9, at 620–21, 635, 661–64

While this solution sounds sensible in theory, in practice a host of problems arise,[12] as the Facebook settlement suggests. In particular, the recipient charities often fail to serve the interests of the class or to address the concerns raised in their lawsuit. Defendants may prefer cy pres distributions over direct payments to class members, however, because from a public relations perspective, it looks good when a company makes a sizeable "donation" to charity; and reviewing courts may enjoy the opportunity to steer the funds to a favored charity or alma mater. Class counsel, which should be working its hardest to put the settlement funds into the hands of class members, may suffer a conflict of interest. Class counsel's fee is typically determined as a fraction of the settlement fund regardless of the portion that is actually claimed by absent class members, so class counsel may not work its hardest to put money into the hands of the absentees.[13]

These problems arise in large part because the absent class members lack the incentive and means to monitor class counsel.[14] In the absence of monitoring, class counsel may negotiate a settlement that fails to serve the best interests of the class and may fall down on the job of getting settlement funds into the hands of the absentees. The court, which is required by the Federal Rules of Civil Procedure to review any proposed class action settlement,[15] may lack the information needed to assess the settlement's fairness and the appropriateness of any cy pres distribution contemplated by the settlement.[16] Thus, this Article proposes a set of pragmatic recommendations designed to diminish the conflict of interest between the class and its counsel and to provide the court with the information it needs to scrutinize class action settlements and proposed cy pres distributions.[17]

Part II sets the stage by describing the varied circumstances in which class action settlement funds remain unclaimed or non-distributable. Part III identifies the alternate means by which courts could distribute such funds—reversion to the defendant, escheat to the state, or supplemental distributions to claimants—and the reasons why courts often reject these

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(same).

12. *See infra* Part V.

13. *See infra* notes 109–115, 192–195 and accompanying text.

14. *See infra* notes 240–242 and accompanying text.

15. FED. R. CIV. P. 23(e).

16. *See infra* notes 270–275 and accompanying text.

17. *See infra* Part VII.

alternatives. To introduce the cy pres remedy, Part IV provides a brief history of its use in the context of charitable trusts and its adaptation in the class action context. With this background on cy pres in place, Part V identifies the problems that may arise when cy pres is used in the class action context. Specifically, Part V addresses the risk that the defendant and class counsel will put their own interests ahead of the interests of the class in structuring the settlement and choosing the cy pres recipients, and the reasons why courts sometimes acquiescence. Part VI illustrates these problems with analyses of two recent class action settlements.

Part VII, the centerpiece of this Article, offers four pragmatic recommendations to limit reliance on cy pres remedies and to better tailor them to serve the interests of the class. The first proposal, to presumptively limit attorneys' fees in cases in which some or all of the settlement fund is distributed cy pres to charity, is designed to address the potential conflict of interest between the class and its counsel. The second and third proposals, regarding disclosure statements and devil's advocates, are designed to remedy informational deficiencies and to improve monitoring of class counsel. The final proposal, which would require trial courts to make certain findings when reviewing class action settlements with cy pres features, is designed to ensure rigorous judicial review by both trial and appellate courts and to minimize reliance on cy pres distributions.

## II. THE UNDERLYING PROBLEM OF UNCLAIMED OR NONDISTRIBUTABLE FUNDS

A large percentage of certified class actions settle.[18] Once the district court approves the settlement,[19] the claims administrator distributes the settlement monies to the class members upon submission of claim forms. Sometimes, however, class members cannot be identified or it costs too much to process their claims relative to their size.[20] Even when claiming

18. While Federal Judicial Center researchers had previously concluded that "almost all certified class actions settle," Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 647 (2006), their most recent "study shows . . . a lower percentage (58%) of original proceedings with certified classes leading to a class settlement." Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003–2007*, 80 U. CIN. L. REV. 315, 341–42 (2011).

19. Class actions filed in federal court "may be settled . . . only with the court's approval." FED. R. CIV. P. 23(e).

20. *E.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 819 (9th Cir. 2012) (noting that a settlement fund is "non-distributable" when "the proof of individual claims would be burdensome or distribution of

class members are paid, a portion of the settlement fund often remains unclaimed and the court must decide what to do with the unclaimed funds. Before we consider possible solutions to this problem, it may be helpful to consider why settlement funds are non-distributable or go unclaimed.

First, in some class actions, a significant number of absent class members' identities are not known and it is impossible to provide them with individual notice of the opportunity to file a claim.[21] Consider, for example, the class actions filed on behalf of purchasers of Milli Vanilli recordings,[22] purchasers of Cuisinart food processors,[23] and taxicab customers in Los Angeles,[24] just to list a few of my favorites. While the court must "direct to class members the best notice that is practicable under the circumstances"[25] and may in some cases resort to notice by publication, broadcast, or Internet,[26] there is a genuine risk in such cases that the absentees will not learn of the settlement and therefore will not file claims.[27]

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damages costly" (quoting Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011))), *cert. denied sub nom.* Marek v. Lane, 134 S. Ct. 8 (2013) (mem.). The objecting class members in *Lane* "concede[d] that direct monetary payments to the class of remaining settlement funds would be infeasible given that each class member's direct recovery would be *de minimis*." *Id.* at 821.

21. *E.g.*, Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 786 (7th Cir. 2004) (noting the impossibility of individual notice because the defendant lacked a record of the customers whose financial information it had given to telemarketers). *See also* 3 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 10:14 (4th ed. 2002) (describing circumstances in which funds remain unclaimed); Tidmarsh, *supra* note 11, at 769–70 & n.7 (noting that in some instances it may be too difficult "to identify the victims of conduct that occurred years earlier").

22. *See* Freedman v. Arista Records, Inc., 137 F.R.D. 225, 228–29 (E.D. Pa. 1991) (declining on other grounds to certify a class of seven million purchasers of Milli Vanilli recordings who claimed they had been defrauded upon learning that the group's "singers" had not actually sung in the recordings).

23. *In re* Cuisinart Food Processor Antitrust Litig., 1983 U.S. Dist. LEXIS 12412, at *8–10, *20–21, *29 (D. Conn. Oct. 24, 1983) (approving the settlement of a class action filed on behalf of more than 1.5 million Cuisinart purchasers and noting that fewer than one million received individual notice of the class action and proposed settlement).

24. Daar v. Yellow Cab Co., 433 P.2d 732, 740 (Cal. 1967) ("The fact that the class members are unidentifiable at this point will not preclude a complete determination of the issues affecting the class.").

25. FED. R. CIV. P. 23(c)(2)(B).

26. 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 8:29–8:30 (5th ed. 2013).

27. *See, e.g.*, Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1306 (9th Cir. 1990) (anticipating that "a substantial number of class members would never be located for distribution of the damage award").

Second, even where the class members' identities are known, their claims may be so small that it is not economically feasible to calculate individual damages or to cut individual checks and mail them to the absentees.[28] For example, in a class action that challenged AOL's practice of appending footers with advertisements to emails, the court concluded that the maximum the class could have recovered at trial would have been $2 million (that is, the amount AOL received for selling the ads); but with sixty-six million AOL subscribers in the class, "each member of the class would receive only about 3 cents. The cost to distribute these payments would far exceed the maximum potential recovery."[29]

Third, even where direct payments are economically feasible, absent class members may decline to submit claim forms.[30] In cases involving elderly or ill class members, there is a heightened risk that they will die before claiming their respective shares. For example, in a class action against a drug manufacturer that allegedly inflated the price of a cancer drug, the parties anticipated that some class members would "not file claims because they [were] elderly or [had] died and their heirs [would] not stand in their shoes."[31] In other cases, the cumbersomeness of the claims

28. *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 821 (9th Cir. 2012) ("[D]irect monetary payments to the class . . . would be infeasible given that each class member's direct recovery would be *de minimis*."), *cert. denied sub nom.* Marek v. Lane, 134 S. Ct. 8 (2013) (mem.); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 475 n.15 (5th Cir. 2011) ("[T]here comes a point at which the marginal cost of making an additional pro rata distribution to the class members exceeds the amount available for distribution."); *In re* Am. Tower Corp. Sec. Litig., 648 F. Supp. 2d 223, 224 n.1 (D. Mass. 2009) ("[R]esidual funds will be donated to nonprofits only where the cost per class member of distributing the residual funds substantially outweighs the amount each class member would receive."). *See also* ALI PRINCIPLES, *supra* note 11, § 3.07 cmt. b (sanctioning cy pres awards where "distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable"); 3 CONTE & NEWBERG, *supra* note 21, § 10:14, at 511 ("[T]here may be instances when the class is so numerous and the individual claims so small that no recovery or distributions for past losses are possible as a practical matter. . . ."); Tidmarsh, *supra* note 11, at 769–70 ("It may be too difficult (due to information and cost constraints) to identify the victims of conduct that occurred years earlier or to assess their damages accurately.").

29. Nachshin v. AOL, LLC, 663 F.3d 1034, 1037 (9th Cir. 2011). *Cf.* Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004) (rejecting the parties' contention that "each member would receive an amount smaller than the cost of postage").

30. 3 CONTE & NEWBERG, *supra* note 21, § 10:14.

31. Howe v. Townsend (*In re* Pharm. Indus. Average Wholesale Price Litig.), 588 F.3d 24, 34 (1st Cir. 2009). *See also id.* at 29 (explaining that a large portion of the sum would go unclaimed because "many class members were elderly, had died, or could die soon").

process may discourage class members from claiming their portion of the settlement. For example, in an antitrust class action that accused defendants of conspiring to set a price floor for certain baby products, the only way a class member could recover more than five dollars in damages was by submitting valid proof of purchase. Questioning the fairness of "a settlement with such a restrictive claims process," the U.S. Court of Appeals for the Third Circuit hypothesized that "many class members did not submit claims because they lacked the documentary proof necessary to receive the higher awards contemplated, and the $5 award they could receive left them apathetic."[32]

Fourth, even where class members submit claims and the claims administrator mails them checks, some (or many) of the checks are returned as undeliverable or are never cashed.[33] Finally, in some cases, interest on the settlement fund accrues during the claims administration process, yielding additional funds that may remain unclaimed.[34]

In all of these situations in which unclaimed funds remain, the court (typically guided by the parties) must decide how to distribute the funds. We will consider a number of alternatives to cy pres distributions before we explore the cy pres remedy itself.

## III. ALTERNATIVES TO CY PRES DISTRIBUTIONS

A number of potential solutions to the "unclaimed funds" problem exist. As we will see, however, each of these potential solutions has

32. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 176 (3d Cir. 2013). *See also* Goodrich v. E.F. Hutton Group, Inc., No. 360, 1996 Del. LEXIS 73, at *4 (Del. Feb. 2, 1996) (anticipating that a large portion of the settlement fund would not be distributed to class members because their claims were "quite small" and their transaction costs in filing claims would be "relatively high"), *aff'd*, 681 A.2d 1039 (Del. 1996). *In re Baby Products* is discussed further in Part VI.A.

33. *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. Georgia-Pacific Corp., 119 F.3d 703, 706–07 (8th Cir. 1997) ("[O]ver 125 checks were returned as undeliverable."). *See also* 3 CONTE & NEWBERG, *supra* note 21, § 10:14 ("Even when individual notices to last known addresses of class members are sent, significant numbers of such notices are usually returned as undeliverable.").

34. *See, e.g.*, *In re* Holocaust Victim Assets Litig., 424 F.3d 158, 164 (2d Cir. 2005) (noting that $60 million in interest had accrued); *Powell*, 119 F.3d at 705 (reviewing distribution of unclaimed funds, which included hundreds of thousands of dollars in accrued interest); SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 403 (S.D.N.Y. 2009) ("[M]ore than $79 million . . . cannot be distributed and continues to accrue interest.").

problems of its own, so negotiating parties and courts often find themselves resorting to cy pres distributions.

### A. REVERSION TO THE DEFENDANT

One option is to return the unclaimed funds to the defendant.[35] The rationale is that the defendant owns the money it places into the settlement fund to compensate class members, and unless or until the money is claimed by members of the class, the defendant has a substantial, if not compelling, claim to its return.[36] The excess remaining in the settlement fund exists, the argument goes, only because of a mutual mistake regarding the amount needed to satisfy the class members' claims.[37] Returning the excess to the defendant avoids "charging [it] an amount greater than the

35. *See, e.g.*, *In re Baby Prods.*, 708 F.3d at 172 (viewing "reversion to the defendant" as one of the "three principal options for distributing the remaining funds"); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 477 (5th Cir. 2011) (noting that the defendant "itself would appear to have a greater claim to the funds than a charity . . . absent a contrary directive from the property-interest-defining settlement agreement"); *id.* at 481–82 (Jones, C.J., concurring) (suggesting that "if the defendant had not waived its right to request a refund, it would have been entitled to the excess" and that "[i]n the ordinary case, . . . the superior approach is to return leftover settlement funds to the defendant"); Wilson v. Sw. Airlines, Inc., 880 F.2d 807, 813, 816 (5th Cir. 1989) (characterizing the defendant's claim to the unclaimed funds as a "substantial equitable claim[]" and concluding that a settlement that awarded 64.5 percent of the surplus to the defendant was "fair, reasonable, and adequate"); Van Gemert v. Boeing Co. (*Van Gemert V*), 739 F.2d 730, 731 (2d Cir. 1984) (affirming a district court order distributing the unclaimed fund to the defendant, subject to the condition that the defendant "stand ready to pay valid claims against the fund in perpetuity"); 3 CONTE & NEWBERG, *supra* note 21, §§ 10:15, 10:17 (explaining that one option for distribution of unclaimed balances is to have the "surplus funds revert to the defendant"); Redish, Julian & Zyontz, *supra* note 9, at 638–39, 665 (describing arguments in favor of retention of unclaimed funds by the defendant); Tidmarsh, *supra* note 11, at 768 (noting that while one option is to return unclaimed funds to the defendant, that option "suffers from a significant downside: it is a windfall to the alleged wrongdoer").

36. *Wilson*, 880 F.2d at 813 ("Since [the defendant] turned over its money in the clear and reasonable expectation that the money was required for the specific purpose of compensating the class, its equitable claim to any money remaining after the accomplishment of that purpose is compelling."). *See also* McKinnie v. JP Morgan Chase Bank, 678 F. Supp. 2d 806, 812 (E.D. Wis. 2009) ("[T]he reversion of unclaimed funds to the defendant is not objectionable when class members receive full recovery for their damages and the parties agree to the reversion." (citing Mangone v. First USA Bank, 206 F.R.D. 222, 230 (S.D. Ill. 2001))); Redish, Julian & Zyontz, *supra* note 9, at 639 ("[R]eversion to the defendant has at least an arguable foundation when the victim, authorized to recover by governing substantive law, has for whatever reason failed to claim his award.").

37. *Klier*, 658 F.3d at 482 (Jones, C.J., concurring).

harm it bargained to settle."[38]

Reversion of excess funds to the defendant may also be supported by the preexistence principle advocated by the late Professor Richard Nagareda. According to Nagareda, class actions cannot "alter unilaterally class members' preexisting bundle of rights."[39] In his view, class action settlements are vehicles for the purchase and sale of these preexisting rights.[40] Once the defendant has "purchased" all the claims "sold" by participating class members, there would appear to be no basis under preexisting law for depriving the defendant of additional funds.

Some courts have rejected the reversion option, however, because it "risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement."[41] Courts have considered the policies underlying the substantive laws invoked by the class. Where the statutory objectives include deterrence or disgorgement, "it would contradict these goals to permit the defendant to retain unclaimed funds."[42] As Professor Jay Tidmarsh put it, reversion to the defendant provides "a windfall to the alleged wrongdoer."[43]

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38. *Id.*

39. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 181 (2003).

40. *Id.* at 216.

41. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013). *See also* Hodgson v. Quezada, 498 F.2d 5, 6 (9th Cir. 1974) (rejecting reversion to the defendant of the unclaimed portion of a settlement fund in an enforcement action by the Secretary of Labor under the Fair Labor Standards Act because the statute was designed to "depriv[e] a violator of any gains resulting from his violation"); ALI PRINCIPLES, *supra* note 11, § 3.07 cmt. b (noting that reversion to the defendant "would undermine the deterrence function of class actions").

42. Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990) (citing Simer v. Rios, 661 F.2d 655, 676 (7th Cir. 1981)). *See also, e.g.*, CAL. CIV. PROC. CODE § 384(b) (West 2004) (requiring a court that enters a class action judgment to amend it if monies cannot be distributed to class members and to direct the defendant to pay the "unpaid residue" to cy pres recipients; barring reversion to the defendant); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004) (questioning "the reversion of unclaimed refunds to the putative wrongdoer"); ALI PRINCIPLES, *supra* note 11, § 3.07 cmt. b (noting that reversion to the defendant "would undermine . . . the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable"); Sam Yospe, Note, *Cy Pres Distributions in Class Action Settlements*, 2009 COLUM. BUS. L. REV. 1014, 1044 ("[R]eturning the money to the defendant is often contrary to the purpose of the statute in the underlying litigation.").

43. Tidmarsh, *supra* note 11, at 768. *See also* Stewart R. Shepherd, Comment, *Damage*

### B. ESCHEAT TO THE GOVERNMENT

A second option is for the non-distributable or unclaimed funds to escheat to the government.[44] Section 2042 of Title 28 of the United States Code authorizes reversion to the United States government of funds deposited with a federal court that remain unclaimed after five years.[45] The statute applies when a court so orders or when a court fails to otherwise dispose of funds.[46] Section 2042 permits claimants entitled to any portion of the funds to petition for a court order directing payment to them upon proof of their entitlement.[47] Because the federal statute permits recovery by absent class members even after reversion of the funds to the government, this option has been found to "fully protect[]" the interests of absent class members.[48] In fact, the escheat under § 2042 has been called "impermanent"[49] and some have questioned whether it is an escheat at all

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*Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 456 (1972) (noting that a cy pres distribution is "preferable to the unjust enrichment of the defendant").

44. *E.g.*, Nachshin v. AOL, LLC, 663 F.3d 1034, 1041 (9th Cir. 2011) ("If a suitable cy pres beneficiary cannot be located, the district court should consider escheating the funds to the United States Treasury."); *Six Mexican Workers*, 904 F.2d at 1307–08 (identifying "escheat to the government" as one of the court's alternatives in dealing with unclaimed funds); *In re* Folding Carton Antitrust Litig., 744 F.2d 1252, 1255 (7th Cir. 1984) (directing that the "remainder of the reserve fund escheat to the United States"); Van Gemert v. Boeing Co. (*Van Gemert V*), 739 F.2d 730, 733–36 (2d Cir. 1984) (analyzing 28 U.S.C. §§ 2041 and 2042, and holding that they authorize but "do not require as a matter of law that the unclaimed judgment fund be deposited in the Treasury"). *See also* 3 CONTE & NEWBERG, *supra* note 21, §§ 10:15–17; Redish, Julian & Zyontz, *supra* note 9, at 619, 639, 665.

45. 28 U.S.C. § 2042 (2012). Section 2041 directs that "[a]ll moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court." *Id.* § 2041. Section 2041 "does not limit the discretion of the district court to control the unclaimed portion of a class action judgment fund." *Van Gemert V*, 739 F.2d at 735. *Accord* Nw. Mut. Life Ins. Co. v. Quinn, 69 F. 462, 464 (C.C.W.D. Mich. 1895).

46. *See, e.g.*, *Van Gemert V*, 739 F.2d at 735.

47. 28 U.S.C. § 2042.

48. *Six Mexican Workers*, 904 F.2d at 1308. *See also In re Folding Carton*, 744 F.2d at 1255 (noting that entitled claimants may recover from the government "after the escheat"); SEC v. Golconda Min. Co., 327 F. Supp. 257, 260 (S.D.N.Y. 1971) (directing the Trustee "to deposit the remaining balance in the Registry of this Court, to be held pursuant to 28 U.S.C., sections 2041 and 2042, for the benefit of those persons who are entitled to payment under the final judgment, or for the benefit of their successors in interest").

49. *In re Folding Carton*, 744 F.2d at 1255. *See also, e.g.*, Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971) (stating, in the context of an enforcement action filed by the Secretary of Labor to enforce the Equal Pay Act, that "[t]here is never a permanent escheat to the United States"

because the United States does not gain title to the money, but just holds it "as trustee for the rightful owners."[50]

Money held by the United States under § 2042, money held by a settlement administrator, or unclaimed funds subject to state court control may escheat to the state.[51] Unlike reversion to the federal government under § 2042, escheat is a procedure by which the state actually acquires title to the abandoned property.[52] In the context of class actions, a state may escheat the unclaimed funds as a representative of its citizens who did not collect their share of the fund.[53] If the nonclaiming class members are citizens of different states, each state may escheat the fraction of the fund corresponding to the fraction of nonclaiming class members whose last known addresses were within the state.[54] The theory is that "nonclaiming

(citing *In re* Moneys Deposited In and Now Under the Control of the U.S. Dist. Court for the W. Dist. of Pa., 243 F.2d 443 (3d Cir. 1957))).

50. *In re Folding Carton*, 744 F.2d at 1257 (Flaum, J., concurring in part and dissenting in part) (stating that § 2042 is "not a federal escheat statute"; the law "does not operate to change the ownership of the funds; . . . the United States obtains no beneficial interest in the funds"; and "[t]hus, there can be no permanent escheat to the United States"). *See also In re Moneys Deposited*, 243 F.2d at 445 (stating that the United States "holds the money as statutory trustee for the rightful owners").

51. *See, e.g.*, United States v. Klein, 303 U.S. 276, 282–83 (1938) (affirming a state court decree that escheated to the state unclaimed funds that had been transferred to the United States Treasury pursuant to the statutory predecessor to § 2042); All Plaintiffs v. All Defendants, 645 F.3d 329, 332, 335, 337 (5th Cir. 2011) (holding that funds in the possession of a settlement administrator were within the scope of the Texas unclaimed property statute; concluding that "Rule 23(e) does not preclude application of the Act to unclaimed funds allocated to identified class members"; and concluding that a failure to apply the state unclaimed property law in federal court "would lead to the inequitable administration of justice"); *In re Folding Carton*, 744 F.2d at 1258 (Flaum, J., concurring in part and dissenting in part) ("[M]oney deposited under section 2042 may escheat to the states . . . even where . . . the unclaimed property is created under federal law"); *Van Gemert V*, 739 F.2d at 735 (noting that if §§ 2041–42 were applied in equity, New York and Illinois eventually "could assert claims under state abandoned property laws"); *Hodgson*, 446 F.2d at 535 ("A State may succeed via escheat to the money" on deposit with the Treasury pursuant to § 2041 and § 2042. (citing *Klein*)).

52. *See, e.g.*, Texas v. New Jersey, 379 U.S. 674, 675 (1965) (describing escheat as "a procedure with ancient origins whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears").

53. *In re Folding Carton*, 744 F.2d at 1258 (Flaum, J., concurring in part and dissenting in part) ("Unlike the federal government, a state government may escheat unclaimed property on behalf of its citizens because the state stands as *parens patriae* as to its citizens." (citing Shepherd, *supra* note 43, at 453–58)).

54. *Id.* at 1259 (citing *Texas v. New Jersey*, 379 U.S. at 680–83). Since the Constitution prevents more than one state from escheating a given piece of property, W. Union Tel. Co. v. Pennsylvania, 368

class members will benefit indirectly to the extent that the state uses the fund to benefit all of its citizens."[55] Thus, the compensatory objectives of the law underlying the class claims are served, albeit quite indirectly and imperfectly since the nonclaiming class members are typically but a small subset of the state's overall population.[56]

While imperfectly serving a compensatory objective, an escheat may better serve the deterrent or disgorgement policies of the substantive law underlying the class claim by ensuring that the defendant pays the full amount of the settlement and receives no reversion of unclaimed funds.[57]

Whether or not an escheat serves the policies underlying the substantive law at issue in the class action, some might justify it on the theory that the class members benefitted from having their dispute resolved by the court. As one circuit judge explained, "repayment to the government to defray some of the costs of the court system would be in the nature of a

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U.S. 71, 75–76 (1961), the Supreme Court fashioned the rule that "each item of [intangible] property . . . is subject to escheat only by the State of the last known address of the creditor, as shown by the debtor's books and records," *Texas v. New Jersey*, 379 U.S. at 681–82. *See also All Plaintiffs*, 645 F.3d at 337 (concluding that unclaimed funds allocated to class members with a last known address in Texas were governed by the Texas unclaimed property law).

55. *In re Folding Carton*, 744 F.2d at 1258 (Flaum, J., concurring in part and dissenting in part).

56. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) (noting that escheat to the state "benefits the community at large rather than those harmed by the defendant's conduct"); *In re Folding Carton*, 744 F.2d at 1258 (Flaum, J., concurring in part and dissenting in part) (commenting on the "imperfect fit" but noting that escheat serves antitrust law's compensatory rationale "by allowing each member of the class some degree of recovery, even if indirect"); ALI PRINCIPLES, *supra* note 11, § 3.07 cmt. b ("[E]scheat to the state . . . would benefit all citizens equally, even those who were not harmed by the defendant's alleged conduct."); Shepherd, *supra* note 43, at 455–56.

57. *In re Baby Prods.*, 708 F.3d at 172 ("Escheat . . . preserves the deterrent effect of class actions . . . ."); Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308–09 (9th Cir. 1990) (noting that escheat may serve the deterrence and enforcement policies underlying the substantive law); *In re Folding Carton*, 744 F.2d at 1258 (Flaum, J., concurring in part and dissenting in part) (noting that "to the extent that antitrust law serves a deterrence purpose, it is served through any plan not resulting in the return of the fund to the defendants"); SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 416 (S.D.N.Y. 2009) ("[E]scheat to the government serves the 'deterrence and enforcement goals' of federal statutes." (quoting *Six Mexican Workers*, 904 F.2d at 1308)). *See also* Redish, Julian & Zyontz, *supra* note 9, at 619 (noting that the deterrent effect would be "completely defeated" or "seriously diluted" if the remainder of the unclaimed fund were to revert to the defendant); Tidmarsh, *supra* note 11, at 768–69 (reasoning that returning the unclaimed funds to the defendant "is a windfall to the alleged wrongdoer").

user fee."[58] But one may question the fairness of imposing this "fee" on settling class members when no other litigants have to pay to have their claims adjudicated in court.

### C. ADDITIONAL DISTRIBUTIONS TO CLAIMANTS

A third option is to distribute the unclaimed funds, pro rata, among class members who already have stepped forward to claim their due.[59] This option has been espoused by the American Law Institute in its Principles of the Law of Aggregate Litigation ("the ALI Principles" or, "the Principles"), which recommend that courts resort to cy pres distributions only after seeking to "provide for further distributions to participating class members."[60] The ALI Principles favor further payments to claiming class members on the theory that

> few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery for those class members. In any event, this Section takes the view that in most circumstances distributions to class members better approximate the goals of the substantive laws than distributions to third parties that were not directly injured by the defendant's conduct.[61]

Numerous courts have favored this approach over cy pres distributions. For example, in a class action against a company whose plant allegedly emitted toxic chemicals, the U.S. Court of Appeals for the Fifth Circuit held that unused funds that had been allocated to perform medical monitoring on members of subclass B should have been distributed to members of subclass A, who "were the most grievously injured and had not been fully compensated,"[62] rather than to charity by way of a cy pres

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58. *In re* Pet Food Prods. Liab. Litig., 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J., concurring and dissenting).

59. Redish, Julian & Zyontz, *supra* note 9, at 619. *See also* Shepherd, *supra* note 43, at 453 (noting that one option is to "divide the uncollected damages among those class members who do collect their shares"); Tidmarsh, *supra* note 11, at 768 (noting that one way of dealing with unclaimed excess is to "increase payments to those who file claims").

60. ALI PRINCIPLES, *supra* note 11, § 3.07(b). I served on the Members' Consultative Group of the American Law Institute project, the Principles of the Law of Aggregate Litigation, discussed here and *infra* Part VII.D.

61. ALI PRINCIPLES, *supra* note 11, § 3.07 cmt. b. *Accord In re Baby Prods.*, 708 F.3d at 173 (cautioning that "direct distributions to the class are preferred over cy pres distributions").

62. Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 476 (5th Cir. 2011); *id.* at 475–79 (finding support for a further distribution to members of subclass A in the language of the settlement

distribution.

In a variation on this approach, anticipating that a large portion of the settlement fund would go unclaimed because the class included many elderly and ailing people, the parties to one class action settlement agreed that class members who filed claims should receive double their actual losses.[63] In assessing the adequacy of the settlement, the U.S. District Court for the District of Massachusetts agreed with one objector that even more money should go to the claiming class members (rather than to a charity cy pres). At the trial court's urging, the parties modified the settlement agreement to provide claiming class members with treble damages if funds remained after all claiming class members had been paid double damages.[64] In yet another variation, an appellate court suggested that upon remand, the parties should consider modifying the settlement agreement to lighten the eligibility or documentary proof requirements for making a claim, thereby enlarging the group of absent class members who could submit viable claims for payment and receive more than a nominal payment.[65] By putting more money in the hands of (some) class members, all of these variations further both the compensatory and deterrent objectives of the laws underlying the class claims.[66]

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agreement). *See also, e.g.*, *In re Baby Prods.*, 708 F.3d at 174 (noting that a court "could condition approval of a settlement on the inclusion of a mechanism for additional payouts to individual class members if the number of claimants turns out to be insufficient to deplete a significant portion of the total settlement fund").

63. Howe v. Townsend (*In re* Pharm. Indus. Average Wholesale Price Litig.), 588 F.3d 24, 30 (1st Cir. 2009).

64. *Id.* at 31–32. In another variation on this approach, a trial court supervising the distribution of disgorged funds in an SEC enforcement action approved of "additional outreach to locate eligible recipients who had not submitted a claim." SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 409–10 (S.D.N.Y. 2009) (describing the fund administrator's renewed and innovative outreach efforts to reach investors who had not submitted claim forms, and noting that the 47 percent response rate in "phase II" was "remarkable" because it represented submissions from people who had not responded in phase I and actually exceeded the response rate achieved in phase I). *Cf.* Rohn v. Tap Pharm. Prods. (*In re* Lupron Mktg. & Sales Practices Litig.), 677 F.3d 21, 31–32 (1st Cir. 2012) ("The district court appropriately decided that a supplemental consumer claims process would be prohibitively expensive, time-consuming, and, given the high mortality rate among members of the class, would likely recruit few new claimants.").

65. *In re Baby Prods.*, 708 F.3d at 172 n.6, 176.

66. *Cf.* Shepherd, *supra* note 43, at 453 (noting that this method "would neither diminish the deterrent effect of the judgment nor unjustly enrich the defendant," but adding that "silent class members will not receive any compensation, even indirectly").

Not all courts have favored additional distributions to claiming class members, however. Some courts and scholars have expressed concern that such a distribution would result in a windfall to the claiming class members[67] or create a potential conflict of interest between the class and its named representatives, who would have an interest "in keeping the other class members uninformed."[68] Some courts have declined to approve additional payments to claiming class members to offset their litigation costs and inflation, concluding that non-claiming absentees have a superior equitable claim compared to the claim of class members who already have come forward.[69] Courts also have expressed concern about the cost and difficulty of locating individual class members for an additional distribution, especially if a significant amount of time has passed since the

67. *See, e.g.*, *In re Lupron Mktg.*, 677 F.3d at 35 ("[P]rotesting class members are not entitled to windfalls in preference to cy pres distributions"); *Klier*, 658 F.3d at 475 (favoring "additional pro rata distributions to class members . . . except where an additional distribution would provide a windfall to class members with liquidated-damage claims that were 100 percent satisfied by the initial distribution" (footnote omitted)); Van Gemert v. Boeing Co. (*Van Gemert II*), 553 F.2d 812, 816 (2d Cir. 1977) (bemoaning a possible windfall); *In re* EasySaver Rewards Litig., 921 F. Supp. 2d 1040, 1053 (S.D. Cal. 2013) (declining to award claimants the unclaimed funds and expressing concern for "an impermissible windfall"); McKinnie v. JP Morgan Chase Bank, 678 F. Supp. 2d 806, 812 (E.D. Wis. 2009) (concluding that "a pro rata distribution . . . would result in a windfall"). *See also* Redish, Julian & Zyontz, *supra* note 9, at 620, 639 (expressing concern for an "unjustified" or "undeserved" windfall to the claiming class members); Shepherd, *supra* note 43, at 453 ("The claims of the silent class members would be expropriated and a windfall might result for those who appeared and collected their share of the damages."); Tidmarsh, *supra* note 11, at 768 (expressing concern for "overcompensation for some victims").

68. *Van Gemert II*, 553 F.2d at 816 (quoting Shepherd, *supra* note 43, at 453). *See also, e.g.*, *In re Lupron Mktg.*, 677 F.3d at 35 (noting that such windfalls may "create a perverse incentive among victims to bring suits where large numbers of absent class members were unlikely to make claims" (quoting Redish, Julian & Zyontz, *supra* note 9, at 632)).

69. *See, e.g.*, *In re Lupron Mktg.*, 677 F.3d at 34 (rejecting the claim of class members—who had already received 167 percent of their damages—that they were entitled to residual settlement funds, and favoring a cy pres distribution that would "benefit the potentially large number of absent class members"); *In re* Folding Carton Antitrust Litig., 744 F.2d 1252, 1258 (7th Cir. 1984) (Flaum, J., concurring in part and dissenting in part) ("[A]warding the fund to . . . the claiming class members . . . ensures that non-claiming members will receive no benefit."); Van Gemert v. Boeing Co. (*Van Gemert V*), 739 F.2d 730, 736 (2d Cir. 1984) (rejecting pro rata distribution of unclaimed funds); *Van Gemert II*, 553 F.2d at 815–16 (noting that a distribution of unclaimed funds to claiming class members means that the non-claiming absentees "will not receive any compensation, even directly" (quoting Sheperd, *supra* note 43, at 453)).

initial distribution and class members may have relocated.[70] The administrative inconvenience of a pro rata distribution among the claiming class members is exacerbated where the defendant had been responsible for the initial distribution but would play no role in a follow-up distribution of unclaimed funds.[71]

Since each of these options—reversion to the defendant, escheat to the government, and further distribution to claiming class members—has drawbacks (at least in the eyes of some), settling parties and courts have employed another option to dispose of non-distributable or unclaimed funds: cy pres distributions.[72] We turn now to a brief history of the cy pres doctrine, before considering the problems that arise when cy pres distributions are made in the context of class action settlements.

## IV. A BRIEF HISTORY OF THE CY PRES DOCTRINE

The phrase "cy pres" derives from the Norman French expression, *cy près comme possible*, which means "as near as possible."[73] In the charitable trust context in which the equitable cy pres doctrine originated, courts employ it when a settlor's or testator's precise intent in creating a charitable trust cannot be effectuated. In such cases, courts attempt to save the trust by devising an alternate plan that serves the donor's intent as nearly as possible.[74] For example, the March of Dimes Foundation, which

70. Holtzman v. Turza, 728 F.3d 682, 689 (7th Cir. 2013) (noting that a cy pres distribution "is most useful when individual stakes are small, and the administrative costs of a second round of distributions to class members might exceed the amount tha[t] ends up in class members' pockets"); Powell v. Georgia-Pacific Corp., 119 F.3d 703, 705 (8th Cir. 1997) (noting that the district court's "primary concern was the fact that locating the individual class members for an additional distribution would be very difficult and costly").

71. *Powell*, 119 F.3d at 707.

72. Professor Martin Redish advocates yet another alternative: denial of class certification. Redish, Julian & Zyontz, *supra* note 9, at 639–40.

73. *E.g.*, Howe v. Townsend (*In re* Pharm. Indus. Average Wholesale Price Litig.), 588 F.3d 24, 33 (1st Cir. 2009); BLACK'S LAW DICTIONARY 470 (10th ed. 2014); EDITH L. FISCH, THE *CY PRES* DOCTRINE IN THE UNITED STATES 1 (1950). For more thorough discussions of cy pres's origins in the law of trusts, see, for example, Alberto B. Lopez, *A Revaluation of Cy Pres Redux*, 78 U. CIN. L. REV. 1307, 1313–29 (2010); Redish, Julian & Zyontz, *supra* note 9, at 624–33; John H. Beisner, Jessica Davidson Miller & Jordan M. Schwartz, *Cy Pres: A Not So Charitable Contribution to Class Action Practice*, U.S. CHAMBER COM. 3–6 (Oct. 2010), http://ilr.iwssites.com/uploads/sites/1/cypres_0.pdf.

74. RESTATEMENT (THIRD) OF TRUSTS § 67 (2003) ("Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or

was initially established to treat polio victims and to conduct research into polio prevention,[75] was permitted to alter its mission to combat other childhood diseases once the polio vaccine was developed and the donors' precise intent could no longer be effectuated.[76]

In the Middle Ages, the English chancery court invoked the cy pres doctrine for the benefit of the *donor*. The theory was that the donor may have donated money to charity in the hope of securing an "advantageous position in the kingdom of heaven."[77]

> If the exact scheme for securing pardon and an eternal period of bliss for the soul failed for any reason it was natural that chancery with its ecclesiastical tinge, should think that the testator would have desired the substitution of any other plan which would bring about the same result as the original gift.[78]

Thus, the Chancellor's early use of cy pres in the charitable trust context at least indirectly benefitted the donor.[79] With some initial hesitation,[80] American courts, too, began to employ the doctrine of cy pres in the charitable trust context; now virtually all states have codified the practice.[81]

Although the cy pres doctrine was initially used only in connection

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becomes wasteful to apply all of the property to the designated purpose, the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose."); RESTATEMENT (FIRST) OF TRUSTS § 399 (1935) ("If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor."); FISCH, *supra* note 73, at 1.

75. *Whatever Happened to Polio? March of Dimes*, NATIONAL MUSEUM AM. HIST., http://amhistory.si.edu/polio/howpolio/march.htm (last visited Oct. 21, 2014).

76. Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004) (mentioning the March of Dimes example). *Cf.* Sister Elizabeth Kenny Found. v. Nat'l Found., 126 N.W.2d 640, 642 (Minn. 1964) (discussing a motion by a charitable trust beneficiary, which received trust funds to treat polio victims, to use the funds to treat other muscular or skeletal diseases).

77. FISCH, *supra* note 73, at 4.

78. *Id.* at 5 (quoting GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 431 (1935)).

79. Redish, Julian & Zyontz, *supra* note 9, at 626 (discussing the use of cy pres to improve the settlor's "chance at salvation").

80. FISCH, *supra* note 73, at 9–28; Beisner, Miller & Schwartz, *supra* note 73, at 4–5.

81. Redish, Julian & Zyontz, *supra* note 9, at 628 & n.59.

with trusts and estates,[82] in recent years, American courts have adapted it to the class action context. Drawing upon a student comment published in the University of Chicago Law Review in 1972[83] and two student notes that followed in 1987,[84] courts have invoked the cy pres doctrine to distribute unclaimed or non-distributable funds to serve the policy objectives underlying the class action and the interests of the absent class members "as nearly as possible."[85]

Judge Richard Posner of the Seventh Circuit Court of Appeals has argued that the analogy to cy pres in the trust context is strained:

> In the class action context the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement . . . to the class members. There is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the "cy pres" remedy (badly misnamed . . .) is purely punitive.[86]

Professor Martin Redish, too, views the analogy as faulty[87] and

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82. *Id.* at 630.

83. Shepherd, *supra* note 43, at 452 ("When distribution problems arise in large class actions, courts may seek to apply their own version of cy pres by effectuating as closely as possible the intent of the legislature in providing the legal remedies on which the main cause of action was based.").

84. Kerry Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591, 1600 & 1605 (1987) (arguing that "the best option for most small claim consumer class actions is a single, class-wide distribution" in the form "of an equitable trust designed to benefit the injured class," and suggesting that charities would be "appropriate recipients" of the trust funds); Natalie A. DeJarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 732 (1987) (arguing that "the consumer trust fund should be used creatively for the 'next best' distribution of funds that remain in consumer class action settlements and damage awards"). Both works are cited in Redish, Julian & Zyontz, *supra* note 9, at 633–34.

85. *See, e.g.*, Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011) (requiring that a "cy pres distribution . . . be guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members" (citing Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1307 (9th Cir. 1990))); Am. Soc'y of Travel Agents v. United Airlines, Inc. (*In re* Airline Comm'n Antitrust Litig.), 307 F.3d 679, 682 (8th Cir. 2002) ("[T]he unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." (citing Am. Soc'y of Travel Agents v. United Airlines, Inc. (*In re* Airline Comm'n Antitrust Litig.), 268 F.3d 619, 625–26 (8th Cir. 2001))). *See also* Shepherd, *supra* note 43, at 452.

86. Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004).

87. Redish, Julian & Zyontz, *supra* note 9, at 624 (rejecting cy pres in class actions because its use "contravenes important constitutional and procedural limitations").

criticizes courts for invoking cy pres to distribute unclaimed funds without even trying to "indirectly compensate members of the injured class."[88]

Whether the analogy to the trust context is apt or not, litigants and courts have enthusiastically latched onto cy pres as a potential solution to the problem of unclaimed class action settlement funds. As we will see, while courts increasingly prefer cy pres to the alternative means of distributing unclaimed funds considered above in Part III,[89] this solution, too, has serious problems. Parts V and VI will describe these flaws and illustrate them with analyses of two recent cases. Part VII will then offer a slate of pragmatic recommendations to limit and tailor the use of cy pres to better serve the interests of absent class members.

## V. PROBLEMS WITH CY PRES DISTRIBUTIONS IN THE CLASS ACTION CONTEXT

Courts have adapted the cy pres doctrine to distribute unclaimed funds in the class action context because they view it as superior to reversion, escheat, or pro rata distribution to claiming class members. By ensuring that the defendant pays the full amount of the settlement (rather than receiving a reversion of any unclaimed portion), cy pres distributions advance the deterrence and disgorgement objectives of the law underlying the class claims.[90] Because the unclaimed funds are ostensibly used to

88. *Id.* at 635. *See also id.* at 637 (criticizing cy pres awards to charities that did not "constitute even a feeble attempt to indirectly compensate victims"). In Redish's view, cy pres awards in the class action context are not only sloppy adaptations of trust law, but also unconstitutional arrogations of power that violate Article III of the United States Constitution and the Due Process Clause of the Fifth Amendment (at least in adjudicated actions). *Id.* at 622–23, 641–48 (elaborating upon "three key constitutional flaws"). *See also* Beisner, Miller & Schwartz, *supra* note 73, at 15 (expressing concern that "extending cy pres to litigated class actions would contravene fundamental legal principles"). Notwithstanding these arguments, cy pres distributions continue to feature prominently in many class action settlements. In light of their prevalence, I offer pragmatic suggestions that, if implemented, would limit the use of cy pres distributions and better tailor them to serve the interests of absent class members. *See infra* Part VII. But my proposals do not address, and would not remedy, the underlying Article III problems identified by Redish.

89. *See supra* note 9 and accompanying text.

90. *See, e.g.*, Barnett, *supra* note 84, at 1600, 1614 (stating that a cy pres distribution, in the form of an equitable trust, "forces the defendant to disgorge ill-gotten gains, deters future illegal conduct, and compensates injured class members"); DeJarlais, *supra* note 84, at 767 (stating that the use of cy pres distributions to create consumer trust funds "is a cost-effective distribution method that serves the goals of compensation, disgorgement . . . , and deterrence"); Tidmarsh, *supra* note 11, at 781 ("[T]he basic argument for cy pres relief is to increase the net deterrent effect of a class action."); ALI PRINCIPLES,

benefit the absent class members "as nearly as possible," cy pres distributions are believed to better serve the compensatory objectives of the underlying law than escheat, which allows the state to use the unclaimed funds to benefit the population at large.[91] Further, cy pres distributions purportedly avoid creating a windfall for those class members who have already claimed their portion of the settlement fund.[92] So courts often prefer cy pres distributions to reversion, escheat, and supplemental distributions to claimants.

But while cy pres distributions may avoid the perceived drawbacks of the alternative means of distribution considered in Part III, they often have problems of their own.

### A. CY PRES DISTRIBUTIONS ARE NOT ALWAYS WELL-TAILORED TO SERVE THE INTERESTS OF THE CLASS

In theory, cy pres distributions are supposed to serve the interests of the absent class members "as nearly as possible." In practice, however, they often stray far from this goal.[93] Courts have approved settlement agreements that authorized the distribution of unclaimed funds, or direct payments by defendants, to charities that bore little relationship to the absent class members or the laws underlying their claims.[94] In some cases,

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*supra* note 11, § 3.07 cmt. b (stating that cy pres is preferable to reversion to the defendant because reversion "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"). *But see* Redish, Julian & Zyontz, *supra* note 9, at 650 (arguing that Rule 23 "is a legally inappropriate device" for deterring unlawful behavior in the absence of an effective remedial framework built into the substantive law).

91. *But see* Redish, Julian & Zyontz, *supra* note 9, at 622, 623 (viewing the use of cy pres in the class action context to achieve deterrence and compensation as a "troubling . . . part of the modern class action" since, "[i]n a variety of ways, use of cy pres threatens to create or foster 'pathologies' of the modern class action"; and viewing cy pres as creating only an "illusion of class compensation").

92. *E.g.*, Van Gemert v. Boeing Co. (*Van Gemert II*), 553 F.2d 812, 815–16 (2d Cir. 1977) (declining to approve a distribution of unclaimed funds to claiming class members to avoid a windfall).

93. *See, e.g.*, Redish, Julian & Zyontz, *supra* note 9, at 634 ("Courts seem to feel no need to find a form of relief that will ultimately have the effect of indirectly compensating as-yet uncompensated class members."); Yospe, *supra* note 42, at 1023–26 (discussing the lack of a nexus between a plaintiff class and residual fund beneficiaries).

94. Beisner, Miller & Schwartz, *supra* note 73, at 12 (describing a case in which "none of the recipient charities . . . [bore] any logical relationship to the plaintiff class or the asserted claims" (citing Brief for Objector-Appellant at 19, Nachshin v. AOL, LLC, 663 F.3d 1034 (9th Cir. 2011) (No. 10-55129))).

the funds were distributed (or proposed to be distributed) via cy pres to charities that served a geographical area in which few, if any, class members resided.[95] In other cases, the proposed cy pres recipients were charities whose good works, while unquestioned, were wholly unrelated to the wrongs challenged in the class action litigation.[96] For example, in a class action alleging price-fixing by vendors of NASCAR race souvenirs, the court approved a cy pres distribution to ten charities, including the Make-a-Wish Foundation and the American Red Cross, which bore no discernible relationship to the absent class members or their claims.[97] In approving the distribution, the court relied on precedents approving distributions to "non-profit groups unrelated to the plaintiffs' original claims."[98]

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95. *E.g.*, *Nachshin*, 663 F.3d at 1040 (concluding that approval of the cy pres distribution was an abuse of discretion in part because the class included persons residing throughout the United States, whereas two-thirds of the proposed donations would have been made to local charities in Los Angeles); Am. Soc'y of Travel Agents v. United Airlines, Inc. (*In re* Airline Comm'n Antitrust Litig.), 268 F.3d 619, 626 (8th Cir. 2001) (rejecting a cy pres distribution to "mostly local recipients" in a class action that was national in scope); Houck v. Folding Carton Admin. Comm., 881 F.2d 494, 502 (7th Cir. 1989) (setting aside grants to two Chicago law schools and urging the district court upon remand of a nationwide class action "to consider to some degree a broader nationwide use of its cy pres discretion"); Schwartz v. Dallas Cowboys Football Club, Ltd., 362 F. Supp. 2d 574, 577 (E.D. Pa. 2005) (rejecting a proposed distribution because "the relief proposed . . . would be limited to organizations based in the Philadelphia area"). *But see* Powell v. Georgia-Pacific Corp., 119 F.3d 703, 705 (8th Cir. 1997) (affirming a cy pres distribution of unclaimed funds to support scholarships for high school students living in the three Arkansas counties and the three Louisiana parishes in which most of the class members lived).

96. *See, e.g.*, Holtzman v. Turza, 728 F.3d 682, 689 (7th Cir. 2013) (noting that the charity named in the district court order "does not directly or indirectly benefit" the class); Fears v. Wilhelmina Model Agency, Inc., No. 02 Civ. 4911 (HB), 2007 U.S. Dist. LEXIS 48151 (S.D.N.Y. July 5, 2007) (in a class action alleging price-fixing in the modeling industry, approving a cy pres distribution to charities providing services of benefit to women in general, even though only a slim majority of the class members were female and the charities did not purport to advance the policy objectives underlying the antitrust law), *vacated on other grounds*, 315 F. App'x 333 (2d Cir. 2009) (summary order); *In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1395–99 (N.D. Ga. 2001).

97. *In re Motorsports Merch.*, 160 F. Supp. 2d at 1395–99 (explaining that the "[c]ourt has attempted to identify charitable organizations that may at least indirectly benefit the members of the class of NASCAR racing fans").

98. *Id.* at 1394 (citing Superior Beverage Co. v. Owens-Illinois, Inc., 827 F. Supp. 477, 478–79 (N.D. Ill. 1993); *In re* Folding Carton Antitrust Litig., 1991 U.S. Dist. LEXIS 2553 (N.D. Ill. Mar. 5, 1991), *aff'd in part, remanded in part*, 934 F.2d 323 (7th Cir. 1991)). *Accord* Fears v. Wilhelmina Model Agency, Inc., No. 02 Civ. 4911 (HB), 2005 U.S. Dist. LEXIS 7961, at *34–38 (S.D.N.Y. May 5,

In another case, this one alleging a price-fixing conspiracy in the modeling industry, the district court approved a cy pres distribution to a number of charities that provided services of benefit to women in general even though only approximately 60 percent of the class members were female and the charities did not purport to advance the policy objectives underlying the antitrust law at issue in the case.[99] In sum, as the Third Circuit explained,

> Cy pres distributions . . . 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 . . . . Cy pres distributions imperfectly serve that purpose by substituting for that direct compensation an indirect benefit that is at best attenuated and at worse illusory.[100]

### B. CY PRES DISTRIBUTIONS MAY SERVE THE INTERESTS OF THE DEFENDANT AT THE EXPENSE OF THE CLASS

Not only do some cy pres distributions fail to serve the interests of the class or the policies underlying their claims, but some stray so far as to serve the *defendant's* interests at the expense of the class. Typically, when a defendant makes a donation to charity in lieu of direct payments to class members, the defendant enjoys the good will and good publicity (and possibly even the tax deduction) associated with making a charitable gift, while the class members may receive little, if any, benefit from the charity's activities.[101] Consider, for example, the class action filed against Kellogg, the cereal company, in which plaintiffs alleged that advertisements had falsely claimed that children who ate Kellogg's cereal for breakfast were more attentive in school than other children.[102] As part of the class action settlement, Kellogg agreed to donate $5.5 million worth

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2005) (noting that the "courts' broad equitable powers now permit use of funds for other public interest purposes by educational, charitable, and other public service organizations" (quoting *Superior Beverage Co.*, 827 F. Supp. at 479)), *aff'd in part, vacated in part sub nom*; Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007) (holding that the district court had discretion to allocate unclaimed funds as treble damages to claiming class members).

99. *Fears*, 2007 U.S. Dist. LEXIS 48151, at *36–44. *See also Fears*, 2005 US. Dist. LEXIS 7961, at *34–53, 36 n.14.

100. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 169, 173 (3d Cir. 2013) (citing Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784–85 (7th Cir. 2004)).

101. *See, e.g.*, SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) ("[D]efendants reap goodwill from the donation of monies to a good cause.").

102. Dennis v. Kellogg Co., 697 F.3d 858, 861–62 (9th Cir. 2012).

of its products to charity and to establish a $2.75 million settlement fund to satisfy class members' claims. Unclaimed funds would be donated to charities that feed the indigent, to be chosen by the parties and approved by the court.[103] The U.S. Court of Appeals for the Ninth Circuit reversed the district court order approving the settlement, holding that the cy pres awards were "divorced from the concerns embodied in consumer protection laws" invoked by the class; charities that feed the indigent have "little or nothing" to do with consumer protection.[104] Recognizing the need to "pay[] special attention" to settlement terms indicating "incentives favoring pursuit of self-interest rather than the class's interests,"[105] the court questioned whether Kellogg could treat the distribution of cereal to organizations that feed the poor and its donation of the unclaimed funds as tax-deductible charitable donations, and whether it could donate the unclaimed funds in place of a charitable donation it had already pledged to make.[106]

In other cases, courts have approved cy pres distributions to organizations in which the defendants had pre-existing interests.[107] For example, in a class action brought on behalf of purchasers of satellite television packages of National Football League ("NFL") games, the court approved a cy pres distribution of unclaimed funds to NFL Youth Education Town Centers, which were youth centers funded in part by the defendant NFL. Likewise, in a case against Facebook, the Ninth Circuit approved a settlement pursuant to which Facebook paid *no* money to class members other than the named representatives, but paid $3 million in attorneys' fees and $6.5 million to set up a new charity to be run by Facebook's own Director of Public Policy together with two other directors.[108]

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103. *Id.* at 862–63, 866.

104. *Id.* at 866 (quoting Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011)).

105. *Id.* at 867 (quoting Staton v. Boeing Co., 327 F.3d 938, 960 (9th Cir. 2003)).

106. *Id.* at 867–68. *See also* Radosti v. Envision EMI, LLC, 717 F. Supp. 2d 37, 64 (D.D.C. 2010) (expressing concern that the defendant would use the cy pres distribution "as a promotional tool").

107. *See, e.g.*, *In re* EasySaver Rewards Litig., 921 F. Supp. 2d 1040, 1058 (S.D. Cal. 2013) (approving a cy pres distribution to a law school attended by both defense counsel and class counsel); Schwartz v. Dallas Cowboys Football Club Ltd., 362 F. Supp. 2d 574, 577 (E.D. Pa. 2005) (approving a cy pres distribution to community youth centers that were funded in part by the defendant).

108. Lane v. Facebook, Inc., 696 F.3d 811, 817–18, 820–22 (9th Cir. 2012), *cert. denied sub nom.* Marek v. Lane, 134 S. Ct. 8 (2013) (mem.). The settlement agreement also established a Board of Legal Advisors for the new charity consisting of defense counsel and class counsel. *Id.* at 817–18. *See also infra* Part VI.B.

### C. CY PRES DISTRIBUTIONS MAY SERVE THE INTERESTS OF CLASS COUNSEL AT THE EXPENSE OF THE CLASS

Cy pres distributions are subject to criticism not only because they may fail to serve the interests of the class and may even benefit the defendants whose wrongdoing gave rise to the suit, but also because they may benefit class counsel at the expense of the class. Since attorneys' fees in class actions are often calculated as a percentage of the recovery,[109] class counsel benefits if the overall recovery is large regardless of whether class members actually receive it.[110] In fact, awarding attorneys' fees based on the size of the entire settlement rather than the amount actually claimed by class members can create a conflict of interest between class counsel and the class.[111] As the Third Circuit noted:

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109. Although courts may use either the lodestar or percentage of recovery approach in calculating fees, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 176 (3d Cir. 2013), they "have trended toward the percentage-of-the-fund approach in cases involving the creation of a common fund for the class." Tidmarsh, *supra* note 11, at 786. *See, e.g.*, *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821 (3d Cir. 1995) ("Courts use the percentage of recovery method in common fund cases on the theory that the class would be unjustly enriched if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class."); Bowling v. Pfizer, Inc., 922 F. Supp. 1261, 1279 (S.D. Ohio 1996) (noting a "clear trend . . . to award a reasonable percentage of the [common] fund" (citing Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1267 (D.C. Cir. 1993))); *In re* Chrysler Motors Corp. Overnight Evaluation Program Litig., 736 F. Supp. 1007, 1009, 1016 (E.D. Mo. 1990).

110. *See, e.g.*, SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) (noting that "the attorney's fee award is exaggerated by cy pres distributions that do not truly benefit the plaintiff class"); Redish, Julian & Zyontz, *supra* note 9, at 640 ("[O]ne of the primary effects, if not purposes, of class action cy pres is to inflate the size of class attorneys' fees."); Beisner, Miller & Schwartz, *supra* note 73, at 13 ("Cy pres awards also create the potential for conflicts of interest by ensuring that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated."); George Krueger & Judd Serotta, Op-Ed., *Our Class-Action System is Unconstitutional*, WALL ST. J. (Aug. 6, 2008), http://online.wsj.com/articles/SB121798040044415147 (bemoaning "that attorneys . . . have received fees that are entirely divorced from the harm actually recognized by the people they supposedly represent"). Stated more pointedly, "the fundamental flaw in cy pres relief . . . is that it provides no incentive to class counsel to negotiate the optimal class settlement—the settlement that maximizes the net social benefit to a class of optimal size and claim structure." Tidmarsh, *supra* note 11, at 782.

111. Tidmarsh, *supra* note 11, at 772, 782. Redish frames this concern in terms of due process: "By disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens the due process rights of those class members. In this manner, the practice unconstitutionally undermines the due process obligation of those representing absent class members to vigorously advocate on their behalf and defend their legal rights." Redish, Julian & Zyontz,

> Cy pres distributions . . . present a potential conflict of interest between class counsel and their clients because the inclusion of a cy pres distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class. . . . Arrangements such as [these] . . . decouple class counsel's financial incentives from those of the class. . . .[112]

Moreover, the perennial risk of collusion between the defendant and class counsel[113] is enhanced in this context since defendants may prefer cy pres distributions for the reasons described in Part V.B above, and class counsel's interest in maximizing its fees is satisfied regardless of whether the settlement funds are paid to class members or distributed cy pres.[114] A

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*supra* note 9, at 650 (citing Hansberry v. Lee, 311 U.S. 32, 45–46 (1940)). On the basis of an empirical study, he concludes that "cy pres awards . . . can also increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefiting the plaintiff." *Id.* at 661.

112. *In re Baby Prods.*, 708 F.3d at 173; *id.* at 178 (quoting Int'l Precious Metals Corp. v. Waters, 530 U.S. 1223, 1224 (2000) (statement of O'Connor, J., respecting the denial of the petition for a writ of certiorari)). *See also Int'l Precious Metals*, 530 U.S. at 1224 (maintaining that the approval of attorneys' fees without considering "whether there must at least be *some* rational connection between the fee award and the amount of the actual distribution to the class" could have "several troubling consequences").

113. *See, e.g.*, Jones v. GN Netcom, Inc. (*In re* Bluetooth Headset Prods. Liab. Litig.), 654 F.3d 935, 947 (9th Cir. 2011) (stating that courts "must be particularly vigilant . . . for more subtle signs that class counsel ha[s] allowed pursuit of their own self-interests . . . to infect the negotiations"); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 232–33 (1983) ("[T]he plaintiff's attorney is subject to a serious conflict of interest—one that can distort the settlement process and reduce the deterrent effect of private litigation—whenever the determination of the fee award is not made a sufficiently direct function of the size of the recovery so as to align the interests of the private enforcer with those of the class he purports to represent."); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 473 (2000) ("The defendant may even agree not to oppose class counsel's application for exorbitant fees . . . if class counsel agrees to the low-ball offer. The pressure on class counsel to collude with the defendant in this manner may be extreme." (footnote omitted)); Brian Wolfman, *Judges! Stop Deferring to Class-Action Lawyers*, 2 U. MICH. J.L. REFORM ONLINE 80, 86 (2013) (noting the absentees' inability to monitor class counsel and the resultant "possibility of collusive (or at least sub-optimal) deals").

114. *See, e.g.*, Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004) (questioning whether it would "be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and [the defendant] wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself"); Redish, Julian & Zyontz, *supra* note 9, at 621 ("[I]n many class actions it is solely the use of cy pres that assures distribution of a . . . fund sufficiently large to guarantee substantial attorneys' fees . . . ."); Tidmarsh, *supra* note 11, at 768 n.2, 782 (noting that "the desire for a larger fee is one reason that the cy pres approach . . . may be attractive to counsel," and stating that "cy pres may provide an incentive for some rapacious putative class

cy pres distribution coupled with a "clear sailing" agreement by which the defendant agrees not to challenge class counsel's fee application would advance the interests of both class counsel and the defendant at the expense of the class.[115]

### D. CY PRES DISTRIBUTIONS MAY CREATE AN APPEARANCE OF IMPROPRIETY

Cy pres distributions not only exacerbate the risk of conflicts of interest between class counsel and the class, but they also may enhance the risk that judges will, or will appear to, engage in improper behavior.[116] Rather than designate specific beneficiaries to whom unclaimed funds should be distributed or list potential beneficiaries from which the court may choose cy pres recipients,[117] some settlement agreements simply give the judge discretion to designate a charity or charities to which unclaimed funds should be donated.[118] If this discretion is not constrained, the judge

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counsel to undercut efforts to achieve a settlement large enough to deliver individual relief to class members").

115. *See, e.g.*, *Jones*, 654 F.3d at 947 ("[A] 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds . . . carries '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.'" (quoting Lobatz v. U.S. W. Cellular of Cal., Inc., 222 F.3d 1142, 1148 (9th Cir. 2000)); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 48–49, 48 n.58 (2002) (explaining that defendants often lack an incentive to scrutinize class counsel's fees if they are paid from the settlement fund); Tidmarsh, *supra* note 11, at 785 & n.58 (describing clear sailing arrangements).

116. *See, e.g.*, Holtzman v. Turza, 728 F.3d 682, 689 (7th Cir. 2013) (expressing "skepticism about using the residue of class actions to make contributions to judges' favorite charities"); Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011) ("[T]he specter of judges . . . dealing in the distribution and solicitation of settlement money may create the appearance of impropriety." (quoting SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009))); Yospe, *supra* note 42, at 1027 (noting that discretion regarding the choice of a cy pres recipient may "lead to questions of bias").

117. The ALI Principles provide that "[t]he court, when feasible, should require *the parties* to identify a recipient whose interests reasonably approximate those being pursued by the class" and further direct the court to "give weight to the parties' choice of recipient." ALI PRINCIPLES, *supra* note 11, § 3.07(c) & cmt. b (emphasis added).

118. *E.g.*, Rohn v. Tap Pharm. Prods. (*In re* Lupron Mktg. & Sales Practices Litig.), 677 F.3d 21, 24 (1st Cir. 2012) (stating that the settlement agreement provided that "all unclaimed funds would go into a cy pres fund to be distributed at the discretion of the trial judge"); Wilson v. Sw. Airlines, Inc., 880 F.2d 807, 810 (5th Cir. 1989) (reviewing a cy pres distribution made pursuant to a consent decree, which provided that "[a]ny residual fund may be utilized, after all payment of backpay, as the Court directs"). *See also Nachshin*, 663 F.3d at 1037, 1040 (rejecting a settlement that authorized donations to

might choose to distribute unclaimed funds to "favored charities, alma maters, and the like."[119] As the U.S. Court of Appeals for the First Circuit has noted, "having judges decide how to distribute cy pres awards both taxes judicial resources and risks creating the appearance of judicial impropriety."[120]

Thus, while judges may prefer cy pres distributions to the alternatives of reversion, escheat and supplemental distributions to claimants, the proposed "solution" has problems of its own, including an appearance of impropriety by the judges themselves. We turn now to two cases that vividly illustrate these problems.

## VI. VIVID ILLUSTRATIONS OF THE PROBLEMS WITH CY PRES DISTRIBUTIONS

### A. *IN RE BABY PRODUCTS ANTITRUST LITIGATION*

In its first opinion addressing the use of cy pres in the class action context,[121] the Third Circuit reviewed a district court order approving the

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three charities agreed to by the parties upon the district court's suggestion).

119. Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007), http://www.nytimes.com/2007/11/26/washington/26bar.html. *See also* R. Robin McDonald, *Retirement Ends JQC Probe; Judge Douglas Pullen to Step Down Amid Questions Involving Unserved Prison Term, Distribution of 'Cy Pres' Funds*, DAILY REP., Aug. 24, 2011, at 1 (reporting the retirement of a judge "in the middle of an ethical inquiry" by a judicial commission; noting that the investigation was exploring, among other issues, the judge's approval of distributions of cy pres funds to his undergraduate and law school alma maters, following which the university awarded the judge an honorary degree); Daniel J. Popeo, *Online Privacy Organizations Get "Buzzed" on Millions from Google Lawsuit Settlement*, FORBES (June 2, 2011), http://www.forbes.com/sites/docket/2011/06/02/online-privacy-organizations-get-buzzed-on-millions-from-google-lawsuit-settlement (discussing a settlement in which the judge independently nominated the university at which he lectured as a cy pres recipient). For an extreme case, see *Ky. Bar Ass'n v. Bamberger*, 354 S.W.3d 576, 578–79 (Ky. 2011) (ordering the permanent disbarment of a judge who, after an ex parte meeting with plaintiffs' counsel and their trial consultant, approved the establishment of a charitable entity to which the attorneys directed $20 million in "excess funds" and from which they later received large monthly directors' fees; the judge himself "accepted the plaintiffs' attorneys' invitation to become a paid director" of the charitable entity and received $48,150 from it).

120. *In re Lupron Mktg.*, 677 F.3d at 38.

121. In an earlier Third Circuit case, the late Judge Joseph Weis expressed an opinion regarding cy pres, which the majority did not address. *See In re* Pet Food Prods. Liab. Litig., 629 F.3d 333, 363–64 (3d Cir. 2010) (Weis, J., concurring and dissenting) (expressing reservations about the invocation of the cy pres doctrine in the class action context).

settlement in *In re Baby Products Antitrust Litigation*,[122] which sought to resolve two consolidated antitrust class actions filed against Toys "R" Us, Babies "R" Us, and manufacturers of baby products.[123] Filed in the U.S. District Court for the Eastern District of Pennsylvania, the class actions alleged that the defendants had conspired to set a price floor for certain products, thereby causing class members to pay more than they otherwise would have paid for the products.[124] The district court certified a class of purchasers and created several subclasses for persons who had purchased specific products during particular time periods.[125] About eighteen months later, the parties to the two class actions jointly moved for preliminary approval of a settlement.[126]

After a fairness hearing, the district court approved a settlement of the claims for $35.5 million, of which one-third would be paid to class counsel for attorneys' fees ($11.83 million) and litigation expenses ($2.23 million).[127] Under the settlement, claimants who submitted proof of purchase of a qualifying baby product would receive 20 percent of the purchase price (the amount they overpaid due to defendants' illegal behavior), but claimants who lacked proof of purchase would receive only five dollars.[128] Thus, a class member who purchased a three hundred dollar stroller covered by the settlement would have been eligible to receive sixty dollars if she submitted proof of purchase. If the portion of the settlement fund allocated to a particular subclass were not exhausted, members of that subclass who had submitted proof of purchase would be eligible to receive up to three times the original amount of their award,[129] consistent with the

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

123. *Id.* at 168–70, 181.

124. *Id.* at 170.

125. *Id. See* McDonough v. Toys "R" Us, Inc., 638 F. Supp. 2d 461 (E.D. Pa. 2009) (creating subclasses). The second class action was filed later in the year. Class Action Complaint, Elliott v. Toys "R" Us, Inc., No. 2:09-cv-06151-AB (E.D. Pa. Dec. 28, 2009), ECF No. 1.

126. Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Classes and for Permission to Disseminate Class Notice, McDonough v. Toys "R" Us, Inc., No. 2:06-cv-0242-AB (E.D. Pa. Jan. 21, 2011), ECF No. 38. *See also In re Baby Prods.*, 708 F.3d at 170 (stating that the parties in the two class actions "signed an agreement consolidating and settling their lawsuits").

127. McDonough v. Toys "R" Us, Inc., 834 F. Supp. 2d 329 (E.D. Pa. 2011), *vacated by In re Baby Prods.*, 708 F.3d at 181–82. *See also In re Baby Prods.*, 708 F.3d at 170 (describing the district court orders).

128. *In re Baby Prods.*, 708 F.3d at 170–71.

129. *Id.* at 171.

Clayton Act's provision for treble damages.[130] If funds still remained, qualifying members of other subclasses would be eligible to receive treble damages. Finally, if funds remained after providing treble damages to all claimants who submitted proof of purchase, the remaining funds would be donated to charitable organizations selected by the court from among those suggested by the parties.[131] Thus, it appeared that the parties had negotiated a settlement agreement that would pay significant sums of money to class members and employed cy pres only as a last resort.

But appearances can be deceiving. In fact, because the vast majority of claimants failed to submit proof of purchase and therefore qualified to receive only five dollars each, it turned out that class members would receive only about $3 million of the $35.5 million settlement, or less than 10 percent of the total fund.[132] Reviewing the settlement on an appeal filed by an objecting absentee class member, the Third Circuit vacated the orders approving it because the district court lacked the facts needed to assess its fairness.[133]

In explaining its decision, the Third Circuit focused on the informational deficiencies suffered by the district court and the potential conflict of interest between the class and its counsel.[134] In terms of informational deficiencies, the Third Circuit emphasized the lower court's lack of awareness that only approximately $3 million dollars of the settlement fund would be distributed to class members, with the rest of the $21.5 million available after attorneys' fees and expenses to be paid to charities.[135] Moreover, in approving the five-dollar cap on compensation for those lacking proof of purchase, the district court had assumed that the standard of proof required for a higher award would be "fairly low" and a risk of fraud justified it.[136] But the small fraction of prospective claimants who actually submitted proof of purchase belied the assumption about the ease of proving purchase.[137] In short, what concerned the Third Circuit was that the district court "approved the settlement without being made aware that almost all claimants would fall into the $5 compensation category,

130. 15 U.S.C. § 15(a) (2012).

131. *In re Baby Prods.*, 708 F.3d at 171.

132. *Id.*

133. *Id.* at 175.

134. *See infra* notes 240–242, 271–273 and accompanying text.

135. *In re Baby Prods.*, 708 F.3d at 175.

136. *Id.*

137. *Id.*

resulting in minimal (and we doubt sufficient) compensation going directly to class members."[138]

In that one sentence, the Third Circuit not only chided the district court for approving a cy pres distribution without the requisite facts, but it also chastised class counsel for negotiating a settlement that *appeared* to put lots of money into the hands of the class while in fact achieving very little in that regard. But that was not the court's only criticism of class counsel. Earlier in the opinion, the Third Circuit subtly chastised counsel for "not provid[ing] . . . information"[139] to the district court about the very low claims rate, and later it questioned "whether agreeing to a settlement with such a restrictive claims process was in the best interest of the class."[140] Reinforcing its reservations about class counsel's efforts, the appellate court encouraged the parties on remand to consider altering the settlement's terms to "provide greater direct benefit to the class, such as by increasing the $5 payment or lowering the evidentiary bar for receiving a higher award."[141]

In vacating the award of attorneys' fees and addressing the objector's argument that such fees should be discounted whenever a portion of the settlement is distributed cy pres,[142] the Third Circuit commented more explicitly on the potential conflict of interest between class counsel and the class:

> We appreciate . . . that awarding attorneys' fees based on the entire settlement amount rather than individual distributions creates a potential conflict of interest between absent class members and their counsel. "Arrangements such as [these] . . . decouple class counsel's financial incentives from those of the class . . . . They potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class." . . . Class members are not indifferent to whether funds are distributed to them or to cy pres recipients, and class counsel should not be either.[143]

While declining to adopt a categorical rule that would require district

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138. *Id.* at 176.

139. *Id.* at 175.

140. *Id.* at 176.

141. *Id.* at 175.

142. *Id.* at 177.

143. *Id.* at 178 (citation omitted) (quoting Int'l Precious Metals Corp. v. Waters, 530 U.S. 1223, 1224 (2000) (statement of O'Connor, J., respecting the denial of the petition for a writ of cert.)).

courts to discount attorneys' fees whenever some or all of the settlement fund would be distributed cy pres,[144] the Third Circuit did encourage district courts to decrease attorneys' fee awards when they have "reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class."[145] Here, while the *Baby Products* settlement "had the potential to compensate class members significantly," the Third Circuit concluded that "the current distribution of settlement funds arguably overcompensates class counsel at the expense of the class."[146]

Thus, *Baby Products* illustrates how a potential conflict of interest between class counsel and the class can result in a settlement that distributes too little money to the class and too much to charity cy pres. It also illustrates the importance of ensuring that the trial court has accurate and complete information about the proposed settlement and the likelihood that it will provide direct benefit to the class.[147]

### B. *LANE V. FACEBOOK, INC.*

If the *Baby Products* settlement is subject to criticism because class members received such a small percentage of the settlement fund, the settlement in *Lane v. Facebook, Inc.*[148] is even more problematic, both because the class members received *no* money (indeed no relief) whatsoever and because the cy pres recipient was a new charity in which

144. *Id.*

145. *Id.* The court invoked both a comment to the ALI Principles and a provision of the Class Action Fairness Act of 2005 ("CAFA") as support for the proposition that "the actual benefit provided to the class is an important consideration when determining attorneys' fees." *Id.* at 179 & n.13 (citing 28 U.S.C. § 1712(a) (2012) (requiring courts to calculate attorneys' fees based on the value of coupons that are *redeemed* rather than the face value of coupons issued in class action settlements) and ALI PRINCIPLES, *supra* note 11, § 3.13 cmt. a ("[B]ecause 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.")). *See also infra* notes 203–213 and accompanying text.

146. *In re Baby Prods.*, 708 F.3d at 179.

147. At the same time, the case illustrates the difficulty of ensuring that the trial court will receive accurate and complete information in any settlement class action; once class counsel and defense counsel reach a settlement in a case, it is in their shared interest to withhold from the court any information that calls the adequacy of the settlement into question. *See infra* Parts VII.B & C for proposals to help address these informational deficiencies.

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

the defendant had an interest. Moreover, while the problematic settlement in *Baby Products* was vacated by the Third Circuit,[149] the troubling settlement in the Facebook litigation was actually *affirmed* by the Ninth Circuit.[150]

The plaintiffs in *Lane* challenged a program called Beacon, which Facebook launched in late 2007. Beacon shared information about Facebook members' Internet activity with their online "friends."[151] In particular, Beacon announced on members' Facebook profiles their interactions with participating websites that had contracted with Facebook to participate in the program. For example, if a Facebook member rented a movie from Blockbuster.com, Facebook would announce the movie rental on the member's personal profile and on her friends' "News Feeds."[152] Facebook did not require members' affirmative consent to participate in the Beacon program, and many members complained that Beacon resulted in the posting of private information.[153] For instance, the named plaintiff, Sean Lane, had bought a ring from Overstock.com as a Christmas present for his wife; but Facebook ruined the surprise by sharing the news with his seven hundred Facebook friends before he gave the ring to his wife and by revealing, perhaps to her disappointment, "that he had bought [the ring] cheaply."[154]

Nineteen plaintiffs filed a class action complaint in the U.S. District Court for the Northern District of California against Facebook and the online companies participating in the Beacon program.[155] The complaint alleged violations of various federal and state privacy statutes,[156] including the Electronic Communications Privacy Act of 1986,[157] the Computer

149. *In re Baby Prods.*, 708 F.3d at 181.

150. *Lane*, 696 F.3d at 826.

151. *Id.* at 816.

152. Class Action Complaint at 23, 27, Lane v. Facebook, Inc., No. 5:08-cv-03845 (N.D. Cal. Aug. 12, 2008), ECF No. 1. *See also Lane*, 696 F.3d at 816.

153. *Lane*, 696 F.3d at 816. Opting out of the program was difficult. *Id.* at 827 (Kleinfeld, J., dissenting). *See also* Marek v. Lane, 134 S. Ct. 8, 8 (2013) (statement of Roberts, C.J., respecting the denial of certiorari) ("[A] member had to affirmatively opt out [using a] pop-up window that appeared for about ten seconds . . . .").

154. *Lane*, 696 F.3d at 827 (Kleinfeld, J., dissenting).

155. Class Action Complaint, *supra* note 152, at 2. *See also Lane*, 696 F.3d at 816.

156. Class Action Complaint, *supra* note 152, at 3–4.

157. 18 U.S.C. § 2510 (2012).

Fraud and Abuse Act,[158] the Video Privacy Protection Act,[159] the California Consumers Legal Remedies Act,[160] and the California Computer Crime Law.[161]

While Facebook's motion to dismiss was pending, the parties engaged in protracted settlement negotiations and eventually submitted a settlement agreement to the district court for preliminary approval.[162] Pursuant to the settlement agreement, Facebook agreed to permanently terminate the Beacon program,[163] although the agreement inexplicably permitted Facebook "to reinstitute the same program under a different name."[164] In addition, Facebook agreed to pay $9.5 million to settle the claims and not to oppose class counsel's request for approximately $3 million of that amount for attorneys' fees, administrative costs, and incentive payments to the named representatives.[165] *None* of the remaining $6.5 million would be paid to absent class members; instead, it would be used to set up a new charity, the Digital Trust Foundation ("DTF"), which was intended 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."[166] DTF would be run by a three-member board of directors; one of the initial directors would be Facebook's Director of Public Policy.[167] Class counsel and Facebook's counsel would serve on DTF's Board of Legal Advisors.[168] The settlement purported to bind not

158. *Id.* § 1030.

159. *Id.* § 2710.

160. CAL. CIV. CODE § 1750 (West 2009).

161. CAL. PENAL CODE § 502 (West 2010).

162. Lane v. Facebook, Inc., 696 F.3d 811, 826 (9th Cir. 2012), *cert. denied sub nom.* Marek v. Lane, 134 S. Ct. 8 (2013) (mem.).

163. *Id.*

164. *Id.* at 828 (Kleinfeld, J., dissenting). Apparently this form of "relief" is one that Facebook has offered elsewhere. *See* Fraley v. Facebook, Inc., 966 F. Supp. 2d 939, 945 (N.D. Cal. 2013) (approving, in a class action that challenged Facebook's "Sponsored Stories" program, which used the names and likenesses of Facebook users to promote products and services, a settlement that neither "ended Sponsored Stories, [nor] set up an 'opt-in' rather than a[n] 'opt-out' system, [nor] even provided for members to be paid for use of their names and likenesses").

165. *Lane*, 696 F.3d at 817; *id.* at 832 (Kleinfeld, J., dissenting) (describing "a version of a clear sailing agreement").

166. *Id.* at 817 (quoting the settlement agreement).

167. *Id.*

168. *Id.* at 817–18.

only the class members on whose behalf the suit had been filed, but also a broader group of Facebook users who would be precluded from suing Facebook for harms caused by the Beacon program.[169] Following a fairness hearing, at which several class members voiced their objections, the district court certified a settlement class and approved the settlement.[170]

On appeal, the Ninth Circuit affirmed the district court order, concluding that the trial court had not abused its discretion in finding the settlement "fair, reasonable, and adequate."[171] Several features of the settlement call that conclusion into serious question, however. First, the value of the class members' claims may have exceeded the $9.5 million that Facebook agreed to pay to settle them.[172] For example, some of the class members had claims under the Video Privacy Protection Act ("VPPA"), which bars "video tape service providers" from disclosing "personally identifiable information" about its consumers.[173] VPPA "provides for liquidated damages in the amount of $2500," as well as punitive damages and attorneys' fees, for violations of the act.[174] While Facebook had a "good argument that it was not itself a 'video tape service provider'" under VPPA, it "still had a risk of some sort of vicarious, joint, or 'civil conspiracy' liability. If found liable, it was a deep pocket target for the punitive damages for which the statute expressly provides."[175] Once class counsel had reached a settlement with the defendant, however, it no longer had an incentive to present the court with proof of the strength of these claims. Given that the class members lacked the resources and incentive to monitor class counsel, the trial court may have lacked the information needed to assess the adequacy of the settlement.[176]

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169. Marek v. Lane, 134 S. Ct. 8, 9 (2013) (statement of Roberts, C.J., respecting the denial of certiorari); *Lane*, 696 F.3d at 832 (Kleinfeld, J., dissenting).

170. *Lane*, 696 F.3d at 818; Findings of Fact, Conclusions of Law, and Order Approving Settlement at 3–5, 10, Lane v. Facebook, Inc., No. 5:08-cv-03845-RS (N.D. Cal. Mar. 17, 2010), ECF No. 123.

171. *Lane*, 696 F.3d at 818, 825 (quoting FED. R. CIV. P. 23(e)).

172. Petition for Writ of Certiorari at 21, Marek v. Lane, 134 S. Ct. 8 (2013) (No. 13-136), 2013 WL 3944136 (noting that the "settlement approval affirmed by the Ninth Circuit ma[de] no attempt to estimate the value of class members' claims").

173. *Lane*, 696 F.3d at 822 (quoting 18 U.S.C. § 2710(b) (2012)).

174. *Id.* at 822, 828 n.1 (citing 18 U.S.C. § 2710(c)(2)).

175. *Id.* at 833 (footnote omitted).

176. *Id.* at 829 (noting that absent class members "are in no position to prevent class counsel from pursuing his own interests at their expense").

Second, even if $9.5 million adequately valued the class claims, not one penny of that money was paid to the absentees. They did not even receive coupons,[177] a form of compensation suspicious enough to prompt regulation by Congress.[178] While the Ninth Circuit concluded that it would have been too burdensome to distribute the settlement fund directly to class members because their individual claims were "*de minimis*,"[179] that conclusion derives at least in part from the questionable size of the settlement fund and the attorneys' agreement, at the end of the day, to enlarge the size of the class.[180]

Third, serious doubts surround the decision to use the settlement funds to create the DTF. After all, the defendant, Facebook, retained a significant degree of control over the cy pres recipient, creating a conflict of interest.[181] Moreover, while Ninth Circuit precedent requires consideration of the recipient's relation to the class and its "record of service" in remedying the types of wrongs alleged by the class,[182] DTF had *no* record of service against which to judge its commitment and ability to serve the interests of the class.[183] Nor was it created to "advance the objectives of the statutes relied upon in bringing suit."[184] While all of the federal statutes relied upon by the class were designed to "prevent[] the *unauthorized* access or disclosure of private information, . . . the DTF's sole stated purpose" was to provide education "on how to protect Internet privacy 'through *user control*.'"[185] As Judge Smith stated in his dissent from the denial of rehearing en banc,

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177. *Id.* at 832 (Kleinfeld, J., dissenting).

178. 28 U.S.C. § 1712 (2012) (regulating coupon settlements in class action litigation). *See infra* notes 199–215 and accompanying text.

179. *Lane*, 696 F.3d at 824–25.

180. *Accord* Petition for Writ of Certiorari, *supra* note 172, at 14 ("[T]he size of the fund, the number of class members, the absence of subclasses—were components of the settlement itself.").

181. *Lane*, 696 F.3d at 834 (Kleinfeld, J., dissenting) (noting the "incentive for collusion . . . where . . . there is nothing to stop Facebook and class counsel from managing the charity to serve their interests").

182. Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308–09 (9th Cir. 1990) (setting aside a cy pres distribution in part because the recipient did not have a "substantial record of service").

183. *Lane*, 696 F.3d at 834 (Kleinfeld, J., dissenting) ("The cy pres award in this case goes to a new entity with no past performance at all.").

184. Lane v. Facebook, Inc., 709 F.3d 791, 793–94 (9th Cir. 2013) (Smith, J., dissenting from the denial of rehearing en banc), *cert. denied sub nom.* Marek v. Lane, 134 S. Ct. 8 (2013).

185. *Id.* at 794 (quoting *Lane*, 696 F.3d at 822).

> [A]n appropriate cy pres recipient must be dedicated to protecting consumers from the precise wrongful conduct about which plaintiffs complain. But an organization that focuses on protecting privacy solely through 'user control' can *never* prevent unauthorized access or disclosure of private information where the alleged wrongdoer *already has unfettered access* to a user's records.[186]

In sum, it is hard to see how the cy pres remedy proposed here—the creation of the DTF—bore "a direct and substantial nexus to the interests of absent class members and thus properly provide[d] for the 'next best distribution' to the class."[187]

As in *Baby Products*, the problems in *Lane* likely arose because class counsel's self-interest in securing a healthy fee and the defendant's interest in settling the class claims cheaply could both be satisfied by a cy pres distribution that denied the class sufficient direct benefit, and because the courts lacked either the inclination or the information needed to carefully scrutinize the settlement.

## VII. PRAGMATIC PROPOSALS TO MINIMIZE RELIANCE ON, AND TO IMPROVE THE EFFICACY OF, CY PRES DISTRIBUTIONS

While cy pres distributions may be necessary when direct payments to individual class members are economically infeasible, the cases analyzed in Part VI demonstrate that endemic agency problems in class actions contribute to their overuse. While clients in non-class litigation have an incentive to monitor the performance of their counsel, in the class action context class members lack that incentive because their individual claims are too small to justify monitoring costs. Therefore, freed from the constraints that monitoring would impose, class counsel may seek to maximize its fee at the expense of the class. Parties with a duty to monitor or interest in monitoring class counsel—courts and objectors, respectively—typically lack the information they need to perform such monitoring. And courts themselves actually have a countervailing interest in approving class action settlements in order to clear their own dockets. Each of these factors plays a role in the overuse of cy pres distributions, and therefore each must be addressed in any proposal to minimize reliance on this often suboptimal remedy.

First, unconstrained by monitoring, class counsel may not work its

186. *Id.* (citations omitted).

187. *Lane*, 696 F.3d at 821.

hardest to negotiate a settlement that maximizes recovery for the class because its fees are the same regardless of whether the settlement fund is paid to the class or to a charity via cy pres.[188] This potential conflict of interest between class counsel and the class may result in settlements that distribute too little money to the class, too much money to charities, and generous attorneys' fees to class counsel regardless of how well (or poorly) they serve the class.

Second, neither the absent class members, nor potential objectors, nor even the trial courts themselves have the information needed to monitor class counsel's performance to ensure that counsel is trying its hardest to secure the best recovery for the class.[189] By the time class counsel and the defendant have negotiated a settlement, their interests are aligned in obtaining judicial approval of the settlement and the court does not receive an adversarial presentation identifying the weaknesses of the settlement. These informational deficiencies hamper efforts to monitor,[190] and when coupled with the potential conflict of interest described above, increase the likelihood of sub-optimal settlements containing cy pres provisions.

Finally, the trial court may fail to vigorously scrutinize the class action settlement to determine whether its cy pres component is necessary and, if it is, whether it is carefully tailored to best serve the interests of the class. Courts may have their own reasons for preferring settlements to trials, and a judicial laissez-faire attitude may compound the foregoing problems.[191]

In this part, I offer four interrelated pragmatic proposals to address these problems. The proposal regarding attorneys' fees described in Part VII.A is designed to address the potential conflict of interest. The proposals regarding disclosure statements and devil's advocates, advanced in Parts VII.B and C, are designed to remedy informational deficiencies, to improve monitoring of class counsel, and to reduce reliance on cy pres distributions. The final proposal, described in Part VII.D, which requires courts to make certain findings when reviewing class action settlements with cy pres features, is designed to ensure rigorous judicial review by both trial and appellate courts and to minimize reliance on cy pres distributions.

188. *See supra* Part V.C.

189. *See infra* notes 240–242, 259–273, and accompanying text.

190. *See infra* notes 239–241, 266–273, and accompanying text.

191. *See infra* notes 285–286 and accompanying text.

### A. PRESUMPTIVE REDUCTION OF ATTORNEYS' FEES

Legal scholarship is rife with analyses of potential conflicts of interest between class counsel and the represented class.[192] As described in Part V.C above, this conflict may manifest itself when class counsel negotiates a settlement containing a cy pres distribution. If class counsel's fee is calculated as a percentage of the total recovery,[193] including the cy pres distribution, then class counsel may be indifferent to whether the settlement fund is paid to individual class members or to charities via cy pres. If defendants (and possibly even judges) prefer cy pres distributions[194] and class counsel is principally motivated to maximize its fee, class counsel may lack the incentive to push for a settlement that provides more a direct benefit for individual class members because its fee will be the same either way.[195]

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192. For classic treatments of the issue, see, for example, 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, 677 (1986) (discussing "the conflicts that arise between the interests of these attorneys and their clients in class and derivative actions" and hypothesizing that class actions "are uniquely vulnerable to collusive settlements that benefit plaintiff's attorneys rather than their clients"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 44–45 (1991) (noting the "severe conflict of interest" that class counsel often faces in negotiating class action settlements).

193. "Courts generally use one of two methods for assessing the reasonableness of attorneys' fees —a percentage-of-recovery method or a lodestar method." *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 176 (3d Cir. 2013). They "have trended toward the percentage-of-the-fund approach in cases involving the creation of a common fund for the class." Tidmarsh, *supra* note 11, at 786 (footnote omitted). *See also In re Baby Prods.*, 708 F.3d at 177 ("[T]he Supreme Court confirmed the permissibility of using the entire fund as the appropriate benchmark . . . ."); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821 (3d Cir. 1995) (discussing courts' common usage of the percentage of recovery method in class action cases and their reliance on "common fund" principles). Whichever method is employed, courts often use the other method to double-check the reasonableness of the initial fee determination. *See In re Baby Prods.*, 708 F.3d at 176 ("[I]t is sensible for a court to use a second method of fee approval to cross check its initial fee calculation." (internal quotation marks omitted) (quoting *In re* Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 333 (3d Cir. 1998))).

194. *See supra* Parts V.B and D.

195. *See supra* Part V.C. *See also* John Beisner & Jessica Davidson Miller, *Litigating in the New Class Action World: A Guide to CAFA's Legislative History*, 6 Class Action Litig. Rep. (BNA) No. 11, at 403, 413 (June 10, 2005) (stating that if attorneys' fees were based on the portion of a coupon settlement distributed cy pres to charities, "class counsel would have no incentive to ensure that the coupons [were] actually distributed to—and used by—the class members who were allegedly

To better align the interests of class counsel and the class, and to give class counsel a personal, financial incentive to push hard to get more money into the hands of individual claimants (as opposed to cy pres distributions to charities), I propose that courts alter the method they use to calculate attorneys' fees.[196] In particular, borrowing from the solution Congress adopted in the Class Action Fairness Act to address the problem of coupon settlements,[197] I propose that courts presumptively reduce attorneys' fees whenever all or a portion of the class action settlement is distributed to charities cy pres.

To put this proposal in context, consider the problems posed by coupon settlements in recent decades. To settle class action lawsuits filed against them, defendants offered coupons to class members to purchase their products at a reduced price.[198] Such settlements were a win-win for defendants because the product manufacturers did not have to pay anything out-of-pocket to settle the claims (other than attorneys' fees to class counsel and their own attorney), yet they benefitted from higher sales if

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aggrieved").

196. For other proposals to align the interests of the class and its counsel through the structure of attorneys' fee awards, see, for example, Coffee, *supra* note 192, at 725 (encouraging the use of a percentage of recovery attorneys' fee formula to reduce collusion and to promote self-policing); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 94–95 (2003) (analyzing proposals "to link attorneys' fees to the amount of benefit the attorney provides the class," but maintaining that they "capture[] only one aspect of the weak governance structure of class actions"); and Tidmarsh, *supra* note 11, at 784–97 (proposing three "friendly amendments" to Professor Kevin Clermont's hybrid approach to better align interests in the context of cy pres distributions). *See also* Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 546–66 (1978) (proposing a hybrid system—not focused on class actions—that would award attorneys' fees based on the number of hours worked on behalf of a client, plus a percentage of the portion of the recovery that exceeds the lodestar).

197. *See infra* notes 203–213 and accompanying text.

198. *E.g.*, S. REP. NO. 109-14, at 15–20 (2005) (recounting numerous examples of coupon settlements approved by state courts). *See also In re Gen. Motors*, 55 F.3d at 803 (expressing suspicion of settlements involving only "non-cash relief," such as coupons). The enactment of the Class Action Fairness Act did not eliminate coupon settlements. *E.g.*, *In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1176 (9th Cir. 2013) (reviewing the fee award in a class action challenging HP's business practices regarding its printers' ink cartridges in which the proposed settlement offered class members nontransferable coupons for HP printers and printer supplies that would expire six months after issuance); Radosti v. Envision EMI, LLC, 717 F. Supp. 2d 37, 54–64 (D.D.C. 2010) (approving a settlement that awarded class members vouchers for discounted tuition on other programs offered by the defendant).

absent class members actually used the coupons.[199] Unfortunately, the coupon settlements were often a lose-lose for class members because they received no cash in the settlement and the coupons that they did receive were of no value to them if they could not afford to use them.[200] The problem of valueless coupons was particularly pronounced when the coupons could not be transferred or aggregated or where they expired soon after issuance.[201] To make matters worse, while class members received coupons of questionable value, class counsel received substantial attorneys' fees.[202] Thus, in the coupon settlement context, like the cy pres context, the interests of the class and its counsel were "decoupl[ed]."[203]

In an effort to regulate coupon settlements and to "curb [other]

199. *See, e.g.*, *In re Gen. Motors*, 55 F.3d at 808 ("[T]he certificate settlement might be little more than a sales promotion for GM . . . .").

200. *Id.* at 807 ("[O]nly 14% of the class reported that they would 'definitely' or 'probably' buy a new truck" with the coupon offered in the settlement.); *id.* at 808 ("People of lesser financial means will be unable to benefit comparably from the settlement.").

201. Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1699 (2006) ("Techniques for suppressing redemption rates include . . . limiting the transferability of coupons . . . ."); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1015–23 (2002) (explaining how defendants diminish the value of coupon settlements, including limits on transferability); Michael Mallow & Livia Kiser, *The Elephant in the Room: Contingency Fees and the Future of Coupon Settlements After In re HP Inkjet Printer Litigation*, 14 Class Action Litig. Rep. (BNA) No. 17, at 1125 (Sept. 13, 2013); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443, 1445 (2005). *See also In re Gen. Motors*, 55 F.3d at 780, 807, 809–10 (describing the limits on the transferability of the coupons).

202. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4, 4 (2005) (codified as amended at 28 U.S.C. § 1711 (2012)) ("Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value . . . ."); S. REP. NO. 109-14, at 14–20, 30 (2005).

Coupon settlements may not have been as widespread as Congress imagined and surely were not the only class action settlements that awarded counsel "disproportionate" fees. *See, e.g.*, Klonoff & Herrmann, *supra* note 201, at 1711–12 ("[T]he focus on coupon settlements ignores the many other kinds of settlements that potentially result in 'disproportionate' awards to attorneys. . . . [C]oupon settlements constitute only a small fraction of all class settlements . . . ."); Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. 97, 132–34 (1997) (finding that coupons were the predominant form of relief in only 10 percent of the class action settlements studied in the mid-1990s).

203. *In re HP Inkjet Printer*, 716 F.3d at 1178.

perceived abuses of the class action device,"[204] Congress enacted the Class Action Fairness Act ("CAFA"),[205] which regulates coupon settlements in two principal ways.[206] First, § 1712 regulates awards of attorneys' fees in coupon class actions. Most relevant for our purposes is § 1712(a), which provides that when a class action settlement awards coupons to the class, "the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed."[207] In other words, class counsel's fee must be based on the fraction of the coupons that are *redeemed*, rather than on the total face value of the coupons that are awarded.[208] This provision was intended "to put an end to the 'inequities' that arise when class counsel receive attorneys' fees that are grossly disproportionate to the actual value

204. Tanoh v. Dow Chem. Co., 561 F.3d 945, 952 (9th Cir. 2009).

205. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended at 28 U.S.C. §§ 1711–15, 1332(d), 1453 (2012)).

206. *See* Klonoff & Herrmann, *supra* note 201, at 1698–1705 (describing and critiquing CAFA's efforts to regulate coupon settlements). In addition to regulating coupon settlements and other unfair aspects of class action settlements, CAFA enlarged both original federal subject matter jurisdiction and removal jurisdiction to shunt more class actions into federal court. *See* 28 U.S.C. §§ 1332(d), 1453. *See also* S. REP. NO. 109-14, at 28–29, 35–50 (2005).

207. 28 U.S.C. § 1712(a).

208. *Id.* Section 1712(b)(1) provides that "[i]f a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action." *Id.* § 1712(b)(1). There is some doubt about the scope of subsection (b), its relationship with subsection (a), and whether the two subsections, read together, permit a court to use a lodestar method to award attorneys' fees for negotiating a coupon settlement. *Compare In re HP Inkjet Printer*, 716 F.3d at 1181–87 (concluding that lodestar fees may not be awarded for the coupon portion of the class recovery) *and* Mallow & Kiser, *supra* note 201, at 1126 ("When coupons provide the sole basis for relief to the class, CAFA requires the attorneys' fees award to 'be based on the value to class members of the coupons that are redeemed.'" (quoting 28 U.S.C. § 1712(a))), *with* Blessing v. Sirius XM Radio Inc., 507 F. App'x 1, 4–5 (2d Cir. 2012) ("Even assuming that the coupon provisions of CAFA were applicable, the district court's approval of the proposed settlement and the attorneys' fee award was appropriate. . . . The district court approved the fee award after determining it was reasonable under the lodestar method . . . and is therefore consistent with CAFA."), *In re* Sw. Airlines Voucher Litig., No. 11 C 8176, 2013 U.S. Dist. LEXIS 143146, at *24 (N.D. Ill. Oct. 3, 2013) (concluding that "the statute allows for the calculation of fees in a coupon settlement using the lodestar-multiplier method"), *and* Beisner & Miller, *supra* note 195, at 413 ("[T]he law does not require that fees in coupon settlements be structured as contingency fees. Rather, the fees can be based upon the amount of time class counsel reasonably expended working on the action.").

of the coupon relief obtained for the class."[209] As the Report of the Senate Judiciary Committee on CAFA put it, Congress intended to link class counsel's fees to the "demonstrated value of coupons actually redeemed by the class members."[210]

Second, § 1712(e) requires greater judicial scrutiny of coupon settlements.[211] In addition to reiterating that district courts must scrutinize coupon settlements to ensure that they are "fair, reasonable and adequate,"[212] subsection (e) specifically regulates the use of cy pres to distribute unclaimed coupons:

> The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. *The distribution and*

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209. *In re HP Inkjet Printer*, 716 F.3d at 1179 (citing S. REP. NO. 109-14, at 29–32 (2005)). In cases in which "a coupon settlement also provides for non-coupon relief, such as equitable or injunctive relief," *id.* at 1183, the court should apply the lodestar method to calculate the attorneys' fees earned for non-coupon relief obtained. *Id.* at 1183–85 (interpreting 28 U.S.C. § 1712(b)). *See also* 28 U.S.C. § 1712(c) (governing attorneys' fees in cases in which a class action settlement provides for both coupon and equitable relief); S. REP. NO. 109-14, at 31 (2005) (stating that a portion of the fees should be determined by "time spent by class counsel" if some of the relief is equitable or injunctive).

210. S. REP. NO. 109-14, at 30 (2005).

211. 28 U.S.C. § 1712(e). *See also In re HP Inkjet Printer*, 716 F.3d at 1178 ("Section 1712 codifies Congress's effort to regulate coupon settlements. That regulation takes two forms. The first invites increased judicial scrutiny of coupon settlements generally." (citing 28 U.S.C. § 1712(e))).

212. *Compare* FED. R. CIV. P. 23(e)(2) ("If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."), *with* 28 U.S.C. § 1712(e) ("In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members."). Although the language of § 1712(e) mirrors Rule 23(e)(2), some courts have read § 1712(e) to impose a heightened level of scrutiny. *See, e.g.*, Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 654 (7th Cir. 2006) (stating in dicta that "Congress required heightened judicial scrutiny of coupon-based settlements" in CAFA); True v. Am. Honda Motor Co., 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010) ("[S]everal courts have interpreted section 1712(e) as imposing a heightened level of scrutiny in reviewing such [coupon] settlements."); Figueroa v. Sharper Image Corp., 517 F. Supp. 2d 1292, 1321 (S.D. Fla. 2007) (interpreting CAFA "to imply the application of a greater level of scrutiny to the existing criteria than existed pre-CAFA"). *But see* Radosti v. Envision EMI, LLC, 717 F. Supp. 2d 37, 55 (D.D.C. 2010) (finding that "the judicial scrutiny called for by § 1712(e) is indistinct from the scrutiny required by Rule 23(e)").

*redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.*[213]

Thus, while ensuring that unclaimed coupons do not go to waste (by permitting cy pres distributions to charities), subsection (e) clarifies that class counsel cannot receive attorneys' fees based upon the portion of the coupons that are distributed in this way.[214]

To ensure that class counsel has a strong incentive to negotiate a settlement that directly benefits the class and to discourage the use of cy pres distributions, I propose that courts presumptively reduce attorneys' fees in cases in which all or a portion of the settlement fund is distributed cy pres. Courts using a percentage of recovery method to calculate attorneys' fees could reduce attorneys' fees in a number of ways. Drawing upon the CAFA model, courts could calculate attorneys' fees as a percentage of only those settlement funds actually claimed by class members, and decline to award fees on the portion of the fund distributed to charities cy pres.[215] This "no fee" approach, which would deny class

213. 28 U.S.C. § 1712(e) (emphasis added).

214. Taking a similar tack, the Private Securities Litigation Reform Act provides that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class [in private securities class actions] shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest *actually paid to the class*." 15 U.S.C. § 78u-4(a)(6) (2012) (emphasis added). *See also* H.R. REP. NO. 104-369, at 36 (1995) (seeking to limit "the award of attorney's fees and costs to counsel for a class . . . to a reasonable percentage of the amount of recovery awarded to the class" and intending "to give the court flexibility in determining what is reasonable on a case-by-case basis"). *But see* Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 437–38 (2d Cir. 2007) ("[T]he entire fund created by the efforts of counsel presumably is 'paid to the class,' even if some of the funds are distributed under the Cy Pres Doctrine.").

At least one state law regulating coupon settlements imposes even greater limits on the fees recoverable by class counsel. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 26.003(b) (West 2008) ("[I]f any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney's fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.").

215. *See* Tidmarsh, *supra* note 11, at 788 ("[I]n calculating the amount of the recovery on which the percentage is calculated, a court must include only the amount distributed to class members[,] . . . use the net recovery to the class, rather than the gross recovery, as the fund of which counsel may receive a percentage[, and] . . . subtract[] . . . the costs of litigation—including the costs of delivering the remedy to individual class members" (footnotes omitted)); Beisner, Miller & Schwartz, *supra* note 73, at 19 ("[W]henever a settlement agreement includes a cy pres component, the fees awarded to class counsel should be tied to the value of money and benefits actually redeemed by the injured class members—not the theoretical value of the cy pres remedy.").

counsel any fee on the portion of the fund distributed cy pres, would align the interests of the class and its counsel by giving class counsel a very strong incentive to maximize the amount of money put into class members' hands. The disadvantage of the "no fee" approach is that it would reduce fees even for attorneys who work aggressively and valiantly to maximize class recovery.[216] Moreover, the "no fee" approach could discourage the filing of class actions in which cy pres relief would be the only viable (or principal) method for distributing the settlement fund. While some might welcome that result,[217] others might bemoan the loss of deterrence and disgorgement that class actions can achieve even when they fail to compensate absent class members for their losses.[218]

As an alternative to the CAFA "no fee" approach, courts could award class counsel a lower percentage of the portion of the settlement fund distributed cy pres.[219] Like the "no fee" approach, this "reduced fee" approach would give class counsel a financial incentive to maximize the portion of the settlement fund distributed directly to class members since counsel would receive a larger percentage of those funds actually paid to

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216. *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 178 (3d Cir. 2013) ("There are a variety of reasons that settlement funds may remain even after an exhaustive claims process—including if the class members' individual damages are simply too small to motivate them to submit claims. Class counsel should not be penalized for these or other legitimate reasons unrelated to the quality of representation they provided.").

217. *See* Redish, Julian & Zyontz, *supra* note 9, at 665 (advocating a denial of class certification in cases in which the court anticipates "significant unclaimed funds").

218. *E.g.*, Klonoff & Herrmann, *supra* note 201, at 1704 (questioning the sentence in section 1712(e) of CAFA that denies attorneys' fees on the portion of a coupon settlement that is distributed to charities cy pres, and expressing concern that "certain socially beneficial class action lawsuits will not be filed and misconduct will go undeterred"). *Cf. In re Baby Prods.*, 708 F.3d at 178 (disclaiming an interest in "discourag[ing] 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").

219. The ALI Principles appear to take this "reduced fee" approach. While the black letter rule provides that "[a]ttorneys' fees in class actions . . . should be based on *both* the actual value of the judgment or settlement to the class *and* the value of cy pres awards," ALI PRINCIPLES, *supra* note 11, § 3.13(a) (emphasis added), the comment adds that "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." *Id.* § 3.13(a) cmt. a. *See also, e.g.*, *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. . . . [D]iscounting the [cy pres] payment by 50% best values the benefit conferred on the class." (footnote omitted)).

the class and a smaller percentage of the remaining funds distributed cy pres. Arguably, the incentive to maximize payments to class members provided by the "reduced fee" approach would not be as great as the incentive provided by the "no fee" approach because under the former, class counsel would receive a fee, albeit a reduced one, even on the portion of the fund distributed to charity. On the other hand, class counsel would not be as discouraged from filing class actions that could achieve deterrence and disgorgement even if they could not ensure compensation to the absent class members.[220]

Courts employing the lodestar method should also seek to align the interests of the class and its counsel by presumptively discounting attorneys' fees whenever all or a portion of the settlement fund is distributed cy pres. To do so, courts employing the lodestar method should presumptively apply a "negative multiplier" whenever a portion of the settlement fund is distributed cy pres to charity.[221] In other words, after determining the number of hours reasonably spent representing the class and multiplying that number by a reasonable hourly rate, the court would reduce the total, by multiplying it by a number less than one, in light of counsel's failure to ensure that the entire settlement fund was distributed to class members. The size of the negative multiplier should reflect, among other things, the portion of the fund distributed cy pres.

Like the "no fee" and the "reduced fee" methods described above, the "negative multiplier" method would reduce attorneys' fees in cases in which class members did not claim the entire settlement fund. Professor Tidmarsh's suggestion that "only hours spent working to generate compensation for class members should count"[222] would achieve the same result. I prefer the "negative multiplier" approach because it avoids the difficult task of determining which attorney-hours actually resulted in compensation for the class.

Regardless of whether the court applies a percentage of recovery method, a lodestar method, one of these methods cross-checked by the

220. *See supra* note 218.

221. *See, e.g.*, Jones v. GN Netcom, Inc. (*In re* Bluetooth Headset Prods. Liab. Litig.), 654 F.3d 935, 942 (9th Cir. 2011) (using the term "negative multiplier" to refer to the number by which the lodestar figure would be multiplied to achieve a downward adjustment in attorneys' fees). I use the term "negative multiplier" although I find it somewhat confusing; the lodestar figure is not multiplied by a negative number, but rather by a fraction less than one.

222. Tidmarsh, *supra* note 11, at 788.

other, or a hybrid approach,[223] the court's *default position* should be to discount attorneys' fees whenever all or a portion of the settlement fund is distributed cy pres. With this presumptive rule in place, attorneys would know from the outset that their fees likely would be reduced if they failed to negotiate a settlement that put money into the hands of the class. Since class counsel would have a personal financial incentive to put more money into the hands of class members, their interests would be better aligned with the interests of the class.

Courts could depart from the presumptive approach and award undiscounted fees (or even fees increased by application of a "positive multiplier") upon a showing that unclaimed funds remained notwithstanding class counsel's best efforts to maximize class recovery. Such a showing could be made in cases in which individual claimants could not be identified through reasonable effort, individual payments were not economically feasible, or where claims filed by absent class members failed to exhaust the settlement fund notwithstanding genuine and vigorous efforts by class counsel both to structure the settlement to maximize class recovery and to inform the class of the opportunity to file a claim.[224] The disclosures proposed below in Part VII.B should enable the court to make this determination. In cases in which class counsel makes such a showing, the court could consider the "quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment"[225] to support further adjustments to the multiplier or the percentage of recovery. In sum, my proposal of a rebuttable presumptive reduction in attorneys' fees is both less absolute than CAFA's mandatory "no fee" approach and somewhat more stringent than the Third Circuit's case-by-case discretionary approach,[226] which lacks a default or presumption in favor of discounted attorneys' fees.

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223. Clermont & Currivan, *supra* note 196, at 546–66. *See also* Tidmarsh, *supra* note 11, at 787–88 (describing and proposing friendly amendments to Professor Clermont's proposal).

224. *Accord* Klonoff & Herrmann, *supra* note 201, at 1718–20 (proposing that attorneys' fees should be awarded even on the portion of a settlement distributed cy pres in cases in which the class would indirectly benefit *and* where "(1) . . . direct distribution to individual class members is not economically feasible or (2) when funds remain after class members are given a full and fair opportunity to make a claim").

225. *In re Bluetooth Headset Prods.*, 654 F.3d at 942 (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1029 (9th Cir. 1998)).

226. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 179 (3d Cir. 2013) ("[O]ur approach is case by case, providing courts discretion to determine whether to decrease attorneys' fees where a portion of a fund will be distributed cy pres.").

Any proposal that ties attorneys' fees to the portion of the settlement fund actually *claimed* by the class members runs the risk of delaying the award of such fees. After all, if the court cannot calculate attorneys' fees until it has determined how much of the fund has been claimed by absent class members and how much has been distributed to charities cy pres, then class counsel may have to wait until after this determination is made to recover its fees. This problem is not insurmountable, however, and several possible solutions exist.

First, and most obvious, the court could simply delay awarding attorneys' fees until after the close of the claims period. Only then would it know the actual amount of the settlement fund distributed to class members and the amount distributed cy pres. In cases with short claims periods, such a delay would not impose an undue hardship on class counsel and would simplify the judicial task of approving a fee award.[227]

Second, courts could award fees based upon a good faith projection of the portion of the fund to be claimed by class members (based upon either expert testimony[228] or past experience in a similar case[229]), subject to later adjustment upon the close of the claims period.[230] Counsel could be required to post a bond to ensure reimbursement of any overpayment once the final fees are calculated and approved. Since class members are often afforded the opportunity to submit claim forms following provisional certification of the class and before final approval of the settlement,[231] there

227. *See, e.g.*, *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 292 F. Supp. 2d 184, 190 (D. Me. 2003) (delaying award of attorneys' fees and commenting that a six-month claims period "is not an inordinately long extension").

228. *See, e.g.*, 28 U.S.C. § 1712(d) (2012) ("[T]he court may . . . receive expert testimony . . . on the actual value to the class members of the coupons that are redeemed."); *In re Compact Disc Minimum Advertised Price*, 292 F. Supp. 2d at 187–88 & nn.5–6 (discussing an expert economist's calculation of the anticipated redemption rate for a voucher); Mallow & Kiser, *supra* note 201, at 1127 ("Plaintiffs' counsel sometimes use expert testimony to try to establish the 'redemption value' of the coupons in order to provide courts with evidence to support their requested fee award.").

229. *Cf.* Duhaime v. John Hancock Mut. Life Ins. Co., 989 F. Supp. 375, 378 (D. Mass. 1997) (concluding that it would be improper to "project a value for the settlement by comparing this settlement to similar ones" because the other settlements were "different enough from the present one that they [did] not provide a reliable indication of what the actual value of the settlement [would] be in this case").

230. *See* Klonoff & Herrmann, *supra* note 201, at 1701–02 ("[C]ourts could allow class counsel to receive fees based on projected redemption rates subject to later adjustment once actual redemptions can be counted.").

231. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 175 (3d Cir. 2013) (noting that the

might even be good data upon which to base such a projection.

Third, the court could award attorneys' fees in periodic installments, based upon actual claims submitted by class members over time, with a final adjustment at the conclusion of the claims period.[232] Such an approach would give class counsel a strong ongoing incentive to identify and encourage prospective claimants to file claims against the settlement fund.[233]

A court could combine the last two approaches by making an initial provisional award of attorneys' fees based upon a projection or estimate of the claims to be made by class members; ordering an immediate payment of a portion of such fees; and, at the close of the claims period, ordering a final payment of the balance of fees owed to class counsel, adjusted to take into account the amount paid directly to class members and the scope of the cy pres distribution.[234]

In sum, regardless of the method by which they ordinarily calculate attorneys' fees in class action litigation, courts should presumptively reduce such fees whenever a portion or all of the settlement funds are distributed cy pres. Such a fee structure would better align the interests of class counsel and the represented class, thereby creating incentives for class counsel to negotiate settlements that maximize recovery by the class. This

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claims period had expired before the district court approved the settlement); Mallow & Kiser, *supra* note 201, at 1127 ("[T]he settlement agreement nearly always allows settlement class members to 'claim in' prior to final approval (i.e., file a claim for benefits) so the number of settlement class members requesting coupons in advance of final approval will be known to the court.").

232. *See* Klonoff & Herrmann, *supra* note 201, at 1702 (positing that attorneys' fees could "be paid on a periodic installment basis depending on the value of coupons received during the installment period" (citing *Duhaime*, 989 F. Supp. at 379)).

233. *See, e.g.*, *Duhaime*, 989 F. Supp. at 380 ("Staging the fee award . . . will reinforce class counsel's continuing incentive to monitor the ADR process vigorously . . . .").

234. Courts have taken such an approach in other contexts in which the value of the settlement could not be determined at the time class counsel submitted its application for attorneys' fees. *See, e.g.*, *id.* at 379 ("The solution is to approve the fee requested provisionally, permit its partial payment immediately, but reserve the balance for payment either in full or after any appropriate adjustment in the light of actual experience under the settlement."); Bowling v. Pfizer, Inc., 922 F. Supp. 1261, 1284 (S.D. Ohio 1996) (ordering an immediate payment to counsel of 10 percent of the amounts paid by defendant into the common fund to date; anticipating applications on an annual basis for up to 10 percent of the amount to be paid by defendant into the settlement fund in future years). *See also* FED. R. CIV. P. 23(h) advisory committee's note (2003) ("In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known.").

presumption of reduced fees could be overcome if class counsel demonstrated that individual claimants could not be identified through reasonable effort, direct payments to class members were not economically feasible, or settlement funds remained notwithstanding vigorous and genuine efforts by class counsel to maximize recovery by members of the class.

### B. DISCLOSURE STATEMENT REGARDING EFFORTS TO MAXIMIZE CLASS RECOVERY AND TAILOR CY PRES REMEDY

Just as a presumptive reduction in attorneys' fees should deter over-reliance on cy pres distributions, required disclosures should facilitate monitoring, enable better-informed decisionmaking, and maximize the portion of a settlement fund that is paid to individual class members. Mandatory disclosures are common in the law, as evidenced by, for example, the National Environmental Policy Act's required environmental impact statements[235] and the Food, Drug, and Cosmetic Act's mandated disclosures regarding proposed new drugs.[236]

Once a class action settlement is negotiated and presented to the court for its approval, several different players have occasion to review it. The court has to assess the proposed settlement's fairness, reasonableness, and adequacy;[237] absent class members have to decide whether to accept the settlement or to opt out;[238] and potential objectors often have to decide whether or not to oppose it.[239] Unfortunately, these players typically lack the information they need to make these decisions.[240] After all, none of

235. 42 U.S.C. § 4332(C) (2012) (requiring that all federal agencies proposing legislation or "other major Federal actions significantly affecting the quality of the human environment" prepare a "detailed statement" on "the environmental impact," "any adverse environmental effects," "alternatives to the proposed action," "the relationship between local short-term uses . . . and . . . long-term productivity, and . . . any irreversible and irretrievable commitments of resources").

236. 21 U.S.C. § 355(b)(1) (2012) (requiring disclosure of investigations of a proposed drug's safety and efficacy; its components; "a full description of . . . the manufacture, processing, and packing of such drug"; and proposed labels, among other things).

237. FED. R. CIV. P. 23(e)(2).

238. FED. R. CIV. P. 23(e)(4).

239. FED. R. CIV. P. 23(e)(5).

240. *See, e.g.*, *In re* Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 787, 789 (3d Cir. 1995) (discussing the reasons why the trial judge in a settlement class action lacks the information needed to monitor for collusion and other abuses); Klement, *supra* note 115, at 45–52 (describing the informational deficiencies suffered by courts and absent class members); Lahav, *supra* note 196, at 118 ("[T]he lack of information available to class members, and especially objectors and

them participated in the settlement negotiations, and none had the ability or incentive to monitor the attorneys who were involved.[241] Moreover, once class counsel and defense counsel reach a settlement, it is in their mutual self-interest to secure judicial approval, objectors' silence, and class members' buy-in; neither side has an interest in identifying the inadequacies of the settlement.[242] These informational deficiencies make it difficult for the interested parties to determine whether class counsel has done its best to maximize direct payments to the class and to gauge the need for, and appropriateness of, a cy pres distribution.

To ameliorate these informational deficiencies, I recommend that class counsel be required to make certain disclosures at the time she seeks approval of a class action settlement that contemplates a cy pres distribution. First, class counsel should provide (1) its best estimate of the

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judges, limits the ability of these important actors to challenge the existing governance structure.").

241. *See, e.g.*, John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 652 (1987) (noting that in negative-value class actions, "no individual plaintiff probably has the ability or incentive to monitor [class counsel's] performance"); Klement, *supra* note 115, at 47 ("[C]ourts often find it almost impossible to monitor attorneys in common fund class actions."); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1203 (1982) (noting that even the named class representatives "generally are neither highly motivated nor well situated to monitor the congruence between counsel's conduct and class preferences"); Wasserman, *supra* note 113, at 482 ("Without sufficient investment in the litigation, it is unlikely that class members will monitor class counsel . . . .").

242. *See, e.g.*, Klement, *supra* note 115, at 50 n.66 ("[T]he settling defendant and class attorney . . . obviously have no interest in meaningful inquiries."); Lahav, *supra* note 196, at 80 (noting that fairness hearings are usually non-adversarial because "both parties' attorneys want approval of the settlement they have worked hard to formulate"); John Leubsdorf, Statement at the Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (Nov. 22, 1996), *in* 4 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, 1, 9, (1997) [hereinafter Leubsdorf Statement], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/WorkingPapers-Vol4.pdf (noting that the defendant and class counsel "unite in arguing [the merits of the settlement] to the court, which hence has no source of contrary information and advocacy"); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1445 (2006) ("Because counsel for the plaintiff class and the defendant share an interest in obtaining court approval of the settlement, judges are unlikely to receive information that could be relevant to the fairness of the settlement from the parties themselves."); Wasserman, *supra* note 113, at 475–76 (noting that class counsel's "strong self-interest in gaining judicial approval of the settlement" may outweigh her interest in "providing full and fair disclosure of the settlement terms"); Wolfman, *supra* note 113, at 86–87 (stating that once settlement is reached, "the named parties are non-adverse, and judges do not have their lawyers' help in ferreting out the case's strengths and weaknesses as they do in other cases").

number of prospective claimants; (2) the basis for, and data underlying, that estimate; (3) the total amount of money the defendant has agreed to pay the class; (4) the amount an individual claimant may receive (by category if different amounts are available to class members in different circumstances); and (5) the estimated costs of processing individual claims and making individual payments. These disclosures are designed to assess the viability of individual payments and the corresponding need, if any, for a cy pres distribution.[243]

Second, class counsel should identify all "reasonable effort[s],"[244] whether made independently or in conjunction with the defendant[245] or others,[246] to identify and notify the absent class members. If individual notice was already provided to the absentees, class counsel should disclose (1) the means employed to identify them; (2) the number of notices mailed and the method of mailing employed;[247] (3) efforts to reach the estates of class members who had died;[248] (4) the number of notices returned as undeliverable; and (5) the steps taken, if any, to notify those class members whose notices were returned.[249] In all events, class counsel should disclose

243. ALI PRINCIPLES, *supra* note 11, § 3.07(a) (barring cy pres distributions where class members are readily identifiable and have claims large enough to make individual distributions economically viable).

244. FED. R. CIV. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified *through reasonable effort*" (emphasis added)). *See also* ALI PRINCIPLES, *supra* note 11, § 3.07(a) (describing the criteria to determine when a cy pres award is appropriate); 3 RUBENSTEIN, *supra* note 26, § 8:8 (discussing the "reasonable effort" requirement).

245. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 355 (1978) ("Rule 23(d) . . . authorizes a district court in appropriate circumstances to require a defendant's cooperation in identifying the class members to whom notice must be sent.").

246. Class counsel typically retains a for-profit company to provide notice to the class. 3 RUBENSTEIN, *supra* note 26, § 8:1, at 238–39, § 8:27, at 310 (describing the use of for-profit notice companies).

247. Class counsel may choose from different methods of mailing. *Id.* § 8:28, at 310 ("[F]irst class mail is ideal for sending individual notice to class members."); *id.* at 310–12 (discussing bulk mail and postcard options).

248. *See, e.g.*, Childs v. United Life Ins. Co., No. 10-CV-23-PJC, 2012 U.S. Dist. LEXIS 70113, at *15–16 (N.D. Okla. May 21, 2012) (concluding that the "manner of informing heirs of deceased Class Members is inadequate").

249. *See, e.g.*, Rannis v. Recchia, 380 F. App'x 646, 650 (9th Cir. 2010) (concluding that "skip trace searches on each member whose notice was returned as undeliverable in an effort to locate better addresses" demonstrated a reasonable effort); *Childs*, 2012 U.S. Dist. LEXIS 70113 at *7 (describing efforts to re-mail notices where forwarding addresses were available or where an "address search firm"

the private company, if any, retained to provide notice to the class,[250] and describe the actions taken other than, or in addition to, notice by mail to provide notice to the class, including newspaper, television or radio advertisements, Internet notice, posted notices in the workplace, and the like.[251] These disclosures are designed to ensure that class counsel attempts to notify as many class members as reasonably possible so as to maximize the portion of the settlement fund distributed directly to individual class members.[252] If the court previously approved the notice plan,[253] class counsel seeking final approval of a settlement with a cy pres component would have to disclose only new information not previously provided to the court.

Third, class counsel should describe the steps taken, or proposed to be taken, to maximize the number of absent class members who actually submit claims for payment from the settlement fund. In this regard, counsel should describe efforts to reduce hurdles that may inhibit participation, such as a requirement for receipts or other records that prospective claimants might lack. In particular, class counsel should identify less demanding evidentiary requirements for making claims that were considered, if any, and why they were rejected.[254] This disclosure

located new addresses).

250. *See supra* note 246.

251. 3 RUBENSTEIN, *supra* note 26, §§ 8:29, 8:30 (describing notice by publication and notice by broadcast and Internet).

252. *See supra* notes 19–27, 33 and accompanying text (explaining how settlement funds often go unclaimed due to the difficulty of providing notice to potential class members whose identities are unknown).

253. Certification notice is mandatory in Rule 23(b)(3) opt-out class actions, FED. R. CIV. P. 23(c)(2)(B), and notices of a proposed settlement and a petition for attorneys' fees are also mandatory. FED. R. CIV. P. 23(e)(1), 23(h)(1). Often a "single notice encompasses notice of certification, settlement, and fees." 3 RUBENSTEIN, *supra* note 26, § 8:1, at 238. Before notice is provided, the parties must present a notice plan to the court for its approval. *See, e.g.*, *In re* Motor Fuel Temperature Sales Practices Litig., 279 F.R.D. 598, 617–18 (D. Kan. 2012) (reviewing the parties' notice plan, describing the notice hearing at which the parties' notice experts testified, and approving the plan); *Childs*, 2012 U.S. Dist. LEXIS 70113, at *9–14 (following judicial approval of a joint notice plan, holding that the notice *actually* provided was inadequate because the settlement administrator relied upon bulk mail, rather than direct mail to each individual class member); 3 RUBENSTEIN, *supra* note 26, § 8:36, at 341–42 (describing the court's evaluation of notice plans).

254. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 176 (3d Cir. 2013) (positing that "many class members did not submit claims because they lacked the documentary proof necessary" and questioning whether "a settlement with such a restrictive claims process was in the best interest of the

requirement is designed to increase the participation rate by eliminating unnecessary hurdles that might inhibit participation.

Fourth, class counsel should describe the follow-up steps taken, or proposed to be taken, to maximize payments to individual class members in the event that funds remain following the conclusion of the claims period. In particular, counsel should describe the steps taken or proposed to be taken, if any, to reach prospective class members who did not or have not yet filed claims,[255] and to provide further distributions to class members who already have filed claims. If class counsel does not propose to engage in additional outreach efforts or to make further distributions to current claimants, it should explain its reasons for declining to take these steps.[256]

Finally, class counsel should identify the charity or charities to which it proposes to donate the unclaimed or non-distributable funds; report on the charity's record of service;[257] explain how the charity's interests align with those of the class;[258] and explain whether the geographical area the

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class"); *id.* at 175 ("The parties may wish to . . . lower[] the evidentiary bar for receiving a higher award."). *See also* Brief Amicus Curiae of Angeion Group, LLC in Support of Petition for Rehearing or Rehearing En Banc at 4–8, Carrera v. Bayer Corp., No. 12-2621 (3d Cir. Oct. 4, 2013), 2013 WL 5606438 (describing the sophisticated fraud-prevention screening methods, programmatic audits, and other tools employed by claims administrators to screen out fraud in cases in which proof of purchase is not required); Francis E. McGovern, *Distribution of Funds in Class Actions—Claims Administration*, 35 J. CORP. L. 123, 125, 134 (2009) (recommending "more user friendly forms to reduce the burden of participation").

255. *See, e.g.*, SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 409–10 (S.D.N.Y. 2009) (describing the fund administrator's renewed and innovative outreach efforts to reach investors who had not submitted claim forms and noting that the 47 percent response rate in "phase II" was "remarkable" because it represented submissions from people who had not responded in phase I and actually exceeded the response rate achieved in phase I).

256. *See, e.g.*, Rohn v. Tap Pharm. Prods. (*In re* Lupron Mktg. & Sales Practices Litig.), 677 F.3d 21, 31–32 (1st Cir. 2012) ("The district court appropriately decided that a supplemental consumer claims process would be prohibitively expensive, time-consuming, and, given the high mortality rate among members of the class, would likely recruit few new claimants."). *See also supra* notes 67–71 and accompanying text (explaining situations in which courts have determined that additional outreach efforts and further distributions are not necessary).

257. *See* Lane v. Facebook, Inc., 696 F.3d 811, 834 (9th Cir. 2012) (Kleinfeld, J., dissenting) (expressing concern that the cy pres distribution "goes to a new entity with no past performance at all"), *cert. denied sub nom.* Marek v. Lane, 134 S. Ct. 8 (2013) (mem.); Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990) (rejecting a cy pres distribution because the proposed recipient "is not an organization with a substantial record of service").

258. *See* ALI PRINCIPLES, *supra* note 11, § 3.07(c) ("The court, when feasible, should require the

charity serves coincides with the area in which the class members reside or work or where the events giving rise to the claim occurred.[259] Such disclosures are designed to ensure that if the entire settlement fund cannot be distributed to class members, at least it is donated to a charity with a proven record of serving their interests. Moreover, requiring the parties to propose potential cy pres recipients should reduce the judge's discretion to steer the remainder to a favored charity.[260]

Requiring class counsel to disclose the extent of their efforts to maximize direct payments to individual class members and to tailor cy pres distributions to serve the class's best interests should not only facilitate monitoring by the court, the class, and potential objectors, but should also prompt class counsel to monitor themselves. As Professor Alexandra Lahav has written,

> Class counsel may behave differently when the prospect of transparency looms over them, and thus results may be improved *ex ante*. . . . [T]he sanitizing effect of mandatory disclosure may work from the inside as well as out—not just catching irresponsible behavior but encouraging better behavior to make disclosure less painful.[261]

To address potential concerns regarding duplicative disclosures, timing, and cost, I offer several refinements to my proposal. Just as courts should delay final awards of attorneys' fees until they have data on the distribution of the settlement fund,[262] I suggest that they should delay final approval of class action settlements, or at least the cy pres portion of such

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parties to identify a recipient whose interests reasonably approximate those being pursued by the class."). *See also supra* Part V.A (explaining that cy pres distributions can be problematic when they are not well-tailored to serve the interest of the class).

259. *See, e.g.*, Nachshin v. AOL, LLC, 663 F.3d 1034, 1040 (9th Cir. 2011) (concluding that approval of the cy pres distribution was an abuse of discretion in part because the class included persons throughout the United States, whereas two-thirds of the proposed donations would have been made to local charities in Los Angeles). *See also supra* note 95 (citing cases in which the cy pres distribution did not match the geographical location of the class members).

260. *See* Yospe, *supra* note 42, at 104, 1055–56 (proposing that "[l]imiting the judicial role from a position of absolute discretion to that of an arbiter would reduce the judicial bias problem" and strongly encouraging the parties to propose potential cy pres recipients in the settlement agreement); Beisner, Miller & Schwartz, *supra* note 73, at 20 (proposing that the parties, rather than the judge, should determine the cy pres recipients to "minimize the risk that judges will use their influence to steer cy pres funds to their preferred charities").

261. Lahav, *supra* note 196, at 121 (footnote omitted).

262. *See supra* notes 227–234 and accompanying text (proposing several means by which attorneys' fees could be calculated after class members were paid from the settlement fund).

settlements,[263] until they receive the disclosures described above detailing the amount of the recovery that has been or will be paid to the class and efforts made to maximize that amount and to reduce reliance on cy pres distributions.[264] If claimants can submit their claim forms upon the provisional approval of the settlement,[265] then the court can hold the fairness hearing and consider final approval of the settlement after the claims period closes and class counsel has made the requisite disclosures. This timing would be optimal because it would permit the court to review disclosures regarding the extent of the direct benefit to the class *before* it decides whether to finally approve the settlement.[266]

If, for some reason, class members cannot submit claim forms until after the settlement is finally approved, then the court may approve the settlement upon receipt of the disclosures that counsel was able to submit in advance of the fairness hearing; but it should withhold final consideration of the cy pres portion of the settlement until the close of the claims period and upon receipt of class counsel's final disclosures.[267]

In no event should class counsel have to submit identical information more than once. Thus, if class counsel has already provided the court with some of the required information, it would disclose only "new" information when it seeks final approval of the settlement or the cy pres portion thereof. For example, if the court already approved the notice plan, then in connection with its motion seeking final approval of the settlement, class counsel would not re-disclose its plan for broadcast and Internet notice, but it would disclose the number of notices that could not be delivered, the

263. *E.g.*, Radosti v. Envision EMI, LLC, 717 F. Supp. 2d 37, 65 (D.D.C. 2010) ("Because the Court has concerns about the distribution of proceeds from the proposed cy pres fund, the Court shall HOLD IN ABEYANCE approval of the Class Settlement Scholarship Fund and revisit that issue after the class members have submitted their claims for vouchers and the amount of money to be deposited into the CSSF is determined."); Diamond Chem. Co. v. Akzo Nobel Chems. B.V., 517 F. Supp. 2d 212, 220 (D.D.C. 2007) ("hold[ing] in abeyance Class Plaintiff's Motion to Distribute, insofar as it seeks approval of a cy pres distribution to the Endowment Fund, and . . . order[ing] Class Plaintiff to provide further briefing as to the appropriateness of its proposed cy pres recipient").

264. *See* Lahav, *supra* note 196, at 119 ("The most important way that mandatory disclosure reduces agency costs is by enabling informational intermediaries to monitor class counsel.").

265. *See supra* note 231 and accompanying text (discussing the opportunity to file claim forms upon provisional approval of the settlement).

266. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 175 (3d Cir. 2013) (vacating the district court order approving the settlement because "it did not know the amount of compensation that will be distributed directly to the class").

267. *Supra* note 263–264 and accompanying text.

number of forwarding addresses identified and employed, and other steps taken to notify those class members whose notices were returned as undeliverable.

Even if made only once, the disclosures proposed here would impose significant costs on the attorneys who would have to prepare them and on the judges who would have to review them.[268] The attorneys' costs likely would be paid from the settlement fund (or by the defendant, which would reduce the size of the settlement fund to cover these costs). If the disclosures ultimately result in larger and more direct payments to individual class members and fewer cy pres distributions, then imposition of the costs will be worth it.[269] As to the judicial costs, if courts continue to entertain proposals for cy pres distributions, they should at least be willing to experiment with disclosures that could reduce over-reliance on such distributions and increase their efficacy.

### C. APPOINTMENT OF AN OBJECTOR OR A DEVIL'S ADVOCATE TO OPPOSE THE CY PRES DISTRIBUTION

While the disclosures proposed above should provide absent class members, prospective objectors, and the court with the types of information needed to monitor class counsel and to assess the settlement and its cy pres provisions, agency costs remain. The court in an adversarial system is passive and depends upon the parties to present it with information,[270] but the lawyers who negotiate the settlement have no interest in disclosing any information that would call into question the settlement's adequacy or the cy pres remedy's appropriateness.[271] Class members, who have little at stake, lack both the incentive and resources to monitor.[272] Thus,

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268. Lahav, *supra* note 196, at 121 ("[D]isclosure requirements create additional monitoring costs for courts as well as costs for class counsel who must compile materials.").

269. *Id.* ("Whether disclosure rules will in fact produce social gains in excess of their cost is a matter for empirical study."). If the cost of the disclosures were to exceed the increase in the amount paid directly to class members, this particular proposal would need to be revisited.

270. *See, e.g.*, Klement, *supra* note 115, at 45 (noting the "institutional requirements of neutrality and passivity set by the adversary system"); Macey & Miller, *supra* note 192, at 66 (noting judicial passivity); Wasserman, *supra* note 113, at 479 (same).

271. *See supra* notes 189–190, 240–241 and accompanying text. *See also* Wasserman, *supra* note 113, at 479–80 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997); Kamilewicz v. Bank of Bos. Corp., 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting) (noting that the parties "may even put one over on the court, in a staged performance")).

272. *See* supra notes 240–248 and accompanying text.

"informational intermediaries" are needed to monitor class counsel.[273] Building upon suggestions by John Leubsdorf,[274] William Rubenstein,[275] and others,[276] I recommend the appointment of an objector or a "devil's advocate" to *oppose* class action settlements in general and cy pres distributions in particular.

In proposing the appointment of an attorney to oppose class action settlements, Leubsdorf was careful to distinguish such an objector from a guardian *ad litem*. In his view, a guardian *ad litem* would "duplicate the court's function by evaluating whether the settlement is desirable," whereas an objector would be "instructed to bring to the court's attention all relevant information and reasonable arguments supporting *rejection* of the settlement."[277] Analogizing to individuals appointed by the Catholic Church to *oppose* proposed canonizations or beatifications, Rubenstein, too, has proposed appointment of a devil's advocate to make the best arguments *against* a class action settlement.[278]

Drawing upon these proposals, I recommend that following receipt of the disclosures required in Part VII.B above and before conducting a fairness hearing on a proposed class action settlement that contemplates a cy pres distribution, the trial judge should appoint a devil's advocate to oppose the cy pres remedy.[279] Specifically, the court should ask the devil's

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273. *See* Lahav, *supra* note 196, at 119 (citing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 292–93 (1991)).

274. Leubsdorf Statement, *supra* note 242, at 9 (proposing that Rule 23 be amended to "require courts to appoint a lawyer to challenge any proposed settlement in any class action in which the estimated value of the relief (including attorney fees) exceeds $1,000,000").

275. Rubenstein, *supra* note 242, at 1453–56, 1475–77.

276. *See, e.g.*, Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1109 n.190 (1996) (advocating Leubsdorf's proposal); Lahav, *supra* note 196, at 128 ("[T]he adversarial principle requires that the court appoint a third party to act as a 'devil's advocate' for the class . . . ."); Wasserman, *supra* note 113, at 529 (advocating the appointment of a "court-appointed advocate" to "scrutinize the fairness and adequacy of the proposed settlement and make a report to the court"). *Cf.* Klement, *supra* note 115, at 50 n.66 (explaining the limited utility of guardians *ad litem* and special masters appointed after a class action settlement is reached); *id.* at 28–29, 61–80 (proposing an auction system for the appointment of a monitor, who would select class counsel at the outset of the litigation, determine counsel's fee, and monitor counsel's performance).

277. Leubsdorf Statement, *supra* note 242, at 9 (emphasis added).

278. Rubenstein, *supra* note 242, at 1453–54,1475–76.

279. I support the appointment of a devil's advocate to oppose the class action settlement in its entirety, but I focus here on efforts to limit and tailor the use, and improve the efficacy, of cy pres distributions.

advocate to (1) identify weaknesses in class counsel's efforts to identify and notify prospective class members; (2) identify obstacles that might (or did) interfere with class members' ability or incentive to file claims, such as unnecessarily challenging requirements for documentation; (3) identify alternatives to a cy pres distribution that would put more money into the hands of the class members, such as further payments to claimants until they receive 100 percent of their losses (or possibly more, if treble damages are available under the law); (4) explain why the proposed cy pres distribution is not narrowly tailored to serve the best interests of the class or the policy objectives of the laws underlying the class claims; (5) explain why the proposed cy pres recipient is not an appropriate one; and (6) oppose the fee petition submitted by class counsel. In addition, the court should require class counsel and the defendant to post a bond to cover the devil's advocate's fees and expenses to ensure that the advocate would be compensated even if the settlement were ultimately disapproved by the court.[280]

Notwithstanding class counsel's affirmative obligation to make the disclosures described in Part VII.B above, class counsel would have an incentive to limit or shade these disclosures.[281] To combat this tendency, the court should provide the devil's advocate with a reasonable opportunity to take discovery to identify alternatives to, and weaknesses in, the cy pres portion of the proposed settlement and the request for attorneys' fees.[282] If, after reviewing class counsel's disclosures and taking discovery, the devil's advocate were unable to identify a substantial weakness in or objection to the proposed cy pres distribution or request for attorneys' fees, the advocate could withdraw, as suggested by Rubenstein, after identifying any

280. *See* Wasserman, *supra* note 113, at 529 ("Rule 23 and the state certification rules should be . . . amended to require class counsel and the defendant . . . to post a bond to cover the costs of a court-appointed advocate."). *Cf.* Leubsdorf Statement, *supra* note 242, at 9 (proposing that the objector be paid out of the recovery); Rubenstein, *supra* note 242, at 1453, 1455 (recommending that the devil's advocate be paid from the settlement or with public funds); *id.* at 1456–59 (considering a bond requirement that could be used to pay the attorneys' fees of objectors).

281. *See supra* note 242 and accompanying text (describing class counsels' lack of motivation to subject the settlement to scrutiny).

282. Leubsdorf Statement, *supra* note 242, at 9 ("The objector would be entitled to obtain reasonable discovery concerning the settlement . . . ."); Wasserman, *supra* note 113, at 529 (recommending that the class advocate be provided with "reasonable access to all relevant information"). *Cf.* Koniak & Cohen, *supra* note 276, at 1109 (noting the paltry discovery ordinarily afforded to class action objectors); Lahav, *supra* note 196, at 85 (noting the "limits on objector discovery").

material that arguably counseled against the cy pres distribution or fee award.[283]

If courts regularly appointed devil's advocates to oppose cy pres distributions and took their objections seriously in gauging the fairness and adequacy of class action settlements, presumably the class action bar would begin to police itself and propose fewer and better cy pres remedies.[284]

### D. FINDINGS REQUIRED TO ENSURE RIGOROUS JUDICIAL REVIEW AND TO LIMIT RELIANCE ON CY PRES DISTRIBUTIONS

Required disclosures by class counsel and appointments of devil's advocates to oppose cy pres distributions should provide courts with the information they need to rigorously assess proposals to distribute some or all of the settlement fund to charities cy pres. But if courts are not sufficiently motivated to carefully scrutinize settlement agreements to ensure that they maximize payments to individual class members, then the disclosures may be for naught. A risk of judicial *ennui* exists because courts have incentives to clear their dockets—especially of time-consuming class actions[285]—and may be predisposed to approve distributions to charities with which they are affiliated or that serve their own communities.[286] The challenge, then, is to ensure that courts rigorously scrutinize cy pres distributions and approve their use only where direct payments to individual class members are not feasible.

On the theory that trial courts will take their responsibilities especially seriously when they are required to justify their conclusions in writing and when they can expect scrupulous appellate review, I propose that trial

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283. *See* Rubenstein, *supra* note 242, 1455–56 & n. 96 (discussing *Anders v. California*, 386 U.S. 738, 744 (1967), which permits a court-appointed criminal defense attorney to withdraw if she finds the client's case to be "wholly frivolous" and requires her to prepare a brief identifying "anything in the record that might arguably support the appeal").

284. *Id.* at 1454 ("In a well-functioning system, the prospect of litigating against the devil's advocate ought to create self-policing by class and defense attorneys, deterring both frivolous lawsuits and sell outs."). *See also supra* text accompanying note 261.

285. *See, e.g.*, Rhonda Wasserman, *Secret Class Action Settlements*, 31 REV. LITIG. 889, 934–35 (2012) (noting that a court that "approves a class action settlement . . . is freed of the burden of overseeing a large and potentially time-consuming case . . . [and] may also gain prestige as the court that oversaw the settlement of a complex class action" (footnote omitted) (citing, *inter alia*, Koniak & Cohen, *supra* note 276, at 1122–23, 1127; Macey & Miller, *supra* note 192, at 45–46; Rubenstein, *supra* note 242, at 1445; Wasserman, *supra* note 113, at 476 & n.73)).

286. *See supra* Part V.D.

courts be required to make findings on certain issues before approving cy pres distributions. In particular, I propose that courts approve class action settlements with cy pres features only upon finding that they satisfy the requirements of section 3.07 of the ALI Principles. This section requires a court to apply specific criteria in deciding whether to approve a cy pres distribution in a given case. I incorporate the ALI criteria (with a few modest adjustments) not only because they are eminently sensible, but also because they have been vetted by a reputable and experienced group of judges, practitioners, and academics and should be familiar to most judges. My principal goals in requiring these findings are to ensure that trial courts carefully scrutinize class action settlements, in light of the disclosures made by class counsel and the objections proffered by devil's advocates, and that appellate courts carefully review orders approving cy pres distributions, to minimize reliance on cy pres remedies.

Just as required disclosures should facilitate self-monitoring by class counsel,[287] required findings by trial judges should promote greater scrutiny of cy pres distributions. The Federal Rules of Civil Procedure require judges to make findings in other select contexts. Rule 52(a)(3) recognizes that district courts may be required to "state findings or conclusions when ruling on a motion,"[288] and Rules 23 and 54 specifically require district courts to make findings in connection with class action settlements[289] and awards of attorneys' fees.[290] The court's special

287. *See supra* text accompanying note 261.

288. FED. R. CIV. P. 52(a)(3). *See also id.* advisory committee's note (2007) (noting that the rule "reflects provisions in other rules that require Rule 52 findings," including Rules 23(e), 23(h) and 54(d)(2)(C)).

289. FED. R. CIV. P. 23(e)(2) ("[T]he court may approve [a proposed class action settlement] only after a hearing and on finding that it is fair, reasonable, and adequate."). *See also* FED. R. CIV. P. 23(e)(1)(B) advisory committee's note (2003) ("The court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.").

290. FED. R. CIV. P. 23(h)(3) (stating that a court entertaining a motion for attorneys' fees in a certified class action "may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a)"); FED. R. CIV. P. 54(d)(2)(C) (requiring that a court entertaining a motion for attorneys' fees "must find the facts and state its conclusions of law as provided in Rule 52(a)"); FED. R. CIV. P. 54(d)(2)(C) advisory committee's note (1993) ("To facilitate review, the paragraph provides that the court set forth its findings and conclusions as under Rule 52(a), though in most cases this explanation could be quite brief."). *See also, e.g.*, 28 U.S.C. § 1712(e) (2012) (CAFA provision requiring written finding of fairness of coupon settlements).

responsibility and unique role in scrutinizing attorneys' fees[291] and class action settlements[292] not only justifies these existing Rules, but also the proposed requirement that trial courts make findings in connection with cy pres remedies.

In reviewing class action settlements, I recommend that trial courts approve cy pres distributions only upon a finding that individual class members are not identifiable through reasonable effort or their claims are too small to make individual payments economically feasible.[293] In other words, as required by section 3.07(a) of the ALI Principles, courts should decline to approve cy pres distributions where direct payments to class members are a viable option.[294]

In cases in which individual payments to class members are made but some funds remain unclaimed, courts should approve cy pres distributions of the unclaimed funds only upon a finding that neither further outreach to non-claiming class members[295] nor further distributions to participating

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291. *See, e.g.*, FED. R. CIV. P. 23(h) advisory committee's note (2003) ("Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process.").

292. FED. R. CIV. P. 23(e) advisory committee's note (2003) ("[C]ourt review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.").

293. ALI PRINCIPLES, *supra* note 11, § 3.07(a). *Cf. In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173–74 (3d Cir. 2013) (agreeing that "cy pres distributions are most appropriate where further individual distributions are economically infeasible," but "declin[ing] to hold that cy pres distributions are only appropriate in this context"; directing courts to consider "the degree of direct benefit provided to the class"); Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 435–36 (2d Cir. 2007) (vacating a district court order that had approved a cy pres distribution where "neither side contends . . . it would be onerous or impossible to locate class members or because each class member's recovery would be so small as to make individual distribution economically impracticable"; concluding that the district court had discretion to "allocate [unclaimed] funds to the members of the class as treble damages"); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004) ("[T]he reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement . . . .").

294. As the Comment to section 3.07 makes clear, the Principles "begin[] from the premise that funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members . . . . Starting from this vantage point, this Section generally permits cy pres awards only when direct distributions to class members are not feasible . . . ." ALI PRINCIPLES, *supra* note 11, § 3.07 cmt. b.

295. This specific proposal does not derive from section 3.07(b) of the ALI Principles. *See supra* note 64 (describing additional outreach efforts to increase the number of class members who file claims

class members would be economically viable or upon a finding that the latter would be "impossible or unfair."[296] "[T]he settlement should presumptively provide for further distributions to participating class members,"[297] as section 3.07(b) states, or for initial payments to class members who have not previously submitted claim forms. A vague anxiety over windfalls would not justify a finding of unfairness.[298]

Where individual distributions are not viable, the courts should approve cy pres distributions only upon a finding that the prospective recipient's interests "reasonably approximate those being pursued by the class."[299] This finding is required to ensure, whenever possible, a close nexus between the class and the cy pres recipient.[300] In making this finding, courts should consider, among other things, whether the prospective recipient works to advance the policies underlying the laws invoked by the class,[301] whether it has a proven track record of doing so,[302] and whether it

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against the settlement fund).

296. ALI PRINCIPLES, *supra* note 11, § 3.07(b). *Accord* Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 475 (5th Cir. 2011) (stating that a cy pres distribution is appropriate "only if it is not possible to . . . benefit[] the class members directly").

297. ALI PRINCIPLES, *supra* note 11, § 3.07(b).

298. Rejecting the argument that further distributions to claiming class members would constitute a windfall, the Comment to section 3.07 explains that "few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery for those class members." *Id.* § 3.07 cmt. b. Moreover, in most cases, additional payments to claiming class members are more likely to serve the goals of the laws underlying the class members' claims than would a cy pres distribution. *Id. See also supra* text accompanying note 66 (maintaining that distributing more money to at least some of the class members achieves the underlying objectives of compensation and deterrence).

299. ALI PRINCIPLES, *supra* note 11, § 3.07(c).

300. *Id.* § 3.07 cmt. b ("A cy pres award to a recipient whose interests closely approximate those of the class is preferable" to reversion to the defendant or escheat to the state).

301. Some courts have approved cy pres distributions that do not meet this condition. *See, e.g.*, Holtzman v. Turza, 728 F.3d 682, 689 (7th Cir. 2013) (noting that the charity named in the district court order "does not directly or indirectly benefit" the class); Fears v. Wilhelmina Model Agency, Inc., No. 02 Civ. 4911 (HB), 2007 U.S. Dist. LEXIS 48151 at *4–5 (S.D.N.Y. July 5, 2007) (in a class action alleging price-fixing in the modeling industry, approving a cy pres distribution to charities providing services of benefit to women in general, even though only a slim majority of the class members were female and the charities did not purport to advance the policy objectives underlying the antitrust law), *vacated on other grounds*, 315 F. App'x 333 (2d Cir. 2009) (summary order); *In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1395–99 (N.D. Ga. 2001) (in a class action alleging price-fixing by vendors of NASCAR race souvenirs, approving a cy pres distribution to ten charities, including the Make-a-Wish Foundation and the American Red Cross, which bore no discernible relationship to the

serves the geographical area in which most or many of the claimants live or work or where their claims arose.[303] If the court finds that no charity can be identified that would meet the forgoing requirements, then and only then may it approve a recipient "that does not reasonably approximate the interests being pursued by the class."[304] In all events, courts should approve cy pres distributions only upon a finding that none of the parties, their attorneys or the court has "any significant prior affiliation" with a prospective recipient that would "raise substantial questions" about the integrity of the selection process.[305]

### E. IMPLEMENTATION

If these proposals are worthy of adoption, the final question is how they should be implemented. The recommendations in Parts VII.B, C and D, regarding disclosures, devil's advocates, and judicial findings could be implemented by amendment of Rule 23(e) of the Federal Rules of Civil Procedure. Alternatively, trial courts could adopt these proposals on their own, or, more likely, courts of appeals could require trial courts to follow them. After all, the courts of appeals have developed the standards that district courts now apply to review the fairness and adequacy of class action settlements.[306] If and when the Supreme Court answers Chief Justice

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absent class members or their claims).

302. *See* Lane v. Facebook, Inc., 696 F.3d 811, 834 (9th Cir. 2012) (Kleinfeld, J., dissenting) (expressing concern that the cy pres distribution "goes to a new entity with no past performance at all"), *cert. denied sub nom.* Marek v. Lane, 134 S. Ct. 8 (2013) (mem.); Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990) (rejecting a cy pres distribution because the proposed recipient "is not an organization with a substantial record of service").

303. *See, e.g.*, Nachshin v. AOL, LLC, 663 F.3d 1034, 1040 (9th Cir. 2011) (concluding that approval of the cy pres distribution was an abuse of discretion in part because the class included persons throughout the United States, whereas two-thirds of the proposed donations would have been made to local charities in Los Angeles); Am. Soc'y of Travel Agents v. United Airlines, Inc. (*In re* Airline Comm'n Antitrust Litig.), 268 F.3d 619, 626 (8th Cir. 2001) (rejecting a cy pres distribution to "mostly local recipients" when the class action was national in scope); Houck v. Folding Carton Admin. Comm., 881 F.2d 494, 502 (7th Cir. 1989) (setting aside grants to two Chicago law schools and urging the district court upon remand of a nationwide class action "to consider to some degree a broader nationwide use of its *cy pres* discretion").

304. ALI PRINCIPLES, *supra* note 11, § 3.07(c).

305. *Id.* § 3.07 cmt. b. *See also supra* notes 107–108, 119–120 and accompanying text (citing cases in which the recipients of cy pres distributions had ties to the parties, their attorneys, or the judges).

306. *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 818–19 (9th Cir. 2012) (noting that the

Roberts's call to scrutinize cy pres distributions,[307] the Court itself could require lower courts to follow these recommendations.

The recommendation made in Part VII.A regarding a presumptive reduction in attorneys' fees should be enacted by Congress,[308] as were the provisions regulating attorneys' fees in CAFA and the Private Securities Litigation Reform Act;[309] but the likelihood of congressional action on this issue (on any issue, it seems) is remote. It may be that, in the absence of legislation, the courts could adopt this recommendation too, as they have developed a significant body of case law governing attorneys' fees in class action litigation, especially in "common fund" cases.[310]

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*Hanlon* factors guide the district court in determining the fairness and adequacy of a class action settlement; requiring a "higher standard of fairness" when the settlement is reached before class certification (citing Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998))), *cert. denied sub nom.* Marek v. Lane, 134 S. Ct. 8 (2013) (mem.); Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski, 678 F.3d 640, 648 (8th Cir. 2012) (identifying four factors to be considered in assessing the fairness of a class action settlement (citing *In re* Wireless Tel. Fed. Cost Recovery Fees Litig., 396 F.3d 922, 932 (8th Cir. 2005))); *In re* Pet Food Prods. Liab. Litig., 629 F.3d 333, 350 (3d Cir. 2010) (stating that district courts "must make findings as to each of the nine *Girsh* factors in order to approve a settlement as fair, reasonable, and adequate" and noting the "additional inquiries," identified in *Prudential*, "that in many instances will be useful" (discussing Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) and *In re* Prudential Ins. Co. Sales Practice Litig., 148 F.3d 283, 323–24 (3d Cir. 1998))).

307. Marek v. Lane, 134 S. Ct. 8, 8 (statement of Roberts, C.J., respecting the denial of certiorari). *See also supra* notes 1–7 and accompanying text (describing Chief Justice Roberts's reservations about the cy pres remedy in *Marek v. Lane*).

308. Federal legislation would avoid any potential Rules Enabling Act challenge to a Federal Rule that purported to limit attorneys' fees, *see, e.g.*, Marek v. Chesny, 473 U.S. 1, 36 (1985) (Brennan, J., dissenting) (arguing that Federal Rule 68, as interpreted by the majority to include attorneys' fees as part of "costs," violated the Rules Enabling Act because it would "'abridge' and . . . 'modify' this statutory right to reasonable attorney's fees"); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 262 (1975) ("[T]he range of discretion of the courts in making [attorneys' fee] awards are matters for Congress to determine."), although fee awards in "common fund" class actions are not typically governed by federal statute.

309. 28 U.S.C. § 1712(e) (2012) (CAFA provision governing attorneys' fees on coupon settlements); 15 U.S.C. § 78u-4(a)(6) (2012) (Private Securities Litigation Reform Act provision governing attorneys' fees in private securities litigation).

310. *See Alyeska*, 421 U.S. at 257 (noting "the historic power of equity to permit . . . a party preserving or recovering a fund for the benefit of others . . . to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit"). *See also, e.g.*, Blessing v. Sirius XM Radio, Inc., 507 F. App'x 1, 4 (2d Cir. 2012) (noting that the reasonableness of an award of attorneys' fees is governed by the *Goldberger* factors, regardless of the method of calculation employed (citing Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000))), *cert.*

## VIII. CONCLUSION

Unclaimed or non-distributable funds are a common feature of class action settlements. The settling parties and courts often prefer cy pres distributions to reversion and escheat because they are more likely to achieve the deterrent and compensatory objectives of the law underlying the class claims. But cy pres distributions are overused today because defendants prefer them and class counsel do not fight hard enough to maximize cash payments to class members. Too often the courts acquiesce in the parties' cy pres proposal.

This Article makes four pragmatic recommendations to minimize cy pres distributions and to tailor them to better serve the interests of the class. First, to align the interests of class counsel and the represented class, courts should presumptively reduce attorneys' fees in cases in which cy pres distributions are made. Second, to ensure that class members, potential objectors, and courts have the information they need to assess the fairness of a settlement that contemplates a cy pres distribution and to enable class members to make intelligent decisions regarding the right to opt out, class counsel should be required to make a series of disclosures when it presents a proposed settlement for judicial approval. Third, to inject an element of adversarial conflict into the fairness hearing and to further ensure that the court receives the information needed to scrutinize the proposed cy pres distribution, the court should appoint a devil's advocate to oppose the settlement in general, the cy pres distribution in particular, and the request for attorneys' fees by class counsel. Finally, the court should make written findings in connection with its review of any class action settlement that contemplates a cy pres distribution.

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*denied*, 134 S. Ct. 402 (2013); Sullivan v. DB Investments, Inc., 667 F.3d 273, 330–31 (3d Cir. 2011) (identifying the factors to be applied in "determining the appropriate percentage fee award" (citing Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) and *In re Prudential*, 148 F.3d at 338–40)); Jones v. GN Netcom, Inc. (*In re* Bluetooth Headset Prods. Liab. Litig.), 654 F.3d 935, 941–43 (9th Cir. 2011) (identifying the "reasonableness" factors that may be applied to adjust the lodestar figure (citing *Hanlon*, 150 F.3d at 1029)).