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The Cy Pres Doctrine in Class Action Residual Distributions: Cy Pres as a Best Practice and Recommendations for Regulation

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The Cy Pres Doctrine in Class Action Residual Distributions: Cy Pres as a Best Practice and Recommendations for Regulation[1]

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[1] Evelyn Abravanel, J.D.

I. INTRODUCTION

In a 2007 article adeptly titled "Doling Out Other People's Money," the *New York Times* reported on a $22 million settlement in the antitrust class action lawsuit, *Fears v. Wilhelmina Model Agency*,[2] initiated by fashion models against model management companies for price fixing.[3] Judge Harold Baer, a judge in the U.S. District Court for the Southern District of New York, ordered $6 million in residual funds, the leftover money after compensation has been made to eligible class claimants, to be distributed to charitable organizations whose purposes had no direct relation to either antitrust matters or fashion models.[4] Instead, the judge "doled" out the money to programs that would provide a benefit to what he believed best characterized the class, women in general, based on the fact that the class representatives just happened to be all female models, even though he acknowledged that male models comprised approximately 40% of the class.[5] The seven recipients of the residual funds included an eating disorders program, a substance abuse program, an ovarian cancer center, two heart disease projects focused on women, and a legal aid society.[6] In approving the "charitable route"[7] of distributing the leftover money, the judge looked at two prior antitrust settlements from other jurisdictions where the courts concluded that it was permissible and, indeed, equitable, to donate the funds to a wide range of public interest organizations unrelated to the lawsuit.[8]

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[2] No.01 Civ.4911(HB), 2005 WL 1041134 (S.D.N.Y. May 5, 2005).
[3] Adam Liptak, *Doling Out Other People's Money,* N.Y. TIMES, November 27, 2007, at Sidebar.
[4] *Id.*; *see also Fears*, 2005 WL 1041134, at *12.
[5] *Fears*, 2005 WL 1041134, at *11.
[6] *Id.* at *12.
[7] *Id*. at *11.
[8] *Id*. at *10-11.

Distributing class action settlement funds in this fashion is known as a cy pres distribution, which is a growing, yet largely unregulated, practice in courts across the nation.[9] When applied in the class action settlement context, the cy pres doctrine (which is borrowed from trust law and is also referred to as the "next best use" doctrine) traditionally requires that settlement funds be used in a manner that provides as much indirect benefit as possible to both the injured class members and the issues underlying the lawsuit when direct compensation is not feasible.[10]

Just how indirect or tangential the benefit can be, however, is the controversy currently surrounding cy pres distributions.[11] A class action settlement can adhere closely to the next best use idea, as illustrated in *Nelson v. Gadsden Housing Authority*,[12] where funds leftover after compensating tenants for their landlord's failure to grant them a utility allowance were ordered to be used by the landlord to increase the energy efficiency of the apartments.[13] On the other hand, a cy pres distribution may largely deviate from a strict application of the doctrine, as described in *Fears,* where – in the *New York Times* writer's somewhat sardonic terms – the court decided to "use the leftover money for programs that would indirectly help the entire class of skinny women prone to drug addiction."[14]

This article examines the widespread and inconsistent use of cy pres distributions arising from class action settlements. Part II discusses the cy pres doctrine's theoretical and practical application in class action settlements, as well as the discrepancy between the two. Part III looks

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[9] NEED CITE

[10] *See, e.g.*, Tim A. Thomas, Annotation, *Permissible Methods of Distributing Unclaimed Damages in Federal Class Action,* 107 A.L.R. Fed. 800 (1992), at §3(b).

[11] A recent Note addressed the similar question of cy pres distributions in the context of class action settlements, but with a focus on the option of returning residual funds to defendants. Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1017 (2009). The dissimilar scope and implications discussed in this article leads to a different conclusion.

[12] 802 F.2d 405 (11th Cir. 1986).

[13] *Id.* at 409.

[14] Liptak, *supra* note 2, at Sidebar.

at three alternative approaches to distributing residual funds and concludes that a cy pres distribution scheme is usually the best approach. Part IV questions the need for more uniform regulations over cy pres distributions and, if needed, who should enforce such rules and what mechanisms should be employed to do so. This part also analyzes some of the existing state laws that govern cy pres awards. Lastly, Part V concludes that government regulation or supervision by an independent body would not necessarily reduce the occurrence of erroneous applications of the cy pres doctrine in the class action context and would likely place severe limits on judicial discretion. Instead, to increase the consistency and fairness of cy pres distributions, greater transparency must be given to the settlement proceedings.

II. THE CY PRES DOCTRINE

A. Origins of the Cy Pres Doctrine

The cy pres doctrine is a term originating from Law French, an archaic language with its roots in Norman, French, and English that was used in English courts from the eleventh to seventeenth centuries.[15] Cy pres, an abbreviation of "cy pres comme possible," translates into "as nearly as possible."[16] At common law, if a settlor's objective for a charitable trust becomes impossible or illegal to carry out, a court has the power to modify the terms of the trust in order to fulfill the settlor's intent as closely as possible.[17] A classic example is *Jackson v. Phillips*,[18] where the testator provided for the establishment of a trust to abolish African-American slavery and aid fugitive slaves in the United States.[19] Shortly after the testator's death, the U.S. Constitution was amended to end slavery,[20] thus rendering the purpose of the trust moot. The

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[18] 14 Allen 539 (Mass. 1867).
[19] *Id.* at 540.
[20] *Id.*

Jackson court applied the cy pres doctrine and held that in, keeping with the testator's intent, the money should, instead, be used to provide education to freed slaves and help poor African-Americans in the city where the testator had lived.[21]

In the United States, the cy pres doctrine is codified in both individual state laws and Section 413 of the Uniform Trust Code (UTC),[22] a model code that a number of states have adopted either verbatim or as a model for major legislative reform.[23] In addition to the original common law definition allowing changes when the objective of a trust becomes illegal or impossible, the UTC has broadened the scope of the doctrine to allow courts to apply cy pres principles when a trust's purpose becomes "impracticable" or "wasteful," and not just impossible or illegal.[24] An impracticable purpose is one that is unreasonable or not feasible to accomplish, even though it is still possible to do so.[25] A wasteful situation is defined as one where the amount of trust money "exceeds what is needed for the particular charitable purpose to such an extent that the continued expenditure of all the funds for that purpose, although possible to do, would be wasteful.[26] In this situation, a court can direct the surplus trust funds to a "like purpose in a different community" or a "different but reasonably similar charitable purpose."[27] Besides the addition of these two types of purposes, Section 413 also alters the common law rule in that it "creates a presumption of general charitable intent" by prohibiting courts from giving the trust funds to a non-charity, unless the settlor expressly allowed it to do so.[28]

B. Cy Pres Doctrine in the Class Action Context

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[21] *Id.* (allowing cy pres in the abolitionist context but disparately not allowing cy pres in the universal suffrage context, despite the fact that both would represent changes in the equal rights laws of the country).
[22] Cy-pres Doctrine, *supra* note 13.
[23] CITE NEEDED
[24] Uniform Trust Code § 413 (Nat'l Conference of Comm'rs of Unif. State Laws 2005).
[25] In re Trust of Lowry, 885 N.E.2d 296, 300 (Ohio Ct. App. 2008).
[26] *Id.* at 301 (quoting RESTATEMENT (THIRD) OF TRUSTS §67 (2003)).
[27] *Id.* (citation omitted).
[28] Uniform Trust Code Art. 4.

i. History

Courts in the 1970s, particularly those in California, institutionalized the practice of cy pres distributions in class actions.[29] The important case, *State of California v. Levi Strauss & Co.*, laid out the concept of applying the cy pres doctrine in class action settlements and delineated factors to consider when deciding whether a cy pres distribution would be appropriate.[30] Confronted with a large residual fund following an antitrust class action settlement, the court in *Levi Strauss* turned to the equitable doctrine of cy pres, more specifically referred to as "fluid recovery" in class action cases, and held that "[f]luid recovery may be essential to ensure that the policies of disgorgement or deterrence are realized. Without fluid recovery, defendants may be permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts."[31]

The defendant in this case, Levi Strauss, a popular denim jeans manufacturer, was accused of pressuring clothing stores to overcharge for its jeans.[32] In opting to settle, Levi Strauss agreed to pay $3 to customers who had proof they purchased the overpriced jeans.[33] However, only a few class members had retained sales receipts and, consequently, only a few were eligible for compensation.[34] To prevent the defendant from keeping the "ill gotten gains," the court considered four possible methods of distributing the funds[35]: a cy pres distribution and three other methods, which will be discussed in Part III below. The court concluded that a cy

[29] S. Gale Dick, *Fluid Recovery: Flexible Ways to Settle Cases,* 13 ALTHCL 73, 81 (1995).
[30] 715 P.2d 564 (Cal. 1986).
[31] *Id.* at 570-71.
[32] *Id.* at 565.
[33] *Id.*
[34] *Id.*
[35] *Levi Strauss*, 715 P.2d at 571.

pres distribution going towards the creation of two consumer protection trust funds would ultimately provide the most indirect benefit to the class of wronged consumers.[36]

As a side note, although the terms "cy pres distribution" and "fluid recovery" are used interchangeably in class action cases, over the years a slight distinction has been made between the two.[37] Fluid recovery is a method used to distribute residual funds – funds that remain only after the defendant has paid its total damages over into a class fund and individual class members have been given an opportunity to collect their shares.[38] In contrast, while "cy pres distribution" can be used as an identical description for what a fluid recovery does, it is broader in that it is not limited to residual funds.[39] The court in the federal fraud case of *In re Mexico Money Transfer Litigation,*[40] involving a class of over 13.5 million members, many of whom were undocumented immigrants, stated that approval of a cy pres distribution "does not depend on its being composed of residual or unclaimed funds."[41] Given the immense difficulty of locating and eliciting claims from millions of people, especially from undocumented immigrants fearful of coming forward in case their illegal status were to be discovered, the court decided to set aside a large portion of the settlement funds specifically for a cy pres distribution to Mexican and Mexican-American public interest projects that would indirectly benefit the class members.[42]

ii. Factors in Determining a Cy Pres Distribution

When a court is left with residual funds from a class action settlement, it is typically due to one of three scenarios that commonly occur in class action lawsuits. First, it is often difficult to locate all class members and notify them to collect their share of the settlement because of the

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[36] *Id.* at 576.
[37] Alexandra D. Lahav, *Absence Makes the Heart Grow Fonder: Dead Souls, Phantom Clients and the Modem Class Action, in* 40 STUD. IN L. P. SOC'Y 153, 178 (Austin Sarat ed., 2007).
[38] *Id.*
[39] *Id.*
[40] 164 F.Supp. 2d 1002 (N.D. Ill. 2000).
[41] *Id.* at 1011, 1031.
[42] *Id.* at 1031.

sheer size or ambiguity of a particular class.[43] Examples of a large class include the 13.5 million-member class in *Mexico Money Transfer Litigation*, as discussed above, and the class in *Daar v. Yellow Cab Co.,* where the class members that needed to be tracked down were individuals who had used Yellow Cab Company's taxicab services in Los Angeles sometime during a period of four years.[44] An example of an ambiguous class is found in *Committee on Children's Television, Inc. v. General Foods Corp*., a case where a coalition of public health and consumer organizations sued on behalf of unnamed plaintiffs – some of whom were described as children and their parents in the entire state of California who were allegedly misled by the false advertisement of General Foods' sugary cereals as nutritious.[45]

The second scenario that would give rise to residual funds is when eligible class members fail to submit claims[46] or do not have the documentation to prove they are members of the class.[47] Class members in *Yellow Cab* and *Levi Strauss*, for instance, would have had difficulty filing valid claims without a taxicab or sales receipt, an item that most people do not keep or receive.[48]

The third and final situation resulting in leftover settlement funds occurs when the administrative cost of compensating eligible class members exceeds the individual economic damages suffered by each class member.[49] For example, spending $5.50 in processing costs to mail a thirty-eight cent check to a class member "would be absurd," according to the *In Re Wells*

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[43] Natalie A. DeJarlais, *The Consumer Trust Fund: A Cy pres Solution to Undistributed funds in Consumer Class Actions,* 38 HASTINGS L.J. 729, 730 (1987).
[44] Daar v. Yellow Cab Co., 433 P.2d 732, 736 (Cal. 1967).
[45] Committee on Children's Television, Inc. v. General Foods Corp., 673 P.2d 660, 663 (Cal. 1983).
[46] DeJarlais, *supra* note 43, at 730.
[47] Anna L. Durand, *An Economic Analysis of Fluid Class Recovery Mechanisms,* 34 STAN L. REV. 173 n.3 (1981).
[48] *See id.*
[49] Dejarlais, *supra* note 43, at 755-56.

Fargo Securities Litigation court, where a residual fund of $35,000 was to be divided among 2,619 class members.[50]

Following any of these three scenarios, a court can choose to invoke the cy pres doctrine to distribute the residual funds. In doing so, several key factors must be applied in determining the best use for the money. Early cases, such as *Levi Strauss*, held that the cy pres distribution must fulfill the purposes of the lawsuit's underlying causes of action and satisfy the policies of deterrence and disgorgement with regards to the wrongdoer.[51] Post-*Levi Strauss* cases, while agreeing with the importance placed on considering underlying issues, have expanded on the list of factors. One case, *Schwartz v. Callas Cowboys Football Club, Ltd.*, cites three additional elements that should be looked at: (1) objectives of underlying statutes, (2) interests of class members, and (3) geographic scope of the case.[52] *Schwartz*, an antitrust case, rejected a proposal by the plaintiff to distribute residual funds to a law school clinic in Pennsylvania, because doing so would not further the objectives of the Sherman and Clayton Acts and, due to the national scope of the case, would not benefit class members living in states other than Pennsylvania.[53] Another case, *In re Airline Ticket Commission Antitrust Litigation*,[54] has advised examining the interests of not just class members, but also persons similarly situated to class members.[55] The court, in *Airline Ticket*, which involved cuts in commissions paid to travel agencies by airlines, held that, even though travel agencies in Puerto Rico and the U.S. Virgin Islands were not class members, they should not have been precluded from the cy pres distribution "since they were affected by the commission caps; they were 'the next best class.'"[56]

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[50] *In re Wells Fargo Securities Litigation,* 991 F. Supp. 1193, 1194 & 1196 (N.D. Cal. 1998).
[51] California v. Levi Strauss & Co., 715 P.2d 564, 570-71 (Cal. 1986).
[52] Schwartz v. Dallas Cowboys Football Club, Ltd. 362 F. Supp. 2d 574, 576 (E.D. Pa. 2005).
[53] *Id.* at 576-577.
[54] 268 F.3d 619 (8th Cir. 2001).
[55] Thomas, *supra* note 10.
[56] *Airline Ticket*, 268 F.3d at 626.

More recently, in a sharp deviation from *Levi Strauss*-type analysis, a small group of cases (including *Fears v. Wilhelmina*) have stated that, because the cy pres doctrine has significantly evolved from its traditional definition, a modern interpretation allows for the distribution of settlement funds to organizations whose aims are completely unrelated to those derived from the lawsuit.[57]

As can be seen from these conflicting outcomes, a court is not bound by a single set of rules when it comes to structuring a cy pres distribution. The wide spectrum of decisions as to what constitutes an appropriate cy pres distribution is due to such variables as the unique facts of each case and the subjective agendas of all parties involved: courts, class members, defendants, attorneys, and potential cy pres recipients. The next section looks at the spectrum of cases that showcase the diverse range of cy pres distributions and the varying proximity of those distributions to the traditional principles of the cy pres doctrine.

iii. Cy Pres Distributions in Practice

1. As nearly as possible: a strict application of the cy pres doctrine

The previously mentioned case of *Nelson v. Gadsden* is an example of when the cy pres distribution provides a benefit that is as near as possible to a benefit class members would have received if they were directly compensated.[58] In *Nelson,* tenants who were injured by their landlord's refusal to give them a federally-mandated allowance for utility usage benefited from a cy pres distribution ordering the landlord to improve the energy efficiency of the tenants' apartments,[59] thereby, ultimately resulting in lower utility costs. Similarly, in *Market Street Railways Company v. Railroad Commission,* train riders who were overcharged by the railway

[57] *See, e.g.* Fears v. Wilhelmina Model Agency, Inc. No. 02-Civ.4911(HB), 2005 WL 1041134, at *10-*11 (S.D.N.Y. May 5, 2005); Thomas, *supra* note 10.
[58] Robert E. Draba, *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near As Possible,"* 16 LOY. CONSUMER L. REV. 121, 134 (2004).
[59] Nelson v. Gadsden Housing Authority, 802 F.2d 405, 409 (11th Cir. 1986).

company gained a close benefit when the company was ordered to use residual funds to improve the transportation facilities that those riders used.[60]

In *Powell v. Georgia-Pacific Corporation,* an employment discrimination case where race was the basis for discrimination, the court approved a cy pres distribution to fund scholarships for minority students in the three counties where the class members lived.[61] Although the class members themselves were adult workers, not students, the class still benefited indirectly, since the distribution centered around addressing the underlying issue of racial discrimination and was limited to the areas in which the class members resided.[62] Moreover, the court stated that such a distribution would satisfy the class members' intent: a "desire to have the scholarships benefit the class members' younger relatives."[63]

Class action cases such as *Nelson, Market Street Railways,* and *Powell* involve circumstances that make it easier to create a satisfactory cy pres distribution when considering the factors of class interests, underlying issues of the case, and relevant laws. The small scope of the cases, in terms of geographic area, size of the class, and easily identifiable injuries to class members makes them more manageable and, hence, simpler to provide indirect benefits that are appropriate and fair when applied to all elements. Unfortunately, as the scope of a case grows and facts and issues become more varied, far-reaching, and complex, the nexus between the traditional theory of the cy pres doctrine and the actual cy pres distribution becomes more attenuated.

2. *More distantly related: a flexible application of the cy pres doctrine*

[60] Market Street Railway Company v. Railroad Commission, 171 P.2d 875, 880-81 (Cal. 1946).
[61] Powell v. Georgia-Pacific Corporation, 119 F.3d 703, 704, 707 (8th Cir. 1997).
[62] *Id.* at 705.
[63] *Id.* at 707.

Class action settlement funds intended for a vast number of class members will inevitably generate a sizeable portion of leftover money, for reasons previously discussed, such as the difficulty of notifying all class members of their right to make a claim. In ordering a cy pres distribution, courts have attempted to give an indirect benefit to these "silent" class members (those who have not made a claim or are ineligible for an award) in two general ways. The first way is for a court to donate cy pres funds to existing organizations that deal with issues related to the underlying matters or interests of class members in the class action lawsuit.[64] The second way is to create a trust fund – one that acts like a foundation and provides grants to projects seeking to achieve objectives related to the class action.[65]

Examples of the first type of distribution to an existing organization are *Starr v. Fleet Finance, Inc.*[66] and *Vasquez v. Avco Financial Services.*[67] *Starr* was a predatory lending case in which cy pres funds were given to a legal aid society that aided low-income victims of predatory lending.[68] Even though the class members might not have been the direct recipients of assistance from the legal aid society, they still received an indirect if distant benefit by having an organization help fight against the issue of abusive lending practices at large.[69] In *Vasquez*, class members were illegally charged higher interest rates on loans, leading the court to entrust residual funds to a consumer protection group called the "Consumers Union," which, in turn, had to use the money for "administrative, legislative, legal, research, education, and direct service

[64] *See* California v. Levi Strauss & Co., 715 P.2d 564, 573 (Cal. 1986) (holding that "to further the purposes of the substantive law and provide indirect compensation to class members…some courts have allocated the funds directly to responsible private organizations").
[65] Dejarlais, *supra* note 43, at 759.
[66] No. 9210-2314-06 (Cobb County Ga. Super. Ct. filed Apr. 3, 1992).
[67] No. NCC 11933 (Los Angeles Sup. Ct. filed Apr. 24, 1984).
[68] Draba, *supra* note 58, at 135-36.
[69] *Id.*

projects to benefit those [class members] who would otherwise have received [their share of the settlement]."[70]

An example of the second type of distribution (towards creating a trust fund) is seen in *Levi Strauss.* In response to Levi Strauss overcharging consumers for its clothing, the court ordered the creation of two trust funds intended to support programs the main mission of which was to provide consumer protection services.[71] Another example is the Telecommunications Education trust, a trust fund established using over $16 million in residual settlement money from a case against the Pacific Bell telephone company for deceitful marketing practices.[72] The fund has been used to award grants to a large number of organizations for projects designed to educate the public on telecommunications issues, including the creation of a hotline that answers people's questions on privacy rights related to telecommunications.[73]

Beyond trust funds and direct donations to charitable organizations, a cy pres distribution does not always have to take a monetary form. An interesting example of a non-monetary cy pres distribution is *In re Compact Disc Minimum Advertised Price Antitrust Litigation,* an antitrust case involving a conspiracy by distributors and retailers to inflate the cost of music products, where the court ordered 5.6 million compact discs to be distributed to libraries and schools in forty-three states to allow the public to enjoy them for free.[74]

3. *Cy loin comme possible (as far as possible): a questionable application of the cy pres doctrine*

Deviating as far as possible from the traditional concept of the cy pres doctrine, there are several cases that have approved the concept of using cy pres funds for purposes unrelated to the

[70] Dejarlais, *supra* note 43, at 760-61.
[71] Dick, *supra* note 29, at 81-82.
[72] *Id.* at 82.
[73] *Id.*
[74] In re Compact Disc Minimum Advertised Price Antitrust Litigation, 216 F.R.D. 197, 199-200 (D. Me. 2003); Draba, *supra* note 58, at 137.

issues or interests of class members in a class action suit. *Fears v. Wilhelmina* is one such case, where the court relied on the *In re Motorsports Merchandise Antitrust Litigation* case in implying that the equitable nature of the cy pres doctrine allows for the removal of the factor requiring benefits to be used as nearly as possible for the purposes of the class action.[75]

Motorsports Merchandise involved an allegation of price-fixing brought by consumers against vendors of NASCAR (National Association for Stock Car Auto Racing) merchandise.[76] After initial distribution of the settlement, $2.4 million in residual funds were shared among various organizations including Duke University Medical Center, Susan G. Komen Breast Cancer Foundation, three heath care programs, and two law school clinics[77] – all organizations that essentially had no relation with either NASCAR, fans of NASCAR who purchased the merchandise, or antitrust laws.[78] The court in *Motorsports Merchandise* cited two cases that it believed expanded the scope of the cy pres doctrine and gave it the authority to distribute funds to organizations that did not even have a remote nexus to the underlying NASCAR theme of the class action.[79]

Another price-fixing case, *Superior Beverage Co., Inc. v. Owens-Illinois, Inc.,* here concerning the price of glass containers, distributed residual funds to law school clinics and legal aid organizations working on issues such as criminal justice, health care law, civil rights, and

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[75] *See* Fears v. Wilhelmina Model Agency, Inc., No. 02-Civ.4911 (HB), 2005 WL 1041134, at *10-11 (S.D.N.Y. May 5, 2005) (stating that where the court has "discretion to distribute residual funds…cy pres principles permit [] the distribution of residual funds to a wide range of charitable organizations" and that the 'courts' broad equitable powers now permit use of funds for other public interest purposes by educations, charitable, and other public service organizations"); In re Motorsports Merchandise Antitrust Litigation, 160 F. Supp. 1392, 1394 (N.D. Ga. 2001) (concluding that "Courts have expanded the cy pres doctrine to also permit distributions to charitable organizations not directly related to the original claims").
[76] *Motorsports Merchandise*, 160 F.Supp. 2d at 1393.
[77] I*d.* at 1396-99.
[78] *See* Draba, *supra* note 58, at 154 (arguing that the court should have made "better choices" by distributing the funds to organizations 'nearer' to injured consumers of NASCAR merchandise" such as "organizations whose missions are aligned with traffic safety, driver education, or the prevention of alcohol-related automobile accidents").
[79] *Motorpsorts Merchandise*, 160 F.Supp. 2d at 139.

poverty law.[80] In addition, the court also approved a $50,000 grant to a museum to create a space solely for exhibiting glass art.[81] A second case of a securities fraud class action, *Jones v. National Distillers*, donated the entire residual fund sum of $18, 400 to the civil division of a legal aid society.[82]

In creating a cy pres distribution that funded organizations unrelated to the case, the court in *Superior Beverage* held that "the doctrine of cy pres and courts' broad equitable powers now permit use of funds for other public interest purposes," even while acknowledging that the "use of funds for purposes closely related to their origin is still the best cy pres application."[83] The court in *Jones* attempted to find a tie between the issue of securities fraud and the recipient of the residual funds.[84] Admittedly, the tie was weak, although the court claimed that the legal aid society bore some connection to the class action since the society's civil division could purportedly help people with civil securities fraud problems, whereas no connection would exist if "the donation served an entirely unconnected cause such as a dance performance or a zoo."[85]

There appears to be some confusion as to whether *Superior Beverage* and *Jones* actually stand for the proposition that the cy pres doctrine has been relaxed, as far as it relates to class action cases, in allowing distributions to unrelated organizations or for unrelated purposes.[86] One commentator has suggested that the court in *Jones* did not intend to challenge the conventional tenets of the cy pres doctrine but, instead, was forced to donate the residual funds to an unrelated organization because there was "no obvious use for the money that provided a

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[80] Superior Beverage Co., Inc. v. Ownes-Illinois, Inc., 827 F. Supp. 477, 480-87 (1993).
[81] *Superior Beverage*, 827 F.Supp. at 485.
[82] Jones v. National Distillers, 56 F. Supp. 2d 355, 356, 360 (S.D.N.Y. 1999).
[83] *Superior Beverage,* 827 F. Supp. at 479.
[84] *Jones*, 56 F. Supp. 2d at 359.
[85] *Id.*
[86] *See* Draba, *supra* note 58, at 149 (contending that the tenuous cy pres distributions in *Superior Beverage* and *Jones* should have been viewed as exceptions to the cy pres doctrine, rather than expansions, and that the courts were constrained by the particular facts of the cases in deciding how to distribute the residual funds).

particular benefit to class members."[87] The *Jones* court reasoned that because the class was injured more than twenty years ago – "an eternity in the fast-changing world of securities markets" – distributing funds to support securities fraud research or prevention would merely benefit "participants in the global economy" and not the class members, particularly as it was unclear how many of the claimants remained active stock investors.[88] Nevertheless, the *Jones* court relied on the *Superior Beverage* decision, which stated "[i]n recent years, the [cy pres] doctrine appears to have become more flexible," to conclude that the "absence of an obvious cause to support with the funds does not bar a charitable donation."[89]

III. ALTERNATIVES TO A CY PRES DISTRIBUTION

A cy pres distribution is not the only method available to courts for distributing residual funds. The three main alternatives are claimant fund-sharing, reversion of the funds to the defendant, and escheat of the funds to the government.[90] In consumer class actions, a fourth alternative may be to order price rollbacks on goods or services used by class members.[91]

A. Claimant Fund-Sharing (Redistribution Among Class Members)

Class members who have already claimed and received their settlement compensation often ask that any residual funds be distributed among them pro rata.[92] The one compelling argument for allowing this is that class members are the ones who directly suffered an injury from the defendant's actions, not third-party organizations or similar situated individuals who stand to gain benefits under a cy pres distribution.[93] Advocates of giving residual funds to class

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[87] *Id.* at 151 (quoting *Jones,* 56 F. Supp. 2d at 358).
[88] *Jones,* 56 F. Supp. 2d at 358.
[89] *Id.* at 359.
[90] *See generally* Levi Strauss, 715 P.2d at 571-75; DeJarlais, *supra* note 43, at 748-59; Thomas, *supra* note 10.
[91] *See generally,* Levi Strauss, 715 P.2d at 571-72; DeJarlais, *supra* note 43 at 753-55.
[92] DeJarlais, *supra* note 43, at 755.
[93] NEED CITE

members over charitable organizations assert "[It's] [class members'] money. I don't care how much good you want to do. Do it with your own money, not someone else's money."[94]

The problems with claimant fund-sharing, however, appear to exceed the benefit associated with this argument. Claimants are likely to receive a windfall,[95] especially in cases with large classes where, as previously discussed, many class members fail to submit claims for various reasons, such as the impossibility of locating and notifying all members or members finding it inconvenient to come forward when the individual award is miniscule. Furthermore, claimant fund-sharing forecloses the indirect benefits that silent class members would receive under a cy pres distribution.[96] Another problem with claimant fund-sharing is that the administrative costs of disbursing the residual fund to claimants may be excessive, thereby making it a wasteful expenditure.[97] All these arguments against claimant fund-sharing are discussed in *Van Gemert v. Boeing Co.,* where the court in rejecting plaintiffs' request for a pro rata distribution of the residual fund further postulated that claimant fund-sharing could result in claimants intentionally concealing the pro rata redistribution plan from other class members in order to gain a larger share.[98] A claimant fund-sharing scheme, therefore, seems to be an appropriate method of distribution only in a limited number of cases, such as those where the majority of class members have come forward and received compensation.[99]

However, one exception to this general principle exists. While case law has not been shown to support claimant fund-sharing in situations where claimants ask to share in a residual fund after they learn that there is leftover money, courts do allow such a distribution when the

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[94] *Liptak, supra* note 3, at Sidebar.
[95] Dejarlais, *supra* note 43, at 755.
[96] California v. Levis Strauss & Co., 715 P.2d 562, 573 (Cal. 1986).
[97] DeJarlais, *supra* note 43, at 755-56.
[98] Van Germert v. Boeing Co., 553 F.2d 812, 816 (2d Cir. 1977).
[99] DeJarlais, *supra* note 43, at 756.

parties in the class action foresee the possibility of a residual fund and expressly provide for this type of distribution in the settlement agreement.[100] The intent of the plaintiffs, like the intent of the settlor in charitable trust law, is given precedence.

B. Reversion to the Defendant

Not surprisingly, just like many class claimants desire to partake in a residual fund, defendants also frequently seek the return of any unclaimed money.[101] Proponents of reverting unclaimed funds to the defendant claim that, if the funds will not be used to compensate directly class members, any other distribution constitutes an "unlawful forfeiture."[102] Two notable cases held that reversion to the defendant is permissible. *Van Gemert v. Boeing,* a case that rejected a claimant fund-sharing plan, held that a return of the residual fund to the defendant was fair, considering that the defendant "had at all times acted without malice, without bad faith, and in reliance on the advice of others (including two law firms)" when it breached its contractual duties with the plaintiff class, which gave rise to the lawsuit.[103] In approving the reversion, the court ordered the defendant to publicize the existence of the fund annually for ten years and pay any valid future claims made by class members who had not yet received compensation.[104]

The second case is *Wilson v. Southwest Airlines, Inc.,* a case alleging that Southwest Airline's policy of hiring only attractive female employees violated anti-discrimination laws.[105] Left with more than $500,000 in unclaimed funds, the court approved an agreement between the

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[100] *See* Thomas, *supra* note 10 at §6(b) (discussing Beecher v. Able, 575 F.2d 1010 (2d Cir. 1978), a federal securities case where the court approved a claimant fund sharing plan because the parties had explicitly provided in the settlement agreement that any unclaimed funds would not revert to the defendant but would be distributed among class members according to certain percentages).
[101] *See* DeJarlais, *supra* note 43, at 749-50.
[102] *Id.* at 749.
[103] Thomas, *supra* note 10, at §9(a).
[104] *Id.*
[105] Wilson v. Southwest Airlines, 880 F.2d 807, 809 (5th Cir. 1989).

parties for the return of 64.5% of the funds to the defendant.[106] As the *Boeing* court did, the *Southwest Airlines* court looked at the defendant's motive when breaching the law as well as the defendant's demeanor throughout the case. The court stated that, because

> (1) the employer's conduct was not based on invidious discrimination but rather on a good faith interpretation of applicable law; (2) the employer had conducted the litigation in a straightforward and unequivocal manner; (3) the employer had acted quickly and in good faith to bring its hiring practices into compliance with the law once the District Court's verdict as to liability was rendered; and (4) the policy of Title VII [anti-discrimination law] is compensatory rather than punitive

the defendant had an equitable claim to reversion of the funds.[107]

On the other hand, opponents of reversion cite California's Supreme Court, which held in *Levi Strauss* that there are strong public policy considerations against allowing defendants to retain ill-gotten gains.[108] In *Six Mexican Workers v. Arizona Citrus Growers*,[109] the court held reversion to be an appropriate distribution mechanism in only one circumstance: "when deterrence is not a goal of the statute which the defendant has violated."[110] Since *Six Mexican Workers* revolved around a federal law with a deterrent purpose, the Migrant and Seasonal Agricultural Worker Protection Act, the aim of which is to "provide employment related protections to migrant and seasonal agricultural workers,"[111] the court dismissed reversion to the defendant as a possible option for distributing residual funds.[112]

C. Escheat to the Government

A third distributive mechanism available to courts is to escheat residual funds to the government. Theoretically, residual funds could be classified as unclaimed property, which falls

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[106] *Id.* at 816.
[107] Thomas, *supra* note 10, at §9(a).
[108] DeJarlais, *supra* note 43, at 749-750.
[109] 904 F.2d 1301 (9th Cir. 1990).
[110] Thomas, *supra* note 10 at §5.
[111] Department of Labor, *The Migrant and Season Agricultural Worker Protection Act, http://www.dol.gov/whd/regs/statutes/0001.mspa.htm* (last visited December 2, 2011).
[112] Thomas, *supra* note 10, at §5.

under federal and state abandoned property statutes.[113] However, courts have held that these laws may result in two unintended consequences: it would disturb "the equitable discretion of the courts in managing private consumer class actions" and "cripple the compensatory function for the private class action."[114]

A few cases have taken the position that escheat is permissible, most notably *Six Mexican Workers.* This case listed two important factors to examine before ordering an escheat. First, both a cy pres distribution and reversion to the defendant must be found inappropriate.[115] Second, if escheat becomes an option, the escheat must serve "the deterrence and enforcement goals of the substantive federal statute under which the suit is brought."[116]

There are two types of escheat: "earmarked" and "unconditional."[117] An earmarked escheat, as its name suggests, requires that the government earmark the given funds for programs that benefit the class action's next best class.[118] In contrast, an unconditional escheat has no restraints and simply indicates that the money will be placed in the government's treasury to be used as the government deems fit.[119]

In *West Virginia v. Chas. Pfizer & Co.,*[120] the court ordered an earmarked escheat of residual funds to several states.[121] Since *Pfizer* was an antitrust case involving antibiotics manufacturers, those states were required to use the funds for general public health purposes.[122] One positive effect of earmarked escheat is the reduction of distribution costs since the

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[113] Kevin M. Forde, *What Can A Court Do With Leftover Class Action Funds? Almost Anything!,* 35 JUDGES' J. 19, 19-29 (1996).
[114] *Id.* at 20 (quoting California v. Levi Strauss & Co., 715 P.2d 564, 575-75 (Cal. 1986)).
[115] Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990).
[116] Thomas, *supra* note 10, at §5 (citing to the court's findings in *Six Mexican Workers*).
[117] DeJarlais, *supra* note 43, at 751.
[118] *Id.*
[119] *Id.*
[120] 314 F. Supp. 710 (S.D.N.Y. 1970).
[121] DeJarlais, *supra* note 43, at 752.
[122] *Id.*

government already has agencies established to provide public services.[123] However, the existence of these agencies can also pose a problem, as when the government lowers its own budgetary expenditures on an earmarked program by the amount of the escheat award and then diverts the extra funds to other projects that are completely unrelated to the class action and do not benefit the injured class.[124] Furthermore, the absence of benefits associated with the class action suit is amplified when an escheat is made unconditionally since nothing prevents the government from spending the money on programs that simply have nothing to do with the case.[125]

D. A Situational Alternative: Price Rollbacks

In consumer class action cases, such as *Levi Strauss,* courts have the option of ordering a price rollback to remedy the injury to the class. For example, the taxicab company that overcharged passengers in *Daar v. Yellow Cab* was ordered to lower its fares until the residual funds were used up.[126] Another case that applies the price rollback mechanism was *Colson v. Hilton Hotels Corp.,* where hotels that had billed guests an illegal service charge for telephone calls were ordered to apply $5 million in residual funds to reduce hotel room rates by fifty cents per stay.[127]

While ordering price rollbacks as a remedy appears to be the most logical method to counteract a defendant's wrongful act of overpricing good or services, the result may not actually benefit injured consumers.[128] The problematic issues with price rollbacks are that non-class members would gain a windfall if they were to take advantage of the reduced prices,[129] whereas

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[123] *Id.* at 751.
[124] *Id.* at n. 134.
[125] *Id.* at 753.
[126] DeJarlais, *supra* note 43, at 754.
[127] Colson v. Hilton Hotels Corp., 59 F.R.D. 324, 326 (N.D. Ill. 1972).
[128] DeJarlais, *supra* note 43, at 754.
[129] *Id.*

class members who choose not to or are unable to purchase the goods or services at the lower price do not gain any benefit. Another group that could suffer a loss from a price rollback consists of the defendant's competitors, who would also have to reduce their prices in order not to risk losing customers.[130] In this sense, the price rollback mechanism appears to have a value that is limited only to defendants that have no or few competitors,[131] and in situations where it is likely that a majority of the class members will continue to use the defendant's good or services.[132]

E. Abuse of Discretion and When Courts Cannot Make Up Their Mind: The Drama of the Folding Carton Litigation

A scheme for distributing residual funds ordered by a trial court is not immune to a challenge by the parties. On appeal, a higher court may overturn the distribution if it discovers that the trial court abused its discretion.[133] For example, in *Kansas Association of Private Investigators v. Joseph Mulvihill,* the appellate court overturned the trial court's order to donate residual funds to two children's charities, in a case in which a company of private investigators sued the Board of Police Commissioners in Kansas City, Missouri for charging improper licensing fees.[134] The Court of Appeals concluded that the trial court had abused its discretion in three ways[135]: first, by distributing the funds to organizations completely unrelated to the activities of the parties in the class action; second, by not notifying the parties of the intended distribution; and, third, by selecting cy pres recipients located in the county where the case was

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[130] *Id.* at 754-55.
[131] *Id.* at 755.
[132] *See* California v. Levi Strauss & Co., 715 P.2d 564, 571 (Cal. 1986) (stating that "price rollbacks are particularly effective for remedying overcharges on items which are repeatedly purchased by the same individuals").
[133] Draba, *supra* note 58, at 128.
[134] Kansas Association of Private Investigators v. Joseph Mullvihill, 159 S.W.3d 857, 858, 861-62 (Mo. App. 2005).
[135] *Kansas Ass'n of Private Investigators,* 159 S.W.2d at 859 (using the following standard for finding an abuse of discretion: "we will find an abuse of discretion if the trial court's decision is against the logic of the circumstances before the court at the time and is so arbitrary and unreasonable that it shocks the conscience of this court and suggests a lack of careful consideration").

heard, even though both parties resided in another county.[136] Citing *Airline Ticket Comm'n,* the appellate court held that, when choosing to apply the cy pres doctrine, "funds must be distributed to charities with interests as near as possible to the interests of the class members and those similarly situation."[137] Even with the Court of Appeal's finding of an abuse of discretion, however, the class members still appeared to be irrevocably injured as it was unlikely that the money given to the children's charities could be recovered.[138]

Another case where the impropriety of the cy pres distribution was much more pronounced is the so-called Fen-Phen scandal. In the 1990s, Fen-Phen (a drug regimen whereby an individual would take a combination of two appetite suppressants – fenflueramine and phentermine) was touted as a miracle weight loss drug cocktail until a medical study showed that fenfluramine caused heart defects, resulting in the U.S. Food and Drug Administration pulling it off the market.[139] Three attorneys represented 441 users of the drug in bringing a class action suit in Kentucky against the manufacturer of fenfluramine and won a $200 million settlement.[140] However, only $74 million went to the plaintiffs, while the remaining $106 million was divided among the three attorneys and a fourth "consultant" attorney, in addition to a $20 million cy pres distribution made to the Kentucky Fund for Healthy Living.[141] The Kentucky Fund was an ostensible non-profit, charitable organization newly created and wholly managed by the four attorneys, thus raising serious questions about their ethical conduct and duties toward their

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[136] *Id.* at 862.
[137] *Id.*
[138] *Id.*
[139] *See generally,* Andrew Wolfson, *Grand Jury to Look at Diet-Drug Attorneys,* COURIER-JOURNAL.COM (March 15, 2007, 2:28 AM), http://www.courier-journal.com/article/20070315/NEWS01/703150464/Grand-jury-to-look-at-diet-drug-attorneys; U.S. FOOD AND DRUG ADMINISTRATION, QUESTIONS AND ANSWERS ABOUT WITHDRAWAL OF FENFLURAMINE (PONDIMIN) AND DEXFENDLURAMINE (REDUX), (last updated July 7, 2005), http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforpatientsandProviders/ucm180078.htm.
[140] Wolfson, *supra* note 139.
[141] Adam Liptak, *Fraus Inquiry Looks at Lawyers in Diet-Drug Case,* N.Y. TIMES, March 24, 2007; Beth Musgrave & Jim Warren, *Fen-Phen Settlement in Back in the Courtroom*, HERALD-LEADER (Jan. 29, 2005), http://www.pph-net.org/news/pph-news-0016.htm (last visited April 27, 2010).

clients.[142] More egregiously, the judge who presided over the case and settlement proceedings was named a director of the fund and paid $5000 per month.[143] Following this settlement, civil and criminal charges of fraud were filed against the attorneys, and the judge was forced to resign after Kentucky's Judicial Conduct Commission declared his actions to be "disturbing, inexcusable, and shocking to the conscience."[144]

The cy pres distribution in this case – the creation of the trust fund – is not an unethical remedy per se. The administrators of the fund claimed to have made several grants to public service organizations, including a university medical center and a rehabilitation center[145] which, perhaps, shared some relationship with the issues of the class action or the interests of the class members. What gave rise to the notion of impropriety, however, is the way in which the cy pres distribution was handled. The attorney representing the four attorneys in the fraud case argued that it was common for a settlement to yield residual funds and for those funds to be used for charitable purposes.[146] The attorney further contended that the claimants in the class action were simply upset after learning that they could not share in a redistribution of the remaining funds as doing so would give them an unfair windfall.[147] However, the plaintiffs in the class action alleged that they were never told the total amount of the settlement as they could not have found out through public records because they were sealed at the defendant's request, and that they were intimidated by the attorneys into agreeing to the creation of the trust fund.[148] Moreover, there does not seem to be any de jure precedent in class action settlements where the plaintiffs' attorneys and the court have full control over residual funds and derive financial benefits from

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[142] Musgrave, *supra* note 141.
[143] Liptak, *supra* note 141.
[144] Id.; Wolfson, *supra* note 139.
[145] Musgrave, *supra* note 141.
[146] *Id*.
[147] *Id*. In addition to the class action members, there were an estimated 90,000 people who took Fen-Phen in Kentucky who would be precluded from any benefits if a claimant fund-sharing plan was instituted.
[148] *Id*. Liptak, *supra* note 141.

them. Clearly, in the Fen-Phen scandal, the covert settlement agreement and the lack of information given to the class members constituted an abuse of the judicial system, raising the need for a mechanism to prevent such abuses from recurring, an issue that will be addressed in Part IV below.

As seen in the *Kansas Ass'n of Private Investigators* and the Fen-Phen case, an abuse of discretion is generally only found where the defendant has engaged in conduct that shocks the conscience. The following series of cases, collectively referred to as the *Folding Carton Antitrust Litigation,*[149] show how easily courts can disagree on the issue of distributing residual funds and the differences in opinion as to whether a decision shocks the conscience, both of which reflect the vast amount of discretion that courts have in deciding this matter.[150]

In *In re Folding Carton Antitrust Litigation,* commercial purchasers of folding cartons brought allegations of price-fixing against the manufacturers, who eventually settled for $200 million.[151] After distribution, $6 million remained, which the district court ordered to be used to create "The Antitrust Development and Research Foundation," a foundation that the court believed would "serve the Sherman Act policies of antitrust enforcement, deterrence and fair competition while providing some indirect benefit not only to the uncompensated members of the plaintiff class, but also to the general public, the ultimate consumers of folding cartons…."[152]

On appeal, the circuit court held that the district court's order was an abuse of discretion, because there were already so many organizations that had conducted "voluminous research" on antitrust litigation that creating another one was analogous to "carry[ing] coals to Newcastle."[153] The circuit court, instead, recommended that the residual funds escheat to the federal

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[149] *In re Folding Carton Antitrust Litigation,* 557 F.Supp. 1091 (N.D. Ill. 1983), *aff'd in part.*
[150] Forde, *supra* note 113, at 21.
[151] *Folding Carton,* 557 F. Supp. at 1093-94.
[152] I*d*. at 1094, 1110.
[153] *Folding Carton I,* 744 F.2d at 1254-55.

government, because it seemed unlikely that any additional claimants would come forward given that five years had elapsed since the settlement was first approved in 1979.[154]

Nevertheless, the parties to the class action did not follow this recommendation, but agreed to a distribution plan where half of the residual funds would be paid to existing claimants and the other half would be donated to law schools for antitrust research projects.[155] In response, the government, which would have benefited under the circuit court's escheat recommendation, filed an untimely appeal to have the new settlement voided.[156] Due to the un-timeliness of the petition, the circuit court was forced to dismiss the government's motion, but re-emphasized that its earlier opinion "against using the funds for antitrust purposes remains and shall not be circumvented by the parties or the district court."[157]

The Federal Judicial Center Foundation, a "government agency responsible for providing education and training services to all judicial personnel,"[158] was mentioned by the circuit court as a potentially valid recipient of the residual funds, even though the foundation had no relation to the class action's issues or interests of its members.[159] The seemingly biased preference of the circuit court's judges for the federal government is evidenced, first, through their order to escheat the funds and, second, by their choice of a congressionally-created agency.[160] On remand, the district court reviewed a number of grant proposals, including one from the Federal Judicial Center Foundation, but decided that all the remaining funds should be distributed to the National

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[154] *Id*. at 1255. The federal escheat statutes, 28 U.S.C. §2041 & 2042, requires that five years pass before the unclaimed money can be deposited in the government treasury. On remand, however, the district court pointed out that the circuit court had overlooked the fact that the funds were still being claimed and paid as late as 1986, thereby making the statutory time period inapplicable. 687 F. Supp. at 1233.
[155] Forde, *supra* note 113 at 21.
[156] *Id.*
[157] *Id.*
[158] 881 F.2d at 503, n.8.
[159] Forde, *supra* note 113, at 21.
[160] *See, e.g.* 687 F. Supp. at 1223 (asserting that "[u]nclaimed funds generally can only escheat to the appropriate *state* government") (emphasis added).

Association for Public Interest Law to create fellowships for attorneys working in public interest organizations.[161] The court reasoned that the fellowships would benefit the following groups, none of which were related to the class action: recipients of public legal services; graduating law students interested in practicing public interest law; public interest organizations that generally have difficulty acquiring sufficient funds; and society as a whole by helping individuals who do not have access to the legal system and, therefore, for these reasons, the fellowship program would be "appropriate under the cy pres doctrine."[162]

F. Cy Pres Distribution as the Better Alternative

Judging from the negative aspects of the four alternatives to the cy pres distribution mechanism (most notably, the inability to provide benefits to silent class members), it appears courts should favor the use of a cy pres distribution as much as possible. The alternatives should not be totally discounted, however, as they have been shown to have value in certain situations and, indeed, could be used in conjunction with a cy pres distribution, if doing so provides greater benefits to all class members – both silent and active – and the issues underlying a class action lawsuit.

When applying the cy pres doctrine, courts should undertake to apply first the traditional principles of the doctrine, that is, to take into consideration the interests of the class members, issues of the class action, and other factors relevant to the lawsuit. A cy pres distribution that does not reflect any of these factors raises questions concerning impropriety and bias (even if the court claims the cy pres doctrine has been expanded to allow distributions to any charitable organization). Tenuous applications of the cy pres doctrine often lead to appeals on the ground of abuse of discretion and, moreover, before the matter can be resolved, the funds may be

[161] In re Folding Carton Antitrust Litigation, No. 01-C-019011CC00290, 1991 WL 32897, at *1-2 (N.D. Ill. Mar. 6, 1991).
[162] *Id.* at *3.

misspent,[163] thereby resulting in an inefficient judicial process, economic waste, and unfairness to the parties. The only two exceptions in which the cy pres doctrine should be relaxed or altogether discarded are, first, when there is a rational basis for being unable to accomplish traditional cy pres objectives, such as demonstrated in *Jones v. National Distiller,* and, second, when the parties mutually agree to do so.

IV. REGULATION OF CY PRES DISTRIBUTIONS

Until recently, there were no federal or state laws mandating the terms of a cy pres distribution. Due to the historical nature of the cy pres doctrine as an equitable power, courts have vast discretion in applying the doctrine to formulate a remedy, provided that, in the area of trust law, the settlor's intent is fulfilled as closely as possible.[164] A court's approval or disapproval of a cy pres distribution is given deference, and should only be overturned in instances where there is a showing of an abuse of discretion.[165]

However, in 2006, Washington became one of the first states to place a limitation on the highly discretionary task of distributing residual funds. The Washington Supreme Court amended the state's civil rule on class actions to require that no less than 25% of residual funds from a class action settlement be given to the Legal Aid for Washington Fund (LAW Fund), a privately-established foundation that provides funding for statewide legal aid services.[166] Not only does the amendment benefit the legal aid community, but it is unique in that it also codifies,

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[163] For example, after the parties in *Folding Carton Litigation* agreed to distribute residual funds to existing claimants and law schools, the circuit court vacated the parties' settlement and ordered that the funds be collected back from the recipients. The district court held that this was impossible, since the majority of claimants had already spent their share of the funds by paying off creditors, attorneys, and accountants. 687 F. Supp. at 1232-33.

[164] *See* Draba, *supra* note 58, at 126-28, for a brief discussion of the origins of judicial cy pres and the courses of authority that a court has in approving a cy pres distribution, namely the court's general equitable powers and supervisory powers over class action settlements.

[165] *See supra*, Part III, Section E.

[166] Andrea D. Axel & David A Leen, *Unclaimed Class-Action Funds Offer Hope for Equal Justice,* WASHINGTON STATE BAR ASSOCIATION, July 2007, available at http://www.wsba.org/media/publications/barnews/july07-axelleen.htm (last modified July 10, 2007).

in general terms, the traditional concepts of the cy pres doctrine: "The court may disburse the balance of any residual funds…to any other entity for purposes that have a direct or indirect relationship to the objective of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class."[167]

Prior to this codification, only two other states had similar laws with respect to legal aid funding: California allows, but does not mandate, courts to set aside a portion of residual funds for legal aid organizations and North Carolina, as of 2005, requires all unclaimed funds to be split evenly between two organizations (The Indigent Person's Attorney Fund and the North Carolina State Bar) that provide legal services to indigent persons.[168]

The state legislature in Illinois has since followed suit in imposing legal restrictions on the distribution of residual funds in class action settlements. Effective July 1, 2008, a new statute requires that:

> An order approving a proposed settlement of a class action that results in the creation of a common fund for the benefit of the class shall, consistent with the other Sections of this Part, establish a process for the administration of the settlement and *shall provide for the distribution of any residual funds to one or more eligible organizations*, except that up to 50% of the residual funds may be distributed to one or more other nonprofit charitable organizations or other organizations that serve the public good if the court fins there is good cause to approve such a distribution as part of a settlement.[169]

What this statute essentially requires is that residual funds from a class action settlement decided in Illinois must be given to, at least, one "eligible organization," which is defined as a not-for-profit organization that "has a principle purpose of promoting or providing services that

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[167] WASH C.R. 23 (f)(2)(2009).
[168] *See* Axel, *supra* note 166; American Bar Association, *Innovative Cy Pres Rules Approved in Washington Sate and North Carolina,* LEGAL SERVICES NOW BULLETIN (May 16, 2006), http://www.abanet.org/legalservices/sclaid/lsn/docs/200605.html (last updated Sept. 28, 2006).
[169] 735 ILCS 5/2-807(b)(2010) (emphasis added).

would be eligible for funding under the Illinois Equal Justice Act."[170] The Illinois Equal Justice Act, passed in 1999, established the Illinois Equal Justice Foundation, which "distributes funding appropriated by the State to support not-for-profit legal aid programs."[171] The basic premise of the Act and the Foundation is that all residents of Illinois, regardless of income, are entitled to have access to the justice system.[172]

Mandating that a portion of cy pres funds be distributed to support legal aid organizations is a partial solution by states to remedy cutbacks in government funding to these organizations. The concept has been heavily promoted by legal aid organizations and seized on by judges who lacked knowledge of the cy pres doctrine or its applicability to class action suits.[173] The question, then, becomes whether it is appropriate or beneficial for states to sanction this "cy press movement"[174] and, ultimately, change the underlying premise of the traditional cy pres doctrine, of requiring funds to be paid, in part, to organizations that serve the public good, irrespective of whether these organizations have a nexus to the original class action. The difficulty in answering this question lies in the tentative balance between the importance of upholding a utilitarian social policy and preserving the autonomy and rights of class members.

In a case like *Folding Carton Litigation,* where a proposal was made to form an unneeded antitrust research foundation using millions of dollars from residual funds, the answer seems to

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[170] *Id.* at (a)(iv). Other requirements of an eligible organization are that it "has been in existence for no less than 3 years; has been tax exempt for no less than 3 years from the payment of federal taxes…; [and] is in compliance with registration and filing requirements applicable pursuant to the Charitable Trust Act and the Solicitation for Charity Act…." *Id.* at (a).

[171] Illinois Equal Justice Foundation, About Us, http://www.ieif.org (last visited April 30, 2010).

[172] *Id.* at Funding Categories, http://www.iejf.org/categroies/categories.html (last visited April 30, 2010) (reading that "Low-income Illinoisans only receive legal assistance for one our of every six problems they face"); Illinois Equal Justice Act, 30 765/5(a) (2010) (asserting that "Equal Justice is a basic right that is fundamental to democracy in this State, and the integrity of this State and this State's justice system depends on protecting and enforcing the rights of all people").

[173] Charles Wood, *Class Action Meets Legal Aid,* 30 NOV MONT. LAW 5, 7 (November 2004) (describing a judge who has presided over several class action cases but "knows nothing about the specific cy pres doctrine or how it is now being applied to fundraising for legal services").

[174] *Id.*

point toward having a law that requires some of the funds to be channeled towards uses that provide greater social benefits and, thus, militate against wasteful spending. On the other hand, in a case like *Motorsport Merchandise,* where funds were given to organizations unrelated to the class action, even though there were plenty of other charities that were relevant to the lawsuit and that would have provided beneficial social services had they received funding,[175] such a law might further dilute the cy pres doctrine's protection of class members.

Nevertheless, these laws appear to be far more beneficial than had they not been enacted. The goals of ensuring equal justice and maintaining the interests of class members are both met through these laws, as only a small portion of residual funds are required to be distributed to public service organizations. Furthermore, laws like the Illinois act have incorporated procedures that safeguard against abuse of the funds through measures that increase the accountability and transparency concerning the distribution of the funds. For example, the Illinois act prohibits the donation of funds for uses such as lobbying, political activities, labor or anti-labor activities, and demonstrations.[176] Recipients of funds must submit an annual report to the Illinois Equal Justice Foundation detailing their expenditures and containing either an audit or fiscal review of the funds.[177] In turn, the foundation's board must submit an annual report to state officials and the state supreme court listing the amounts of distributions, the identities of recipients, and the costs and balance of the total fund.[178] The reports from both the recipients and the foundation are a matter of public record.[179]

If legislative control over the distribution of residual funds for legal aid purposes aims to provide accountability and transparency, the next question becomes whether the distribution of a

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[175] *See infra* note 76 for examples.
[176] Illinois Equal Justice Act, 30 IL CS 765/40 (2010).
[177] *Id.* at 765/35(a).
[178] *Id*. at 765/35(b).
[179] *Id.* at 765/35.

class action's entire residual fund should be regulated by the government under identical provisions. Certainly, there are strong public interests in preventing another Fen-Phen scandal or even cases, like *Kansas Ass'n of Private Investigators* and *Holding Carton Litigation*, where favoritism was evident in the distributions.

Government supervision, insofar as it requires the submission of financial reports from recipients of residual funds and/or any trust funds managing the money, is merely extraneous. Many courts already require recipients to keep the court informed on the details of their expenditures and, indeed, even before distributions are decided, courts review potential recipients' grant proposals and, frequently, choose those organizations that have demonstrated the ability to disburse funds with the least amount of administrative costs.[180] If government supervision were present, however, and a problem involving the expenditure of residual funds were to arise, then the government would have to participate actively in investigating and resolving the issue. This may not be the best solution and could create complications for various reasons, one being that the government would not have the same level of knowledge of the case that the court and the parties would and, therefore, would not be in a position to make the best assessment for the parties and issues involved. Furthermore, the government has its own agenda and interests which may conflict with the interests of the class members. Any government interference with judicial discretion is also likely to be met with resistance. The flexibility and discretion afforded to the court and parties in their equitable application of the cy pres doctrine is a fundamental part of defending the relevant interests and issues arising from a class action lawsuit and for providing checks on the legislative branch's authority over the judiciary.

Similarly, the arguments against having increased government regulation over the distribution of residual funds also militate against creating an independent commission to

[180] By way of example, this is what the judge in the *Fears v. Wilhelmina* case did.

oversee cy pres distributions. The independent body would not have the same understanding of the case and, therefore, would not be in the best position to determine the allocation of funds as would the presiding judge. Moreover, the 'independence" of the individuals sitting on the commission could not be guaranteed, especially given the intense lobbying efforts of potential cy pres recipients. If a cy pres distribution carries suspicions of bias, it would be far easier for an appellate court to examine the interests and ties of a single judge than it would be for the court to have to inquire into the operations of multiple organizations.

Thus, the more effective remedy to ensuring that cy pres distributions are made appropriately and free of abuse is to create a system that provides transparency to class action settlement proceedings. Abuses of discretion, as in the Fen-Phen scandal, are not discovered until it is too late. A mechanism is needed to help not only class members, but also the general public, ascertain any self-serving interests that someone involved with the class action suit may have in proposing a particular cy pres distribution plan.

The question, therefore, arises as to how we ought proceed. I would propose the creation of a public electronic database – the Cy Pres Clearinghouse – that actively tracks all class action settlements and provides easily searchable information on the interests or partialities that the class action participants may have.[181] The information that would need to be gathered begins with the identities of those involved with each class action settlement, namely, the judge, counsel for the parties to the litigation, the class representatives, and the recipients of cy pres awards. For each participant, information should be listed regarding its publicly-known interests. For example, the information on a judge would include membership in any organizations, alma

[181] Currently, there does not appear to be any national system of monitoring class action suits. *See* Axel, *supra* note 164 (stating that "Historically, class actions have not been tracked in Washington [state], so no one knows how many class-action suits are currently pending in state court. Nor is there any data showing what percentage of certified cases generate residual funds").

mater,[182] and any prior class actions over which he or she has presided. For the recipients of residual funds, the information would include the organizations' primary objective, the identities of the directors and officers, publicly-available information on whether any of the directors or officers share a personal or professional relationship with any of the participants in the class action, and details on whether the organization has previously received residual funds from other class actions, and if so, from which case and how much.

By creating this database, the hope is to increase the accountability of all participants by placing them under greater public scrutiny. Greater accountability is necessary to ensure that the cy pres doctrine is applied as it is supposed to be – by protecting and promoting the interests, issues, and other factors that are at the crux of the class action.

V. CONCLUSION

The application of the cy pres doctrine in the class action context is an innovative way of achieving a fair result when other typical class action remedies are not feasible or available. Over the years, courts have stretched the doctrine from its original concept under trusts law, making it not just about fulfilling the intent of class members as closely as possible, but also about considering the issues of the class action suit and the interests of the next best class, as well as balancing the civic desire of promoting all public interests other than ones affiliated with the class actions.

Given the flexibility with which some courts have applied the doctrine, residual settlement funds have become more prone to being misused. If courts wish to continue using the cy pres doctrine and call it such, they should revert back to a more traditional application – one

[182] In the Fen-Phen settlement, a million dollars was given to the alma mater of one of the plaintiffs' attorneys, which in turn paid that attorney $100,000 a year for a no-show job. Ted Frank, *Cy Pres Settlements,* AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH ARTICLES AND COMMENTARY, April 10, 2008, *available at* http://www.aei.org/publications/filter/all/pubID.27789/pub_detail.asp (last visited April 30, 2010).

that always looks first at how class members and the issues of the class action can be helped. Furthermore, steps should be taken to increase the transparency of class action settlements in an attempt to ensure that all class action participants become more aware of their accountability in the hope that they will, in turn, take greater care in seeking to ensure that the cy pres doctrine is fairly and properly applied.