THE IMPORTANCE OF *CY PRES* IN MODERN CLASS ACTION JURISPRUDENCE AND THE MYTHS CONCERNING ITS USE

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I. *Cy Pres* as a Part of Class Action Settlements Has Become Ensconced in American Jurisprudence

The *cy pres* doctrine has its roots in the laws of trusts and estates, operating to modify charitable trusts when a gift is specified to go to a charitable entity that either no longer exists, has become infeasible to distribute to, or whose receipt of funds would be in contravention of public policy.[2] Over time, 48 states have institutionalized this elegant solution of transferring funds to the next best charitable or public interest use in a way that would satisfy "as nearly as possible" the trust settlor's original beneficent intent.

With the advent of class actions, another source of funds has emerged whose allocation at times has proven difficult to distribute. This occurs when class action settlements cannot be fully distributed due to an inability to locate absent class members, class members failing to do what is necessary to receive the funds owed to them, or, less frequently, when it is economically or administratively infeasible to distribute funds to class members (for example, when the costs of individual distribution to class members exceeds the amount to be distributed).[3]

As procedures involved in class action litigation have matured, it has come to be accepted in federal courts that when cases are resolved and excess funds remain, those funds will be distributed in the form of *cy pres*. Examples within every Circuit can be found where a *cy pres* distribution has been approved: 1) *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24,33-36 (1st Cir.2009) (holding trial court didn't abuse discretion in approving settlement that distributed excess funds for cancer research or patient care); 2) *In re Holocaust Victim Assets Litig.*, 424 F.3d 132,146 (2d Cir.2005) (distribution to the neediest class members); 3) *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163,172-175 (3d Cir.2013) (approved "for a purpose related to the class injury"); 4) *Jones v. Dancel*, 792 F.3d 395,406, n.6 (4th Cir.2015) (because it was not practical to distribute *de*

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[2] *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir.2002) (internal citations and quotation marks omitted).

[3] PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §3.07 cmt. a (2010) ("ALI PRINCIPLES"); ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS §11:20 (4th ed. 2012) ('Newberg").

minimis amounts to the class, the arbitrator ruled that those damages be distributed in equal portions to two recipients); 5) *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468,475 (5th Cir.2011) (permissible when either: (1) infeasible to distribute additional settlement funds to class members; or (2) claimants have been fully compensated and further distribution would be a windfall); 6) the Sixth Circuit's *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 621,625 (N.D. Ohio 2016); 7) *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494,502 (7th Cir.1989) (recognizing broad discretion); 8) *Powell v. Ga. Pac. Corp.*, 119 F.3d 703,706-07 (8th Cir.1997) (approval of minority student scholarship program where most class members lived); 9) *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121,1129 (9th Cir.2017) (recognizing "courts have long employed *cy pres* remedies when some or even all potential claimants cannot be identified"); 10) *Tennille v. W. Union Co.*, 809 F.3d 555,563 (10th Cir.2015); 11) *Nelson v. Mead Johnson & Johnson Co.*, 484 Fed. Appx. 429,435, 2012 WL 2947212 (11th Cir. July 20, 2012) (in an unpublished decision,[4] affirming a settlement with a *cy pres* distribution when class members received "full compensation" under the terms of the settlement); and 12) *Keepseagle v. Perdue*, 856 F.3d 1039,1043 (D.C. Cir.2017).

Cy pres distributions have also been widely used after the settlement of state court class actions. In 23 states (and Puerto Rico), state supreme courts or legislatures have adopted specific rules or statutes that authorize *cy pres*. Meanwhile, *cy pres* distributions have also been approved by courts in at least 17 other states where state Supreme Court rules or statutes have not been set forth. (*See* Table "A" for a list of state statutes and Supreme Court rules, as well as examples of court decisions in states absent either.)

The U.S. Congress has also expressly authorized the use of *cy pres*. With the passage of Public Law 109–2, §1712—FEB. 18, 2005 ("The Class Action Fairness Act" ("CAFA")) Congress specifically included the following language as part of §1712(e): "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."

Thus, whether promoted by statute, court rules, or court precedent, the use of *cy pres* has become broadly established throughout American jurisprudence. It serves three salutary purposes: 1) it allows for an effective distribution of residual funds to non-profit entities; 2) it preserves the deterrent effect of class actions; and 3) it permits parties to settle litigation.

[4] Although *Nelson* is unpublished and not binding precedent, it "may be cited as persuasive authority." 11th Cir. Rule 36-2.

II. Challenges to the Legal and Constitutional Underpinnings of *Cy Pres* in the Class Action Setting

A. Article III's Requirements of Standing

Several commentators have taken the position that *cy pres* should not be allowed because it allegedly constitutes a court-imposed payment of unclaimed class funds that are being taken from private litigants and then given to parties whose rights are not at issue in the lawsuit.[5] They argue that the redistribution of unclaimed funds to charities transforms the adversarial two-party judicial process into an unconstitutional trilateral process. In essence, their position is that *cy pres* recipients have no standing and, therefore, the requirements of U. S. Constitution, Article III, §2 cannot be met.

However, arguing that *cy pres* distributions impermissibly forge a trilateral relationship seems to mischaracterize what *actually* happens in class action settlements. In order to resolve class action litigation, district courts must first approve a proposed settlement along with any proposed distribution.[6] Until a settlement is approved, the only parties with standing before the court are the adversarial parties, *i.e.*, the class representative(s) and settling defendant(s).

Although a court may be free to elicit information from a prospective recipient, it is only after approval of the settlement that a *cy pres* recipient obtains any interest in any funds, which is similar to the way proposed recipients are treated under charitable trust law.[7] Once this interest is established, *cy pres* recipients necessarily participate in court actions and come under the court's jurisdiction; at this point *cy pres* recipients have standing to assert or defend their claims to the funds, satisfying Article III's case-or-controversy requirement.

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[5] Redish, Julian & Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010), the article most frequently cited against the use of *cy pres*. *See also* Sam Yospe, Note*, Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L.Rev. 1014,1027–41 (2009); and Goutam U. Jois, *The Cy Pres Problem and the Role of Damages in Tort Law*, 16 Va. J. Soc. Pol'y & L. 258,259 (2008).

[6] *See generally,* F. R.C..P. 23; MANUAL §13.1 at 167–82; NEWBERG §10:16; *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682,689 (7th Cir.2013) (remanding district court's order of *cy pres* award as premature, but stating "[o]nce the court knows what funds are available for distribution, it should (if necessary) reconsider how any remainder will be applied," including potentially ordering a *cy pres* distribution).

[7] In the charitable trust arena, courts acknowledge the standing of potential beneficiaries when they must determine whether to exercise their *cy pres* power. *See, e.g.*, *In re Trustco Bank*, 929 N.Y.S.2d 707,711 (N.Y. Sup. Ct. 2011) ("[T]he issue of standing and who has the right to appear and participate as a party in any given case is commonly addressed at the outset of the litigation . . . to protect the interests of all parties, [and] to avoid prejudice. . . . This approach is all the more appropriate in *cy pres* proceedings, where the issues of whether to apply *cy pres* and how to apply it are interrelated.").

The other case-or-controversy argument that has been raised is a challenge to the underlying "standing" of the class itself to have brought the action when there is a "*cy pres* only" settlement.[8] The assertion is that if the class members receive no direct relief, the lawsuit could not have had standing, because there could not have been a "case or controversy." Ignored is the fact that the party seeking certification must not only seek to satisfy Rule 23(a)(1)-(a)(4) but, as all other litigants, meet the requirements of standing. Subsequently, whether or not class members actually succeed in recovering monetary damages has nothing to do with standing; indeed, taken to its logical conclusion this *post hoc ergo propter hoc* reasoning would lead to the absurd argument that every plaintiff bringing a lawsuit unsuccessfully did not have standing *ab initio*.[9]

B. The Rules Enabling Act

Another contention is that a court-imposed payment of unclaimed settlement funds from a defendant to a third-party *cy pres* recipient transforms the class members' individual settlements into a civil fine. As a result, it is argued that the class as a whole is being granted more rights than its members would have had if they had filed individual lawsuits. Under substantive laws that only permit recovery of compensatory damages for the class itself, it is argued that such a civil fine cannot be authorized.[10]

Courts have uniformly rejected this argument as it misperceives Congressional intent in enacting Rule 23.[11] There can be no question that Congress specifically approved of the aggregation of private causes of action into representative actions, thereby allowing plaintiffs to recover damages on a collective basis. A class action lawsuit, therefore, does not abridge, enlarge, or modify the substantive right to bring a collective action nor afterwards to settle the lawsuit. The *cy pres* distribution itself becomes only one part of the administrative function of distributing the settlement proceeds.[12] As the Third Circuit noted:

> Because "a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in

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[8] *Frank v. Gaos*, No. 17-961, —— U.S. ——, 139 S.Ct. 1041, 203 L.Ed.2d 404 (U.S. Mar. 20, 2019).
[9] This "standing" argument also ignores the fact that *cy pres,* as will be discussed further below, does provide relief to the class, albeit indirectly; therefore, it is incorrect to say that there is no redressability due to an alleged absence of relief directly to class members.
[10] Redish, *supra*, 62 Fla. L. Rev. at 644-646.
[11] *See In re Baby Prods.*, 708 F.3d at 173 n.8; ALI PRINCIPLES, §3.07 cmt. a
[12] This administrative function is one basis for the court's power to approve *cy pres*. A second basis is the court's general equitable powers. *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir.1989) (treating *cy pres* distribution as a matter of the federal court's inherent equitable discretion). Finally, there are statutory powers, granted by 23 states and the U.S. Congress as part of CAFA.

> any substantive adjudication of the underlying causes of action," we do not believe the inclusion of a *cy pres* provision in a settlement runs counter to the Rules Enabling Act.

In re Baby Prods., 708 F.3d at 173 n.8 (citation and quotations omitted). This is in accord with ALI PRINCIPLES, §3.07 cmt. a, which both respect the Rules Enabling Act and conclude that *cy pres* distributions are permissible when it is not feasible to make distributions to the class.

C. First Amendment Concerns

It has also been argued that the First Amendment is allegedly violated when class representatives agree to give *cy pres* funds to charitable entities, because individual absent class members have no control over which charitable organization(s) will receive the funds.[13] Therefore, when settlement funds are directed to non-profit entities, absent class members may be forced to support organizations with which they may not agree. This, it is argued, would constitute a violation of the First Amendment's proscription against compelled speech, as articulated in *Janus v. Am. Fed'n of State, County, & Mun. Employees Council 31*, 138 S. Ct. 2448, 2464 (2018).[14]

What distinguishes this situation from *Janus* and *Knox* is that absent class members would already have been given notice of their right not to participate in the case at all, and, therefore, ultimately its settlement, by opting out of the class action. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797,812 (1985) ("[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court ... "). *See* F.R.C.P. 23(c)(2)(B). In having failed to opt out of the class, absent class members have consented to the representative plaintiff(s) approved by the court acting on behalf of their interests. This includes entering into a settlement and subsequently, if necessary, the designation of *cy pres* recipients. Thus, unlike the plaintiffs in *Knox* and *Janus*, the "opt out" right at issue for class members is one expressly provided for by Congress. While in *Janus* and *Knox*, the Supreme Court held that non-members cannot be forced to fund political activity, those cases are inapposite in the class context. Those who fail to opt out of a class action are specifically given notice that they will become members of the class and that class representatives will make decisions on their behalf. This is not

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[13] See, e.g., *Brief of Center for Individual Rights as Amicus Curiae in Support of Petitioners*, *Frank v. Gaos*, No. 17-961 (2019)

[14] *See also Knox v. SEIU*, 567 U.S. 298,309 (2012) ("Closely related to compelled speech . . . is compelled funding of other private speakers or groups.").

an illusory but rather a Congressional mandate which results in those not opting out accepting their membership in the class.[15]

D. Alleged Problematic Behavior of Class Counsel

A number of commentators have based their criticism not upon the theoretical basis of *cy pres* as a class action settlement tool but rather what they view to be problematic conduct that they claim to be rampant in the use of *cy pres* by class counsel.[16] Of course, inherent in any action, including class actions, is the potential for conflicts of interest and less than ethical behavior by litigants and counsel (or even defense counsel and courts). However, multiple rules are in place to address this possibility.

The most common allegation is that class counsel are only concerned with their own fees while disregarding the interests of the class members. To say that this is prolific, however, ignores how fees are generally requested and approved. As a rule, fees are either based upon hours worked, a percentage of the total payment made by the defendant, or both. MANUAL §14.121-122. Often these are negotiated separately with the defendant and presented to the court in a separate request for approval. *Id*., 14.22. And at times, fees are contested by defendants, even though the underlying settlement is agreed to. *Id*., 14.23.

However, at this point fees are only being requested. In evaluating the settlement of a class action, Rule 23 and most states have invested courts with a fiduciary duty on behalf of absent class members who did not participate in negotiating the settlement agreement.[17] As such, all jurisdictions require judicial approval of fee requests. The issue then is not the rules themselves but rather the consistency and vigilance of judicial oversight in scrutinizing and, as required, preventing abuses.

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[15] This is not to say that absent class members lose their ability to further challenge the designation of a *cy pres* recipient with which they do not agree. Absent class members have the remaining safeguard that a class action can only be maintained if, among other things, "the representative parties will fairly and adequately protect the interests of the class" as a whole. F.R.C.P. 23(a)(4). If absent class members believe this has not occurred, they may still object as part of the proceedings required by F.R.C.P. 23(e)(5). Indeed, no class settlement may be approved by the court unless notice of the proposed settlement was provided to the members of the class to be bound by the settlement. F.R.C.P. 23(e)(1)(B). Then, a court may approve a settlement that "would bind class members" only "after a hearing and on finding that it is fair, reasonable, and adequate." F.R.C.P. 23(e)(2).

[16] Redish, *supra*, fn. 5; Yosepe, *supra* fn. 5; Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S.Cal. L. Rev. 97 (2014), relying in part on John H. Beisner, Jessica Davidson Miller and Jordan M. Schwartz, *Cy Pres: A Not So Charitable Contribution to Class Action Practice*, U.S. Chamber Institute for Legal Reform, (October 2010); *see also* Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 914 Kan. L. Rev. 65 (2017) for a thoughtful discussion of frequently raised issues and authorities.

[17] *See* F.R.C.P. 23(e); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277,279–80 (7th Cir. 2002) (district judges must "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions.").

In undertaking this review, greater scrutiny tends to be given under certain circumstances. These include where there is little or no distribution to the class, MANUAL § 21.61, at 309-310, attorneys' fees are high, or when unclaimed funds revert to the defendant whose conduct resulted in the settlement. In the Ninth Circuit, for instance, class action settlements in which the settlement agreement is negotiated prior to formal class certification require "an even higher level of scrutiny." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 946; NEWBERG §11:27. Moreover, recently amended Rule 23(e)(2)(C)(ii) (effective Dec. 1, 2018) specifically requires the trial court to evaluate the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims."

III. Guidance to Consider in Evaluating the Distribution of *Cy Pres*

For the most part, critiques of *cy pres* ignore this vital role of the courts in evaluating all aspects of a settlement, including *cy pres*. While there are, as always, a few outliers, overall, judges have appropriately performed their job of scrutinizing class action settlements along with the distribution of *cy pres* pursuant to their Congressionally and state-mandated administrative duty of evaluating and approving all aspects of class settlements. In *Marek v. Lane*, 571 U.S. 1003 (2013), Chief Justice Roberts' concurring opinion listed a number of questions related to the use of *cy pres* that the U.S. Supreme Court to this date has not directly addressed nor expressly provided direction for. In response to Justice Roberts' questions, below a suggested general guidance is provided.

A. Distributing Settlement Funds to Class Members Should Always Be the First Priority

Cy pres awards should not be used when the funds recovered from the defendants can be effectively delivered to class members. Courts should scrutinize these closely, which indeed numerous federal courts have done. Examples include: the Second Circuit in *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423,434-36 (2d Cir. 2007) (noting it appeared the district court was not aware that it could allocate excess funds to class members as treble damages); and the Seventh Circuit in *Pearson v. NBTY*, No.11-07972, Dkt. 213-1 ¶¶7-8 (N.D. Ill. May 14, 2015) (renegotiated *cy pres* to give class members $4 million more). If this direct distribution can be done by crediting a class members' credit card, bank account, cell phone or other account, it should be. If that is not possible, but class members can be sent checks, this should constitute a method of distribution provided the transaction costs are not greater than the settlement.[18]

[18] Note that virtually all Circuits have concluded that distribution to class members should not result in a windfall to members who have submitted claims and already been fully compensated. *In*

B. Factors to Be Considered in the Selection of *Cy Pres* Recipients

Despite the fact that class members should always be the primary recipients of settlements, at times settlements will inevitably result in funds that cannot be reasonably or economically distributed to class members. It is for this reason that all Circuits and the vast majority of state court systems have concluded that *cy pres* distributions are necessary.

While reversion to the defendant has been suggested as an alternative to *cy pres*, this has generally been rightfully rejected.[19] Reversion plays havoc with the deterrent function of class action settlements.[20]

The question then is what should be considered by the court in approving *cy pres* recipients. After finding that *cy pres* is necessary, most courts have concluded that *cy pres* should be distributed so that it indirectly benefits the class, consistent with the goals of the underlying case. To this end, courts have rejected proposed *cy pres* distributions which have had no relationship to the underlying case. *See, e.g.*, *In re Airline Ticket Comm'n*, 268 F.3d 619,626 (8th Cir. 2001) and *In re Airline Ticket Comm'n*, 307 F.3d 679,683-684 (8th Cir. 2002) (*Cy pres* recipients should have as close as possible relationship to the class action suit and reflect the geographic scope of the class.)[21] Notwithstanding this, ALI PRINCIPLES, supra note 3, § 3.07(c) does appropriately caution that while *cy pres* recipients should be those "whose interests reasonably approximate those being pursued by the class," there are times when no such recipients exist and still ALI concludes "a court may approve a recipient that does not reasonably approximate the interests of the class."

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re Lupron, 677 F.3d at 35; *Klier*, 658 F.3d at 475; *see also* Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361,393 (1999).

[19] Redish *supra,* fn. 5 at 631.

[20] *See, e.g., In re Lupron*, 677 F.3d at 32-33; *In re Baby Prods.*, 708 F.3d at 172; *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24,35 (1st Cir.2009); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330,1355 (S.D. Fla.2011) (one of the most important functions of the class action device in small-stakes cases is the "deterrence of wrongdoing").

[21] For example, the Ninth Circuit has rejected a number of proposed *cy pres* distributions. *See Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301,1307–09 (9th Cir.1990) (rejection of non-earmarked *cy pres* to humanitarian organization in Mexico where Mexican farm workers sued for violation of Farm Labor Contractor Registration Act); *Nachshin v. AOL, LLC*, 663 F.3d 1034,1040-1041 (9th Cir.2011) (rejection of award to local non-profits with "no apparent relation to the objectives of the underlying statutes, and it is not clear how this organization would benefit the plaintiff class" in case involving internet subscribers receiving wrongfully inserted advertisements in email messages where the court noted that proper *cy pres* recipients would be "organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance."); *Dennis v. Kellogg Co.*, 697 F.3d 858,867 (9th Cir.2012) (rejection of *cy pres* to organizations that feed the poor where allegation was that Kellogg falsely advertised that its cereal improved children's attentiveness with Ninth Circuit holding that "appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising.").

The reason for this is that if the scope is too narrowly limited, appropriate *cy pres* recipients to the precise claims at issue may not always be possible or practical and this may unnecessarily complicate the socially desirable settlement of class action disputes.

In determining whether a *cy pres* remedy is appropriately tailored to the class, courts should consider at least the following factors: (1) what the lawsuit is about and the interests of the absent class members; (2) when it is alleged that a statute was violated, the objectives of the statute; (3) the loss suffered by the class members; and (4) the geographic breadth of the class.[22]

C. Class Representative(s) Should Make the Initial Selection of *Cy Pres* Recipients

As a rule, defendants should not be involved in making the selection of *cy pres* recipients. There are several reasons for this. First, one thing that class members must have in common is an injury caused by the defendant(s).[23] Indeed, implied in any settlement (though seldom expressly stated) is that a defendant makes a payment because victims have some legal right to restitution. The result of a successful trial or settlement should be a transfer of wealth from perpetrator to victim and not back to the perpetrator.

Just as a reversion to a defendant is inappropriate, class members should not be compelled to return hard won compensation to the surrogates for the party that injured them or to beneficiaries selected by them. Certainly, the money paid due to a defendant's misconduct should not be used to burnish the public-relations image of a defendant that inflicted the damage giving rise to the lawsuit.[24] If *cy pres* funds are at all controlled by defendants, the improper result would be that class members will be forced to indirectly support those who caused their injuries, substantially diminishing any deterrent effect of the case's resolution.

Furthermore, carefully scrutinized recipients should generally not include organizations that have previously received substantial payments from a named defendant. This would be particularly true where the *cy pres* award does not increase the overall contribution by the defendant to the entity in question.[25] While in some cases the selected entities might be the most appropriate recipients, the *cy*

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[22] *See, e.g. In re Holocaust Victim Assets Litigation*, 424 F.3d 132,147 (2d Cir.2005); *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060,1067 (8th Cir.2015), quoting ALI §3.07, cmt b; *In re Airline Ticket Commission,* 268 F.3d at 626; *Lane*, 696 F.3d at 819-20; *Nachshin*, 663 F.3d at 1038; *In re Polyurethane Foam*, 178 F. Supp. 3d at 625); *In re Lupron Marketing* , 677 F.3d at 33.

[23] See F.R.C. P. 23(a)(3); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426,1432 (2013).

[24] *S.E.C. v. Bear, Stearns & Co., Inc.*, 626 F. Supp. 2d 402,415 (S.D. N.Y.2009) (*cy pres* may "actually benefit[] the defendant rather than the plaintiffs" when "defendants reap goodwill from the donation of monies").

[25] *Dennis*, 697 F.3d at 867– 68 (raising concerns about a *cy pres* award that allows the defendant to use "previously budgeted funds" to make the same contribution it would have made anyway).

pres distribution may also appear to be nothing more than part of the continuous funding by the defendant of the entity in question.

While there is a strong impetus for judges to select *cy pres* recipients, doing so is problematic.[26] "The specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety."[27]

Even more importantly, judicial participation in the selection process makes it difficult for the court to properly perform its critical review function over the appropriateness of the distribution. Judges need to make a completely independent determination that is not only based on objective criteria but is without any stigma. Afterwards, the court has a continuing obligation to monitor the disbursal of the class's funds. It is incumbent upon courts to take a hard look at *cy pres* beneficiaries, as well as whether any of the parties involved in the litigation has significant affiliations with or would personally benefit from the distribution to proposed *cy pres* recipients. Such an analysis is not unduly burdensome or challenging for a court, but judges may be compromised (or appear to be compromised) when they themselves are involved in making the selection.

This leaves class representative(s) as the logical choice for at least the initial determination of *cy pres* recipients. As the settlement property belongs to the class, it should be the role of the class representative along with their counsel to suggest the proper distribution of the class's funds. Class counsel has represented the class members throughout the litigation, and has an independent duty to ensure that any distribution, including that of *cy pres*, is proper.[28] Class representatives share this responsibility.[29] Once proffered by the class counsel and class representative(s), it becomes the court's obligation to scrutinize that selection. Ultimately, then, it is the court that has the duty to ensure that class counsel and the class representative(s) have diligently and fairly assessed the need for *cy pres* and then properly chosen the *cy pres* recipient(s).

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[26] *Nachshin* 663 F.3d at 1039; *see also In re Lupron*, 677 F.3d at 38 (affirming, but expressing concern, where the district court, not the parties, chose the *cy pres* recipient); *In re Baby Prods.*, 708 F.3d at 180 n.16 (not reaching the issue, but stating: "we join other courts and commentators in expressing our concern with district courts selecting *cy pres* recipients"). *See* Beisner, supra., at 13-14.

[27] *See Nachshin v. AOL, LLC*, 663 F.3d 1034,1041 (9th Cir.2011) (providing money to a legal aid foundation that though normally a proper choice for *cy pres* was heavily criticized, because the judge's husband sat on the board.) *Perkins v. Am. Nat'l Ins. Co.*, No. 3:05-CV-100 (CDL), 2012 WL 2839788, at *1 (M.D. Ga. July 10, 2012) (approving cy pres award to the presiding judge's *alma mater*).

[28] *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355,359 (S.D.N.Y.1999) ("Additionally, the distribution preference of class counsel is entitled to deference because class counsel are the only entities with a meaningful equitable stake in the remaining class funds.")

[29] *Eubank v. Pella Corp.*, 753 F.3d 718,723–24 (7th Cir.2014) (named plaintiffs have ethical obligations as fiduciaries to the class.)

D. Proper Beneficiaries for the Distribution of *Cy Pres* Funds

"Class actions play a vital role in the judicial system. Often, they are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with widely diffuse harms."[30] This is particularly true when claims involve only small individual recoveries where the transaction costs for individual litigants are too high to pursue the claim or for individual counsel to take on the representation. However, any failure to make complete individual distributions cannot denigrate that at their core the fundamental purpose of every class action is to provide access to justice for people who on their own would not realistically be able to obtain the protections of the judicial system.

Given that the class action device provides litigants access to justice that they would not otherwise have, the use of *cy pres* awards to organizations that make as their mission providing such access has been viewed as a perfect fit.[31] Legal aid and access to justice organizations with objectives directly related to the underlying statutes or claims at issue in relevant class actions are, therefore, very appropriate *cy pres* recipients.

This is not to say that *cy pres* even to such organizations should be haphazardly given. In national class actions, *cy pres* recipients should have a nationwide scope. *Cy pres* from settlements related to consumer fraud, securities violations, or discrimination, for instance, should go to organizations that assist similarly-situated individuals who have been subjected to such fraud, violations, or discrimination or may in the future.

Finally, c*y pres* should generally not go to newly created organizations -- even if there is a "fit" -- absent a compelling reason. Such organizations will not have the necessary track record of performance the court needs to evaluate before approving the distribution.

On the whole, federal and state courts throughout the country have appropriately recognized organizations that provide access to justice for

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[30] *Amchem Prods. v. Windsor*, 521 U.S. 591,617 (1997).

[31] Thomas A. Doyle, Residual Funds in Class Action Settlements: Using "*Cy Pres*" Awards to Promote Access to Justice, FED. LAW, July 2010, at 26, 27 Danny Van Horn & Daniel Clayton, It Adds Up: Class Action Residual Funds Support Pro Bono Efforts, 45 TENN. B.J. 12 (2009); Bryant, Arthur H., "*Cy Pres* Awards Don't Have to Be Complicated," The National Law Journal, February 9, 2015; Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: "A Settling Concept,"* 58 LA. B.J. 248,251 (2011); Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards*: *Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POL'Y & L. 267,291 (2014). *See, e.g.*, *Lessard v. City of Allen Park*, 470 F. Supp. 2d 781,783–84 (E.D. Mich. 2007) ("The Access to Justice fund is the 'next best' use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters." (Citation omitted)).

underserved and disadvantaged populations as proper beneficiaries of *cy pres*. Their need is palpable. As local, state, federal, and private funding dries up, *cy pres* has become the lifeblood for many organizations that provide individuals any real opportunity for access to justice.

TABLE A

Cy Pres by Jurisdiction, Including Statutes, Supreme Court Rules, or Cases if Neither

Alabama	*City of Bessemer v. McClain*, 957 So.2d 1061 (2006)
Arizona	*Charles I. Friedman, P.C. v. Microsoft Corp.,* 141 P.3d 824 at ¶¶ 6, 37 (2006)
Arkansas	*State v. Eli Lilly and Co.,* 2010 WL 544397 (Ark.Cir), Pulaski Cty No. CV-2008-4722 (Feb. 5, 2010) (Trial Order) at Sect. VII(A)(2)
California	Sec. 384 of C.C.P.
Colorado	Sec. 23 (g) of R.C.P.)
Connecticut	Sec. 9-9 of Sup. Ct. Rules
District of Columbia	SCR-Civil Rule 23, comments; Boyle v. Giral, 820 A.2d 561,567-68 (2003)
Florida	*Cole v. Echevarria*, McCalla, Raymer, Barrett & Frappier, 2008 WL 6161610 (Fla.Cir.Ct.) (Trial Order), Leon Cty No. 98-3763 (March 26, 2008) at ¶ 33
Georgia	*Moore v. AMF Bowling Centers, Inc.,* 2004 WL 53119000 (Ga.Super.) (Trial Order) Fulton Cty No. 2003CV66093 (Aug. 27, 2004)
Hawaii	Rule 23 of R.C.P.
Idaho	*State v. Daicel Chemical Industries, Ltd*., 2004 WL 5904008 (Idaho Dist.) (Trial Order) Ada Cty No. CV OC 0300114D (Dec. 2, 2004)
Illinois	Sec. 2-807 (735 ILCS 5/2-807) of C.C.P.)
Indiana	Rule 23 of R.C.P.
Iowa	*Zaber v. City of Dubuque*, 902 N.W.2d 282,287-88 (2017)
Kansas	*Premier Pork, Inc. v. Rhone-Poulenc, S.A.,* 2006 WL 1388464, *4 (Jan. 31, 2006); Scot Cty No. CV2000-3, ¶ 11
Kentucky	Rule 23.05 (6) of Civ. Rules
Louisiana	Rule XLIII of Supreme. Court Rules
Maine	Civil Rule 23(f)(2)

Maryland	*Boyd v. Bell Atlantic-Maryland, Inc.,* 390 Md. 60 (2005)
Massachusetts	Rule 23 of R.C.P.
Michigan	*Cicelski v. Sears, Roebuck & Co.,* 348 N.W.2d 685 (1984)
Minnesota	Rule 23 of R.C.P.
Missouri	*Gerken v. Sherman*, 484 S.W. 39,95,105 (2015)
Montana	Rule 23 of R.C.P.
Nebraska	Sec. 30-3839 of Revised Statutes Cum. Supp., 2012
Nevada	*Carpenter v. Henderson Hyundai Suprestore Inc.* (Nev.Dist.Ct) (Trial Order) Clark Cty No. 10A622114 (Dec. 18, 2012) at ¶ 15
New Jersey	*Sulcov v. 2100 Linwood Owners, Inc.,* 696 A.2d 31,37-38 (1997)
New Mexico	Rule 23 of R.C.P.
New York	*Klein v. Robert's American Gourmet Food, Inc.,* 28 A.D.3d 63,73-74 (2006)
North Carolina	Art. 26B, sub. VIII of Chapter 1 of General Statutes
Ohio	*State v. Countrywide Financial Corp.,* (Ohio Com.Pl.) (Trial Order), Cuyahoga Cty No. CV08-680445 (Dec. 29, 2008) at ¶ 6.1
Oregon	Sec. 32 (Q) of C.C.P.
Pennsylvania	Chapter 1700 of R.C.P.
Puerto Rico	P.R. Laws Ann. tit. 32A § 20.6(b)
South Carolina	Rule 23(e) of Judicial Department Rules
South Dakota	Codified Laws, 16-2-57
Tennessee	Rule 23.08 of R.C.P.
Texas	*Highland Homes Ltd. v. State*, 448 S.W.3d 403 (2014)
Vermont	*Elkins v. Order Approving Settlement Microsoft Corp*., 2005 WL 6235695 (Vt.Super.) (Trial Order), Windham Cty No. 165-4-01 Wmcv. (April 27, 2005) at ¶ 9
Washington	Rule 23 of Supreme Court
West Virginia	Rule 23 of Supreme Court
Wisconsin	Statute 803.08