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October 15, 2015

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: U.S. Chamber Institute for Legal Reform Comments Regarding *Cy Pres*

Dear Ms. Womeldorf:

On behalf of the U.S. Chamber Institute for Legal Reform, I am submitting the attached comments regarding the *cy pres*-related sketches presently under consideration by the Rule 23 Subcommittee of the Advisory Committee on Civil Rules.

Sincerely,

John H. Beisner

The U.S. Chamber Institute for Legal Reform

COMMENTS
to the
ADVISORY COMMITTEE ON CIVIL RULES and its
RULE 23 SUBCOMMITTEE

The U.S. Chamber Institute for Legal Reform ("ILR") submits the following comments to address the preliminary sketches regarding *cy pres* that were included in the most recent Rule 23 Subcommittee Report issued by the Rule 23 Subcommittee of the federal Judicial Conference Advisory Committee on Civil Rules.

ILR is an affiliate of the Chamber of Commerce of the United States, with the goal of making America's civil justice system simpler, fairer and faster. Since its founding in 1998, ILR has worked diligently to limit the incidence of litigation abuse in U.S. courts and has been an active participant in numerous legal-reform efforts at the state, federal and international levels.

ILR applauds the Advisory Committee for considering the issue of *cy pres*. However, if the Committee decides to adopt changes addressing *cy pres*, ILR believes that the proposal currently under consideration should be revised, for several reasons.

First, ILR is concerned that the current conceptual sketch offered by the Subcommittee would inadvertently expand the use of *cy pres* in federal class action practice. In particular, it would make such distributions permissible whenever direct distribution to class members is not "economically viable"[1] – an amorphous concept that could potentially be applied by courts to many low-value class action settlements. While the Subcommittee regards such instances as "rare,"[2] ILR fears that the current sketch could send an unwelcome signal to parties and courts

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1 Subcommittee Report, Sept. 11, 2015, at 15.

2 *Id.* at 17.

that *cy pres* is appropriate in any settlement involving small payments to class members. Because these types of settlements are very common, the Subcommittee's proposal would likely authorize large numbers of class settlements that have no possibility of delivering any direct relief to the injured parties, effectively using class actions – purely procedural devices – to transform the substantive law "from a compensatory remedial structure to the equivalent of a civil fine" in derogation of the Rules Enabling Act.[3] Instead, the Committee should adopt an approach that ***only*** allows *cy pres* for residual funds and only does so in very limited circumstances, where multiple attempts at direct distribution to class members have been undertaken and have failed.

Second, the sketch also fails to meaningfully address the serious issue of attorneys' fees, which often exceed the amount of money actually claimed by the class members, especially in settlements with a *cy pres* component. In order to address this growing problem, any *cy pres*-related amendment to Rule 23 should make clear that fee awards should be based primarily on the benefits that actually reach class members rather than *cy pres* payments. As explained in the *ALI Principles of Aggregate Litigation*, "because cy pres payments . . . only indirectly benefit the class, the court need not give such payments the same full value for purposes of setting attorneys' fees as would be given to direct recoveries by the class."[4] The Third Circuit recently reiterated this principle, declaring that "[w]here a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes ***direct*** benefit to the

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[3] Martin H. Redish et al., *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 641 (2010) (citing Stewart R. Shepard, *Comment, Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448 (1972)).

[4] Am. Law Inst., Principles of the Law: Aggregate Litigation ("*ALI Principles*") § 3.13, cmt. a (2010).

class, . . . it [is] appropriate for the court to decrease the fee award."[5] A rule that embodies this principle would further the stated purpose of class actions by encouraging settlements that deliver direct compensation to those supposedly aggrieved by a defendant's conduct and ensure that *cy pres* is only used as a "last resort" method for distributing unclaimed funds.[6]

Third, the Subcommittee's *cy pres* sketch expresses concern about the potential ramifications of allowing residual funds to revert to a defendant. We believe that such a provision is very important. Reversion is critical to ensure that the class action device is not distorted in a manner that requires defendants to give up specific amounts of money regardless of whether class members have actually made claims for that amount. Moreover, there is no evidence that reversionary clauses "prompt defendants to press for unduly exacting claims processing procedures,"[7] and the Committee's concerns are therefore unwarranted.

I. ***Cy Pres* Is On The Rise: A Comparison Between 2009 And 2014**

ILR recently conducted a study regarding *cy pres*, comparing reported district-court decisions approving/denying class settlements with a *cy pres* component in calendar year 2014 with those from 2009. ILR selected 2014 because that is the most recent year, offering the freshest data on the use of *cy pres*. ILR selected 2009 as the benchmark year because at that point – four years after the enactment of the Class Action Fairness Act, which substantially expanded federal jurisdiction over interstate class actions – the initial influx of new cases being

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5 *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013) (emphasis added).

6 The Subcommittee's initial report included a variety of other proposals, including a provision making *cy pres* the default recovery for settlement cases in which class members would receive less than $100, as well as a provision allowing *cy pres* distributions in cases where a recipient with no nexus to the underlying subject matter of the litigation can be identified. *See* Subcommittee Report, Apr. 19, 2015, at 24, 28. ILR is pleased that those proposals were dropped. The $100 provision would have expanded the use of *cy pres* in cases that have no chance of delivering money to class members, while the other provision would have undermined the premise of *cy pres*, which is to further the interests of absent class members.

7 Subcommittee Report, Sept. 11, 2015, at 16.

heard in federal court was likely reaching the point of settlement or judgment. To identify the universe of class action settlements with a *cy pres* component in 2014 and 2009, the authors conducted searches on Lexis and then searched the dockets of the cases to identify the settlements and other pertinent information with respect to the settlements.[8] The research established that the number of *cy pres* settlements has increased substantially from 2009 to 2014.[9] The following are the key results of the research:

	2009	**2014**
TOTAL REPORTED	23	60
TOTAL APPROVED	22	58
TYPE OF APPROVAL		
- Preliminary	3 (14%)[(a)]	17 (29%)[(b)]
- Final	19 (86%)	41 (71%)
- Denial/Other	1[(c)]	2[(d)]
TYPE OF CLAIM		
- Consumer Fraud	2 (9%)	9 (15%)
- Financial Consumer Protection	2 (9%)	12 (20%)
- Wage-and-Hour	8 (35%)	17 (28%)
- Telephone Consumer Protection Act ("TCPA")	0	5 (8%)
- Privacy	3 (13%)	3 (5%)
- Securities	1 (4%)	1 (2%)
- Antitrust	0	3 (5%)
- Fair Debt Collection Practices Act ("FDCPA")	4 (17%)	5 (8%)
- Other	3 (13%)	5 (8%)
PAYMENT MECHANISM		
- Automatic Payment[(e)]	1 (4%)	20 (33%)
- Claims Process[(f)]	18 (78%)	33 (55%)
- Hybrid (Automatic & Claims Process)	0	3 (5%)
- Injunctive Relief Only	3 (13%)	3 (5%)
- Other	1 (4%)	1 (2%)

(a) All three settlements were finally approved in 2010. This includes one injunctive-relief-only case that was preliminarily denied, but subsequently approved on modified terms, in 2009. *See Zaldivar v. T-Mobile USA,*

[8] The authors conducted searches on lexis.com using the following terms, "'class action' and settl! and 'cy pres' or residu! or unclaim!," for the relevant time periods. This search was designed to uncover any reported federal district court decision addressing class action settlements and that involved some discussion about *cy pres* or residual or unclaimed settlement funds. The authors then weeded out mis-hits – i.e., cases that were not actual class settlements involving a *cy pres* component.

[9] The data reflected in this comment is current as of May 12, 2015.

Inc., No. C07-1695 RAJ, 2009 U.S. Dist. LEXIS 64091 (W.D. Wash. July 10, 2009). The court initially denied approval based on, *inter alia*, the insignificant value of the settlement to the class. The court subsequently approved the settlement in September 2009 on essentially the same basic terms, reasoning that the total per-person damages amounted to (at most) just over $1. *See* Order Granting Prelim. Approval of Class Action Settlement at 2, *Zaldivar v. T-Mobile USA, Inc.*, No. 07-1695, Dkt. No. 167 (D. Wash. Sept. 9, 2009).

(b) These cases are either awaiting final approval or have since been finally approved. One case, *Johnson v. Metlife Inc.*, was initially denied but later approved. In this wage-and-hour class action, the court denied preliminary approval for multiple reasons, including that the parties designated an improper *cy pres* recipient. The parties' first pick for a *cy pres* recipient was Sesame Workshop, the nonprofit educational organization behind Sesame Street, which had no connection to the subject matter of the litigation. The court also rejected the second proposed *cy pres* recipient, the Los Angeles, San Francisco and Orange County Bar Associations' Employment Law Sections. According to the court, the Employment Law Sections "primarily exist to benefit attorneys, not class members." Order Den. Mot. for Prelim. Approval of Class Action Settlement, *Johnson v. Metlife Inc.*, No. 8:13-cv-00128, Dkt. No. 46 (C.D. Cal. Aug. 29, 2014). The parties' third pick, the Legal Aid Society – Employment Law Section – was accepted by the court, which granted preliminary approval to the class on November 7, 2014. The court granted final approval of the settlement on March 19, 2015. *See* Final Approval and Judg. Approving Settlement, *Johnson v. Metlife, Inc.*, No. 8:13-cv-00128, Dkt. No. 73 (C.D. Cal. Mar. 19, 2015).

(c) This settlement was preliminarily denied in 2009 and then preliminarily approved in 2011. The court denied final approval in December 2014. Plaintiffs asserted consumer-fraud and other claims stemming from the defendant's alleged failure to disclose the full terms and conditions associated with gift cards it sold, including those related to certain fees. The parties reached a settlement under which defendant agreed to pay a total of $3 million, plus the costs of notice and settlement administration. The court denied preliminary approval of the settlement in 2009 because, *inter alia*, it was not convinced that individual notice to class members was impractical. *See Kaufman v. Am. Express Travel Related Servs. Co.*, 264 F.R.D. 438 (N.D. Ill. 2009). Further, the court was uncertain whether a *cy pres* distribution was appropriate. In particular, the parties failed to substantiate their claims that American Express lacked sufficient records to identify and locate the injured class members, which would make *cy pres* unnecessary. However, the parties submitted a modified settlement, which was preliminarily approved in 2011. *See* Order Prelim. Approving Class Action Settlement, *Kaufman v. Am. Express Travel Related Servs. Co.*, No. 1:07-cv-01707, Dkt. No. 317 (N.D. Ill. Sept. 30, 2011). The modified version of the settlement purported to provide class members with greater monetary compensation, but still included a *cy pres* provision for unclaimed money. *See* Joint Mem. of Law in Supp. of Final Approval of Class Action Settlement, *Kaufman v. Am. Express Travel Related Servs. Co.*, No. 1:07-cv-01707, Dkt. No. 504 (N.D. Ill. filed May 28, 2014). The court recently denied the motion for final approval of the modified settlement, reasoning, *inter alia*, that it was improper for the parties to agree to reimburse American Express for the costs of notice and claims administration. The court determined that the money earmarked for reimbursement should be added to the *cy pres* distribution, providing greater indirect benefit to the class members. *See* Order Den. Mot. for Final Approval of Class Action Settlement, *Kaufman v. Am. Express Travel Related Servs. Co.*, No. 1:07-cv-01707, Dkt. No. 537 (N.D. Ill. Dec. 18, 2014).

(d) It is unclear whether these settlements will ultimately be approved on modified terms that address the court's concerns. In the first case, a consumer-protection case, *Zepeda v. PayPal, Inc.*, the plaintiff alleged that the defendant placed reserve holds on class members' funds without warning or justification while retaining the interest from any withheld amounts. The denial of preliminary approval was not based on the settlement's *cy pres* provision. *See Zepeda v. Paypal, Inc.*, No. C 10-2500 SBA, 2014 U.S. Dist. LEXIS 24388 (N.D. Cal. Feb. 24, 2014). The parties modified the terms of the settlement, providing for direct monetary payments to class members. Nonetheless, the court recently denied preliminary approval a second time on March 25, 2015. *See* Order Den. Mot. for Prelim. Approval of Class Action Settlement, No. C 10-2500 SBA, Dkt. No. 264 (N.D. Cal. Mar. 25, 2015). In the second case, a medical-monitoring case arising out of the NCAA's handling of student-athlete concussions and concussion-related risks, the district court denied preliminary approval for multiple reasons. The court was particularly troubled by a provision providing that any unused funds from the $70 million medical-monitoring fund after 50 years would revert to the NCAA. *In re NCAA Student-Athlete Concussion Injury Litig.*, MDL No. 2492, 2014 U.S. Dist. LEXIS 174334, at *36 (N.D. Ill. Dec. 17, 2014). The court concluded that this provision could not stand and "suggest[ed] that, to the extent that any of the

original $70 million remains in the Fund . . . the parties agree to use the remaining funds to extend the fifty-year term, thereby providing additional benefits to the class, or donate the unused funds to an appropriate independent institution devoted to concussion research or treatment." *Id.*

(e) Settlements with an automatic payment scheme provide that class members will automatically receive a check in the mail. In these settlements, the names and addresses of the class members are known by the parties, permitting automatic distribution of settlement checks to class members.

(f) Settlements with a claims process provide that class members must submit a form to receive compensation from the settlement. In these settlements, class members must include certain pertinent information on the claims forms demonstrating their eligibility for compensation.

As these statistics demonstrate, *cy pres* is being used with greater frequency in federal class action practice. In the vast majority of the reported cases in 2014 and 2009, the *cy pres* provision was essentially a fallback term designed solely to administer unclaimed funds after multiple attempts were made to distribute the money to class members. This was most often the case in wage-and-hour class actions, which frequently employed automatic payment schemes – rather than claims processes – to distribute settlement money to class members. In these cases, the *cy pres* component of the settlement usually provided that any checks uncashed by class members would be donated to third-party charities, rarely a significant sum of money.[10]

These class settlements are examples of *ex post cy pres*, awards to third-party charities that are made only after class members have failed to submit claims and which are generally faithful to the principles articulated by the *ALI Principles*. According to § 3.07(a), "[i]f individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds

[10] *See, e.g.*, *Alvarez v. Keystone Plus Constr. Corp*., 303 F.R.D. 152, 158 (D.D.C. Apr. 2014) (approving settlement where *cy pres* would be employed only if residual funds remained due to uncashed or returned checks); *Valencia v. Greater Omaha Packing*, Nos. 8:08CV88, 8:08CV161, 2014 U.S. Dist. LEXIS 9051 at *11 (D. Neb. Jan. 23, 2014) (granting final approval to wage-and-hour class settlement; "The settlement is a fair, reasonable and adequate resolution of a *bona fide* dispute. The court also finds that the designated *cy pres* recipient for the proceeds of any uncashed checks, United Way of the Midlands, is reasonable and appropriate."). This limited use of *cy pres* was also carried out in other types of cases, including those involving claims under the FDCPA. *See* Br. in Supp. of Mot. for Final Approval of Class Settlement at 4, *Mazur v. Nat'l Account Sys. of Omaha LLC*, No. 8:14-84, Dkt. No. 35 (D. Neb. filed Nov. 17, 2014).

should be distributed directly to individual class members."[11] This rule is based on the rudimentary principle that "funds generated through aggregate prosecution of divisible claims are presumptively the property of the class members[.]"[12] Therefore, a "settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair."[13] For example, in *Ontiveros v. Zamora*, a wage-and-hour case, the settlement, which was approved in 2014, provided that *cy pres* would be employed only after any residual funds were redistributed to class members who had cashed their checks.[14] In short, *cy pres* should be employed "***only*** if it is not possible to put [the class funds] to their very best use: benefitting the class members directly."[15]

However, while the majority of *cy pres* settlements in 2009 and 2014 adhered to the *ALI's* "last resort" principle, both years saw a small, but disturbing, number of *ex ante cy pres*

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[11] *ALI Principles* § 3.07(a).

[12] *Id.* § 3.07 cmt. b; *accord Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.").

[13] *ALI Principles* § 3.07(b); *see also id.* § 3.07 cmt. b ("[A]ssuming that further distributions to the previously identified class members would be economically viable, that approach is preferable to cy pres distributions."). A specific reason that would render redistribution of unclaimed funds to participating class members unfair is if additional payments to participating class members would provide them with a "windfall" – i.e., more money than their actual damages. *Klier*, 658 F.3d at 475.

[14] *See Ontiveros v. Zamora*, 303 F.R.D. 356, 362 (E.D. Cal. 2014) (granting final approval to settlement authorizing *cy pres*; "Any unclaimed settlement funds will be redistributed to class members on a pro rata basis; if there are funds left over after that point, the funds are to be redistributed to designated *cy pres* beneficiaries. (Settlement Agreement § III, ¶ E.).").

[15] *Klier*, 658 F.3d at 475 (emphasis added). A number of federal appeals courts have endorsed these principles. *See, e.g., id.* at 474; *Ira Holtzman, C.P.A. & Assocs. v. Turza*, 728 F.3d 682, 689-90 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1318 (2014) ("Money not claimed by class members should be used for the class's benefit to the extent that is feasible.") (citing *ALI Principles* § 3.07); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 32-33 (1st Cir. 2012) (affirming settlement with *cy pres* component where class members had received their full damages and endorsing Section 3.07); *Masters v. Wilhemina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (invalidating settlement with *cy pres* component, "tak[ing] note of the" draft version of Section 3.07); *In re Baby Prods.*, 708 F.3d at 173 (agreeing with Section 3.07 in part; "Although we agree with the ALI that *cy pres* distributions are most appropriate where further individual distributions are economically infeasible, we decline to hold that *cy pres* distributions are only appropriate in this context.").

cases. In contrast to *ex post cy pres*, *ex ante cy pres* refers to an award "that was designated as part of a settlement agreement or judgment where: (1) an amount *and* at least one charity was named as a recipient of part of the fund from the outset and the charity's receipt of the award was not contingent on there being remaining/unclaimed funds in the settlement fund, or (2) the entire award was given to at least one charity with no attempt to compensate the absent class."[16] "This form of *cy pres* stands on the weakest ground because *cy pres* is no longer a last-resort solution for a problem of claims administration. The concern for compensating victims is ignored (at least unless the indirect benefits of the *cy pres* award flow primarily to the victims)."[17] This type of *cy pres* was employed in five settlements in 2014, two of which were rejected, in both instances on grounds other than the inclusion of a *cy pres* provision:

- *Poertner v. Gillette Co.*, No. 6:12-cv-803-Orl-31DAB, 2014 U.S. Dist. LEXIS 116616 (M.D. Fla. Aug. 21, 2014), *aff'd*, No. 14-13882, 2015 U.S. App. LEXIS 12318 (11th Cir. July 16, 2015). Plaintiffs commenced a putative class action, alleging that defendants violated the Florida Deceptive and Unfair Trade Practices Act by deceptively claiming that their Ultra Advanced Batteries would last longer than Duracell CopperTop batteries. The parties reached a settlement under which defendants agreed at the outset that they would donate $6 million worth of battery products to various unnamed charitable organizations. Defendants also agreed to pay claimants between $6.00 and $12.00 per household, depending on whether they submitted proof of purchase. Because there was no limit on the total amount payable by the defendants under the agreement, defendants could have theoretically ended up paying $50,000,000 to the class. However, a mere 55,346 claims out of 7.2 million were filed, with a total payout of $344,850. In other words, the settlement yielded a ***0.76%*** claims rate, leaving the overwhelming majority of class members unpaid. By contrast, the plaintiffs' attorneys were awarded $5,407,724.40 in fees, plus $272,275.60 in expenses. The court justified the fee award based on defendants' $6 million in-kind contribution of batteries to various charitable organizations and certain marginal injunctive relief offered by the defendants – i.e., an agreement to stop selling the Ultra batteries. The amount of the *cy pres* donation was established in the settlement agreement itself and was not a method for distributing unclaimed settlement funds. No effort was made to distribute the value of the $6 million in-kind relief to the class members.

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[16] Redish et al., *supra* note 3, at 657 n.171.

[17] Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 Geo. Wash. L. Rev. 767, 770-71 (2013).

- *In re Google Referrer Header Privacy Litig.*, No. 5:10-cv-04809 EJD, 2014 U.S. Dist. LEXIS 41695 (N.D. Cal. Mar. 26, 2014). Plaintiffs accused defendant of violating the privacy of its users by divulging the search queries entered on its search engine. The parties reached an $8,500,000 settlement, under which class members received no monetary benefit. Rather, the settlement provided the class with minor injunctive relief that required defendant to enhance its disclosures to customers. Class counsel requested $2,125,000 in fees. Everything after payment of attorneys' fees and other costs will be donated as *cy pres* to the following organizations: (1) World Privacy Forum; (2) Carnegie-Mellon; (3) Chicago-Kent College of Law Center for Information, Society and Policy; (4) Berkman Center for Internet and Society at Harvard University; (5) Stanford Center for Internet and Society; (6) AARP, Inc. The amount will likely be at least $5,000,000. In its preliminary approval order, the court found that the *cy pres* component was justified "[s]ince the amount of potential class members exceeds one hundred million individuals"; hence, "requiring proofs of claim from this many people would impose a significant burden to distribute, review and then verify. Similarly, the cost of sending out what would likely be very small payments to millions of class members would exceed the total monetary benefit obtained by the class."[18] As Melissa Holyoak and Theodore H. Frank explained in objecting to the settlement, the plaintiffs had originally sought "***trillions*** of dollars in statutory damages," but then opted for an $8.5 million settlement providing no monetary relief to the class members.[19] They further argued that a claims-made process and/or a sampling lottery method could have been implemented to deliver direct monetary benefit to the class. The district court recently granted final approval of the settlement, rejecting these arguments in short order. According to the court, the "[p]laintiffs [had] made a sufficient showing that the cost of distributing this or really any settlement fund to the class members would be prohibitive."[20]

- *Klewinowski v. MFP, Inc.*, No. 8:13-cv-1204-T-33TBM, 2014 U.S. Dist. LEXIS 50434 (M.D. Fla. Apr. 11, 2014). Plaintiff asserted claims under the Fair Debt Collection Practices Act, alleging that defendant sent a debt collection letter to plaintiff that failed to identify the specific creditor plaintiff owed money to, how many creditors defendant was collecting for, how much money plaintiff allegedly owed to each creditor, or the subject matter of the alleged debt(s) that defendant was collecting. The settlement offered the class minor injunctive relief, granted class counsel $16,000 in fees and awarded $17,758.20 to Bay Area Legal Services. Statutory damages were capped at $17,758.20, all of which was paid to a *cy pres* recipient.

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[18] *In re Google Referrer Header Privacy Litig.*, 2014 U.S. Dist. LEXIS 41695, at *21.

[19] *See* Obj. of Melissa Holyoak and Theodore H. Frank at 2, *In re Google Referrer Header Privacy Litig.*, No. 5:10-cv-04809, Dkt. No. 70 (N.D. Cal. filed Aug. 8, 2014) (emphasis added).

[20] *In re Google Referrer Header Privacy Litig.*, No. 5:10-cv-04809-EJD, 2015 U.S. Dist. LEXIS 44057, at *32 (N.D. Cal. Mar. 31, 2015). Objectors Frank and Holyoak have filed an appeal with the Ninth Circuit.

- *Zepeda v. PayPal, Inc.*, No. C 10-2500 SBA, 2014 U.S. Dist. LEXIS 24388 (N.D. Cal. Feb. 24, 2014) (preliminary approval denied). Asserting consumer-protection claims, plaintiffs alleged that defendant placed reserve holds on plaintiffs' funds without warning or justification while retaining the interest from any withheld amounts. The parties agreed to a $1,425,000 settlement that did not offer class members any monetary compensation. Rather, the only benefit that would be realized by class members was limited injunctive relief. Class counsel would receive $500,000, and the Electronic Frontier Foundation would receive a minimum of $250,000. The court denied preliminary approval for multiple reasons, including the lack of any monetary benefit for the class. The parties subsequently modified the terms of the settlement, providing direct monetary compensation to the class. However, the court once again denied preliminary approval of the settlement because, *inter alia*, the parties failed to explain why the settlement encompassed PayPal accountholders who had held accounts since 2006 where the disputed practices did not begin until 2008.[21]

- *In re NCAA Student-Athlete Concussion Injury Litig.*, MDL No. 2492, 2014 U.S. Dist. LEXIS 174334 (N.D. Ill. Dec. 17, 2014) (preliminary approval denied). Current and former student-athletes asserted medical-monitoring and other claims arising out of the NCAA's alleged failure to inform them about the long-term effects of concussions. The parties agreed to a settlement valued at $70,000,000 that provides class members with a limited amount of basic medical monitoring services over a period of 50 years. The settlement also earmarked $5,000,000 for research into the prevention, treatment, and/or effect of concussions. Notably, concussion-related research conducted by a NCAA member institution "will be credited (as appropriate) toward the foregoing monetary requirement."[22] In other words, defendant may not even be required to spend any money on concussion-related research if NCAA member institutions spend $5,000,000 on the topic. The court denied preliminary approval for reasons unrelated to the *cy pres* component. In fact, the court suggested adding a second *cy pres* component instead of allowing unused money in the medical-monitoring fund to revert to the NCAA.

Similarly, *ex ante cy pres* was employed in five settlements in 2009, one of which was rejected, but ultimately approved on the same basic terms:

- *In re MetLife Demutualization Litig.*, 262 F.R.D. 205 (E.D.N.Y. 2009). Plaintiffs initiated a putative class action on behalf of former MetLife members who were allegedly harmed by MetLife's demutualization process – its conversion from a

[21] *See* Order Den. Mot. for Prelim. Approv. of Class Action Settlement, No. C 10-2500 SBA, Dkt. No. 264 (N.D. Cal. Mar. 25, 2015)

[22] *See* Settlement Agreement, Section IX.A, *In re NCAA Student-Athlete Concussion Injury Litig.*, MDL No. 2492, Dkt. No. 64-1 (N.D. Ill. filed July 29, 2014).

mutual insurance company to a stock corporation. The case settled during trial. Defendant agreed to pay a $50,000,000 settlement, $32,500,000 of which was allocated to the "closed block," a fund created as part of the demutualization process in order to protect reasonable policy-holder expectations. Rather than mail out individual checks to approximately 11 million class members, the $32.5 million fund would be used to pay dividends and benefits on the policies within the closed block. If individual checks were mailed out, average class members would likely receive less than $2.00 per person. The settlement provided for a *cy pres* distribution of $2.5 million to the Foundations for the National Institutes of Health, which was designed to compensate those policyholders who would not be compensated through the "closed block" fund – i.e., they had died or their policies had lapsed. There were several objections, one of which argued that the $2.5 million *cy pres* payment was inadequate to compensate those class members who had died or whose policies had lapsed. The court approved the settlement, accepting the parties' argument that it would have been difficult and impractical to find these individuals and provide them with remuneration, which would have been small for each individual member.

- *Gravina v. Client Servs., Inc.*, No. 2:08-cv-*03634*-LDW-MLO, 2009 U.S. Dist. LEXIS 78204 (E.D.N.Y. Aug. 25, 2009). Plaintiffs claimed that defendant violated the federal Fair Debt Collection Practices Act by leaving a message on a telephone answering device that did not identify the defendant as the caller, state the purpose or nature of the communication, or did not disclose that the message was left by a debt collector. The defendant agreed to a $224,000 settlement that did not provide class members with any monetary benefit. Rather, the benefit was limited to injunctive relief. By contrast, class counsel received $125,000 in fees, and Lions Club International received $94,900. As the court explained in approving the settlement, the maximum statutory damages that the class could recover under the FDCPA was $146,000, and distributing that money among the five million class members would have resulted in *de minimis* recoveries.

- *Parker v. Time Warner Entm't Co.*, 631 F. Supp. 2d 242 (E.D.N.Y. 2009). Plaintiffs asserted claims under the substantive privacy provisions of the Cable Communications Policy Act of 1984, alleging that defendant collected and disclosed its customers' personally identifiable information and failed to give proper notice of its practices. Under the final settlement, class members could choose either a $5 check or one free month of service. The parties also agreed to a predetermined *cy pres* donation of $500,000 to be divided between the Samuelson Law, Technology & Public Policy Clinic at Boalt Hall Law School and the Center for Democracy and Technology's Ronald Plesser Fellowship. As of the date of the fairness hearing, 459,105 claims out of approximately 7.2 million had been submitted by class members, constituting a 6.4% claims rate. Assuming 550,000 claimants submit claims (the claims deadline had not yet passed), the total value of their claims, according to the court, would be $3,712,500. Factoring in the *cy pres* donation of $500,000 and settlement costs of $3 million, the court determined that the gross settlement value was

approximately $7.2 million. That value contrasted with the $5 million in requested fees.

- *Anderson v. Nationwide Credit, Inc.*, No. 2:08-cv-01016-LDW-MLO, 2009 U.S. Dist. LEXIS 57157 (E.D.N.Y. June 25, 2009). Plaintiff brought suit under the FDCPA, alleging that defendant failed to meaningfully identify itself as the caller, state the purpose or nature of the communication, or disclose that the communication was from a debt collector. Under the settlement, class members only received minor injunctive relief. Defendant also agreed to pay a *cy pres* donation of $188,500, to be divided among organizations that assist consumers regarding debt. The *cy pres* payment constituted 58% of the total settlement, which offered aggrieved class members no monetary compensation. Like the other FDCPA cases, the rationale for the substantial *cy pres* donation was that distributing the maximum amount of statutory damages under the FDCPA across a class of over one million people would have resulted in *de minimis* compensation.

- *Zaldivar v. T-Mobile USA, Inc.*, No. C07-1695 RAJ, 2009 U.S. Dist. LEXIS 64091 (W.D. Wash. July 10, 2009). Plaintiffs asserted breach-of-contract and consumer-protection claims arising out of defendant's alleged failure to properly disclose that individuals would be charged for text messages when they subscribed to a plan that did not include texting services. The $925,000 gross settlement provided no monetary benefits for class members; rather, it specified that defendant would agree to certain injunctive relief. The settlement provided that defendant would donate $200,000 to Mobile Giving Foundation, an organization with no connection to the subject matter of deceptive business practices. Class counsel would receive close to $700,000 for their efforts. The court initially denied approval based upon, *inter alia*, the insignificant value of the settlement to the class. The court subsequently approved the settlement in September 2009 on essentially the same basic terms, reasoning that the total per-person damages amounted to (at most) just over $1.

In the cases described above in which courts approved proposed class settlements, the *cy pres* distributions were anything but a last resort. Specifically, those settlements either provided the class members with no monetary compensation whatsoever or committed substantial sums of money to charities before attempting to distribute the money to the class members. For the cases in which the court determined that a claims-made process would not be administratively feasible in light of the millions of class members in the classes at issue, the parties could have distributed money directly to class members on a lottery basis after accepting claims and/or randomly

sampling the class.[23] Such a proposal would have "divert[ed] the compensation money back to the place where it belongs: the class of plaintiffs."[24] "For instance," in one hypothetical, "instead of paying five dollars to each member of the class, the court [could] randomly select one in every twenty plaintiffs, who is awarded one hundred dollars. The benefits of this simple method are straightforward. The proposed distribution scheme would result in saving substantial per-claim administrative costs (e.g., locating plaintiffs, handling each payment, and proving individual entitlements)," while "plaintiffs would receive, on average, a larger compensation."[25] In short, innovative proposals like the one described above could help courts ensure that *cy pres* is limited to its modest residual function.

In addition to the *ex ante cy pres* settlements summarized above, 2009 and 2014 saw a small but growing category of residual-based *cy pres* cases in which the residual was – or is likely to be – so substantial that the bulk of the settlement money will be donated to charities. While these cases technically qualify as *ex post cy pres* – i.e., any *cy pres* payment is predicated on there being unclaimed funds – they are essentially de facto *ex ante cy pres* settlements given the likelihood that the overwhelming majority of the settlement funds will go to third parties and class counsel rather than the class members. In these cases, particularly those involving consumer-fraud claims, the claims rate is so small that the *cy pres* provision of the settlement is not a fallback term of the agreement, but rather constitutes the centerpiece. As a result, *cy pres* can hardly be characterized as a "last resort" method of distributing class settlement money – i.e., where it is not feasible to make distributions to class members.

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[23] *See* Shay Levie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 Geo. Wash. L. Rev. 1065 (2011).

[24] *Id.* at 1068.

[25] *Id.*

Notably, the number of class settlements in which the *cy pres* provision is essentially the fulcrum of the agreement rather than a limited provision aimed at distributing unclaimed money increased between the study's sample years of 2009 and 2014. In both years, such provisions often arose in consumer-fraud class settlements. These types of settlements typically offered class members little in terms of real monetary benefits and therefore saw low class member participation.[26] While some have attributed low claims participation rates to insufficient notice and inadequate settlement terms, the reality is that many consumer class action settlements simply do not appeal to putative class members because they do not feel aggrieved in the first place – e.g., their allegedly defective product or deficient service worked as intended or did not manifest the alleged problem giving rise to the lawsuit.

Of the fifty-eight *cy pres* settlements approved in 2014, five of them fall within this category, four of which involved claims of consumer fraud:

- *Mirakay v. Dakota Growers Pasta Co.*, No. 13-cv-4429 (JAP), 2014 U.S. Dist. LEXIS 148694 (D.N.J. Oct. 20, 2014). The nationwide settlement centered on allegations that defendant deceptively labeled and advertised Dreamfields Pasta as a low-glycemic-index and low-carbohydrate alternative to traditional pasta constituting a violation of the New Jersey Consumer Fraud Act and other state laws. The parties agreed that defendant would pay $5 million for distribution to class members who submit a valid claim form. Defendant also agreed to separately pay $2.9 million in attorneys' fees. Class members who purchased Dreamfields online will automatically receive reimbursement of $1.99 for each box purchased during the class period. Class members who purchased Dreamfields in stores and who submit a valid claim form will receive $1.99 for each box of Dreamfields purchased during the class period, up to a total of 15 boxes. The settlement provides that recovery may be increased by 50% if

[26] Not all consumer-fraud settlements approved in 2014 involved low claims rates. For example, in *Mason v. Heel, Inc.*, No. 3:12-cv-03056-GPC-KSC, 2014 U.S. Dist. LEXIS 58257 (S.D. Cal. Mar. 13, 2014), plaintiffs asserted consumer-fraud claims arising out of defendant's marketing and promotion of its homeopathic products. The $1 million settlement provided for payments of up to $150 for each class member who submitted proof of purchase ($25/product) for the products with a claim form, and up to $100 for each class member without evidence of purchase, but who signed a claim form under penalty of perjury. Any remainder would be split 50/50 between participating class members and a *cy pres* recipient. However, there was no residual money left over after class members submitted claims, obviating the need for *cy pres*. *See* Br. in Supp. of Mot. for Final Approval of Class Settlement at 27, *Mason v. Heel, Inc.*, No. 3:12-cv-03056, Dkt. No. 34 (S.D. Cal. filed Feb. 13, 2014).

sufficient money remains. Given an expected low claims rate, however, even a 50% increase in recovery for in-store purchasers who submit claims will likely leave a significant portion of the settlement fund left over for *cy pres*. According to one objector, the total amount of claims paid to class members will likely not exceed $450,000, which is far below the substantial $2.9 million fee award.[27] Assuming that class members' claims do not exceed $500,000, class counsel would be receiving close to ***six times*** the benefit actually realized by the class. Despite these concerns, the court approved the settlement and gave no indication that the parties would have to come back to the court after the class distribution to get approval for the *cy pres* payment. Citing the terms of the settlement, the court declared that "any residual funds will not revert to [d]efendant but rather, will be donated on a *cy pres* basis to the American Diabetes Association."[28]

- *Miller v. Ghirardelli Chocolate Co.*, No. C 12-04936 LB, 2014 U.S. Dist. LEXIS 141111 (N.D. Cal. Oct. 2, 2014). Plaintiffs alleged that defendant violated consumer-protection laws by labeling "Ghirardelli Chocolate Premium Baking Chips – Classic White" ("White Chips") as containing chocolate when they did not. Under the $5,250,000 nationwide settlement, class members may receive $1.50 per purchase of the White Chips and $0.75 per purchase of any of other products labeled as "All Natural." There is no cap on the total amount paid to a claimant with proof of purchase of the product, but there is a $24 cap for households without proof of purchase. Class counsel will receive $1,575,000, or 30% of the settlement fund plus $90,000 in expenses. Beyond sending individual notice to defendant's online customers, notice is limited to the creation of a website and publication of notice of the settlement online and in popular print media. Given the limited notice and likelihood that claimants with knowledge of the settlement will submit claims to receive insignificant payouts, a substantial residual fund will likely remain. The money will be divided between four organizations, which are largely unrelated to accurate food labeling: (1) Consumers Union, Yonkers, NY; (2) National Consumer Law Center, Washington, DC; (3) University of California, Davis, Food Science & Technology Department; and (4) Florida State University, Food & Nutrition Science Department. The court gave final approval to the class settlement on February 20, 2015.[29] No information is noted about the claims rate, but presumably, a substantial amount of the settlement fund will be handled by a *cy pres* distribution. As one objector highlighted, "[n]either Class Counsel nor the Settlement Administrator provided details regarding how many valid claims were submitted, how many claimants submitted claims, and what amount of money

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[27] *See* Notice of Obj. filed by Keith Rothman ¶ 15, *Mirakay v. Dakota Growers Pasta Co.*, No. 3:13-cv-04429-JAP-LHG (D.N.J.. filed Sept. 2, 2014).

[28] *Mirakay*, 2014 U.S. Dist. LEXIS 148694, at *5.

[29] *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, 2015 U.S. Dist. LEXIS 20725 (N.D. Cal. Feb. 20, 2015).

will be paid to claimants."[30] In response, Ghirardelli pointed out that 66,800 claims had been submitted as of February 2015, but did not specify what percentage of total class members in the ***nationwide*** settlement that equaled.[31] The district court did not address the claims rate in the case, and there is no indication that the parties will have to return to the court for approval of the ultimate *cy pres* distribution when the claims process has run its course.[32]

- *Howerton v. Cargill, Inc.*, No. 13-00336 LEK-BMK et al., 2014 U.S. Dist. LEXIS 165967 (D. Haw. Nov. 26, 2014). The court approved a nationwide $6,100,000 settlement arising out of allegations that defendant misled consumers by deceptively advertising Truvia as a natural sweetener. Under the terms of the settlement, each class member is eligible to receive between $7.50 and $45.00 depending upon the member's number of purchases during the class period. Alternatively, a class member may opt to receive vouchers valued between $18.00 and $90.00. In return, class counsel are to receive $1,830,000, or 30% of the gross settlement fund. The claims rate was not anticipated to exceed three percent. Specifically, "the claims administrator expect[ed] a total of between 75,000 and 100,000 claims, which is 1.5 to 2.0% of the estimated class."[33] Therefore, a significant amount of the gross settlement likely remained unclaimed and was therefore distributed to two *cy pres* recipients, the National Consumer Law Center and the Consumer Federation of America, which have no connection to food labeling – the subject of the underlying litigation. The claims process terminated in December 2014, and the parties did not return to the court for approval of any charitable distribution, suggesting that the *cy pres* donation was automatic.

- *De Leon v. Bank of Am., N.A.*, No. 6:09-cv-1251-Orl-28KRS, 2014 U.S. Dist. LEXIS 74056 (M.D. Fla. May 29, 2014) (preliminary approval only). Plaintiffs brought a putative nationwide class action against defendants under the Fair Credit Billing Act and Florida's Deceptive and Unfair Trade Practices Act, alleging that they failed to properly credit payments made "upon receipt," resulting in unlawful late charges. The parties reached a settlement under which defendants agreed to pay up to $10 million to compensate the class members and class counsel. Each class member who submits a claim is entitled to $40 for each late fee charged on qualifying payments made during the class period, for up to a maximum of five qualifying payments ($200). The settlement initially provided that if any residual money remained unclaimed, it would be distributed to

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[30] Obj. of Brittany Ference at 3, *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936, Dkt. No. 153 (N.D. Cal. filed Jan. 18, 2015).

[31] *See* Ghirardelli's Resp. to Obj. to Pls.' Mot. for Final Settlement Approval at 5, *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936, Dkt. No. 160 (N.D. Cal. filed Feb. 5, 2015).

[32] Objector Ference and another objector filed notices of appeal of the final judgment in March 2015, which are pending.

[33] *Howerton*, 2014 U.S. Dist. LEXIS 165967, at *10.

America Saves and Consumer Action. Any *cy pres* award was initially limited to $500,000 or 5% of the gross settlement fund. As of the date of the final fairness hearing, only 4,000 claims had been submitted by class members, totaling approximately $530,000.[34] In light of this low claims rate, the parties agreed to extend the claims deadline for 90 days and also increased the amount of *cy pres* that could be donated from $500,000 to $1,000,000, adding the Florida Bar Foundation as a *cy pres* recipient.[35] As of April 13, 2015, 10,988 claims had been filed.[36] That number corresponds to $1,632,040, still just a fraction of the total gross settlement.[37] As of May 2015, the court had not yet rendered its decision on final approval of the settlement agreement.

- *Pearson v. NBTY, Inc.*, No. 11 CV 7972, 2014 U.S. Dist. LEXIS 357 (N.D. Ill. Jan. 3, 2014), *rev'd, remanded*, Nos. 14-1198, et al., 2014 U.S. App. LEXIS 21874 (7th Cir. Nov. 19, 2014). As described in greater detail above, plaintiffs alleged that defendants made false and misleading representations in the packaging and marketing of health supplements containing Glucosamine and Chondroitin. The settlement created a $2 million class fund to compensate aggrieved class members, of which any residual amount would be remitted to the Orthopedic Research and Education Foundation as a *cy pres* payment. The settlement provided that funds would be donated as *cy pres* in the event that the total amount claimed was less than $2,000,000. In this instance, only ***0.6 percent*** of the class submitted claims. Thus, there were insufficient claims to distribute even half of the $2,000,000 minimum, resulting in a *cy pres* award of $1.13 million. While the court granted final approval, it reduced the requested fee award to $1.9 million: "The low claims rate in combination with funds being remitted to *cy pres* in an amount greater than the actual benefit to the Class suggests that there is substantial reason to decrease the percentage of the attorneys' fee award from the 'standard' 25% percentage of the settlement."[38] The district court's final approval order was recently reversed by the Seventh Circuit.[39] The Court of Appeals explained that the "$1.13 million *cy pres* award to the orthopedic foundation did not benefit the class, except insofar as armed with this additional money the foundation may contribute to the discovery of new treatments for joint problems – a hopelessly speculative proposition."[40]

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[34] *See* Pls.' Mot. for Final Order Approving Third Am. Settlement Agreement at 17-18, *De Leon v. Bank of Am., N.A.*, No. 6:09-cv-1251, Dkt. No. 136 (M.D. Fla. filed Nov. 20, 2014).

[35] *See* Pls.' Am. Mot. for Final Order Approving Third Am. Settlement Agreement at 8, *DeLeon v. Bank of Am., N.A.*, No. 6:09-cv-1251, Dkt. No. 142 (M.D. Fla. filed Jan. 28, 2015); Decl. of Claims Administrator, *DeLeon v. Bank of Am., N.A.*, No. 6:09-cv-1251, Dkt. No. 142 (M.D. Fla. filed Apr. 13, 2015).

[36] Pls.' Am. Mot. for Final Order Approving Third Am. Settlement Agreement at 19, *DeLeon v. Bank of Am., N.A.*, No. 6:09-cv-1251, Dkt. No. 142 (M.D. Fla. filed Jan. 28, 2015).

[37] *Id.*

[38] *Pearson*, 2014 U.S. Dist. LEXIS 357, at *22.

[39] *See Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014).

[40] *Id.* at 784.

> Moreover, the court stressed that "[a] *cy pres* award is supposed to be limited to the money that can't feasibly be awarded to the" class members – "which ha[d] not been demonstrated."[41]

Of the twenty-two *cy pres* settlements approved in 2009, three of them fall within this category in which the *cy pres* fund would likely be the largest recipient of class payments:

- *In re VA Data Theft Litig.*, 653 F. Supp. 2d 58 (D.D.C. 2009). Plaintiff veterans alleged violations of the Privacy Act in connection with the burglary of a laptop and external hard drive from the home of an employee of the Department of Veterans Affairs. The external hard drive contained the names, dates of birth, and Social Security numbers of some 26.5 million veterans and their spouses. The United States agreed to fund a $20 million settlement, under which claimants could receive between $75 and $1,500, provided they had sufficiently documented out-of-pocket expenditures potentially related to the theft of their personal information. Any unclaimed funds, after paying attorneys' fees, would be donated to the Intrepid Fallen Heroes Fund and the Fisher House Foundation, not-for-profit charitable organizations that help military personnel. "[A]s of the final fairness hearing . . . only 2100 reimbursement claims had been filed with the common fund administrator. . . . Even if claims were to double before the claims period ended, and the average claim were for $ 500 -- both generous suppositions for the plaintiffs' attorneys -- the class members would only claim $2.1 million."[42] An objector challenged the requested $5 million in fees, arguing that it far outstripped the actual benefit to the class. The court reasoned that because "[t]he *cy pres* contribution will likely dwarf the amount paid to class members," a fee award less than 25% was warranted.[43] The court therefore awarded class counsel $3,600,000, or 18% of the common fund, in fees. No effort was made to locate potential claimants who failed to submit claims. Nor was any effort made to redistribute unclaimed funds to those who had already submitted claims. In sum, it was "likely that the *cy pres* fund w[ould] turn out to have been by far the largest component of the total fund."[44]

- *Norflet v. John Hancock Life Ins. Co.*, 658 F. Supp. 2d 350 (D. Conn. 2009). Plaintiffs accused defendant of engaging in discriminatory practices on the basis of race in the sale of life insurance to African Americans prior to 1959. The parties reached a $24 million settlement, under which eligible class members could obtain $1,200 per policy. Notice was mailed to over 400,000 potential class members and was published in various periodicals. However, the bulk of the

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41 *Id.*

42 *In re VA Data Theft Litig.*, 653 F. Supp. 2d at 60.

43 *Id.* at 61.

44 *Id.*

settlement fund went unclaimed by class members. Approximately $15,300,000, or 64% of the settlement, went to *cy pres* recipients focused on helping African-American communities. Class counsel were awarded $6,682,850.90, or 28% of the settlement.[45]

- *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806 (E.D. Wis. 2009). Plaintiff filed a class action lawsuit alleging that the automated teller machines ("ATMs") owned by defendant Chase violated the Electronic Fund Transfers Act by failing to properly notify ATM users that a fee would be imposed. Under the nationwide settlement, Chased agreed to reimburse claiming class members for all ATM fees paid during the relevant period, up to a maximum total sum of $2.1 million. The agreement provided that any undistributed funds remaining after the deduction of class claims, attorneys' fees, and expenses would be divided as follows: a) 35% to be contributed to a *cy pres* charity; and b) 65% to be returned to Chase. The agreement provided for notice in various publications because the addresses of class members were not known. The notice yielded 1,188 timely claims and 13 late claims, totaling $187,000 in money to class members. As a result, $312,000, or 15% of the settlement fund, was donated to an undesignated *cy pres* charity.[46]

While the class settlements summarized above are technically examples of *ex post cy pres* – awards to third-party charities that are made only after class members have failed to submit claims – they are effectively de facto *ex ante cy pres* settlements. In most of those cases, the courts granted approval of the settlements without knowing the percentage of class members that would actually submit claims and did not require the parties to return to the court at the close of the claims process to seek approval of the specific amount of *cy pres* donation. While it is impossible to predict what percentage of class members actually submitted claims, a recent analysis found that where notice of a class action settlement was disseminated through the

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[45] *See* Consent Mot. for Approval of *Cy Pres* Advisory Committee's Budget, *Norflet v. John Hancock Life Ins. Co.*, No. 3:04-CV-1099, Dkt. No. 221 (D. Conn. filed Nov. 11, 2010).

[46] As previously explained, in a fourth case in 2009, the court actually preliminarily denied approval of a class settlement where the eventual *cy pres* award was likely to be substantial. Although a modified *cy pres* settlement was preliminarily approved in 2001, the court denied final approval in late 2014. *See* Order Den. Mot. for Final Approval of Class Action Settlement, *Kaufman v. Am. Express Travel Related Servs. Co.*, No. 1:07-cv-01707, Dkt. No. 537 (N.D. Ill. Dec. 18, 2014). And in a fifth case, the court *sua sponte* mandated that the difference between the requested fee and the fee actually awarded be donated as *cy pres* to the Volunteer Legal Services Program of the Bar Association of San Francisco. *See Tarlecki v. Bebe Stores, Inc.*, No. C 05-1777 MHP, 2009 U.S. Dist. LEXIS 102531 (N.D. Cal. Nov. 3, 2009).

media, claims rates ranged from ***0.002 percent to 9.378 percent, with a median rate of .023 percent.***[47] And class actions with direct notice have similar claims rates as well.[48] Given the likelihood that few class members will actually submit claims in those cases, the *cy pres* donations will inevitably be substantial, perhaps constituting the largest component of the settlements. The parties to a class settlement are well aware of the fact that consumer class action settlements almost always yield low claims rates. As a result, they know at the outset that the vast majority of the money the defendant agrees to pay as part of the settlement will not actually go to the supposedly aggrieved class members, but will instead be donated as *cy pres*, raising the same problems as those posed by predetermined, *ex ante cy pres*. In short, district courts approving these types of residual-based *cy pres* settlements are failing to heed the growing consensus by federal appeals courts that "[a] *cy pres* award is supposed to be limited to money that ***can't feasibly be awarded to the***" class members.[49]

In sum, the *cy pres* settlements in 2009 and 2014 demonstrate the troubling potential for *cy pres* to steer the bulk of class money away from the class members to uninjured third-party charities, whether the *cy pres* component is designed *ex ante* or *ex post*. Beyond this fundamental flaw, many of the settlements are also problematic because: (1) the *cy pres* recipient had no reasonable relationship to the underlying subject matter of the litigation; (2) *cy*

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[47] Decl. of Deborah McComb ¶ 5, *Poertner v. Gillette Co.*, No. 6:12-CV-00803-GAP-DAB (M.D. Fla. filed Apr. 22, 2014).

[48] *Sylvester v. Cigna Corp.*, 369 F. Supp. 2d 34, 52 (D. Me. 2005) ("'claims made' settlements regularly yield response rates of 10 percent or less").

[49] *Pearson*, 772 F.3d at 784 (emphases added); *see also Oetting v. Green Jacobson, P.C.*, 775 F.3d 1060, 1063-64 (vacating order distributing residual funds to third-party legal services organization, noting that *cy pres* distributions "have been controversial in the courts of appeals," but that district courts are "ignoring and resisting [] . . . circuit court *cy pres* concerns and rulings in class action cases") .

pres resulted in excessive attorneys' fees; and/or (3) the *cy pres* recipient had a preexisting relationship with one or more of the parties to the settlement.

Weak *cy pres* nexus. In addition to the abuses associated with *ex ante* and *ex post cy pres*, courts often fail to ensure that the proper nexus exists between the *cy pres* recipient(s) and the class members whom class counsel ostensibly represent. As one of the leading federal appellate decisions on *cy pres* long ago made clear, *cy pres* must "be rejected when the proposed distribution fails to provide the 'next best' distribution."[50] This is so because any *cy pres* distribution must "adequately target the plaintiff class."[51] To ensure that *cy pres* awards constitute the "next best" distribution of unclaimed class funds, they "must be guided by (1) the objective of the underlying statute(s) and (2) the interest of the silent class members, and must not benefit a group too remote from the plaintiff class."[52] Nevertheless, many of the cases in both 2009 and 2014 involved a *cy pres* recipient with a tenuous (at best) relationship to the class. In total, 35 cases, or 44% of all cases granted approval in 2009 or 2014, were granted either preliminary or final approval notwithstanding a tenuous connection between the *cy pres* recipient and the settlement class. That figure includes 24 cases, or 41% of all cases granted approval in 2014, and 11 cases, or 48% of all cases granted approval in 2009. In some cases, the court was content to approve a general legal aid fund[53] or a general community charity[54] rather than perform a deeper analysis into how the funds could be put to use in a manner that might

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50 *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990).

51 *Id.* at 1309.

52 *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (internal quotation marks and citation omitted).

53 *See, e.g.*, *Smith v. Chargo*, No. 8:14CV183, 2014 U.S. Dist. LEXIS 162230 (D. Neb. Nov. 17, 2014) (designating Legal Aid of Nebraska in a case alleging violations of the FDCPA).

54 *Ogbuehi v. Comcast of Cal./Colo./Fla./Ore., Inc.*, 303 F.R.D. 337 (E.D. Cal. 2014) (designating United Way of the Bay Area in a wage-and-hour class action).

genuinely benefit the class members. In other cases, the *cy pres* recipient seems to have been chosen at random or as a result of some preexisting relationship with one of the parties:

- *Trinidad v. Pret A Manger (USA) Ltd.*, No. 12 Civ. 6094 (PAE), 2014 U.S. Dist. LEXIS 132186 (S.D.N.Y. Sept. 19, 2014). Plaintiffs alleged various wage-and-hour violations, including failure to pay employees for all hours worked, failure to pay overtime, improper tip pooling, and lack of adequate wage statements in violation of the Fair Labor Standards Act and New York Labor Law. The settlement designated City Harvest as the *cy pres* recipient, a local charity that accepts food donations and with whom defendant has a "longstanding relationship."[55]

- *In re Crocs, Inc. Sec. Litig.*, No. 07-cv-02351-PAB-KLM, 2014 U.S. Dist. LEXIS 130965 (D. Colo. Sept. 18, 2014). Plaintiffs, stockholders of the defendant corporation, alleged that defendant violated the Exchange Act and rules promulgated by the Securities and Exchange Commission by making materially false and misleading public statements about their inventory. For reasons that remain unclear, the settlement designated St. Jude's Children's Research Hospital as the *cy pres* recipient, a worthwhile organization lacking any connection to securities fraud.

- *De Leon v. Bank of Am., N.A.*, No. 6:09-cv-1251-Orl-28KRS, 2014 U.S. Dist. LEXIS 74056 (M.D. Fla. May 29, 2014) (preliminary approval only). As discussed above, the plaintiffs in this case brought a putative class action against defendants under the Fair Credit Billing Act and Florida's Deceptive and Unfair Trade Practices Act, alleging that they failed to properly credit payments made "upon receipt," resulting in unlawful late charges. The parties reached a settlement under which defendants agreed to pay up to $10 million to compensate the class members and class counsel. After it became clear that only a fraction of class members had submitted claims, the parties agreed to increase the maximum *cy pres* distribution to $1,000,000. That amount would include a $500,000 payment to the Florida Bar Foundation, an organization with little connection to the subject matter underlying the litigation.[56]

- *Herring v. Hewitt Assocs., LLC*, No. 3:06-cv-00267 (TJB), 2009 U.S. Dist. LEXIS 67283 (D.N.J. Mar. 19, 2009). Plaintiffs alleged wage-and-hour violations under the Fair Labor Standards Act and various state labor laws for failure to pay overtime compensation for hours worked in excess of 40 per workweek. The settlement designated the American Red Cross Disaster Relief

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[55] *Trinidad*, 2014 U.S. Dist. LEXIS 132186, at *7.

[56] *See* Pls.' Am. Mot. for Final Order Approving Third Am. Settlement Agreement at 8, *DeLeon v. Bank of Am., N.A.*, No. 6:09-cv-1251, Dkt. No. 142 (M.D. Fla. filed Jan. 28, 2015).

Fund as the *cy pres* recipient, an organization with no connection to employment law.[57]

In sum, while *cy pres* is sometimes benefitting noble organizations that may do laudable things for American society, they often do not "effectuate . . . the interests of the silent class members."[58] As district courts assess the validity of *cy pres* proposals, they should take heed of "a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests."[59]

Excessive attorneys' fees. *Cy pres* is often a means to justify attorneys' fees by inflating the size of the purported "class award," from which attorneys' fees are calculated.[60] Thus, large *cy pres* distributions can be used to justify hefty fees for class counsel.

A significant portion of the reported *cy pres* settlements in 2014 and 2009 involved potentially excessive attorneys' fees. Altogether, 24 out of 83 reported cases involved settlements that were approved notwithstanding the apportionment of attorneys' fees valued at greater than 30% of the gross settlement.[61] Sixteen, or 28% of settlements finally or preliminarily approved in 2014, fall within this category.[62] By contrast, eight, or 35% of

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[57] Several other cases involved *cy pres* recipients chosen seemingly at random or as a result of a preexisting relationship with the defendant or plaintiff's counsel.

[58] *Six Mexican Workers*, 904 F.2d at 1309.

[59] *ALI Principles* § 3.07 comment b.

[60] *See* Redish et al., *supra* note 3, at 40; *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 834 (9th Cir. 2012) ("And the larger the *cy pres* award, the easier it is to justify a larger attorneys' fees award.") (Kleinfeld, J., dissenting); 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions §§ 14:5-6 (4th ed. 2002).

[61] This figure excludes cases in which either (a) the nature of the settlement precluded determining attorneys' fees purely as a percentage of a gross settlement amount or (b) the gross settlement was a small amount (i.e., less than $500,000).

[62] One of those cases was a denial of approval, demonstrating that courts need not rubber stamp *cy pres* settlements that involve excessive attorneys' fees. *See Zepeda*, 2014 U.S. Dist. LEXIS 24388. Described in greater detail above, the court recognized that "the only persons receiving any funds are persons other than class members. In particular, the agreement permits the payment of up to $500,000 in fees to Plaintiffs' counsel, up to $5,000 as an incentive award for each class representative, and a minimum of $250,000 to the Electronic Frontier Foundation." *Id.* at *21.

settlements finally or preliminary approved in 2009, involved attorneys' fees that exceeded thirty percent of the gross settlement.[63] Additionally, while attorneys' fees were reduced *sua sponte* in a further seven cases in order to bring the fees below thirty percent, the fee awards were still substantial.[64] Even more, the court reduced attorneys' fees in some cases while still awarding class counsel more than 30% of the gross settlement. The following are some of the most egregious examples of excessive attorneys' fee awards from 2014 and 2009:

- *Poertner v. Gillette Co.*, No. 6:12-cv-803-Orl-31DAB, 2014 U.S. Dist. LEXIS 116616 (M.D. Fla. Aug. 21, 2014) *aff'd*, No. 14-13882, 2015 U.S. App. LEXIS 12318 (11th Cir. July 16, 2015). Plaintiffs' counsel in this case, discussed above, were awarded over $5.4 million in fees notwithstanding the fact that a meager $344,850 was paid to the class members. Even considering the $6,000,000 *ex ante cy pres* distribution to various charities (whose connection to the class members is tenuous), plaintiffs' counsel still received roughly 44% of a large settlement.

- *Pearson*, 2014 U.S. Dist. LEXIS 357. In this case, also discussed in greater detail above, plaintiffs' counsel requested $4.5 million in fees where there were insufficient claims to distribute even half of the $2,000,000 minimum settlement fund, resulting in a *cy pres* award of $1.13 million. While the court reduced the requested fee award to $1.9 million, it was still more than what class members actually received. As previously explained, the district court's decision approving the settlement was recently invalidated by the Seventh Circuit. The Court of Appeals declared that the settlement "disserves the class" by conferring only a "meager" benefit to the class, while awarding class counsel with close to $2 million.[65]

- *Mirakay v. Dakota Growers Pasta Co.*, No. 13-cv-4429 (JAP), 2014 U.S. Dist. LEXIS 148694 (D.N.J. Oct. 20, 2014). According to one objector, the total amount of claims paid to class members in this nationwide consumer-fraud settlement had not exceeded $450,000 as of the time of final approval, which is

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[63] One of those cases was a denial of preliminary approval. *See Zaldivar*, 2009 U.S. Dist. LEXIS 64091. However, as previously explained, the court subsequently approved the settlement in September 2009 on essentially the same basic terms.

[64] For example, in *In re VA Data Theft Litigation*, previously described in greater detail, counsel requested $5 million of a $20 million settlement, or twenty-five percent. The court substantially reduced the fee award to $3.6 million, or eighteen percent, based on the fact that "the *cy pres* fund will turn out to have been by far the largest component of the total fund." 653 F. Supp. 2d at 61.

[65] *Pearson*, 772 F.3d at 787.

far below the substantial $2.9 million fee award.[66] Assuming that class members' claims do not exceed $500,000, class counsel will receive close to ***six times*** the benefit actually realized by the class.

- *De Leon v. Bank of Am., N.A.*, No. 6:09-cv-1251-Orl-28KRS, 2014 U.S. Dist. LEXIS 74056 (M.D. Fla. May 29, 2014) (preliminary approval only). As discussed above, the plaintiffs in this case brought a putative nationwide class action against defendants under the Fair Credit Billing Act and Florida's Deceptive and Unfair Trade Practices Act, alleging that they failed to properly credit payments made "upon receipt," resulting in unlawful late charges. The parties reached a settlement under which defendants agreed to pay up to $10 million to compensate the class members and class counsel. As of April 13, 2015, 10,988 claims had been filed, corresponding to $1,632,040.[67] By contrast, class counsel are requesting $2,500,000 in fees.

- *Parker v. Time Warner Entm't Co.*, 631 F. Supp. 2d 242 (E.D.N.Y. 2009). As explained above, class members could choose either a $5 check or one free month of cable service. Factoring in the *cy pres* donation of $500,000 and settlement costs of $3 million, the court determined that the gross settlement value was approximately $7.2 million. That value contrasted with the $5 million in requested fees. There were 113 objections, many of which complained about the disparity between the small class benefit (either $5 or one month's free cable service) and the requested fees of $5 million. The court rejected these objections on the ground that "the small amount of consideration [was] commensurate with the minimal harm to each Class Member."[68] While the court reduced the fee award from $5 million to $3,301,572.97, it still represented more than 30% of the value of the total settlement.[69]

As these examples illustrate, a significant number of *cy pres* settlements are delivering the bulk of settlement proceeds to class counsel and third-party charities rather than class

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[66] *See* Notice of Obj. filed by Keith Rothman ¶ 15, *Mirakay v. Dakota Growers Pasta Co.*, No. 3:13-cv-04429-JAP-LHG (D.N.J. filed Sept. 2, 2014).

[67] *See* Decl. of Claims Administrator, *DeLeon v. Bank of Am., N.A.*, No. 6:09-cv-1251, Dkt. No. 142 (M.D. Fla. filed Apr. 13, 2015).

[68] *Parker*, 631 F. Supp. 2d at 259.

[69] Notably, while 30-33% is a standard fee recovery in individual cases, it is inappropriately high in the class context. After all, in moving for class certification, proponents usually tout the efficiency of class treatment as a primary argument. If litigating a matter on a class basis is truly more efficient, the cost for doing so (and therefore the amount of the contingent fee to be paid) should be substantially less than 30%. Instead, courts should award fees closer to the 10% range (depending on the amount at issue in the litigation).

members. In other words, some *cy pres* settlements are "overcompensat[ing] class counsel at the expense of the class."[70]

Improper relationship between the parties and *cy pres* recipient. Another troubling consequence of *cy pres* awards in class action settlements is the potential for parties to steer money to a favored charity to satisfy their own financial interests. As *cy pres* has become increasingly pervasive in federal class action practice, the number of cases in which the parties have a potentially improper relationship with the *cy pres* recipient has likewise increased. Specifically, in 2014, four reported *cy pres* settlements raised potential ethical questions stemming from the relationship between the parties and the *cy pres* recipient. By contrast, in 2009, only one reported *cy pres* settlement fell within this category. When courts are confronted with *cy pres* settlements that raise these troubling issues, some of them have shrugged off these concerns, as illustrated by the examples summarized below:

- *In re Google Referrer Header Privacy Litig.*, No. 5:10-cv-04809 EJD, 2014 U.S. Dist. LEXIS 41695 (N.D. Cal. Mar. 26, 2014). As discussed in greater detail above, this $8.5 million settlement provided no monetary relief to the class members. In addition to the objections previously described, objectors also highlighted the preexisting relationships between the *cy pres* recipients and class counsel and the defendant. Specifically, class counsel are alumni of several of the designated charities, which are also pet charities of the defendant. In particular, two of the three class attorneys who signed the settlement agreement are alumni of three of the *cy pres* recipients. Similarly, Google is a large donor to the following designated charities: the Berkman Center for Internet and Society at Harvard University; Stanford Center for Internet and Society; AARP; and Chicago-Kent. As the objection brief of Holyoak and Frank explains, "[t]hese are not recipients that are 'independent and free from conflict.'"[71] The court recently rejected these arguments and granted final approval of the settlement. According to the court, "while the potential for a conflict of interest is noted, there is no

[70] *In re Baby Prods.*, 708 F.3d at 179.

[71] Obj. of Melissa Holyoak and Theodore H. Frank at 9, *In re Google Referrer Header Privacy Litig.*, No. 5:10-cv-04809, Dkt. No. 70 (N.D. Cal. filed Aug. 8, 2014).

indication that counsel's allegiance to a particular alma mater factored into the selection process."[72]

- *In re Apple iPhone/iPod Warranty Litig.*, No. CV-10-01610, 2014 U.S. Dist. LEXIS 64573 (N.D. Cal. May 8, 2014). Plaintiffs asserted consumer-fraud and other claims arising out of defendant's denial of warranty coverage based on its former liquid damage policy with respect to approximately 152,000 devices. The nationwide settlement created a $53 million fund sufficient to pay class members approximately 117% of the average replacement cost paid to Apple for similar devices, approximately $241 for each affected class device. The settlement also provides for potential redistribution of uncashed amounts if appropriate. Any residual funds are to be divided equally among various organizations that have little connection to the subject matter of the case. An objector complained that one of the lawyers representing the class had a business relationship with the Center for Auto Safety ("CAS"), one of the designated *cy pres* recipients. While the objector was not a member of the class, the court nonetheless rejected the relationship claim on the merits, concluding that the individual did not substantiate the claim. The alleged conflict of interest was based on a lawyer's pro bono representation of two objectors in another class action at the request of CAS.[73]

- *Trinidad v. Pret A Manger (USA) Ltd.*, No. 12 Civ. 6094 (PAE), 2014 U.S. Dist. LEXIS 132186 (S.D.N.Y. Sept. 19, 2014). Plaintiffs brought a wage-and-hour class action alleging failure to pay employees for all hours worked, failure to pay overtime, improper tip pooling, and lack of adequate wage statements in violation of the Fair Labor Standards Act and New York Labor Law. Under the $910,000 settlement, members who worked for the defendant for one week or less would receive $5. Other members would receive a share of the settlement proportionate to the duration of their employment. The average payout will likely be $174, while the maximum amount will be around $1,900. The attorneys' fees are $209,246, or 25% of the total settlement. Class members will automatically receive checks in the mail, with any uncashed funds going to City Harvest, a charitable organization that donates food to the hungry, and which the court noted has a "longstanding relationship" with the defendant.[74] The court did not elaborate on this preexisting relationship between the defendant and the charity, and documents filed on the docket for this case do not shed more light on the potentially improper relationship.

- *In re NCAA Student-Athlete Concussion Injury Litig.*, MDL No. 2492, 2014 U.S. Dist. LEXIS 174334 (N.D. Ill. Dec. 17, 2014) (preliminary approval denied). As

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72 *In re Google Referrer Header Privacy Litig.*, 2015 U.S. Dist. LEXIS 44057, at *33.

73 *See* Jeffrey Scott Kessinger's Obj. to Class Action Settlement at 5-6, *In re Apple iPhone/iPod Warranty Litig.*, No. 10-CV-01610, Dkt. No. 111 (N.D. Cal. filed Dec. 4, 2013).

74 *Trinidad*, 2014 U.S. Dist. LEXIS 132186, at *7.

previously described in greater detail, this settlement established a $70,000,000 medical-monitoring fund to finance testing for athletes who experienced concussions. The settlement also provided that the NCAA would spend $5,000,000 on researching the prevention, treatment, and/or effect of concussions. Under the terms of the settlement agreement, the defendant appeared to have full discretion to determine how this money would be allocated. In addition, concussion-related research conducted by an NCAA member institution "w[ould] be credited (as appropriate) toward the foregoing monetary requirement."[75] In other words, the settlement gave the defendant an incentive to direct the research money to affiliated organizations. The court denied preliminary approval for reasons unrelated to the *cy pres component*. However, the relationship between the defendant and the potential *cy pres* recipients could have served as another basis for rejecting the settlement.

- *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 U.S. Dist. LEXIS 33900 (N.D. Cal. Apr. 3, 2009). Plaintiff commenced a putative wage-and-hour class action against defendants, alleging that they misclassified plaintiff and other Hanesbrands Service Representatives as exempt under the federal and state labor laws and therefore did not pay proper overtime wages and failed to comply with other requirements. The parties agreed to a total settlement of $408,420.32, from which $280,350 would be distributed to claimants pro rata based on the number of work weeks during the class period. Any residual amount greater than $15,000 would be redistributed pro rata to participating claimants. Any unclaimed amount less than $15,000 would be donated as *cy pres* to the United Way in Forsyth County and to another organization. As the court recognized, the defendants chose the United Way in Forsyth County because they had worked with that United Way for ten years. Indeed, defendants and their employees had donated approximately $2 million per year to that organization. As such, it appears that the organization was selected primarily because it serves as defendants' pet charity – not because it would provide some indirect benefit to the injured class members. Indeed, the United Way, while a worthwhile charity, bears no relationship to the subject matter of the underlying litigation – unlawful labor practices.

In very few of these cases did the court actually address the improper relationship between class counsel/the defendant and the recipient charity – much less consider whether such a relationship posed any potential for conflicts of interest. But the diversion of funds to an organization in which class counsel has such a personal interest arguably runs counter to class

[75] *See* Settlement Agreement, Section IX.A., *In re NCAA Student-Athlete Concussion Injury Litig.*, MDL No. 2492, Dkt. No. 64-1 (N.D. Ill. filed July 29, 2014).

counsel's duty to "fairly and adequately protect the interests of the class."[76] Therefore, as stewards of the Federal Rules of Civil Procedure, courts should scrutinize any preexisting relationships between the parties and the proposed *cy pres* recipient to minimize the potential for conflicts of interest.

II. The Subcommittee's Proposals

Given the rise in *cy pres* and its attendant problems, we applaud the Advisory Committee for its focus on this practice. However, ILR respectfully believes that if the Advisory Committee proceeds with a *cy pres* rule, it should adopt more meaningful measures to curb the practice of *cy pres* and minimize the risks of abuse posed by the practice. Below, we set forth our specific concerns and some proposals for strengthening the proposed sketch.

Any *cy pres* rule should eliminate de facto *ex ante cy pres* settlements. Should the Advisory Committee proceed with a *cy pres* rule, it should be based in large part on the principle that permeates the notes accompanying the current conceptual sketch: "cy pres distributions are a last resort, not a first resort."[77] The current proposal does not achieve this goal. Under the current draft, *cy pres* would be permissible any time a court find that "individual distributions [are not] economically viable[.]"[78] This explicit allowance of *cy pres* in cases where direct distributions to individual class members are not "economically viable"[79] appears to endorse *ex ante cy pres cy pres* in a significant number of cases and could potentially open the floodgates to

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[76] Fed. R. Civ. P. 23(a)(4); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."); *Sipper v. Capital One Bank*, No. CV 01-9547, 2002 WL 398769, at *4 (C.D. Cal. Feb. 28, 2002) ("A central concern of the Rules of Civil Procedure governing class actions is ensuring that the class action format is not hijacked by parties . . . to their own ends at the expense of the other class members.").

[77] Subcommittee Report, Sept. 11, 2015, at 16.

[78] *See id.* at 14.

[79] *Id.* at 15.

even more de facto *ex ante cy pres* settlements. As illustrated in Part I, a number of consumer-fraud class settlements involve small payments to class members that arguably are not economically viable. Moreover, expressly endorsing *cy pres* whenever direct distributions to class members are not "economically viable" would encourage the filing of even lower value class actions and make *cy pres* the default rule when those cases settle. Essentially, such a rule would spawn a cottage industry of tiny-value class actions in which nobody ever expects to obtain any money for the nominal plaintiffs. Such a result would dramatically expand *ex ante cy pres*, contrary to the goals of the Committee.

The current sketch would not only encourage trivial and meritless lawsuits but it would also violate the Rules Enabling Act.[80] This is so because Rule 23 is a neutral rule of procedure; it cannot be construed to alter substantive rights and is not a "free-standing device to do justice."[81] Nonetheless, the current conceptual sketch would implicitly authorize class settlements the parties and the court know up front will not deliver any direct benefits to the class, turning Rule 23 into a private party enforcement device and likely expanding the number of de facto *ex ante cy pres* settlements in federal court. Thus, the Committee should reject any proposal that would authorize ex ante *cy pres* any time a court determines that individualized recoveries are not "economically viable." Instead, the Committee should adopt an approach that ***only*** allows *cy pres* where multiple attempts at direct distribution of money to class members have been made – and where such efforts result in an actual residue of class money. It is only in these limited cases where *cy pres* serves a truly residual function that it should be used to disburse class settlement dollars.

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[80] Redish et al., *supra* note 3, at 623.

[81] *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1105 (D.N.M. 2012).

A *cy pres* rule should address excessive attorneys' fees. ILR also believes that any *cy pres* rule adopted by the Committee should directly address the problem of attorneys' fees.

In many cases, the primary purpose of *cy pres* components of class settlements is to justify attorneys' fees by inflating the size of the "class award," which includes any *cy pres* distribution.[82] This problem is in evidence in the cases summarized in Part I of this paper. Twenty-four out of 83 reported cases in 2014 and 2009 involved settlements that were approved notwithstanding the apportionment of attorneys' fees valued at greater than 30% of the gross settlement. Importantly, the issue of fees has not gone unnoticed by the Subcommittee. The September report notes that "[p]articularly when [fee] awards are keyed to the 'value' of the settlement, treating a lump sum payment by the defendant as the value for purposes of the attorney fee award might seem inappropriate."[83] ILR welcomes a discussion of the important issue of attorneys' fees in class action settlements and would urge that any proposal ultimately devised by the Subcommittee contain a provision that directly addresses this issue in one of the following ways.

First, the Committee should consider a provision requiring that attorneys' fees in class settlements be tied to the value of money and benefits actually received by the class members – and not the amount that goes to *cy pres*. Such a requirement would minimize abuse and properly realign attorneys' incentives by ensuring that the money class counsel receive for their efforts in settling class actions is directly tied to the benefit actually realized by the class members they represent. Congress has already mandated a similar rule for coupon settlements – i.e., settlement agreements under which class members are compensated for their purported injuries with

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82 *See* 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions §§ 14:5-6 (4th ed. 2002).

83 *Id.*

coupons, discounts or credits toward further purchases of the defendant's products or services.[84] Under that rule, the award of attorneys' fees in coupon class actions must be based on the value of the coupons actually claimed by individual class members.[85] It makes little sense to require a relationship between class counsel's fees and the benefits directly obtained by class members in coupon settlements, while not imposing the same requirement in *cy pres* settlements – where the benefits realized by class members are even more tenuous.[86] Because Congress has already imposed this type of limitation in the coupon-settlement context as part of the Class Action Fairness Act, it is sensible for the Advisory Committee to adopt this logical next step.

Alternatively – and at a bare minimum – the Advisory Committee could adopt a rule requiring courts to consider some reduction in attorneys' fees where a request for fees is based in part on *cy pres*. According to the *ALI Principles*, "[a]ttorneys' fees in class actions, whether by litigated judgment or by settlement, should be based on both the actual value of the judgment or settlement to the class and the value of cy pres awards . . . ."[87] The comment to that section clarifies, however, that "because cy pres payments . . . only indirectly benefit the class, the court need not give such payments the same full value for purposes of setting attorneys' fees as would be given to direct recoveries by the class."[88] The Third Circuit reiterated this principle in *In re Baby Products*, declaring that "[w]here a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes ***direct benefit*** to the class, . . . it

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84 *See* 28 U.S.C. § 1712(a).

85 *Id.*

86 *See* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 141 (2014) ("Drawing upon the [Class Action Fairness Act] model, courts could calculate attorneys' fees as a percentage of only those settlement funds actually claimed by class members, and decline to award fees on the portion of the fund distributed to charities [as] cy pres.").

87 *ALI Principles* § 3.13.

88 *Id.* § 3.13 cmt. a.

[is] appropriate for the court to decrease the fee award."[89] Such a principle should have been applied in the *Poertner v. Gillette Co.* case (summarized in Part I), which involved fees of over $5.4 million notwithstanding the fact that a meager $344,850 was paid to the class members. Critics of this proposal have argued that fees should not be reduced in these circumstances because money has still been taken away from the defendant, presumably deterring further misconduct by it.[90] However, such an approach effectively transforms Rule 23 into a private attorney general statute in violation of the Rules Enabling Act. A rule that embodies the *ALI* attorneys' fee principle would go a long way towards reining in disproportionate fee awards that bear little relation to the direct benefits actually realized by the class.

Any *cy pres* rule should allow parties to bargain for reversion clauses. The Subcommittee Report notes that "[o]ne alternative to *cy pres* treatment . . . might be a provision that any residue after the claims process should revert to the defendant which funded the settlement program."[91] The Subcommittee goes on to state that "because the existence of such a reversionary feature might prompt defendants to press for unduly exacting claims processing procedures, a reversionary feature should be evaluated with caution."[92] We do not believe that this caution is warranted.

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89 *In re Baby Prods.*, 708 F.3d at 178 (emphasis added).

90 Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 Tul. L. Rev. 1695, 1704 (2006) (denying attorneys' fees on the portion of a coupon settlement that is distributed to charities as cy pres could mean that "certain socially beneficial class action lawsuits will not be filed and misconduct will go undeterred").

91 *Id.* at 16.

92 *Id.*

The rationale offered by the Subcommittee for such caution is that reversion provisions "might prompt defendants to press for unduly exacting claims processing procedures."[93] But there is no evidence that overly exacting procedures are the reason why so little money earmarked for class members actually reaches those individuals. To the contrary, class member participation is typically low in settlements because most class members are simply uninterested, in many cases because they were affirmatively satisfied with the product or service at issue. In any event, to the extent there is concern about encouraging class member participation in settlements, the better approach would be to base fee awards on the compensation that actually reaches class members, a practice that would incentivize class counsel to negotiate and implement effective claims procedures.

***Cy pres* should only be allowed where there is a direct nexus between the *cy pres* recipient and the underlying subject matter of the litigation.** As demonstrated by a number of the *cy pres* settlements summarized in this comment, *cy pres* money frequently goes to third-party charities with little connection to the subject matter of the claims underlying the settlement. For example, a significant number of *cy pres* settlements involve payments to general legal aid funds or general community charities with virtually no nexus to the underlying subject matter of the litigation. The Subcommittee appears to recognize this problem. Under its current conceptual sketch of a *cy pres* proposal, such payments would only be permissible if they are made "to a recipient whose interests reasonably approximate those being pursued by the class."[94] ILR agrees that such a limitation is necessary. However, the notes accompanying any amended rule should include guidance on how courts should enforce such a provision. In particular,

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93 Subcommittee Report, Sept. 11, 2015, at 16.

94 *Id.* at 15.

district courts should be instructed to undertake a rigorous analysis of the mission of the third-party charity and ensure that it is sufficiently related to the claims that resulted in the settlement. As part of this process, the parties should come forward with evidence demonstrating that the interests of the recipient charity "reasonably approximate those being pursued by the class." If no organization with a sufficient nexus to the subject matter of the litigation can be found, residual money should revert to the defendant.

Should the Advisory Committee decide that a *cy pres* rule is appropriate, it should mandate that *cy pres* awards "effectuate . . . the interests of the silent class members."[95] Specifically, the *cy pres* recipient must "resemble[], in either composition or purpose, the class members or their interests."[96] This is consistent with Section 3.07 of the *ALI Principles*, which requires the parties to "identify a recipient whose interests reasonably approximate those being pursued by the class."[97] The Subcommittee appears to be on board with this proposal.

***Cy pres* recipients should be independent of class counsel.** As the examples provided in this comment illustrate, parties sometimes steer class settlement money to third-party charities with which they have a preexisting relationship. For example, as illustrated in Part I, class counsel or the defendant may have a longstanding relationship with the charitable organization, raising potential conflict-of-interest issues. That was the case in *In re Google Referrer Header Privacy Litigation* (summarized in Part I). In other cases, the judge or his or her spouse might have a relationship with the *cy pres* recipient. These preexisting relationships suggest that the designated *cy pres* organization was chosen to benefit the parties or the court rather than provide some indirect benefit to the class members. Put simply, such arrangements create the appearance

95 *Six Mexican Workers*, 904 F.2d at 1309.

96 *ALI Principles* § 3.07 comment b.

97 *Id.* § 3.07(c).

of a conflict of interest and should not be tolerated. Therefore, the Advisory Committee should consider a provision barring payments to third-party charities that have a preexisting relationship with any of the parties or the judge presiding over the litigation.

CONCLUSION

In most cases, *cy pres* is used solely as a basis for distributing unclaimed settlement money. However, even where *cy pres* serves a residual distribution function, that usage can generate serious problems. Most notably, in some of these residual-based *cy pres* settlements, particularly in the consumer-fraud context, the bulk of the settlement money goes unclaimed – a result the parties likely anticipate at the outset, but neglect to highlight for the court. Thus, while *cy pres* in these cases technically depends on there being some money left over after the expiration of the claims process, the historically low claims rates in consumer class settlements all but guarantee that most of the settlement dollars will end up going to charities rather than the class members, reflecting deeply flawed class action settlements. Unfortunately, the current conceptual sketch being offered by the Subcommittee has the potential to exacerbate this problem by authorizing *cy pres* whenever direct distribution to class members is not "economically viable." Given the ubiquity of class action settlements involving small payments to class members, the endorsement of *cy pres* in such cases could effectively authorize a large number of class action settlements that have no prospect of delivering any direct benefit to the supposedly injured class members, undermining the purpose of class action settlements. Thus, should the Advisory Committee proceed with proposing a formal *cy pres* amendment to Rule 23, it should jettison this aspect of the current conceptual sketch and instead make clear that *cy pres* is only appropriate for residual funds and only where multiple attempts at direct distribution to class members have been undertaken and have failed. In addition, any *cy pres* rule should

address the issue of attorneys' fees in a manner that would encourage class counsel to promote settlements that deliver direct relief to those purportedly aggrieved by a defendant's conduct. And finally, any rule governing *cy pres* should leave intact the parties' freedom to bargain for reversion clauses, which are a preferable alternative to transferring settlement money to third-party charities.