This workshop was held at the 2018 Equal Justice Conference in San Diego, California.

Title:
Cy Pres Awards and Legal Aid: A Win-Win Solution for All

Presenters:
Bill Boies, McDermott Will & Emery LLP, Chicago, IL
Salena Copeland, Legal Aid Association of California, Oakland, CA
Bob Glaves, The Chicago Bar Foundation, Chicago, IL

Cy Pres funds, a/k/a residual funds in class action cases, have been an important source of funding for legal aid and access to justice in recent years. At this session you will learn more about cy pres awards to legal aid and why they can be a win-win solution for the court and the parties to the case, get practical tips from states that have mounted successful educational campaigns for the bench and bar, and have the opportunity to share your own successes and challenges on this front.
RESOLVED, That the American Bar Association urges state, local, territorial and tribal jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to civil justice for persons living in poverty.

FURTHER RESOLVED, That before class action residual funds are awarded to charitable, non-profit or other organizations, all reasonable efforts should be made to fully compensate members of the class, or a determination should be made that such payments are not feasible.
REPORT

Introduction

The unmet need for civil legal services among those living in poverty is well documented: study after study has demonstrated that the majority of poor people who need civil legal services are turned away due to a severe shortage of legal aid resources. This not only has grave consequences for the people who are unable to get this critical legal help; everyone with matters before the courts and the justice system suffers as well as a result of the large increase in people left with no choice but to represent themselves in court on often complex legal matters.

Funding for legal aid services is woefully inadequate and the Association annually organizes bar leaders from around the country to lobby for more funding for the Legal Services Corporation to partially address this problem. The Association has adopted policy statements in support of adequate funding for LSC, as well as called upon bar associations and lawyers to “undertake vigorous leadership and aggressive advocacy to identify, pursue and implement creative initiatives that will result in new funding mechanisms for legal services providers.”

A creative initiative that has now been adopted in 19 U.S. jurisdictions helps provide critical funding for legal aid while at the same time providing a balanced resolution to what otherwise can often become a thorny issue in class action litigation. Specifically, these rules and statutes authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of awards of undistributed class action settlement residuals. This resolution seeks to have the Association go on record as supporting this approach for the reasons articulated below.

The Origins of the Cy Pres Doctrine

Cy pres awards are distributions of the residual funds from class action settlements or judgments (and occasionally from other proceedings, such as probate and bankruptcy matters) that, for various reasons, are unclaimed or cannot be distributed to the class members or other intended recipients. The term cy pres derives from the Norman-French phrase, cy pres comme possible, meaning “as near as possible.” Originating at least as early as sixth-century Rome, the cy pres doctrine has its roots in the laws of trusts and estates, operating to modify charitable trusts that specified a gift that had been granted to a charitable entity that no longer existed, had become infeasible, or was in contravention of public policy. In such instances, courts transferred the funds to the next best use that would satisfy “as nearly as possible” the trust settlor’s original intent.

When class actions are resolved through settlement or judgment, it is not uncommon for excess funds to remain after a distribution to class members. Residual funds are often a result of the inability to locate class members or class members failing or declining to file claims or cash settlement checks. Such funds are also generated when it is “economically or administratively

1 House of Delegates policy resolution 95A124.
infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed.\(^2\)

In these circumstances courts have used the cy pres doctrine to accomplish the distribution of residual funds to charities that benefit persons similarly-situated to the plaintiffs, or that advocate to improve access to justice more generally. This preserves the deterrent effect of the class action device, and allows courts to distribute residual funds to charitable causes that reasonably approximate the interests pursued by the class action for absent class members who have not received individual distributions.

**Cy Pres is a Well-Established Practice**

The application of the cy pres doctrine in class actions, as with any other doctrine throughout legal history, has evolved as courts have been required to grapple with complex and unique facts and circumstances in each particular case. Because of such complexities, trial courts sometimes fashion unique cy pres distributions; some such awards have been reversed on appeal. The vast majority of such reversals are not for “abusing” the cy pres doctrine (i.e., using cy pres for personal gain for counsel or judges). Rather, most reversals are due to the misapplication of the doctrine within the particular circumstances of the case (e.g., failure to make every effort to fully compensate class members or misalignment between the interests of the class members and the interests of the cy pres recipients). While addressing these problems, federal courts have consistently found that the cy pres doctrine is valid in the class action context. The American Law Institute’s Principles of Law of Aggregate Litigation (“ALI Principles”) agrees and provides key guidance on the application of cy pres awards in class actions, which is respected and generally followed by the courts. The ALI Principles acknowledge that “many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members.”\(^3\)

With respect to funds left over after a first-round distribution to class members, the ALI Principles express a policy preference that residual funds should be redistributed to other class members until they recover their full losses, unless such further distributions are not practical:

If the settlement involves individual distributions to class members and funds remain after distribution (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.\(^4\)

\(^2\) *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013)

\(^3\) PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. a (2010) [hereinafter ALI PRINCIPLES]

\(^4\) ALI PRINCIPLES, *supra* note 3, § 3.07(b)
As the ALI Principles recognize, when further distributions to class members are not feasible, the court has discretion to order a cy pres distribution, which puts the settlement funds to their next-best use by providing an indirect benefit to the class.

**Legal Aid and Access to Justice Organizations Are Appropriate Recipients of Cy Pres Distributions**

The fundamental purpose of every class action is to offer access to justice for a group of people who on their own would not realistically be able to obtain the protections of the justice system. This purpose is closely aligned with the mission of every civil legal aid and access to justice initiative across the nation.

In class action suits, when distributions to the class members are not feasible, it is necessary to determine other recipients who would be appropriate to receive the residual cy pres funds. The ALI Principles state that such recipients should be those “whose interests reasonably approximate those being pursued by the class,” and, if no such recipients exist, “a court may approve a recipient that does not reasonably approximate the interests” of the class.5

Courts evaluate whether distributions to proposed cy pres recipients “reasonably approximate” the interest of the class members by considering a number of factors, including: the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reason why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the cy pres recipient.

Organizations with objectives directly related to the underlying statutes or claims at issue in the relevant class action are clearly appropriate cy pres recipients. But narrowly limiting the scope of appropriate cy pres recipients to the precise claims in the class action may not always be possible or practical. Too narrow of a focus on the subject matter of the case can unnecessarily complicate the socially desirable settlement of large class action disputes. In a typical class action, counsel for plaintiffs and a defendant are resolving a complex dispute, and the disposal of residual funds is typically a detail in a larger resolution. While some court opinions speak of residual funds as “penalties” or “recoveries” for violations of the law, settling defendants usually see themselves as making a pragmatic business decision that specifically avoids any admission that they violated the law. Moreover, settling defendants have a practical interest in how residual funds are used, and may wish to avoid funding interest groups that campaign against the interests of the defendant.

There have been cases where parties improperly attempted to direct cy pres awards to causes that had no connection to the class or the case or to access to justice through the courts. Examples have included general awards to charities or educational institutions with no particular relationship to the class action. The concerns in the cy pres context are not about whether these are good and effective charities and institutions; it is their relevance to the class action where

---

5. ALI PRINCIPLES, supra note 3, § 3.07(c)
there are residual funds to be awarded. In some instances, the reasons for including the organization have not been articulated, leaving the appeals court to guess about the connection of a particular organization to the issues of the case.

An appropriate recipient in most cases will be a legal services organization, so long as the underlying premise of expanding access to justice is properly articulated. Thus, federal and state courts throughout the country have long recognized organizations that provide access to justice for low-income, underserved, and disadvantaged people as appropriate beneficiaries of cy pres distributions from class action settlements or judgments. The access to justice nexus falls squarely within ALI Principles’ guidance that “there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests.”

An issue that sometimes arises in disposition of class action residuals is whether the scope of a suit (local or national) has been properly matched to the scope of a cy pres award. It is clearly disfavored under the case law for a cy pres award in a national class action case to be directed solely to a local charity. One advantage of an award to an organization with a broad access to justice mission is that such organizations exist throughout the country so any distribution can easily be structured to take into account the national nature of the case.

Because organizations with broad access to justice missions are widely recognized as appropriate recipients of cy pres awards, a growing number of states have adopted statutes or court rules codifying the principle that cy pres distributions to organizations promoting access to justice are an appropriate use of residual funds in class action cases. The state courts and legislatures in 19 states have adopted rules and statutes that specify, as appropriate cy pres recipients, charitable entities that promote access to legal services for low-income individuals. Nine of these courts and legislatures have mandated a minimum baseline distribution (usually 25% to 50%) to the pre-approved category of recipients. Because such statutes and court rules establish that it is permissible for any residual funds in class action settlements or judgments to be distributed to organizations that provide access to justice/civil legal aid, they make clear that such organizations are distinct from other charitable causes that have drawn legitimate concerns regarding a lack of nexus with the interests of the class members.

Conclusion

6 ALI PRINCIPLES, supra note 3, § 3.07 cmt. b.
7 The states are: California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Mexico, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Washington. As of this writing, it has been reported that the Wisconsin Supreme Court adopted a petition for a cy pres rule, which is expected to become effective January 1, 2017 after final orders are drafted.
8 The states with rules requiring a percentage of cy pres awards to be devoted to access to justice organizations are: Colorado (50%), Illinois (50%), Indiana (25%), Kentucky (25%), Montana (50%), Oregon (50%), Pennsylvania (50%), South Dakota (50%) and Washington (50%). When effective, Wisconsin (50%) will become the 10th state.
Class action litigation has become an important device for resolving a wide range of disputes between individual plaintiffs and corporate defendants. Cy pres awards of undistributed class action settlement residue are an important part of the settlement process. Distributing funds to appropriate recipients is a practical variant of the cy pres device long recognized in trust law and is generally accepted as preferable to returning undistributed funds to the settling defendants or escheat of those funds to the state.

Awards of class action settlement funds should follow these principles: (1) compensation of class members should come first; (2) cy pres awards are appropriate where cash distributions to class members are not feasible; (3) cy pres recipients should reasonably approximate the interests of the class; (4) cy pres distributions should recognize the geographic make-up of the class, and where circumstances dictate should be made on the basis of such factors; (5) legal aid and access to justice organizations should be considered as appropriate cy pres recipients.

The American Bar Association therefore urges that state, local, territorial, and tribal jurisdictions adopt court rules or legislation that authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of class action residual funds.

Respectfully submitted,

Jacquelynne J. Bowman, Member
Standing Committee on Legal Aid & Indigent Defendants

August 2016
Cy Pres Awards, Legal Aid and Access to Justice: Key Issues in 2017 and Beyond

Vol. 20 No. 2

By Bob Glaves, Meredith McBurney

Bob Glaves has been the Executive Director of the Chicago Bar Foundation since 1999, prior to which he was a litigation attorney in private practice for nine years. Meredith McBurney is the Resource Development Consultant for Management Information Exchange and the ABA Resource Center for ATJ Initiatives.

Editor’s Note: An earlier version of this article was published in the Spring 2013 issue of the Management Information Exchange (MIE) Journal; it has since been revised by the authors with updated information and is published here with permission from the MIE Journal. This article provides a summary of the key issues involved in obtaining cy pres funds today and helpful strategies for various types of entities within the legal aid/ATJ community, including legal aid organizations as well as IOLTA programs. The original appendix to this article, which can be found in the library of the MIE website provides more details, including copies of relevant cases, articles, and sample materials. We encourage you to read this article with your computer open to that website!

Introduction

Cy pres awards, which in the class action context most often arise from undistributed residual funds in the case, have become an important source of funding for legal aid and access to justice over the past decade. And appropriately so, as the one common denominator in all class action cases is that they are fundamentally about access to justice, a principle that increasingly is recognized by state supreme courts and legislatures and a host of state and federal courts around the country.
In spite of a large and growing body of authority and precedent, there have been several cases and articles in recent years that have raised questions about these awards, amalgamating the issue of legal aid’s legitimacy as a cy pres recipient with other genuine concerns raised by the circumstances in individual cases. This calls for a coordinated, threefold response from the legal aid/ATJ community throughout the country: (1) educating the bench and bar about the well-established and well-reasoned authority for these awards to go towards legal aid and access to justice initiatives, always remaining consistent on the fundamental arguments; (2) for states where a rule or statute is not already in place, advocating for court rules or statutes that clarify that legal aid/ATJ organizations are an appropriate recipient for these awards; and (3) recognizing the legitimate concerns raised in some cases involving cy pres awards and planning for them in education/outreach efforts so as not to inadvertently get caught in the crossfire when those concerns are present.

We all have a stake in doing this well, and we will all be more successful in our individual efforts if we utilize coordinated and complementary strategies. And when the proper foundation is set, designating one or more legal aid or ATJ organizations as the recipient of residual funds in a class action gives the parties and the court an excellent solution to what otherwise can become a thorny issue in the settlement of a complex case.

A (Very Brief) Overview of Cy Pres Awards and How They Arise

Cy pres awards are funds that, for any number of reasons, are unclaimed or cannot be distributed to the class members or beneficiaries who were the intended recipients. Once it is known that the funds cannot be distributed as originally intended, the parties and the court have to determine how to dispense with those funds. These situations arise most often in class action settlements, and that is the focus of this article. Under the cy pres doctrine and more specific laws in a growing number of states, courts can distribute these residual funds to appropriate charitable causes. As noted in the next section, legal aid and access to justice initiatives are appropriate charitable causes in any class action case.

In considering strategies around this issue, it’s important to remember the context through which these awards normally arise. The parties are going to be focused on the underlying purpose of the class action and the larger settlement of the case. Generally speaking, the issue of what to do with any award of residual funds is considered by the parties settling a class action to be one of several minor collateral issues that must be addressed to close out However, all rights are reserved and no material may be reproduced without express permission of the ABA. Please refer to the ABA copyright statement for more information.

To request reprint permission please visit:
the case. The residual fund issue may be addressed during the settlement negotiations, but in many cases it isn’t addressed in the agreement at all and doesn’t arise until the administration of the settlement has been completed, sometimes years after the rest of the case has concluded.

With that backdrop in mind, what is going to be most important to the parties in a residual fund context is to avoid anything complex or controversial that potentially could draw an objection and upset the larger settlement. And that creates a great opportunity for legal aid and ATJ programs that are properly prepared. With the broad base of authority noted in this article and the universal nature of the access to justice cause in this context, legal aid or ATJ programs can always be pitched as a great solution for the parties and the court.

Legal Aid and Access to Justice Initiatives Are Well-Established as Appropriate Recipients

Federal and state courts throughout the country have long recognized that awarding residual funds from class action settlements or judgments to organizations that improve access to justice for low-income and disadvantaged people is an appropriate use of the *cy pres* doctrine. While some courts have correctly questioned awards to charities with no connection to the class or the underlying case, with just a few notable exceptions courts regularly approve *cy pres* awards to legal aid and ATJ organizations. That is because the one common underlying premise for all class actions is to make access to justice a reality for people who otherwise would not realistically be able to obtain the protections of the justice system.

In addition to the large body of case law supporting the use of *cy pres* awards to advance access to justice, a growing number of states have adopted statutes or court rules at the state level codifying the principle that organizations which promote legal aid and access to justice are always an appropriate use for residual funds in class action cases.

<table>
<thead>
<tr>
<th>States with Rules or Statutes as of Spring, 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
</tr>
<tr>
<td>Nebraska</td>
</tr>
<tr>
<td>Colorado</td>
</tr>
<tr>
<td>New Mexico</td>
</tr>
<tr>
<td>Connecticut</td>
</tr>
<tr>
<td>North Carolina</td>
</tr>
<tr>
<td>Hawaii</td>
</tr>
<tr>
<td>Oregon</td>
</tr>
<tr>
<td>Illinois</td>
</tr>
<tr>
<td>Pennsylvania</td>
</tr>
</tbody>
</table>

These court rules and statutes underscore that legal aid and access to justice are distinct from other charitable causes that have drawn legitimate concerns because they are unconnected from the interests of the class members. Recognizing the value of these rules and statutes, the ABA House of Delegates at its 2016 Annual Meeting passed a resolution that “urges state, local, territorial and tribal jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to nonprofit organizations that improve access to justice for persons living in poverty.”

Based on this well-established authority, hundreds of cy pres and residual fund awards have been directed to legal aid and ATJ programs around the country in recent years. While the total amount of these awards varies on an annual basis, these awards now collectively on average provide more than $10 million in support for the cause each year.

A Few Clouds on the Horizon, Yet the Sun Should Still Shine Through

In spite of the well-established authority noted above, there have been a few cases and articles in recent years that have questioned the legitimacy of certain cy pres awards. In some cases, awards to legal aid organizations specifically have been included among those concerns based on particular circumstances present in those cases.

Connection of Legal Aid to the Underlying Issues

In reviewing these cases, we need to start with the recognition that there indeed have been cases where parties improperly attempted to direct cy pres awards to causes that had no connection to the class or the case or to access to justice through the courts. Examples have included general awards to charities or
educational institutions with no particular relationship to the class action. The concerns in the cy pres context are not about whether these are worthy and effective charities and institutions; it is their relevance to the class action where there are residual funds to be awarded that raises questions.

In many of these cases, the organizations selected may have been appropriate, but the reasons for including the organization were not articulated, leaving the appeals court to guess, sometimes inaccurately, about the connection of the organization to the issues of the case.

There is one negative case from the Eighth Circuit that legal aid advocates should review, though we stress that it only applies to federal court cases in that Circuit and that there remains substantial federal and state authority to support awards to legal aid. In that case, Oetting v. Green Jacobson, the court reversed a cy pres award for a number of reasons, including that the legal aid organization to receive the award was deemed insufficiently connected to the underlying case.

Other Issues: Compensation of Class Members and Geographic Concerns

There are two overarching issues that have often led to problems with settlements involving cy pres awards, and legal aid sometimes has been caught in the crosshairs. First, courts have found that the parties did not do enough to try to distribute the settlement funds to the class members before awarding the class action residuals. Many state rules and statutes explicitly address this issue, as does the ABA’s 2016 resolution on cy pres awards, stating that “before class action residual funds are awarded to charitable, nonprofit or other organizations, all reasonable efforts should be made to fully compensate members of the class, or a determination should be made that such payments are not feasible.”

Another issue that has properly been raised is when cy pres awards in national class action cases are directed to local charities only and do not account for the wider geographic character of the class. For example, in a recent case from the Ninth Circuit Court of Appeals, the court overturned the award of residual funds to a local legal aid organization and two other charities, focusing primarily on its concern that the distribution did "not account for the broad geographic distribution of the class."

Some authors and commentators have inappropriately used those concerns in specific cases to more broadly challenge the legitimacy of legal aid as an appropriate cy pres recipient. However, as noted above, provided that reasonable efforts have been made to distribute funds to the class members and geographic concerns are
properly respected, there is a large base of authority and precedent underscoring that legal aid is distinct from other charitable uses of these awards. Notably, this well-established authority is not acknowledged by the critics and commentators questioning legal aid more broadly, emphasizing the importance of good education and outreach to the bench and bar to ensure these fundamental points are understood and respected.

Three Things Every Program Should Do Now

In order to ensure that the sun does indeed shine through the potential clouds noted above, there are three things every legal aid program and its relevant stakeholders should do on a macro level as part of a coordinated education and outreach campaign:

1. **Maximize the Impact of Rules and Statutes**

   The legislature or Supreme Court in 21 states has enacted a statute or rule stating that legal aid/ATJ is an appropriate recipient of *cy pres* funds. In those states, the legitimacy of legal aid as a *cy pres* recipient in state court cases is established and not subject to question. The presence of the rule or statute also serves as persuasive authority in federal court cases in those jurisdictions. As more states enact rules or statutes, the argument that legal aid and access to justice are distinct from other charitable uses of *cy pres* awards becomes stronger, even in jurisdictions that have not explicitly spoken on the issue.

   For these reasons, for states that do not have a rule or a statute in place, the ATJ community should prioritize obtaining an explicit rule to govern the issue, even if that may have been rejected in the past. States of all sizes and political persuasions have enacted rules or statutes and the ABA has adopted a resolution, underscoring that these policies are the embodiment of the well-established authority that legal aid and access to justice are appropriate recipients of *cy pres* and residual fund awards in any class action case.

2. **Lead With the Access to Justice Principle**

   Always lead with the access to justice principle. This is particularly critical in states without a rule or statute, and imperative for all states in federal court cases. If there is another nexus that fits in a particular case (e.g. in a consumer case noting the important work legal aid does to protect consumers), that can be an effective secondary argument to also include. But it is crucial to always lead with the access to justice principle, as that applies across the board in every class action for every legal aid program.
Again, the access to justice rationale is this: legal aid and ATJ organizations are always appropriate recipients of *cy pres* or residual fund awards in class actions because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system. This fundamental principle is the basis for the growing number of states that have adopted rules or statutes and for hundreds of federal and state court cases throughout the country that have approved these awards to legal aid and ATJ organizations. While there may be other appropriate recipients of a *cy pres* award depending on the basis of a particular class action, a *cy pres* award can always be justified for legal aid or access to justice based on this fundamental principle.

### 3. Be Sure to Account for Geographic Issues

If a class is local or statewide and your legal aid or ATJ organization serves that geographic area, this won’t be an issue. However, in multi-state or national class actions, this is a critical issue to address, as the Ninth Circuit case noted above underscores.

Even in national cases, the class action is typically certified, administered, and resolved in one particular court. Access to justice in that particular jurisdiction therefore takes on added importance for that class, and on that basis courts typically approve up to half of an award to local legal aid or ATJ organizations. The other half of the award must still account for the broader geographic scope, and as we’ve seen, failure to account for it can be grounds for throwing out an entire award.

There are different ways to address the geographic scope issue. One way is to include other legal aid or ATJ organizations that have the appropriate regional or national scope (e.g., Equal Justice Works, the Sargent Shriver National Center on Poverty Law, and the National Consumer Law Center). In larger national cases involving multimillion dollar awards, three approaches that have successfully been used were to give a proportionate share to each state IOLTA organization; a proportionate share to all LSC-funded organizations; or a representative geographic distribution to regional legal aid and ATJ organizations.

Any of these approaches to issues of broader geographic scope can be acceptable; the key is to make sure the issue is addressed!

### Key Education and Outreach Strategies

To ensure that *cy pres* awards remain a strong funding source for legal aid requires a strategic and coordinated education and
outreach campaign in every jurisdiction. It may have been effective in the past to look at these issues more informally, but the recent cases involving challenging facts—along with the organized campaign by organizations that aim to limit class actions more broadly—have put a much greater spotlight on cy pres awards. Even in jurisdictions with a strong rule or statute or solid court precedents, it cannot be assumed that all of the relevant stakeholders (i.e., the courts, the bar, key members of the legal community who work on class action cases, and other legal aid and ATJ organizations) are fully aware of these issues or understand the critical importance of addressing the key “macro” points noted in the preceding section of this article.

1. The Value of a Coordinated Effort

Many states and metro areas have developed a centralized, coordinated effort to ensure that the core cy pres messages are communicated to the key stakeholders on an ongoing basis and that those stakeholders have an appropriate mix of access to justice options from which to choose. These coordinated campaigns are being run by IOLTA programs, bar foundations, and access to justice commissions. If there is not already a coordinated effort in your jurisdiction, one of those entities will be the best place to start that conversation, stressing the key points we have emphasized in this article. The ABA’s Resource Center for Access to Justice Initiatives and MIE are good places to turn to for advice and counsel in starting such an effort.

The Chicago Bar Foundation (CBF) has been serving this role in the Chicago area for more than 12 years. As part of that effort, the CBF periodically does outreach to the class action bar, the state and federal courts, and other stakeholders, including information both about the CBF and the many individual legal aid organizations serving the community. The CBF also includes sample language, fact sheets, and other information on its website, and highlights the many successful court-based advice desks and pro bono projects made possible by these awards. These efforts have collectively generated millions of dollars for the CBF and a number of individual legal aid organizations in recent years.

2. Developing Your Cy Pres Effort—The Basics

Your organization’s role in the cy pres effort will depend on how the overall campaign is structured in your community or state. What is listed here are the basics, which need to be done by somebody—either each individual legal aid program and/or a coordinating entity as described above. This part of cy pres resource development really has not changed in recent years, and there are
plenty of materials available to help you get started if you are new to cy pres.

**Have relevant information readily available:** Every legal aid organization should include cy pres and residual fund awards (using both terms) as one of the ways to support their organization. That option should appear on the organization’s website, with a brief description of the organization and contact information in case someone interested in directing an award has a question. It should also appear in printed brochures and other development materials.

**Talk with your organization’s staff, board, and other key volunteers:** Provide them with information about cy pres awards. Encourage them to be aware of opportunities for cy pres awards for legal aid.

**Develop a cy pres committee:** If there is not already a coordinating entity in your area, you should consider setting up a cy pres committee and developing a strategy. Your committee should include your organization’s board members and other volunteers who are familiar with this area of law and/or have strong relationships with attorneys who do class action litigation and judges who hear these cases—volunteers who can have personal conversations with this relatively small number of attorneys and judges who are involved in class action litigation.

**Develop and implement a cy pres strategy:** The MIE library contains extensive resources on cy pres that include sample messages, materials, and manuals. The ABA Resource Center’s Fundraising Manual includes a chapter on cy pres. This is one area where there are great models to draw upon, and no need to reinvent the wheel!

**Don’t forget fundamentals of development:** A cy pres campaign is basically about resource development, and in many ways is the same as other private fundraising that is being done by your organization:

- Remember the interests of the parties in avoiding potential controversy in the cy pres context. As noted above, legal aid can and should be pitched to the parties as a great solution.
- See the players as individuals, and treat this as you would other personal, one-to-one fundraising efforts.
- Stress initiatives that further the interests of those involved in the case (i.e., plaintiff and defense counsel in the case, one or more corporate defendants, and the court), keeping in mind that the great majority of these awards are distributed as part of a settlement. Examples include projects of your organization (or your grantee organizations) that directly assist the courts, such as court-based pro bono projects or pro se assistance projects, or particular services your organization (or your grantee organizations) provide(s) that will be attractive to the parties.
- If you are contacted about a potential cy pres award, get back with any information requested as quickly as possible. Have template information and materials prepared as part of your strategy, so that with minor adjustments based on the case you can respond to the attorneys or judge
immediately.

- Thank those involved and acknowledge them in your recognition efforts (after confirming they want to be recognized).

### 3. IOLTA Program or Bar Foundation as a Partner

Even if you are in a state or metro area without a coordinated campaign, there will be times where an award to either the IOLTA program or bar foundation in your jurisdiction will be a preferable solution and it will be important to have such an organization as a partner. Examples include where the defendant or the court is uncomfortable with awarding *cy pres* funds to an organization that litigates in that court, or where one of the parties or judge is affiliated with that organization. This only occasionally becomes an issue, but when it does, a bar foundation or IOLTA program that does not litigate and has an objective grants process in place for distribution of funds can allay those concerns and ensure that an award will still advance access to justice.

### Conclusion

There are many things that counsel will disagree on in any class action case, but this is an area where counsel on all sides can agree that the solution works for everyone involved: the class, the defendant, and the courts. In addition to being an important source of funding for the cause, directing *cy pres* awards to legal aid or ATJ programs can be a great solution for the parties and the court so long as geographic and other key considerations are properly addressed.

The materials in the MIE library and the chapter on *cy pres* in the ABA Fundraising Manual can serve as resources for everyone, whether you are just getting started or are fine-tuning an already existing campaign. As we’ve noted throughout this article, we’re all in this together, and it’s absolutely key that we all have good, coordinated education and outreach campaigns that stick to the key messages highlighted in this article.
California Code of Civil Procedure § 384, which has long governed the acceptable use of residual monies from class action cases, was recently amended to create new standards for the distribution of these funds.

*Background.* Section 384 expresses the policy of the State to ensure that the unpaid cash residue and unclaimed or abandoned funds in class action litigation are distributed in specific ways: these funds must, to the fullest extent possible, be designated to qualifying organizations that further the purposes of the underlying class action or causes of action, or that promote justice for all Californians.

The statute sets forth specific procedure for identifying and designating *cy pres* whenever a judgment (including any consent judgment, decree, or settlement agreement) provides for the payment of money to members of the class: any unclaimed funds shall be distributed in accordance with § 384, unless for good cause shown the court makes a specific finding that an alternative distribution would better serve the public interest or the interest of the class. Section 384 sets forth the following requirements:

- The court shall set a date when the parties shall submit a report to the court regarding a plan for the distribution of any money pursuant to this section and shall make any orders necessary and appropriate for the payment, administration, supervision, and accounting of unpaid cash residual or unclaimed or abandoned class member funds.

- Such funds, plus any accrued interest that has not otherwise been distributed pursuant to order of the court, shall be transmitted as follows:
  - 25% shall be allocated to the State Treasury for deposit in the Trial Court Improvement and Modernization Fund for the Judicial Council to fund access to justice or collaborative court grants.
  - 25% shall be allocated to the State Treasury for deposit into the Equal Access Fund for legal aid.
  - The remaining 50% shall be distributed to “nonprofit organizations or foundations, to support projects that will benefit the class or similarly situated persons, further the objectives and purposes of the underlying class action or cause of action, or promote the law consistent with the objectives and purposes of the underlying class action or cause of action; child advocacy programs; or nonprofit organizations providing civil legal services to the indigent.” (The remaining 50% of Funds may be distributed to the Equal Access Fund above, or to any one or more of the organizations identified on Page 4.)

- With respect to multistate or national cases, the court shall ensure that unclaimed funds provide commensurate benefit to persons in California roughly proportional to the number of California class members compared to the number of members in the multistate or national class.
Sample Settlement Agreement Wording: Unclaimed Funds/Cy Pres

The Parties recognize that there likely will be some amount of unclaimed funds after disbursement of the Settlement Fund for the payment of valid claims, and payment of costs and expenses of administration. The Parties agree the unclaimed funds resulting from the failure to file claims and from the denial of claims filed by Class members shall be distributed to cy pres recipients pursuant to CCP § 384 as amended June 17, 2017, and as set forth herein. The portion of the Settlement Fund distributed to cy pres recipients shall be disbursed 25% for the Trial Court Improvement and Modernization Fund and ___% [not less than 25%] to the Equal Access Funds for legal aid to indigent persons. [If less than 75% to the Equal Access Fund: The balance of residual funds shall be disbursed to _______ nonprofit organization(s)/foundation(s) to support projects that will benefit the class (or similarly situated persons), promote the objectives of the class action, support child advocacy programs or nonprofit organizations providing civil legal services to the indigent (including any of the programs identified on page 4.)]

Sample Order: Stipulation of Parties for Order Granting Cy Pres Distribution

The parties hereby stipulate as follows:

WHEREAS, the Court granted final approval of the parties settlement on (date);

WHEREAS, on (date), the Court-appointed Claims Administrator (name) , printed and mailed Settlement Award Payments totaling $_____ and approximately ___% of the net settlement fund was distributed successfully and___% of the settlement checks were cashed, and all reasonable efforts were taken to locate all class members;

WHEREAS, there was an expected residual from the first distribution of $______in unreturned taxes and uncashed checks; and

WHEREAS, on (date), the Court ordered a second distribution of the residual to eligible Class Members; and

WHEREAS, on (date), (name of class administrator) mailed checks totaling $____ as part of the second distribution;

WHEREAS, Section __ of the Settlement Agreement provides that any unclaimed funds may be redistributed to class members or shall be deposited into a cy pres Fund pursuant to CCP §384; and

WHEREAS, (name of class administrator) has testified that, not counting unreturned taxes, the residual is currently $______, and that it is prepared to issue the cy pres distribution upon Order of the Court; and

WHEREAS, the Parties agree that the residual should be distributed at this time to the cy pres recipients: (identify recipients), according to the terms of the Settlement Agreement approved by the Court;

THEREFORE, the Parties stipulate that any residual remaining on the date of this Order shall be distributed to the cy pres beneficiaries according to the terms of the Settlement Agreement within five (5) Court days of the date of this Order. Further, any additional funds received by the Claims administrator, whether through the return of taxes, uncashed checks, or for any other reason shall be distributed in the same manner to the Cy Pres beneficiaries within (5) days of receipt by the Claims Administrator.
As a general rule, class action settlements should provide for a cy pres distribution of settlement funds when such funds cannot be distributed to the class. Counsel should negotiate a provision that designates a cy pres recipient(s).

Sample Order: Final Approval Order for Class Action Settlements (Residual Funds)

WHEREAS, on (date), this matter came before the Court for hearing on Plaintiff’s Motion to Distribute the cy pres Fund;

WHEREAS, on (date), this Court granted final approval of the Settlement Agreement entered into by Class Plaintiffs and Defendants, and at that time found that the plan of allocation (which provides that $___ of the Settlement Fund be distributed to class members; and that any funds remaining in the Settlement Fund after payment of claims, attorneys’ fees and costs, taxes, settlement administration costs, and any class plaintiff incentive awards, will be distributed as cy pres) is fair, reasonable, and adequate;

WHEREAS, as directed by the court, the parties have provided the court with a list of organizations, and a description of the work performed by each organization;

The Court, having considered all papers filed and proceedings herein, directs that 25% of the residual funds shall be disbursed for the Trial Court Improvement Fund and that ___% [not less than 25%] shall be disbursed to the Equal Access Fund, and further finds that (names of Legal Services Organization) are eligible organizations and the Court directs that ___% of any Residual Funds from the Settlement shall be distributed to (Legal Services Organizations). These distributions shall be made in a timely manner and in any event no later than ___ calendar days from the date of this Order without further Order of the Court.

Sample Order: Order for Payment of Cy Pres Award

Having read the parties’ Joint Statement, the Declaration of the Settlement Administrator, and considered these factors as part of the Court’s Ordering of a Final Accounting Hearing, and good cause appearing therefore, the Court hereby Orders, within 5 days of the date of this Order, the Settlement Administrator to remit to the cy pres beneficiaries the residual pursuant to the terms of the Settlement Agreement.

Expanding Access to Justice Through Class Action Residuals and Other Court Awards

Section 384 expresses the policy of the State to ensure that the unpaid cash residue and unclaimed or abandoned funds in class action litigation are distributed in specific ways. These funds must be designated to qualifying organizations that further the purposes of the underlying class action or causes of action, or that promote justice for all Californians. The Equal Access Fund, administered by the State Bar of California, meets this standard because it distributes money to legal aid organizations throughout the State. Designating funds to the Equal Access Fund also helps counsel avoid the appearance of conflict of interest and impropriety because funds are distributed to a wide cross-section of legal aid organizations.
Legal Aid Programs help more than 250,000 of the most vulnerable Californians navigate the legal system each year. Each program is an expert in one or more specific service area(s) and many collaborate with each other to help create and protect fairness to all. All of these programs, as well as The Justice Gap Fund at The State Bar of California, are appropriate recipients of cy pres funds, permitted by California Code of Civil Procedure §384, or under federal case law.

For further information:
Legal Services Trust Fund Program
State Bar of California
180 Howard Street
San Francisco, CA 94105

Stephanie Choy
(415) 538-2249

LEGAL AID ORGANIZATIONS

Advancing Justice - Asian Law Caucus
Advancing Justice-Los Angeles
Affordable Housing Advocates
Aids Legal Referral Panel
Alameda County Bar Volunteer Legal Services
Alameda County Homeless Action Center
Alliance for Children's Rights
Asian Pacific Islander Legal Outreach
Bay Area Legal Aid
Bet Tzedek Legal Services
California Advocates for Nursing Home Reform
California Indian Legal Services
California Rural Legal Assistance Foundation
California Rural Legal Assistance, Inc.
California Women's Law Center
Casa Cornelia Law Center
Center for Gender and Refugee Studies - California
Center for Health Care Rights
Center for Human Rights and Constitutional Law
Central California Legal Services
Centro Legal de la Raza
Chapman University Family Protection Clinic
Child Care Law Center
Coalition of California Welfare Rights Organizations
Community Legal
Community Legal Services in East Palo Alto
Contra Costa Senior Legal Services
Disability Rights California
Disability Rights Education and Defense Fund
Disability Rights Legal Center
East Bay Community Law Center
Elder Law & Advocacy
Family Violence Appellate Project
Family Violence Law Center
Greater Bakersfield Legal Assistance
Harriet Buhai Center for Family Law
IELLA Legal Aid Project
Immigrant Legal Resource Center
Impact Fund
Inland Counties Legal Services
Inner City Law Center
Justice & Diversity Center of the Bar Association of San Francisco
Justice in Aging
La Raza Centro Legal
LACBA Counsel for Justice
Law Foundation of Silicon Valley
Lawyers' Committee for Civil Rights
Learning Rights Law Center
Legal Aid at Work
Legal Aid Foundation of Los Angeles
Legal Aid Foundation of Santa Barbara
Legal Aid of Marin
Legal Aid of Sonoma County
Legal Aid Society of Orange County
Legal Aid Society of San Bernardino
Legal Aid Society of San Diego
Legal Aid Society of San Mateo County
Legal Assistance for Seniors
Legal Assistance to the Elderly
Legal Services for Children
Legal Services for Prisoners with Children
Legal Services for Seniors
Legal Services of Northern California
Los Angeles Center for Law and Justice
McGeorge Community Legal Services
Mental Health Advocacy Services
National Center for Youth Law
National Health Law Program
National Housing Law Project
National Immigration Law Center
Neighborhood Legal Services
New American Legal Clinic
OneJustice
Positive Resource Center
Prison Law Office
Pro Bono Project Silicon Valley
Public Advocates Inc.
Public Counsel
Public Interest Law Project
Public Law Center
Riverside Legal Aid
San Diego Volunteer Lawyer Program
San Luis Obispo Legal Assistance Foundation
Santa Clara County Asian Law Alliance
Santa Clara University Alexander Law Center
Senior Adults Legal Assistance
Senior Citizens Legal Services
UC Davis School of Law Legal Clinics
USD School of Law Legal Clinics
Veterans Legal Institute
Voluntary Legal Services Program of Northern California
Wage Justice Center
Watsonville Law Center
Western Center on Law and Poverty
Worksafe, Inc.
Youth Law Center
Yuba-Sutter Legal Center for Seniors
Support Pro Bono, Legal Aid and Access to Justice in the Chicago Area

- Federal courts in Chicago can advance this goal by directing awards of residual funds to The Chicago Bar Foundation (CBF) or one or more of the many outstanding pro bono and legal aid organizations the CBF supports. A list of CBF-supported organizations appears on the reverse side of this fact sheet, along with information about other organizations providing similar services outside of Cook County.
- In addition to the CBF being an effective vehicle where the court can support all of the major pro bono and legal aid organizations serving the Chicago area, *cy pres* awards enable the CBF to provide ongoing support for a number of successful projects right here in the Northern District.
- Among the federal court projects that *cy pres* awards have made possible and continue to support through the CBF are the Hibbler District Court Pro Se Program and the Bankruptcy Court Help Desk. These awards also provide support for the Settlement Assistance Program, through which pro bono attorneys represent pro se litigants in settlement conferences in federal cases, and help make it possible for the CBF to provide steady support for the major pro bono and legal aid organizations that serve clients in federal court and many other related initiatives that improve access to the courts.

Awards of Residual Funds in Class Actions, or *Cy Pres* Awards, are a Recognized and Proven Way to Promote Access to Justice for the Growing Number of People in Need

- Federal courts in Illinois and elsewhere in the country have long recognized that under the *cy pres* doctrine, courts can distribute these residual funds to appropriate charitable causes, including pro bono and legal aid organizations and related access to justice initiatives.
- As the District Court has recognized in dozens of cases over the past 12 years, awarding residual funds in class action settlements or judgments to organizations that improve access to justice for low-income Illinoisans is an appropriate use of the *cy pres* doctrine, as one underlying premise for all class actions is to make access to justice a reality for Illinois residents who otherwise would not be able to obtain the protections of the justice system.
- In addition to a large body of case law supporting the use of *cy pres* awards to advance access to justice, Illinois is one of a growing number of states that have adopted statutes or court rules at the state level codifying the principle that organizations which promote legal aid and access to justice are always an appropriate use for residual funds in class action cases. See 735 ILCS §5/2-807. While not binding in federal court, the Illinois statute is persuasive authority, and along with similar statutes and rules in other states underscores that legal aid/access to justice is distinct from other charitable causes far unconnected from the interests of the class members that have drawn concerns from the courts and some commentators.

Cy Pres Awards Help Close the Huge Gap in Access to our Justice System

- *Cy pres* awards have proven to be one of the best means available to help thousands of people in need get access to critical legal assistance, helping to expand the capacity of the pro bono and legal aid system and providing the “venture capital” for a number of groundbreaking access to justice initiatives in the Northern District and in the state courts.

For more information about how you can make an impact by directing an award of *cy pres* or residual funds to advance access to justice, contact Bob Glaves of The Chicago Bar Foundation at (312) 554-1205 or bglaves@chicagobar.org.
Class Action Residual Funds To Promote Access to Justice: Qualifying CBF-Supported Pro Bono and Legal Aid Organizations**

The following pro bono and legal aid organizations receive organizational support grants from The Chicago Bar Foundation, and thus have been carefully vetted through a comprehensive grant review process. Awards of residuals funds to The Chicago Bar Foundation and to any of the organizations listed below alphabetically can help advance access to justice in the Chicago area. (For those organizations where CBF support is limited to a specific project--noted in italics--only awards that support that particular project would qualify). More information on each of these organizations is available on the CBF website, www.chicagobarfoundation.org.

Access Living – Legal Services Department
AIDS Legal Council of Chicago
Cabrini Green Legal Aid (CGLA)
CARPLS (Coordinated Advice & Referral Program for Legal Services)
Catholic Charities of the Archdiocese of Chicago – Legal Assistance
Center for Conflict Resolution (CCR)
Center for Disability & Elder Law (CDEL)
Center for Economic Progress – Tax Clinic
Centro Romero – Latin American Legal Assistance Services
Chicago Alliance Against Sexual Exploitation
Chicago Coalition for the Homeless – Law Project
Chicago Lawyers’ Committee for Civil Rights Under Law/ The Law Project
Chicago Legal Clinic (CLC)
Chicago Volunteer Legal Services (CVLS)
Domestic Violence Legal Clinic (DVLC)
Equip for Equality
The Family Defense Center
First Defense Legal Aid (FDLA)
Illinois Legal Aid Online (ILAO)
Indo-American Center – Citizenship & Immigration Services
James B. Moran Center for Youth Advocacy
LAF
Latinos Progresando – Immigration Legal Services
Lawndale Christian Legal Center
Lawyers’ Committee for Better Housing (LCBH)
Lawyers for the Creative Arts (LCA)
Legal Aid Society of Metropolitan Family Services (LAS)
Life Span – Center for Legal Services & Advocacy
National Immigrant Justice Center (NLIC)
The Roger Baldwin Foundation of the ACLU – Children’s Initiative
Sargent Shriver National Center on Poverty Law
Uptown People’s Law Center
World Relief - Chicago – Immigrant Legal Services

** The organizations on this list represent the major pro bono and legal aid organizations providing services in Cook County, but this is not an exclusive list of the organizations that promote access to justice for Illinois residents. In addition, there are several legal aid organizations providing services outside of Cook County, including Prairie State Legal Services, Land of Lincoln Legal Assistance Foundation, DuPage Bar Legal Aid Service, ElderCare Options (Decatur), the Immigration Project (Normal), and Dispute Resolution Institute (Carbondale). The Illinois Bar Foundation also provides funding for these services throughout the State.
September 8, 2015

Electronic Delivery to rules_support@ao.uscourts.gov

Committee on Rules of Practice and Procedure
Thurgood Marshall Building
Administrative Office of the United States Courts
One Columbus Circle NE
Washington D.C. 20544

COMMENT

to the

ADVISORY COMMITTEE ON CIVIL RULES
and the
RULE 23 SUBCOMMITTEE

concerning

Cy Pres Awards in Class Action Settlements Under Rule 23
on behalf of

The National Legal Aid and Defender Association,
The Association of Pro Bono Counsel (APBCo),
The Legal Aid Association of California,
The Chicago Bar Foundation,
The Legal Foundation of Washington and
The Texas Access to Justice Foundation

This submission by National Legal Aid and Defender Association, the
Association of Pro Bono Counsel (APBCo) the Legal Aid Association of California,
the Chicago Bar Foundation, the Legal Foundation of Washington and the Texas
Access to Justice Foundation is to provide the Advisory Committee on the Federal
Rules of Civil Procedure and the Rule 23 Subcommittee with observations and suggestions on *cy pres* awards in Rule 23 class action settlements.
INTRODUCTION

What should be done with any undistributed residue of settlement funds in a class action? The practical and efficient answer is court-approved *cy pres* distributions to appropriate organizations. This well-recognized procedural device has come under recent attack by a small cluster of academics and organizations as part of a broader opposition to Rule 23 class actions. The attacks on *cy pres* distributions point to a handful of controversial awards, argue from these anecdotes that there is a larger problem and then propose the limitation or complete elimination of *cy pres* awards.

Those attacks ask this Committee to ignore the well-settled case law favoring *cy pres* awards in general, the solid basis for *cy pres* awards to legal services organizations in particular, and the rules and procedures already in place for courts to address problems in the process for awarding *cy pres* distributions.

This submission addresses the following subjects concerning *cy pres* awards in class actions:

1. *Cy pres* awards are an established and appropriate device in class action settlement administration.

2. Legal service organizations and foundations are appropriate *cy pres* recipients. In particular, (a) federal courts regularly approve *cy pres* awards for access to justice; (b) *cy pres* awards for legal services fit well within the ALI principles; (c) state statutes and court rules authorize *cy pres* awards to legal services organizations and foundations – and any
proposed revision of Rule 23 should do the same; (d) *cy pres* awards for legal services and foundation do provide access to justice.

3. Courts have developed best practices for the appropriate use of *cy pres* awards. In particular, (a) compensation of class members should come first; (b) *cy pres* awards are also appropriate where cash distributions to class members are not feasible; (c) *cy pres* award recipients should reasonably approximate the interests of the class – which legal services organizations do – but overly literal application of the *cy pres* doctrine in class actions would be a mistake; (d) procedures already in place address conflicts of interest and any appearance of impropriety.

This comment on *cy pres* awards and Rule 23 is a joint submission by the nation’s leading pro bono and legal services organizations and foundations, described in Exhibit A. *Cy pres* awards in class action settlements provide a critical funding source for legal services organizations and foundations. Funding through *cy pres* awards is especially important for legal services organizations because of the dramatic decline in federal and state funding for legal aid and IOLTA (Interest on Lawyer Trust Accounts) funding. Without sufficient funding from other sources such as *cy pres* awards in class actions, legal services organizations and foundations will not have the resources to meet the need for access to justice by the underprivileged and disadvantaged in our country.
I. **CY PRES AWARDS ARE AN ESTABLISHED AND APPROPRIATE DEVICE IN CLASS ACTION SETTLEMENT ADMINISTRATION**

*Cy pres* awards in class action settlements are a positive solution to a practical problem. *Cy pres* awards are usually court-ordered distributions of the residual funds from class action settlements or judgments that, for various reasons, are unclaimed or cannot be distributed to the class members. It is not uncommon for excess funds to remain after a distribution to class members. Residual funds are often the result of an inability to locate class members or class members failing or declining to file claims or cash settlement checks. Such funds are also generated when it is "economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3rd Cir. 2013).

In such circumstances, three primary options are available for disposition of the remaining funds – reversion to the defendant, escheat to the state or a *cy pres* award. Courts have consistently preferred the distribution of residual funds through *cy pres* awards over the other options – and consistently rejected a fourth option of awarding unclaimed residual funds to already fully compensated class members. See *Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) and *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34-36 (1st Cir. 2009). It is well-established that a federal district court "does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the
distribution of excess settlement funds to a third party to be used for a purpose related to the class injury.” In re Baby Prods. Antitrust Litig., 708 F.3d at 172. Other leading appellate decisions supporting class action *cy pres* awards include In re Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 38-39 (1st Cir. 2012); Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007); and United States ex rel. Houck v. Folding Carton Admin. Comm., 881 F.2d 494, 502 (7th Cir. 1989).

The American Law Institute’s Principles of Law of Aggregate Litigation (“ALI Principles”) specifically recognize the use of *cy pres* awards in class actions. The ALI Principles explain that “many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members.” ALI Principles § 3.07 cmt. a (2010); see also 3 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 10:17 (4th ed. 2012) (“When all or part of the common fund is not able to be fairly distributed to class members, the court may determine to distribute the unclaimed funds with a *cy pres* . . . approach.”).

II. **LEGAL SERVICE ORGANIZATIONS ARE APPROPRIATE CY PRES RECIPIENTS**

A. **Federal Courts Regularly Approve *Cy Pres* Awards for Access to Justice**

Federal and state courts throughout the country have long recognized organizations that provide access to justice for underserved and disadvantaged people

The basis for *cy pres* awards to legal services organizations is one of the common underlying premises for all class actions: which is to make access to justice a reality for people who otherwise would not otherwise obtain the protections of the justice system. *See, e.g., Lessard v. City of Allen Park*, 470 F. Supp. 2d 781, 783-84 (E.D. Mich. 2007) (“The Access to Justice fund is the ‘next best’ use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters.”) (internal citation omitted); *In re Folding Carton Antitrust Litig.*, MDL No. 250, 1991 U.S. Dist. LEXIS 2553, at **7-8 (N.D. Ill. Mar. 5, 1991) (approving a *cy pres* distribution to establish a program to increase access to justice “for those who might not otherwise have access to the legal system”).
B. *Cy Pres Awards For Legal Services Fit Well Within The ALI Principles*

This access to justice nexus falls squarely within one of the ALI Principles:

“there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests.”

ALI Principles § 3.07 cmt. b. Applying the ALI Principles:

[L]egal aid or [access to justice] organizations are always appropriate recipients of *cy pres* or residual fund awards in class actions because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system.


C. **State Statutes and Court Rules Authorize Cy Pres Awards to Legal Services Organization – and any Proposed Revision of Rule 23 Should Do the Same**

In addition to the many federal and state court decisions approving the use of *cy pres* awards to legal services organizations, a growing number of states have adopted statutes or court rules codifying the principle that *cy pres* distributions to organizations promoting access to justice are *always* an appropriate use of residual funds in class
actions.\(^1\) A schedule summarizing these state statutes and court rules is attached as Exhibit B.

These state statutes and court rules begin with the general premise that *cy pres* distributions of residual funds are proper and useful, then specify appropriate *cy pres* recipients including or limited to organizations that promote access to justice for low-income individuals. Several state statutes and rules actually *require a minimum or baseline distribution to legal services organizations. Because these statutes and court

\(^1\) See California Code of Civil Procedure § 384 (authorizing payment of residual class action funds to California nonprofits that provide civil legal services to low-income individuals); Hawaii Civil Procedure Rule 23(f) (gives the courts discretion to approve distribution of residual funds to Hawaii nonprofits that provide legal assistance to indigent individuals); 735 ILCS 5/2-807 (2008) (requiring distribution of at least 50% of residual funds to organizations that improve access to justice for low-income Illinois residents); Ind. R. Trial P. 23(F)(2) (requiring distribution of at least 25% of residual funds to the Indiana Bar Foundation); La S. C. Rule XLIII Part Q. (promoting distribution of residual funds to the Louisiana Bar Foundation); Me. R. Civ. P. 23(f) (2) (requiring that residual funds be distributed to the Maine Bar Foundation); Mass. R. Civ. P. 23(e) (permitting distribution of residual funds to Massachusetts nonprofits that provide legal services to low-income individuals); Neb. Rev. Stat. 25-319 (requiring distribution of residual funds to the Nebraska Legal Aid and Services Fund); N.M. Dist. Ct. R. C.P. 1-023(G)(2) (permitting payment of residual funds to New Mexico nonprofits that provide civil legal services to low-income individuals); N.C. Gen. Stat. § 1-267.10 (requiring equal distribution of residual funds between the Indigent Person’s Attorney Fund and the North Carolina State Bar for the provision of civil services for indigents); ORCP 23(O) (directing 50% of residual funds to Oregon Legal Service Program); Pa. R. Civ. P. Ch. 17/00 (directing distribution of at least 50% of residual funds to the Pennsylvania IOLTA Board to promote the delivery of civil legal assistance); S.D. Codified Laws § 16-2-57; (requires at least 50% of residual funds be distributed to the South Dakota Commission on Equal Access to Our Courts); Tenn. Code Ann. § 16-3-821 (authorizing the distribution of residual funds to the Tennessee Voluntary Fund for Indigent Civil Representation); Washington Supreme Court Civil Rule 23(f) (requires distribution of at least 25 percent of residual funds to the Legal Foundation of Washington to promote access to the civil justice system for low-income residents).
rules establish a presumption or requirement that residual funds will be distributed to legal services organizations, they make clear that such organizations are distinct from other charitable causes that have drawn legitimate concerns about their nexus to the interests of the class members. In other words, the state statutes and court rules all recognize the connection between access to justice through legal aid and through class action procedures and also demonstrate a clear public policy favoring cy pres awards to legal services organizations.²

If this Committee decides to suggest revisions to Rule 23 concerning cy pres awards, any proposed revisions should adopt the same approach as these state statutes and rules and formally recognize that legal services providers are appropriate organizations to receive cy pres awards.

D. **Cy Pres Awards for Legal Services Do Provide Access to Justice**

The colorful arguments that cy pres awards are a sham or a waste of money do not apply to cy pres awards to legal services organizations. Legal services organizations across the country protect and preserve the basic necessities of life — food, shelter, health care, safety and education — for millions of Americans. Whether awarded by a federal court order or pursuant to a state statute or rule, class action cy pres distributions to legal services organizations are widely recognized as a successful

² The same public policy is evident in the many state statutes and court rules providing that income earned in attorney trust accounts will be pooled and used to fund legal services.
mechanism to further access to the justice system. See, e.g., Daniel Blynn, Cy Pres
distributions to specific legal services organizations have advanced legal services);
Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., The Cy Pres Doctrine: “A Settling
Concept,” 58 La. B.J. 248, 251 (2011) (cy pres awards made to Louisiana legal services
organizations will promote access to the courts); Danny Van Horn & Daniel Clayton,
It Adds Up: Class Action Residual Funds Support Pro Bono Efforts, 45 Tenn. B.J. 12, 13-14
(2009) (cy pres awards to legal services organizations benefit class members in a similar
way to Rule 23 – both provide access to the justice system).

III. COURTS HAVE DEVELOPED BEST PRACTICES FOR THE
APPROPRIATE USE OF CY PRES AWARDS

In the course of approving and reviewing thousands of class action settlements,
 federal courts have developed what amount to a set of best practices for using the cy
pres doctrine in the class action context. Those best practices more than adequately
address the occasional problems with particular cy pres awards. The few bad examples
and all of the concerns which opponents of cy pres awards trot out to argue against all
cy pres awards can readily be dealt with by applying existing procedures, not by
rewriting Rule 23.3

3 For a detailed discussion of these problems and best practices, see Wilber H. Boies
and Latonia Haney Keith, “Class Action Settlement Residue and Cy Pres Awards:
attached as Exhibit C and available at http://www.vjspl.org/wp-
content/uploads/2014/03/3.25.14-Cy-Pres-Awards_S1E_PP.pdf. That article
A. **Compensation of Class Members Should Come First**

Critics of *cy pres* awards argue as though *cy pres* awards are used instead of distributions to class members. That argument is a straw man which ignores the established requirements and procedures for getting class settlement funds into the hands of class members first. Indeed, when funds are left over after a first round distribution to class members, the ALI Principles express a policy preference that residual funds should be distributed among the class members until class members recover their full losses, unless such further distributions are not practical:

If the settlement involves individual distributions to class members and funds remain after distribution (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

ALI Principles § 3.07(b).

As the ALI Principles recognize, when further distributions to class members are not feasible, the court has discretion to order a *cy pres* distribution. *Id.* at § 3.07 cmt. a. Consistent with this principle, many courts have articulated a reasonable requirement that a *cy pres* distribution is permissible only when it is not feasible to make distributions in the first instance or to make further distributions to class members.

---

discusses in detail the various arguments by *cy pres* award opponents claiming that *cy pres* awards in class actions are unconstitutional or violate the Rules Enabling Act—and explains why those arguments have never been adopted by any court. Also see *In re Baby Products Antitrust Litigation*, 708 F.3d 163, 173 (3rd Cir. 2013) (rejecting Rules Enabling Act argument against *cy pres* awards).
members. *Id.; see In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 35 (1st Cir. 2009); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 812-13 (5th Cir. 1989). To enforce this requirement, appellate courts appropriately reverse district court *cy pres* awards in cases that fail to make feasible payments first to class members. *See Molski v. Gleich*, 318 F.3d, 954-55 (9th Cir. 2003) (rejecting settlement with *cy pres* awards but no provision for payments to class members who had significant disability accommodations claims); *Mirfasibi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (rejecting a settlement because it failed to compensate one subset of class members individually); *Klier v. Elf Atochem North America, Inc.*, (district court abused its discretion by approving a class action settlement that included a *cy pres* distribution to charities of unused funds from one subclass instead of distributing such funds to the members of a different subclass).4 658 F.3d at 479.

B. *Cy Pres* Awards Are Also Appropriate Where Cash Distributions to Class Members Are Not Feasible

Not every class action settlement produces a significant monetary benefit for class members. The ALI Principles and leading cases recognize that there is also a proper place for the application of the *cy pres* doctrine in class action settlements when plaintiffs allege that defendants engaged in misconduct on a wide scale which results

---

4 While often cited by critics of *cy pres* distributions, the *Klier* opinion actually did not reject *cy pres* awards in class actions. Rather, the Fifth Circuit clearly acknowledged that “[i]n the class-action context, a *cy pres* distribution is designed to be a way for a court to put any unclaimed settlement funds to their ‘next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.’” *Id.* at 474.
in only \textit{de minimis} claims of damages to individual class members. See \textit{generally}, ALI Principles § 3.07 cmt. a. (recognizing court authority to approve class action settlements that provide for cash payments to third parties with no direct cash recovery to class members). In \textit{Nachshin v. AOL}, for example, a settlement was approved where the defendant's maximum liability if the class were certified and a money judgment entered was $2 million, which meant that each of some 66 million class members would have been entitled a recovery of only three cents, making any distribution to the class members cost prohibitive. 663 F.3d at 1037. See also \textit{Lane}, 696 F.3d 821 (9th Cir. 2012) (noting objectors' concession that direct monetary payments to the class would be \textit{de minimis} and were therefore infeasible); \textit{Hughes v. Kore of Indiana Enter., Inc.}, 731 F.3d 672, 676 (7th Cir. 2013) (endorsing a \textit{cy pres} award with no payments to class members, stating "class action litigation, like litigation in general, has a deterrent as well as a compensatory objective").

C. \textit{Cy Pres Award Recipients Should Reasonably Approximate the Interests of the Class – Which Legal Services Organizations Do – But Overly Literal Application of the Cy Pres Doctrine in Class Actions Would be a Mistake}

When further distributions to class members are not feasible, either because remaining funds cannot be distributed cost-effectively or because of the minimal value of the claims on an individual class member basis, the question becomes how to determine which entities are appropriate recipients of a \textit{cy pres} distribution. The ALI Principles say that recipients should be those “whose interests reasonably approximate
those being pursued by the class” and, if no such recipients exist, “a court may approve a recipient that does not reasonably approximate the interests” of the class. ALI Principles § 3.07(c); see also In re Lutron Mktg. & Sales Practices Litig., 677 F.3d at 33; Nachshin, 663 F.3d at 1039. However, federal courts should and do reject settlements which propose cy pres awards to organizations which seem to be chosen at random – or are nothing better than favorite charities of the counsel or parties or the district judge.

It is generally agreed that organizations with objectives directly related to the claims at issue in a class action are appropriate cy pres recipients. But a narrow limitation of cy pres recipients tied to the precise claims or relief in the class action has its own problems, both theoretically and practically, and ignores the established practice and sound basis for cy pres awards to legal services organizations that (like the class action mechanism) provide access to justice.5

---

5 This issue of the narrowly limited scope of organizations to receive cy pres awards is particularly apparent in the 9th Circuit of Court of Appeals, where the settlement in Facebook was widely publicized and widely criticized because the Court of Appeals approved a settlement to a new “tailor made” foundation created to receive a large cy pres distribution. Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012). Chief Justice Roberts used the denied certiorari petition in Facebook as the occasion for a statement raising basic questions about cy pres awards that the Supreme Court has never addressed. Marek v. Lane, 134 S.Ct. 8, 187 L. Ed.2d 392 (2013)(statement of Chief Justice Roberts). An amicus brief submitted by a number of legal services organizations to address the narrow limitation issue in another Facebook case pending appeal in Ninth Circuit is attached as exhibit D. Fraley, et al. v. Facebook, (consolidated appeal No. 13-16919 (9th Cir. pending).
As to legal principles, narrowly limiting *cy pres* recipients to the exact claims in a class action takes too literal a view of how the *cy pres* doctrine is used in the class action context. Class actions present the built-in practical problem of what to do with any undistributed settlement residue, and the use of the *cy pres* doctrine to distribute settlement residue is really just a convenient analogy. In a class action settlement, there is no underlying trust which a deceased settler has created for a specified purpose that has become unfeasible. Rather, the *cy pres* doctrine has been borrowed as a device to facilitate the efficient administration of complex class actions. As the Seventh Circuit pointed out in *Mirfasihi v. Fleet Mortgage Corp.*, the *cy pres* device is used in class actions “for a reason unrelated to the trust doctrine” to prevent the defendant from “walking away from the litigation scot-free because of the unfeasibility of distributing the proceeds of the settlement.” 356 F.3d at 784. Punishment aside, using the *cy pres* doctrine gives settling parties and district judges a useful procedural device to solve the recurring practical problem of what to do with undistributed funds.

In actual practice, far from dealing with a specific bequest in a will or trust, class action litigants are resolving a complex lawsuit by a settlement in which the defendant denies liability and disposing of residual funds is typically only a small

---

6 The term *cy pres* derives from the Norman French phrase, *cy pres comme possible*, meaning “as near as possible,” and the *cy pres* doctrine originally was a rule of construction used to save a testamentary gift that would otherwise fail. *In re Airline Ticket Comm’n Antitrust Litig.*, 268 F.3d 619, 625 (8th Cir. 2001).
(albeit important) detail of settlement administration. And while defendants are primarily interested in concluding the case being settled, they also have a legitimate interest in how residual funds are used. For example, the settling defendant in a case about telephone services pricing may be unwilling to stipulate to a *cy pres* award to an organization that campaigns against high telephone bills. Seen in this practical light, a narrow focus on finding *cy pres* recipients which work on the exact subject of the specific asserted claims may actually be a barrier to negotiating a class action settlement. *Cy pres* awards to legal services organizations provide a recognized and practical solution to avoid the problems of awards to unsuitable recipients and awards that seem to “target” settling defendants.

**D. Procedures Already in Place Address Conflicts of Interest and any Appearance of Impropriety**

When carefully examined, the attacks on *cy pres* awards are actually broad extrapolations from particular settlement with debatable *cy pres* awards. Courts reviewing *cy pres* awards should of course look carefully at whether there is any reason to question the propriety of particular *cy pres* awards. However, there are already rules and procedures in place to deal with suggestions of impropriety – and dealing with those issues does not require any change in Rule 23.

Courts have recognized, for example, that a potential conflict of interest exists between class counsel and their clients because *cy pres* distributions may increase a settlement fund as a basis for plaintiffs’ attorneys’ fees, without increasing the direct
benefit to the class. *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173. Opponents say
this is a reason to end all *cy pres* awards. A straightforward and better solution already
exists to address this issue: if the presiding judge is concerned that class counsel may
lack incentive to vigorously pursue compensation for class members, the court can
and should “subject the settlement [and the distribution process] to increased
scrutiny.” *Id.*

There is also a legitimate concern that the prospect of *cy pres* distributions can
improperly motivate lawsuit parties and their counsel to steer unclaimed funds to
recipients that advance their own agendas. *See In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d at 38; *Nachshin*, 663 F.3d at 1039. To deal with this concern, courts should
evaluate whether any of the parties or counsel involved in the litigation has any
significant affiliation with or would personally benefit from the distribution to the
proposed *cy pres* recipients. Such an analysis is not unduly burdensome for the district
court to undertake and addresses this concern about abuse without any need to
rewrite Rule 23.

Finally, critics of *cy pres* awards also worry about judicial involvement in making
*cy pres* awards. In legal ethics terms, “the specter of judges and outside entities dealing
in the distribution and solicitation of settlement money may create the appearance of
impropriety.” *Nachshin*, 663 F.3d at 1039. This concern is also easily addressed. To
avoid criticism of judges, it is preferable practice that the parties or counsel (rather
than the court) propose the charities to receive any *cy pres* distribution and that the
settlement agreement proposes specific *cy pres* awards (rather than leaving the question for resolution by a district judge at some point after the settlement is approved).

As to ground rules to limit the role of the district judge, a sound approach is already spelled out in the ALI Principles: “[a] cy pres remedy should not be ordered if the court . . . has *significant* prior affiliation with the intended recipients that would raise substantial questions about whether the selection of the recipient was made on the merits.” ALI Principles, § 3.07 cmt. b (emphasis added). If necessary, the statutes governing judicial recusal can be applied. For example, in *Nachshin*, one objector attacked the district judge who approved the parties’ settlement agreement because her husband was a board member of one of the proposed *cy pres* recipients. The Ninth Circuit firmly rejected this attack, applying the test for recusal under 28 U.S.C. § 455(a) (“whether a reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned”) and finding that “there is no reason to believe [the judge’s husband] (as one of 50 volunteer board members) would himself realize a significant benefit” from the proposed award.”). *Nachshin*, 663 F.3d at 1041-42

In short, there are good reasons for careful court review of what organizations receive proposed *cy pres* awards – and there are reliable procedures already in place for conducting that review without rewriting Rule 23.

*   *   *

- 19 -
This comment is respectfully submitted on behalf of The National Legal Aid and Defender Association, The Association of Pro Bono Counsel (APBCo), The Legal Aid Association of California, The Chicago Bar Foundation, The Legal Foundation of Washington and The Texas Access to Justice Foundation.

By:  /s/ Wilber H. Boies

Wilber H. Boies
Timothy M. Kennedy
McDermott Will & Emery LLP
227 West Monroe Street
Chicago, IL  60606
312.372.2000
CLASS ACTION SETTLEMENT RESIDUE AND CY PRES AWARDS:
EMERGING PROBLEMS AND PRACTICAL SOLUTIONS

Wilber H. Boies*
Latonia Haney Keith**

ABSTRACT

Class action settlements often present the court and parties with the practical problem of disposing of residual funds that remain after distributions to class members. The cy pres doctrine is a well-recognized device that permits the court to designate suitable organizations to receive such funds. Recently, academics, judges, practitioners, and professional objectors have mounted a multi-faceted attack on this device, ranging from constitutional and ethical concerns to appeals challenging specific awards. This Article first describes the use of cy pres awards in class action settlements and explains why the constitutional, statutory, and ethical objections are unfounded. This Article then addresses other concerns that have been raised about particular awards by suggesting a principled and practical approach to cy pres awards. Finally, this Article explains why public interest and legal services organizations—organizations focused on providing access to the justice system for disenfranchised individuals—are appropriate cy pres recipients and avoid many of the problems raised by other potential recipients.

CONTENTS

Abstract.................................................................................................................................267
Introduction ..........................................................................................................................268
I. Cy Pres—Its Origins & Application in Class Action Settlements.................................268
II. Getting Past the Smoke Screen—Cy Pres Awards in Class Actions are Constitutional......................................................270
   A. Article III Case-or-Controversy Requirement.............................................................271
   B. Rules Enabling Act......................................................................................................273

---

* Wilber H. Boies is a partner at McDermott Will & Emery LLP, whose practice focuses on business disputes counseling and business litigation, including defense of consumer, securities and employee benefits class actions throughout the country. Bill serves as chair of the Chicago Bar Foundation’s cy pres award initiative.

** Latonia Haney Keith is McDermott Will & Emery LLP’s Firm-Wide Pro Bono Counsel. She manages the firm’s pro bono practice and represents charitable organizations and disadvantaged individuals and families. She also serves as president of the Association of Pro Bono Counsel, a membership organization of over 125 attorneys and practice group managers who oversee pro bono practices in 85 of the world’s largest law firms.

We are grateful to Timothy M. Kennedy, Vicky Halikias Kournetas and Brian A. White for their invaluable assistance and to Bob Glaves, Executive Director of the Chicago Bar Foundation, for his unwavering support.
INTRODUCTION

Class action litigation settlements commonly include a settlement fund provided by the settling defendants to be distributed among class members. The distribution by a class action administrator often leaves a residue of undistributed funds, and consequently, the practical question of what to do with those residual funds. The standard solution is a court order for a *cy pres* award providing that the residual funds will be distributed to charities or other nonprofit organizations proposed by the parties and approved by the court.

In recent years, *cy pres* awards in class actions have attracted multifaceted attacks from academics, judges, practitioners, and professional objectors, ranging from constitutional challenges to ethical concerns. Additionally, there has been considerable criticism of *cy pres* awards to particular recipients. Part I of this Article provides an overview of the historical roots and application of the *cy pres* doctrine in class action settlements. Part II addresses the constitutional and statutory arguments against the *cy pres* doctrine in the class action arena. Part III discusses criticisms of problematic *cy pres* awards, identifies categories of concerns with the awards, and suggests solutions to avoid potential problems, including making *cy pres* awards to public interest and legal aid organizations.

I. *CY PRES*—ITS ORIGINS & APPLICATION IN CLASS ACTION SETTLEMENTS

*Cy pres* awards are distributions of the residual funds from class action settlements or judgments (and occasionally from other proceedings, such as probate and bankruptcy matters) that, for various reasons, are unclaimed or cannot be distributed to the class members or
other intended recipients. The term *cy pres* derives from the Norman-French phrase, *cy pres comme possible*, meaning “as near as possible.”¹ Originating at least as early as sixth-century Rome, the *cy pres* doctrine has its roots in the laws of trusts and estates, operating to modify charitable trusts that specified a gift that had been granted to a charitable entity that no longer existed, had become infeasible, or was in contravention of public policy.² In such instances, courts transferred the funds to the next best use that would satisfy “as nearly as possible” the trust settlor’s original intent.³

When class actions are resolved through settlement or judgment, it is not uncommon for excess funds to remain after a distribution to class members. Residual funds are often a result of the inability to locate class members or class members failing or declining to file claims or cash settlement checks.⁴ Such funds are also generated when it is “economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed.”⁵

In these circumstances, three primary options exist for distributing the remaining funds: (i) reversion to the defendant, (ii) escheat to the state, or (iii) a *cy pres* award.⁶ In recent years, courts have consistently (and understandably) preferred the distribution of residual funds through *cy pres* awards over the other options. Reversion to the defendant undermines the deterrent effect of class actions. While escheat to the state overcomes this concern, it benefits only the local government rather

---

² *Id.* at 3; 3 *Alba Conte & Herbert B. Newberg, Newberg on Class Actions* § 10:17 (4th ed. 2012) [hereinafter *Newberg on Class Actions*].
³ *Fisch*, *supra* note 1, at 1.
⁴ This is an indirect result of the 1966 amendments to the Federal Rule of Civil Procedure 23, which altered class action practice by adopting automatic inclusion in, rather than exclusion from, a non-mandatory class for class members who do not opt out of a class. *See Fed. R. Civ. P. 23*. Those amendments increased the number of class actions in which courts and counsel are faced with how to handle residual funds from class awards and settlements.
⁶ Courts have consistently rejected a fourth option of awarding unclaimed residual funds to already fully compensated class members. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) (“Where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so, except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution.”); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34–36 (1st Cir. 2009) (rejecting the argument that claimants are entitled to receive a windfall of any unclaimed residual money regardless of whether they have already been compensated for their losses).
than the class of persons with claims in the class action.\textsuperscript{7} Cy \textit{pres} awards, on the other hand, preserve the deterrent effect and allow courts to distribute residual funds to charitable causes that reasonably approximate the interests pursued by the class action for absent class members who have not received individual distributions.\textsuperscript{8}

II. GETTING PAST THE SMOKE SCREEN—\textit{CY PRES} AWARDS IN CLASS ACTIONS ARE CONSTITUTIONAL

The \textit{cy pres} doctrine was first introduced into the class action context in 1974 in \textit{Miller v. Steinbach}.\textsuperscript{9} It is now well-established that a federal district court “does not abuse its discretion by approving a class action settlement agreement that includes a \textit{cy pres} component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury.”\textsuperscript{10} Despite such precedent, certain academics and practitioners have questioned the constitutionality of \textit{cy pres} awards in the class action context and argued that using the \textit{cy pres}

\begin{itemize}
\item \textit{In re Baby Prods. Antitrust Litig.}, 708 F.3d at 172. Moreover, state seizure of class action residue would complicate resolution of class actions by restricting the options available to parties attempting to resolve complex disputes. The Texas Supreme Court recently heard oral argument in an appeal from an order allowing the State of Texas to intervene to invalidate, and assert an interest in, a \textit{cy pres} component of a class action settlement agreement. The state argued that the residue should be reserved for class members in the Texas Unclaimed Property Fund for three years, after which it would escheat to the state. \textit{State v. Highland Homes, Ltd.}, No. 08-10-00215-CV, 2012 WL 2127721 (Tex. App. Jun. 13, 2012), appeal granted, No. 08-10-00215-CV (Tex. Aug. 23, 2013).
\item \textit{Cy pres} awards may be granted to an organization with a mission directly tied to the underlying statutes at issue in the class action. In a case where AOL allegedly inserted footers containing promotional messages in its e-mails, the Ninth Circuit referenced “non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance” as appropriate \textit{cy pres} recipients. \textit{Nachshin v. AOL, LLC}, 663 F.3d 1034, 1041 (9th Cir. 2011). Courts may also grant \textit{cy pres} awards to legal services and public interest organizations. \textit{See discussion infra Part III.F.}
\item \textit{Miller v. Steinbach}, No. 66 Civ. 356, 1974 U.S. Dist. LEXIS 12981, at *3-4 (S.D.N.Y. Jan. 3, 1974) (approving the parties’ settlement agreement in a case that alleged the terms of a merger were unfair and acknowledging that the court was “applying a variant of the \textit{cy pres} doctrine at common law”).
\item \textit{In re Baby Prods. Antitrust Litig.}, 708 F.3d at 172; \textit{see also} \textit{Lane v. Facebook, Inc.}, 696 F.3d 811, 817–18 (9th Cir. 2012) (affirming trial court’s distribution of settlement funds to entities that promoted online privacy and security in response to plaintiffs’ allegations of privacy violations); \textit{In re Pharm. Indus. Average Wholesale Price Litig.}, 588 F.3d at 33–36 (holding the trial court did not abuse its discretion in approving a settlement that would distribute excess funds to charitable organizations funding cancer research or patient care); \textit{United States ex rel. Houck v. Folding Carton Admin. Comm.}, 881 F.2d 494, 502 (7th Cir. 1989) (recognizing that the court has broad discretion in identifying appropriate uses of \textit{cy pres} distribution of residual settlement funds).
\end{itemize}
doctrine in class actions violates Article III of the United States Constitution, the Rules Enabling Act, and procedural due process. These arguments have not fared well in the courts.

A. Article III Case-or-Controversy Requirement

Opponents of *cy pres* distributions in class actions argue that a court-imposed payment of unclaimed class funds from one private party to another party whose rights are not being adjudicated in the lawsuit violates the case-or-controversy requirement set forth in Article III of the United States Constitution. The supposed violation occurs because the redistribution of unclaimed funds to charities transforms “the judicial process from a bilateral private rights adjudicatory model into a trilateral process . . . wholly unknown to the adjudicatory structure contemplated by Article III.”

Arguing that *cy pres* distributions impermissibly forge a trilateral relationship mischaracterizes what actually happens in class action settlements. In order to resolve class action litigation, district courts must first approve the settlement and then oversee the distribution of settlement funds. Whether such funds are distributed back to the defendant, to the state or to charitable recipients, a court tasked with distributing residual funds merely performs an administrative act to finally resolve a dispute between adverse parties by ordering the distribution of such funds.

11 The most notable opponents to the application of the *cy pres* doctrine in the class action context are Professor Martin H. Redish of Northwestern University School of Law and legal activist Ted Frank, who is the founder of the Center for Class Action Fairness.


14 See generally Fed. R. CIV. P. 23; Manual for Complex Litigation (FOURTH) § 13.1 at 167–82 (2004); Newberg on Class Actions, supra note 2, § 10:16; see also Ira Holtzman, C.P.A. v. Turza, 728 F.3d 682, 689 (7th Cir. 2013) (remanding the district court’s order of a *cy pres* award as premature, but stating that “[o]nce the court knows what funds are available for distribution, it should (if necessary) reconsider how any remainder will be applied,” including potentially ordering and distributing a *cy pres* award); In re Baby Prods. Antitrust Litig., 708 F.3d at 172–74 (stating “[s]ettlements are private contracts reflecting negotiated compromises. The role of a district court is not to determine whether the settlement is the fairest possible resolution . . . . The Court must determine whether the compromises reflected in the settlement—including those terms relating to the allocation of settlement funds—are fair,
The only judicial recognition of this academic argument is in a concurring opinion in a Fifth Circuit case where the majority ordered changes to the cy pres award but did not reject using the device. In that concurrence in Klief v. Elf Atochem North America, Inc., Judge Edith H. Jones raised the concern that cy pres distributions may implicate Article III’s standing requirements because distributions to non-parties to the “original litigation may confer standing to intervene in the subsequent proceedings should the distribution somehow go awry.”

The obvious response is that a charitable recipient of a cy pres award obtains a vested interest in such funds. Once this interest is established, the charitable organization should be entitled to participate in any court action that would affect its expected receipt of the funds. Accordingly, the recipient organization would have standing to contest any action affecting its claim, and the case-or-controversy requirement would be fully satisfied (if necessary). In any event, Judge Jones’ concern was not shared by the other judges in Klief—or by other courts.

Notably, academics advancing challenges to the application of the cy pres doctrine in class actions on constitutional grounds generally admit that those challenges are of no concern in the settlement context. As acknowledged by Professor Martin H. Redish, “[w]hen cy pres relief is voluntarily imposed by the parties themselves . . . it is not properly attributable to the class action court and therefore Article III’s reasonable, and adequate when considered from the perspective of the class as a whole,” and holding that “a district court does not abuse its discretion by approving a class action settlement agreement that includes a cy pres component directing the distribution of excess settlement funds to a third party”).

As mentioned in Section I, the cy pres doctrine originated in the laws of trusts and estates, where courts recognize the standing of claimants. See NEWBERG ON CLASS ACTIONS, supra note 2, § 11:20. In the charitable trust arena, courts acknowledge the standing of potential beneficiaries when they must determine whether to exercise their cy pres power. See, e.g., In re Trustco Bank, 929 N.Y.S.2d 707, 711 (N.Y. Sup. Ct. 2011) (“[T]he issue of standing and who has the right to appear and participate as a party in any given case is commonly addressed at the outset of the litigation . . . to protect the interests of all parties, [and] to avoid prejudice. . . . This approach is all the more appropriate in cy pres proceedings, where the issues of whether to apply cy pres and how to apply it are interrelated.”). Similarly in class actions, courts typically allow cy pres award recipients and claimants to participate in proceedings regarding the award. See Motion for Leave to File a Request for Designation of a Cy Pres Distribution, In re Motorola Sec. Litig., No. 03 C 287 (N.D. Ill., Mar. 5, 2013), and Application of Illinois Bar Foundation for a Cy Pres Award, In re Motorola Sec. Litig., No. 03 C 287 (N.D. Ill., Mar. 5, 2013), for an example of cy pres award recipients participating in the proceedings before the award and the court’s subsequent opinion, In re Motorola Sec. Litig., No. 03 C 287, slip op. at 2 (N.D. Ill., Mar. 5, 2013).
requirements are not implicated.” In other words, class action settlement agreements fashioned by the parties that select appropriate charitable organizations as *cy pres* recipients of any unclaimed funds circumvent the case-or-controversy argument because the parties, and not the court, establish the interests of the third parties.

The Article III concerns and challenges raised by Professor Redish and Judge Jones are theoretical arguments repeated in other recent articles about a device used in hundreds of cases every year. No federal district court has rejected a class action settlement or a proposed *cy pres* distribution because of purported issues related to the interplay between the Article III case-or-controversy requirement and *cy pres* distributions. We are aware of no district court that has even found it necessary to justify its approval of a class action settlement by addressing these professed issues. What initially appears to be one-sided support for these Article III arguments in recent articles is, in reality, only the sound of one hand clapping. The absence of counterarguments against Article III criticisms of class action *cy pres* distributions in actual court opinions does not demonstrate court acceptance of these arguments. It simply demonstrates that federal courts have not found such arguments of concern.

**B. RULES ENABLING ACT**

The Rules Enabling Act prohibits courts from using a rule of procedure to abridge, modify, or enlarge a substantive right. Applied in the class action context, rules of civil procedure therefore cannot grant a class more rights than its members would have had if they had filed individual lawsuits. Opponents of *cy pres* awards argue that a court-imposed payment of unclaimed settlement funds from a defendant to a third party transforms the class members’ private cause of action into a civil penalty. Stated another way, they argue that a class award becomes a civil penalty that modifies the substantive right contained in the underlying cause of action, if and when an unclaimed award is

---

18 Redish et al., *infra* note 13, at 643.
19 Interestingly, critics of *cy pres* awards do not advance Article III violation arguments when contemplating unclaimed funds escheating to the state; their primary concerns with that option are that escheat to the state is “tantamount to fining the defendant,” and there is no guarantee that the state will “necessarily use funds obtained by escheat for purposes reasonably related to the subject matter of a lawsuit, or for compensating the silent class members.” Gayl, *infra* note 13, at 21 (citing Redish et al., *infra* note 13, at 639, 665).
20 28 U.S.C. § 2072 (2006) (providing that the “Supreme Court shall have the power to proscribe general rules of practice and procedure and rules of evidence for cases in the United States district courts[,] . . . [and] [s]uch rules shall not abridge, enlarge or modify any substantive right”).
distributed to a third party. In this way, class action *cy pres* awards supposedly violate the Rules Enabling Act.

Courts have rejected this argument. Congress has approved the aggregation of private causes of action in class actions to allow plaintiffs to recover compensatory damages for their injuries.\(^{22}\) *Cy pres* distributions serve that purpose—albeit imperfectly—by substituting other relief for that direct compensation\(^ {23}\) and are, in practice, only a device for the court to administer the last stage of the settlement of a complex case.\(^ {24}\) As the Third Circuit noted:

Because “a district court’s certification of a settlement simply recognizes the parties’ deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action,” we do not believe the inclusion of a *cy pres* provision in a settlement runs counter to the Rules Enabling Act.\(^ {25}\)

In other words, no Rules Enabling Act issues arise when a district court merely orders that the parties comply with the terms of their settlement agreement.

There are broader problems with the Rules Enabling Act attack. Even ardent opponents of class action *cy pres* awards concede that, rather than transforming underlying substantive law claims into a civil fine, the disposition of unclaimed property is a “legal issue wholly distinct from the substantive law enforced in the suit that [gives] rise to the unclaimed award in the first place.”\(^ {26}\) Moreover, the courts have gained comfort from the guidelines established by the American Law Institute, which both respect the Rules Enabling Act as the “ever-antecedent and overarching limitation on class-action litigation,”\(^ {27}\) and

\(\underline{\text{22}}\) See *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) (citation omitted).

\(\underline{\text{23}}\) See id. at 169.

\(\underline{\text{24}}\) See generally Wilson v. Southwest Airlines, Inc., 880 F.2d 807 (5th Cir. 1989) (treating *cy pres* distribution as a matter of the federal court’s inherent equitable discretion); Van Gemert v. Boeing Co., 739 F.2d 730, 737 (2d Cir. 1984) (stating as support for its decision to make a *cy pres* distribution of unclaimed class action award that “trial courts are given broad discretionary powers in shaping equitable decrees”).

\(\underline{\text{25}}\) *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173 n.8 (citation and quotations omitted).

\(\underline{\text{26}}\) See Redish et al., supra note 13, at 646.

\(\underline{\text{27}}\) Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 474 (5th Cir. 2011).
conclude that *cy pres* distributions are permissible when it is not feasible to make distributions to the class.\(^{28}\)

### C. CONSTITUTIONAL DUE PROCESS

Critics of *cy pres* awards also argue that attorneys’ fees based, in part, on the amount of any *cy pres* distribution\(^{29}\) threaten to “unconstitutionally undermine[] the due process obligation of those representing absent class members to vigorously advocate on their behalf and defend their legal rights.”\(^{30}\) *Cy pres*, as the argument goes, “creates an insidious incentive for class counsel to shirk their responsibility” and therefore “encourages exorbitant fees for class counsel at the expense of the absent class members, who are left with zero compensation.”\(^{31}\)

No one disputes that there have been class actions in which district court fee awards to plaintiffs’ counsel have not been in the best interest of plaintiff class members, but few of those cases involve *cy pres* awards. For example, the Ninth Circuit recently vacated a district-court approved settlement, in part because attorneys’ fees that likely amounted to 38.9% of the total class settlement fund were “excessive.”\(^{32}\) The court noted that the true valuation of a settlement “must be examined with great care to eliminate the possibility that it serves only the ‘self-interests’ of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious.”\(^{33}\) Likewise, in *In re Dry*...

---

\(^{28}\) PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. a (2010) [hereinafter ALI PRINCIPLES].

\(^{29}\) Critics of *cy pres* awards argue that “whenever a settlement agreement includes a *cy pres* component, the fees awarded to class counsel should be tied to the value of money and benefits actually redeemed by the injured class members—not the theoretical value of the *cy pres* remedy.” John H. Beisner et al., *Cy Pres: A Not So Charitable Contribution to Class Action Practice*, U.S. CHAMBER INST. FOR LEGAL REFORM 19, (2010), available at http://ilr.iwssites.com/uploads/sites/1/cypres_0.pdf.

\(^{30}\) Redish et al., supra note 13, at 650; see also Gayl, supra note 13, at 20 (arguing that even if plaintiffs’ lawyers fulfill their ethical obligations to advocate for compensation of individual class members, the mere “temptation to ignore their responsibilities still violates due process”).

\(^{31}\) Beisner et al., supra note 29, at 18; see also Gayl, supra note 13, at 17 (“Plaintiffs’ counsel often misuse the *cy pres* doctrine to generate large attorneys’ fees and positive publicity, bastardizing the purpose of the doctrine.”).

\(^{32}\) Dennis v. Kellogg Co., 697 F.3d 858, 867–68 (9th Cir. 2012) (finding $2 million in attorneys’ fees excessive where such fees would be drawn from a settlement fund that totaled $5.14 million).

\(^{33}\) Id. at 868; see also *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011) (vacating the district court’s approval of a settlement agreement which included $1.6 million in attorneys’ fees on a fee application
Max Pampers Litigation, the Sixth Circuit reversed the district court’s approval of a settlement agreement that provided unnamed class members a “medley of injunctive relief,” while awarding class counsel a fee of $2.73 million, despite the fact that the counsel “did not take a single deposition, serve a single request for written discovery, or even file a response to [Proctor & Gamble’s] motion to dismiss.” The Sixth Circuit held that the settlement agreement gave “preferential treatment” to class counsel “while only perfunctory relief to unnamed class members.” These opinions correctly stress that which is patently obvious: such legal fee awards should not be approved and are subject to objections and reversal on appeal. But a few outlier cases and bad actors should not taint all class actions, which are an invaluable tool for parties who need to resolve complex disputes.

As to cy pres awards and plaintiffs’ attorneys’ fees, critics argue that cy pres “eliminates the allegedly injured class members’ rights to recover compensation directly, most likely without their knowledge.” One important corrective for this supposed problem is adequate notice to class members. Federal Rule of Civil Procedure 23(c)(2)(B) requires district courts to “direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” For an opinion directly addressing this notice issue, see In re Vitamin Cases, where the court held that cy pres distribution of the entire class action award to charitable organizations did not violate the procedural due process rights of the plaintiff class members. The court explained that “[procedural due process] does not guarantee any particular procedure but . . . require[s] only notice reasonably calculated to apprise interested parties of the pendency of the action affecting their property interest and an opportunity to present their objections.”

with “duplicative entries, excessive charges for most categories of services, a substantial amount of block billing, and use of an inflated hourly rate . . . .”)
As to the specific question of counting *cy pres* distributions in the calculation base for legal fee awards to plaintiffs’ counsel, the misuse of the *cy pres* doctrine to justify higher attorneys’ fees for plaintiffs’ lawyers than the actual recovery for the class might suggest is rare. The courts have procedures in place to evaluate the reasonableness of attorneys’ fees, and if necessary, the power to decrease a requested fee award where there is “reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class.” And if the presiding judge fears or observes that class counsel may lack incentive to vigorously pursue individualized compensation for absent class members, she “should subject the settlement to increased scrutiny,” and may reject the proposed settlement agreement. Such safeguards protect against any inclination of class counsel to maximize their own financial gain at the expense of the class.

As with the Article III attacks, critics mounting due process attacks seem to concede that their arguments do not really apply to class actions that are settled. Such critics acknowledge, for example, that “[i]f *cy pres* is to have any application in class action cases, it should only be available in the settlement context . . . .” As the application of the *cy pres* doctrine occurs overwhelmingly in the settlement rather than the judgment context, this concession cannot be overlooked because it demonstrates that concerns as to the constitutionality and procedural validity of the *cy pres* doctrine in class actions are often overstated and a distraction from the more significant discussion about the appropriate application of the doctrine (as discussed in Part III below).

(“[N]otice ‘must be such as is reasonably calculated to reach interested parties’ and ‘apprise [them] of the pendency of the action.’” (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 318 (1950)) (second alteration original)).

42 Courts regularly use one of two methods (and sometimes both as a cross-check) to ensure the reasonableness of attorneys’ fees: a percentage-of-recovery method or a lodestar method. The lodestar method provides a convenient measurement for reasonableness, “calculat[ing] fees by multiplying the number of hours expended by some hourly rate appropriate for the region and for the experience of the lawyer.” In re Baby Prods. Antitrust Litig., 708 F.3d 163, 176 (3d Cir. 2013) (quoting In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819 n.37 (3d Cir. 1995)).

43 Id. at 178 (suggesting the metric for determining attorneys’ fees for class counsel should not include monetary amounts that do not directly benefit plaintiff class members).

44 Id. at 173.

45 Beisner et al., supra note 29, at 19.

46 See Redish et al., supra note 13, at 661 (“[S]ince 2000, the majority of class action *cy pres* awards are associated with cases that were certified solely for the purposes of settlement.”); Beisner et al., supra note 29, at 15 (“[T]he use of *cy
III. USING THE CY PRES DOCTRINE—BAD EXAMPLES AND BEST PRACTICES

In addition to constitutional and statutory arguments, academics, practitioners, and the general media have expressed skepticism about how the cy pres doctrine is being used in the class action context. Critics consistently argue the following:

[C]y pres settlements do not compensate class members; they are used as a means to justify attorneys’ fees for the plaintiffs’ lawyers; they invite judges to abuse their authority by enriching nonprofits with which they have personal ties at the expense of the allegedly injured class members; and they permit plaintiffs’ lawyers and defendants to collude to ensure that the plaintiffs’ lawyers get paid, while permitting the defendants to limit their liability by not paying the purportedly injured class members.47

The critics point to the few cases in which certain district courts misapplied or allegedly abused the doctrine as proof that cy pres is “an invitation to wild corruption of the judicial process”48 and is “an abused concept”49 that should be avoided in class actions.50 Much of the discourse, however, misconstrues the case law by viewing reversals on

---

47 David L. Balser et al., Are Cy Pres Settlements Really ‘Faux Settlements’? Analyzing Recent Criticism of Cy Pres Funds in Class Settlements, 13 CLASS ACTION LITIG. REP. (BNA) 1080, 1081 (2012); see also Adam Liptak, When Lawyers Cut Their Clients Out of the Deal, N.Y. TIMES, Aug. 12, 2013, http://www.nytimes.com/2013/08/13/us/supreme-court-may-hear-novel-class-action-case.html?_r=2 (quoting David B. Rivkin, Jr., the lead lawyer on the petition for certiorari to the United States Supreme Court in Lane v. Facebook as stating “Cy pres awards only increase the risk of collusion, because they facilitate settlements that are cheaper and easier for defendants, still provide high fees for class attorneys, but sell class members down the river.”).
49 Jessie Kokrda Kamens, Class Action Objectors Defend Their Role in Settlement Process at ABA Conference, 80 U.S. LAW WK. (BNA No. 15) 534, 535 (Oct. 25, 2011) (quoting Darrell Palmer, a serial objector and panelist on a panel entitled “Class Action Objectors – Are They Protectors of Absent Class Members or Merely Gadflies?” held during the American Bar Association’s 15th Annual National Institute on Class Actions).
50 See Liptak, supra note 48 (characterizing court-ordered cy pres distribution of unclaimed class action awards as “[a]llowing judges to choose how to spend other people’s money . . . ”); Gayl, supra note 13, at 20 (asserting that cy pres makes bad doctrine for class actions).
appeal of a few dubious cy pres awards as evidence that cy pres is “bad doctrine for class actions.”

The application of the cy pres doctrine in class actions, as with any other doctrine throughout legal history, has evolved as courts have faced complex and unique facts and circumstances in each particular case. As such, it is of no surprise and certainly not unusual that some awards have been reversed on appeal. The vast majority of such reversals are not for “abusing” the cy pres doctrine (i.e., using cy pres for personal gain for counsel or judges). Rather, most reversals are due to the misapplication of the doctrine within the particular circumstances of the case (e.g., failure to compensate class members or misalignment between the interests of the class members and the interests of the cy pres recipients). While addressing these problems, federal courts have remained firm that the cy pres doctrine is valid in the class action context. The American Law Institute’s Principles of Law of Aggregate Litigation (“ALI Principles”) agrees and provides key guidance on the application of cy pres awards in class actions, which is respected and generally followed by the courts. The ALI Principles acknowledge that “many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members.” The question

---

51 Gayl, supra note 13, at 20.
52 See, e.g., In re Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) (“[A] district court does not abuse its discretion by approving a class action settlement agreement that includes a cy pres component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury.”); In re Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 38–39 (1st Cir. 2012) (affirming class action cy pres distribution to charitable recipient); Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011) (“In the context of class action settlements, a court may employ the cy pres doctrine to put the unclaimed fund to its next best compensation use . . . .” (citation and internal quotations omitted)); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 475 n.15 (5th Cir. 2011) (“Cy pres awards are appropriate only when direct distributions to class members are not feasible . . . .” (citation and internal quotations omitted)); Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007) (“The purpose of Cy Pres distribution in the class action context is to put the unclaimed fund to its next best compensation use . . . .” (emphasis in original) (citation and internal quotations omitted)).
53 ALI PRINCIPLES, supra note 28, § 3.07 cmt. a; see also NEWBERG ON CLASS ACTIONS, supra note 2, § 10.17; In re Baby Prods. Antitrust Litig., 708 F.3d at 172–73; In re Lupron Mktg. & Sales Practices Litig., 677 F.3d at 32; Klier, 658 F.3d at 474 n.14.
54 ALI PRINCIPLES, supra note 28, § 3.07 cmt. a; see also NEWBERG ON CLASS ACTIONS, supra note 2, § 10.17 (“When all or part of the common fund is not able to be fairly distributed to class members, the court may determine to distribute the unclaimed funds with a cy pres . . . approach.”).
then becomes how to appropriately apply the *cy pres* doctrine in any given case. The answer can be found in a few best practices that have emerged from court decisions addressing *cy pres* awards.

A. COMPENSATION OF CLASS MEMBERS SHOULD COME FIRST

With respect to funds left over after a first-round distribution to class members (from uncashed checks, for example), the ALI Principles express a policy preference that residual funds should be redistributed to other class members until they recover their full losses, unless such further distributions are not practical:

If the settlement involves individual distributions to class members and funds remain after distribution (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

As the ALI Principles recognize, when further distributions to class members are not feasible, the court has discretion to order a *cy pres* distribution, which puts the settlement funds to their next-best use by providing an indirect benefit to the class. Based on this guidance, many

---

55 Chief Justice John Roberts recently raised this question in a statement published with the order denying certiorari in a class action where the Ninth Circuit upheld a settlement agreement that provided no individual recovery, but rather a significant *cy pres* remedy whereby Facebook would establish a new charitable foundation focused on funding organizations dedicated to educating the public about online privacy. Lane v. Facebook, Inc., 696 F. 3d 811 (9th Cir. 2012), *cert. denied*, Marek v. Lane, 134 S. Ct. 8 (2013). Chief Justice Roberts was critical of the parties’ approach: “Facebook thus insulated itself from all class claims arising out from the Beacon episode by paying plaintiffs’ counsel and the named plaintiff some $3 million and spending $6.5 million to set up a foundation in which it would play a major role.” *Marek*, 134 S. Ct. 8 (statement of Roberts, C.J.). His statement suggested the Supreme Court should, in a suitable case, address fundamental issues about *cy pres* remedies in class action litigation, including: “when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; [and] how closely the goals of any enlisted organization must correspond to the interests of the class.” *Id.*

56 ALI PRINCIPLES, *supra* note 28, § 3.07(b).

57 *Id.* at § 3.07 cmt. a; NEWBERG ON CLASS ACTIONS, *supra* note 2, § 10.17.
courts have articulated a reasonable requirement: that a *cy pres* distribution of residual funds to a third party is permissible only when it is not feasible to make distributions to class members in the first instance or to make further distributions to class members.\(^{58}\)

Appellate courts have appropriately reversed district court grants of *cy pres* awards that fail to make feasible payments to class members first. In *Klier v. Elf Atochem North America, Inc.*, for example, the Fifth Circuit held that a district court abused its discretion by approving a class action settlement that included a *cy pres* distribution of unused funds to charities instead of distributing such funds to the members of the class.\(^{59}\) In that case, the plaintiffs alleged that they were exposed to toxic chemicals emitted by an agrochemicals plant owned by the defendant.\(^{60}\) Eventually, the parties reached a settlement under which the defendant would pay $41.4 million to three subclasses of individuals: those who lived or worked near the plant and suffered from at least one specified health malady (Subclass A); those who were exposed to the toxins but had not yet manifested any health problems (Subclass B); and those who experienced a diminution in the value of their property proximate to the plant (Subclass C).\(^{61}\) After distributing the funds to the subclasses, approximately $830,000 of Subclass B funds went unused.\(^{62}\) After the parties agreed that it was not economically feasible to distribute the remaining unused funds to Subclass B, the defendant proposed the court issue a *cy pres* award to various entities, including five local charities.\(^{63}\) A member of Subclass A opposed the defendant’s proposed *cy pres* distribution, arguing that the remaining Subclass B funds should be distributed to members of Subclass A, “whose members

\(^{58}\) ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. a; see, e.g., *Lane*, 696 F.3d at 821 (acknowledging objectors’ concession that direct monetary payments to the plaintiff class of the remaining settlement funds would be *de minimis*, and therefore infeasible); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 35 (1st Cir. 2009) (noting that “few settlements award 100 percent of a class member’s losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery” and endorsing the district court’s insistence that the “settlement pay class members treble damages [as provided by the underlying antitrust statute] before any money is distributed through cy pres” (quoting PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (Apr. 1, 2009) (proposed final draft))); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 812–13 (5th Cir. 1989) (finding class members could not assert an equitable claim to unclaimed settlement funds because all class members who came forward had been paid the full amount of their liquidated back-pay damages).

\(^{59}\) *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 479 (5th Cir. 2011).

\(^{60}\) *Id.* at 471–73.

\(^{61}\) *Id.* at 472.

\(^{62}\) *Id.*

\(^{63}\) *Id.* at 473.
were the most grievously injured and had not been fully compensated.”

The district court disagreed.

On appeal, the Fifth Circuit reversed, holding that the district court abused its discretion by issuing a *cy pres* award rather than distributing the funds to Subclass A. Relying primarily on the ALI Principles, the Fifth Circuit concluded that because the settlement agreement contained no provision allowing a *cy pres* distribution, such a distribution is permissible “only if it is not possible to put those funds to their very best use: benefitting the class members directly.” Thus, “Subclass B’s failure to fully draw down the medical-monitoring fund did not constitute an abandonment or relinquishment by the class of its property interest in the settlement,” and as it was feasible to make a further distribution to Subclass A, a *cy pres* distribution was inappropriate.

While often cited by critics of *cy pres* distributions, the *Klier* opinion did not reject *cy pres* awards in class actions. Rather, the court clearly acknowledged that “[i]n the class-action context, a *cy pres* distribution is designed to be a way for a court to put any unclaimed settlement funds to their ‘next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.’” Moreover, the *Klier* court did not “[hold] that settling defendants have a more equitable right to unclaimed funds than a charity when the property-interest-defining settlement agreement doesn’t include a contrary directive.” Rather, the court noted that, absent any provision to the contrary in a settlement agreement, the defendant “would appear to have a greater claim to the funds than a charity,” because the overriding objective to any class settlement is to compensate the class members. The conclusion of the *Klier* court was *not* that *cy pres* distributions have no role in class actions, but rather that “there is no occasion for charitable gifts, and *cy pres* must remain offstage” if it is feasible to provide further distributions to the class.

---

64 *Id.* at 476.
65 *Id.* at 480.
66 *Id.* at 475.
67 *Id.* at 479.
68 *Id.* at 474.
69 Gayl, *supra* note 13, at 17.
70 *Klier*, 658 F.3d at 477 (emphasis added).
71 *Id.*
72 *Id.* at 479; see also *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (rejecting a settlement because it was feasible to compensate class members individually). *But see In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) (stating that *cy pres* distributions are “most appropriate where further individual distributions are economically infeasible[,]” but refusing to hold that such distributions are only appropriate in this context).
B. CY PRES RECIPIENTS SHOULD REASONABLY APPROXIMATE THE INTERESTS OF THE CLASS

Once *cy pres* is onstage, the question becomes how to determine which charitable entities are appropriate recipients of a *cy pres* distribution. The ALI Principles state that recipients should be those “whose interests reasonably approximate those being pursued by the class,” and if no such recipients exist, “a court may approve a recipient that does not reasonably approximate the interests” of the class.73

Courts evaluate whether distributions to proposed *cy pres* recipients “reasonably approximate” the interest of the class members by considering a number of factors, including:

- the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reason why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the *cy pres* recipient.74

Applying this reasonable approximation test, the First Circuit upheld a *cy pres* distribution approved by a district court in *In re Lupron* by noting that the settlement agreement expressly contemplated a *cy pres* distribution and holding that the *cy pres* beneficiary—a prostate cancer research and treatment center—was an appropriate recipient because the alleged wrongdoing the plaintiffs sought to correct in the class action was overcharging cancer patients for the drug Lupron.75

In perhaps a narrower interpretation of the reasonable approximation test, the Ninth Circuit has stated that *cy pres* distributions must be “guided by the objectives of the underlying statute and the interests of the silent class members.”76 The Ninth Circuit has enforced this interpretation in several recent cases where rationale for the proposed *cy pres* recipients seemed attenuated or otherwise questionable.77 In

---

73 ALI PRINCIPLES, supra note 28, § 3.07(c).
75 Id. at 36–37.
76 Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1307 (9th Cir. 1990).
77 See, e.g., Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012) (reversing the district court-approved settlement, in part because the proposed *cy pres* distribution to a charity that feeds the indigent had little or nothing to do with the consumer protection laws at issue in the lawsuit); Six Mexican Workers, 904 F.2d at 1301, 1304, 1308–09 (invalidating a *cy pres* distribution to the Inter-American Fund for “indirect distribution to Mexico,” because the distribution
Nachshin v. AOL, LLC, the Ninth Circuit addressed whether a district court abused its discretion by approving a class settlement that allowed AOL to make contributions to several charities in lieu of any compensation to the class members for allegedly inserting footers containing promotional messages in its e-mails. Under the settlement agreement, AOL would alter its allegedly improper practices and contribute $25,000 apiece to the Federal Judicial Center Foundation, the Legal Aid Foundation of Los Angeles, and the Boys and Girls Club of America (split between the Los Angeles and Santa Monica chapters).

After the district court approved the settlement and the cy pres distributions, a class member appealed, arguing that the cy pres recipients were not reasonably related to the issue in the case. The Ninth Circuit agreed. According to the Ninth Circuit, the cy pres awards were not appropriately aligned with the objectives of the underlying statutes on which the plaintiffs based their claims, namely “breach of electronic communications privacy, unjust enrichment, and breach of contract, among others, relating to AOL’s provision of commercial e-mail services.”

While the Nachshin court rejected the proposed cy pres awards, it did so because the parties and the district court had selected, in its view, inappropriate cy pres beneficiaries—not because cy pres relief is improper in the class action context. To the contrary, the Ninth Circuit clearly acknowledged that a cy pres distribution would be appropriate if the “selection of cy pres beneficiaries [were] tethered to the nature of the lawsuit and the interests of the silent class members.”

C. CY PRES AWARDS ARE APPROPRIATE WHERE CASH DISTRIBUTIONS TO CLASS MEMBERS ARE NOT FEASIBLE

The Nachshin decision is also important because it approved application of the cy pres doctrine in class actions in which plaintiffs allege that defendants engaged in misconduct on a wide scale, which resulted in only de minimis damages to individual class members but significant damages in the aggregate. The Nachshin v. AOL settlement was structured so that AOL would not pay any money to the approximately 66 million class members. Because AOL’s maximum

failed to “serve the goals of the statute and protect the interests of the silent class members” who were undocumented workers).

78 663 F.3d 1034 (9th Cir. 2011).
79 Id. at 1036, 1040.
80 Id. at 1040.
81 Id. at 1037–38.
82 Id. at 1040.
83 Id. at 1039.
84 Id. at 1037.
liability if the class were certified and a judgment entered was $2 million, each class member would be entitled only to approximately three cents, which the Ninth Circuit described as “a cost-prohibitive distribution to the plaintiff class.”

Similarly, in *Lane v. Facebook, Inc.*, the Ninth Circuit upheld a class settlement agreement which involved a significant *cy pres* remedy (with no individual class recovery) whereby Facebook would establish a new charitable foundation dedicated to educating the public about online privacy. The use of the *cy pres* award in these situations benefited both the defendants and the class members, as it permitted the defendants to cost-effectively resolve a case that would have been expensive to defend and allowed class plaintiffs to force the defendants to change its allegedly improper practices and pay a penalty for engaging in those practices.

Moreover, the Seventh Circuit recently reversed and remanded a district court’s decertification order in a consumer class action case on the grounds that while the class recovery is small, this alone is not sufficient grounds to deny class certification. The court explained that a case in which the individual claim is small is “the type of case in which class action treatment is most needful”; and a *cy pres* award “would amplify the effect of the modest damages in protecting consumers.”

These opinions contradict critics’ assertions that *cy pres* “facilitates ‘faux’ class actions,” in which “injured victims do not receive compensation, but the victims’ lawyers and the representative plaintiffs are rewarded qui tam action-style creating the illusion of compensation to the injured class.” Settlements with *cy pres* awards can and should be used to resolve class actions in which defendants allegedly engage in wide-scale misconduct that results in only *de minimis* damages to the individual class members. In this context, the ALI Principles recognize that courts do approve class action settlements that provide for cash payments to third parties with no direct cash recovery to class members.

---

85 Id.
86 *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), *cert. denied*, Marek v. Lane, 134 S. Ct. 8 (2013).
88 Id.
89 Gayl, *supra* note 13, at 19.
90 ALI PRINCIPLES, *supra* note 28, § 3.07 cmt. a.
D. CY PRES DISTRIBUTIONS SHOULD RECOGNIZE THE FORUM AND THE GEOGRAPHIC MAKE-UP OF THE CLASS

Nachshin also illustrates that the geographic make-up of the class is important (and appropriately so) in determining valid cy pres recipients. The Nachshin court expressed concern that “[a]lthough the class include[s] more than 66 million AOL subscribers throughout the United States, two-thirds of the donations [would have been] made to local charities in Los Angeles, California.” It therefore held that the cy pres distribution “fail[ed] to target the plaintiff class, because it d[id] not account for the broad geographic distribution of the class.”

In multi-state or national class actions, failure to take into account the geographic composition of the class is a valid concern. While a class action is typically certified, administered, and resolved in one particular location, for reasons related to the case subject matter or the parties, it is important to ensure that the remainder of a national class is likewise considered in the distribution of the cy pres award. A reasonable approach is to ensure that a portion of the cy pres distribution in a multi-state or national class action is awarded to national organizations and the remainder to charities in the local jurisdiction.

E. CONFLICTS OF INTEREST AND THE APPEARANCE OF IMpropriety SHOULD BE AVOIDED

Perhaps because of the history of debatable cy pres awards discussed above, the Ninth Circuit has cautioned that “[w]hen selection of cy pres beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self-interests of the parties, their counsel, or the court.”

---

91 Nachshin v. AOL, LLC, 663 F.3d 1034, 1040 (9th Cir. 2011). It is important to note that the Nachshin court did not hold that a legal aid organization is per se an improper cy pres recipient. Rather, it said that in this instance there was no indication that “the small percentage of plaintiff[s] located in Los Angeles . . . would benefit from donations to the Boys and Girls Club of Los Angeles and Santa Monica or Los Angeles Legal Aid.” Id. This illustrates the necessity for counsel and potential legal aid and public interest cy pres recipients to be mindful of and address directly the tests for cy pres awards in the class action context.

92 Id.

93 This approach is further supported by state statutes and court rules requiring that a certain percentage, typically up to fifty percent, of any residual funds in a class action case must go to organizations that promote or provide access to justice for low-income local residents in the state where the case is filed. See discussion infra Part III.F; see, e.g., In re Motorola Sec. Litig., No. 03 C 287, slip op. at 2 (N.D. Ill., March 5, 2013).

94 Nachshin, 663 F.3d at 1039.
Critics have gone further, arguing that these legitimate concerns give rise to something more sinister and underhanded:

[cy pres] proponents should not receive the same folkloric benefit as Robin Hood stealing from the rich and giving to the poor. Instead, we should denounce applying the cy pres doctrine to class action settlements as walking a very thin ethical line because, in most cases, it steals from corporation, awards funds to uninjured parties, confiscates injured parties’ due process rights, lines the pockets of plaintiffs’ lawyers, and places courts in precarious positions.95

Such rhetoric inflates and overstates the concerns of the Ninth Circuit, which are easily addressed through reasoned criteria and established procedures.

Counsel, courts, and scholars have appropriately recognized that a potential conflict of interest exists between class counsel and their clients because cy pres distributions may increase a settlement fund, and subsequently the attorneys’ fees, without increasing the direct benefit to the class.96 As discussed above,97 however, a straightforward solution exists to address this issue: if the presiding judge fears or observes that class attorneys may lack incentive to vigorously pursue individualized compensation for absent class members, the court can and “should subject the settlement [and the distribution process] to increased scrutiny.”98

There is also a legitimate concern that the lure of cy pres distributions can improperly motivate lawsuit parties and defense or plaintiffs’ counsel to steer unclaimed awards to recipients that advance their own agendas.99 To deal with this concern, courts should take a hard look at cy pres beneficiaries and evaluate whether they meet the criteria discussed above and whether any of the parties involved in the litigation has significant affiliations with or would personally benefit from the distribution to the proposed cy pres recipients. Such an analysis is not unduly burdensome or challenging for the court to undertake and should address this concern about abuse of the doctrine.

95 Gayl, supra note 13, at 20.
97 See discussion supra Part II.C.
98 In re Baby Prods. Antitrust Litig., 708 F.3d at 173.
99 See In re Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 38 (1st Cir. 2012); Nachshin, 663 F.3d at 1039; see also Gayl, supra note 13, at 20; Beisner et al., supra note 29, at 13.
Commentators have also expressed concerns that “judicial involvement in cy pres awards can . . . invite unseemly interactions between charitable organizations and judges”\(^{100}\) and lead to active lobbying of judges by charities.\(^{101}\) In legal ethics terms, “the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.”\(^{102}\) Again, this concern is easily addressed. First, it is preferable that the parties (rather than the court) select the charities that will receive a cy pres distribution and ideally articulate such selection clearly in any settlement agreement. If, however, the parties fail to select the beneficiaries and the judge selects the charities, so long as the beneficiaries are chosen according to the criteria noted above\(^{103}\) and their missions relate to the underlying lawsuit or the interests of the class members, these concerns over impropriety should abate.

While it is possible that a potential conflict of interest could arise between the presiding judge and the class members, such conflict of interest is unlikely if the safeguards are in place, as noted above. Critics claim that parties “often” include a cy pres award to a charity with which the judge or his or her family is affiliated.\(^{104}\) Once again, this is an overstatement, and protections exist to address any instances of impropriety on this score. As an illustration of this concern of “judicial bias,” John H. Beisner, for example, points to Judge Christina A. Snyder’s refusal to recuse herself when reviewing and approving the settlement agreement in Nachshin because her husband was a board member of Legal Aid Foundation of Los Angeles (LAFLA), one of the proposed cy pres recipients.\(^{105}\) The Ninth Circuit however disagreed with the appellant who objected on this very issue. As articulated by the Ninth Circuit, the test for recusal under 28 U.S.C. § 455(a) is “whether a reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned.”\(^{106}\) In this instance, despite Judge Snyder’s husband’s LAFLA board membership, the Ninth Circuit was clear that several points heavily weighed against Judge Snyder’s recusal and obviated any appearance of impropriety:\(^{107}\)

\(^{100}\) Beisner et al., supra note 29, at 14.
\(^{101}\) Liptak, supra note 48.
\(^{102}\) Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011).
\(^{103}\) When applying the cy pres doctrine in the class action context, parties and courts should (i) compensate class members first; (ii) select cy pres recipients that reasonably approximate the interests of the class; (iii) ensure cy pres distributions reflect both the forum and the geographic make-up of the class; and (iv) avoid conflicts of interest and the appearance of impropriety.
\(^{104}\) Beisner et al., supra note 29, at 13.
\(^{105}\) Id. at 13–14.
\(^{106}\) Nachshin, 663 F.3d at 1041.
\(^{107}\) “A cy pres remedy should not be ordered if the court . . . has significant prior affiliation with the intended recipients that would raise substantial questions
(i) a mediator, not Judge Snyder, with no encouragement from Mr. Snyder or LAFLA, recommended LAFLA as one of three beneficiaries; (ii) no indication existed that LAFLA board members, which include roughly fifty attorneys representing law firms, corporations, and community organizations, received financial compensation or any other remuneration for their service; and (iii) no evidence existed that the donation would benefit Mr. Snyder in any way other than allowing LAFLA to continue to provide access to justice to the indigent in Los Angeles. Carefully read, Nachshin is another demonstration that sufficient safeguards already exist to address any ethical concerns with the application of the cy pres doctrine in the class action context.

F. PUBLIC INTEREST AND LEGAL SERVICES ORGANIZATIONS ARE APPROPRIATE CY PES RECIPIENTS

Organizations with objectives directly related to the underlying statutes at issue in the relevant class action are appropriate cy pres recipients. In Nachshin, for example, the Ninth Circuit spoke of “non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance” as appropriate cy pres recipients in a case involving AOL’s alleged insertion of footers containing promotional messages in its e-mails. But narrowly limiting the scope of appropriate cy pres recipients to the precise claims in the class action (e.g., online malfeasance) has its own problems, both theoretically and practically.

As to theory, such a limited approach takes too literal a view of the cy pres doctrine in the class action context. The use of the cy pres doctrine to distribute class action residue is really just a convenient analogy. In a class action settlement, there is no underlying trust that a deceased settlor has created for a specified purpose that has become unfeasible. Rather, the cy pres doctrine has been borrowed as a device to facilitate the administration of complex class actions. As the Seventh Circuit pointed out in Mirfasihi v. Fleet Mortgage Corp., the cy pres device is used in class actions “for a reason unrelated to the trust doctrine . . . to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement[.]

The practical problem with limiting cy pres awards to the specific claims in a class action is that a narrow focus on the subject matter of the case can unnecessarily complicate the socially desirable settlement of

---

108 Nachshin, 663 F.3d at 1041–42.
109 Id. at 1036–37, 1041.
110 356 F.3d 781, 784 (7th Cir. 2004).
large class action disputes. In actual practice, class action plaintiffs’ counsel and a defendant (usually a corporation) are resolving a complex dispute by a settlement in which the defendant denies all liability, and the disposal of residual funds is typically a detail in a larger resolution. While some court opinions speak loosely of residual funds as “penalties” or “recoveries” for violations of the law, settling defendants usually see themselves as making a pragmatic business decision that specifically avoids any admission that they violated the law. Moreover, settling defendants have a practical interest in how residual funds are used. In the real world, the settling defendant in a case about telephone services pricing may be understandably unenthusiastic about a cy pres award to an organization that campaigns against high telephone bills.

One recognized solution to the related problems of awards to dubious recipient organizations and awards that seem to “target” the settling defendants or diminish the desire to settle is directing cy pres awards to public interest and legal services organizations. Federal and state courts throughout the country have long recognized organizations that provide access to justice for low-income, underserved, and disadvantaged people as appropriate beneficiaries of cy pres distributions from class action settlements or judgments. Such awards are granted based on one of the common underlying premises for all class actions: to make access to justice a reality for people who otherwise would not be able to obtain the protections of the justice system. The access to

111 See, e.g., Lessard v. City of Allen Park, 470 F. Supp. 2d 781, 783–84 (E.D. Mich. 2007) (“The Access to Justice fund is the ‘next best’ use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters.” (citation omitted)); Jones v. Nat'l Distillers, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (listing multiple cases where a class action cy pres distribution designed to improve access to legal aid was appropriate); In re Folding Carton Antitrust Litig., MDL No. 250, 1991 U.S. Dist. LEXIS 2553, at *7-8 (N.D. Ill. Mar. 5, 1991) (approving cy pres distribution of the class action “Reserve Fund” to establish a program that would, inter alia, increase access to justice “for those who might not otherwise have access to the legal system”); see also Thomas A. Doyle, Residual Funds in Class Action Settlements: Using “Cy Pres” Awards to Promote Access to Justice, FED. LAW., July 2010, at 26, 27 (providing examples of approved class action settlements with cy pres distribution components that improved access to justice for indigent litigants).

112 Bob Glaves & Meredith McBurney, Cy Pres Awards, Legal Aid and Access to Justice: Key Issues in 2013 and Beyond, 27 MGMT. INFO. EXCH. J., 24, 25 (2013) (“[L]egal aid or [Access To Justice] organizations are always appropriate recipients of cy pres or residual fund awards in class actions because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system.”); Doyle, supra note 111, at 27 (stating that the myriad of state statutes and rules enacted to “require
justice nexus falls squarely within ALI Principles’ guidance that “there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests.”113 One interest of every class member in any class action in any area of the law is access to justice for a group of litigants who, on their own, would not realistically be able to seek court relief, either because it would be too inefficient to adjudicate each injured party’s claim separately or because it would be cost prohibitive for each injured party to file individual claims.114

In addition to the case law supporting the use of cy pres awards to advance access to justice, a growing number of states have adopted statutes or court rules codifying the principle that cy pres distributions to organizations promoting access to justice are always an appropriate use

residual funds to be distributed, at least in part, to legal aid projects . . . provide[s] evidence of a public policy favoring cy pres awards that serve the justice system”).

113 ALI PRINCIPLES, supra note 28, § 3.07 cmt. b.
114 Class action cy pres distributions to legal aid or public interest organizations are widely recognized as an appropriate mechanism to further access to justice. See, e.g., Daniel Blynn, Cy Pres Distributions: Ethics & Reform, 25 GEO. J. LEGAL ETHICS 435, 438 (2012) (mentioning that cy pres distributions that have flowed to specific legal aid organizations have advanced the legal field); Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., The Cy Pres Doctrine: “A Settling Concept,” 58 LA. B.J. 248, 251 (2011) (discussing how cy pres awards made to local legal aid organizations will promote access to civil litigation, in part, by funding and coordinating a pro bono panel utilizing local attorneys); Cy Pres Nets $162,000 for Justice Foundation, MONT. LAW., May 2005, at 24, 24 (noting that a significant cy pres distribution to the Montana Justice Foundation will help fund legal aid for indigent individuals); Danny Van Horn & Daniel Clayton, It Adds Up: Class Action Residual Funds Support Pro Bono Efforts, 45 TENN. B.J. 12, 13–14 (2009) (identifying legal aid organizations which have received residual cy pres funds because of the indirect benefit they provide to class members, which is similar to the central purpose for which FED. R. CIV. P. 23 was designed—access to justice); Nina Schuyler, Cy Pres Awards—A Windfall for Nonprofits, S.F. ATT’Y, Spring 2007, at 26, 27–28 (lauding the charitable efforts the Volunteer Legal Services has provided to low-income residents); Bradley A. Vauter, The Next Best Thing: Unclaimed Funds from Class Action Settlements Could Benefit Low-Income Consumers by Deposits in State Bar of Michigan Access to Justice Development Fund, 80 MICH. B.J. 68, 69 (2001) (advocating for Michigan’s Access to Justice Fund as a recipient of unclaimed class action settlements because it benefits low-income consumers in Michigan); Robert E. Draba, Note, Motorsports Merchandise: A Cy Pres Distribution Not Quite “As Near As Possible,” 16 LOY. CONSUMER L. REV. 121, 122 (2004) (recognizing that the rationale for approving cy pres distributions to two legal aid organizations, like the purpose of the class action device, is “to protect the legal rights of those who would otherwise be unrepresented”).
of residual funds in class action cases.\(^{115}\) The state courts and legislatures begin with the premise that *cy pres* distributions of residual funds resulting from a class action settlement or judgment are proper and valid. From there, these state courts and legislatures specify appropriate *cy pres* recipients: charitable entities that promote access to legal aid for low-income individuals. Finally, most of these courts and legislatures then mandate a minimum baseline distribution to the pre-approved category of recipients, usually either twenty-five or fifty percent of the unclaimed class action award.\(^{116}\) Because such statutes and court rules establish a

---

\(^{115}\) See, e.g., CAL. CIV. PROC. CODE § 384 (2002) (permitting payment of residual class action funds to nonprofit organizations that provide civil legal services to low-income individuals); HAW. R. CIV. P. 23(f) (granting a court discretion to approve distribution of residual class action funds, specifically to nonprofit organizations that provide legal assistance to indigent individuals); 735 ILL. COMP. STAT. 5/2-807 (2008) (requiring distribution of at least fifty percent of residual class action funds to organizations that improve access to justice for low-income Illinois residents); IND. R. TRIAL P. 23(F)(2) (requiring distribution of at least twenty-five percent of residual class action funds to the Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its *pro bono* districts); KY. R. CIV. P. 23.05(6) (requiring distribution of at least twenty-five percent of residual funds to the Kentucky IOLTA Fund Board of Trustees to support activities and programs that promote access to civil justice for low-income Kentucky residents); MASS. R. CIV. P. 23(e) (permitting distribution of residual class action funds to nonprofit organizations that provide legal services to low income individuals consistent with the objectives of the underlying causes of action on which relief was based); N.M. DIST. CT. R. CIV. P. 1-023(G)(2) (permitting payment of residual class action funds to nonprofit organizations that provide civil legal services to low income individuals); N.C. GEN. STAT. § 1-267.10 (2005) (requiring equal distribution of residual class action funds between the Indigent Person’s Attorney Fund and the North Carolina State Bar for the provision of civil services for indigents); PA. R. CIV. P. 1716 (directing distribution of at least fifty percent of residual class action funds to the Pennsylvania IOLTA Board to support activities and programs that promote the delivery of civil legal assistance, permitting distribution of the balance to an entity that promotes either the substantive or procedural interests of the class members); S.D. CODIFIED LAWS § 16-2-57 (2008) (requiring at least fifty percent of residual funds be distributed to the Commission on Equal Access to Our Courts); TENN. CODE ANN. § 16-3-821 (2009) (creating the Tennessee Voluntary Fund for Indigent Civil Representation and authorizing the fund to receive contributions of unpaid residuals from settlements or awards in class action litigation in both federal and state courts); WASH. SUPER. CT. CIV. R. 23(f)(2) (requiring distribution of at least twenty-five percent of residual class action funds to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents).

\(^{116}\) See HAW. R. CIV. P. 23(f); 735 ILL. COMP. STAT. 5/2-807 (2008); IND. R. TRIAL P. 23(F)(2); KY. R. CIV. P. 23.05(6); PA. R. CIV. P. 1716; S.D. CODIFIED LAWS § 16-2-57 (2008); WASH. SUPER. CT. CIV. R. 23(f)(2). Importantly, these statutes and rules do not require that one hundred percent of the residual funds go to *local* legal services organizations. In national class actions, state court
presumption that any residual funds in class action settlements or judgments will be distributed to public interest or legal aid organizations, they make clear that legal services organizations are distinct from other charitable causes that have drawn legitimate concerns regarding a lack of nexus with the interests of the class members. In other words, the statutes and rules recognize the connection between access to justice through legal aid and through class action procedures.

CONCLUSION

Class action litigation has become an important device for resolving a wide range of disputes between individual plaintiffs and corporate defendants. *Cy pres* awards of undistributed class action settlement residue are an important part of the settlement process. Distributing funds to appropriate recipients is a practical variant of the *cy pres* device long recognized in trust law and is generally accepted as preferable to returning undistributed funds to the settling defendants or escheat of those funds to the state.

Critics of *cy pres* awards in class actions have raised several arguments that are often overstated and have not been recognized by the courts. *Cy pres* awards do not violate the case-or-controversy requirement in Article III of the U.S. Constitution. They do not violate the Rules Enabling Act. And they do not infringe constitutional due process rights of class members. Though potential for misapplication of the doctrine and abuse exists, legitimate concerns can be addressed through recognized court procedures.

There has also been considerable recent criticism of specific *cy pres* awards, and several awards have been reversed on appeal. As discussed in this Article, problems concerning specific awards can be anticipated and avoided by following a few simple rules: (1) compensation of class members should come first; (2) *cy pres* recipients should reasonably approximate the interests of the class; (3) *cy pres* awards are appropriate where cash distributions to class members are not feasible; (4) *cy pres* distributions should recognize the geographic make-up of the class; (5) conflicts of interest and the appearance of impropriety should be avoided; and (6) public interest and legal services organizations should be considered as appropriate *cy pres* recipients. Following these simple rules should minimize controversies about an effective and important mechanism for class action administration.

judges are free to grant at least a portion of the *cy pres* award to appropriate national organizations, such as national public interest or legal services organizations, thereby avoiding the problem raised in *Nachshin* of inappropriate *cy pres* awards to local organizations in national class actions. See discussion infra Part III.D.
Legislation and Court Rules Providing for Legal Aid to Receive Class Action Residuals*

California

Legislature amended Section 384 of the California Code of Civil Procedure to state that 25% of class action residuals shall go to the Equal Access Fund for distribution to legal aid programs; 25% shall go to grants to trial courts for new or expanded collaborative courts or grants for Shriver Civil Counsel; and the 50% balance shall go “to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, further the objectives and purposes of the underlying class action or cause of action……to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent.”

Effective date: Original legislation, effective January 1, 1994, permitted class action residuals to go to legal aid. Statute was amended, effective June 27, 2017, to provide the set-asides described above.

Implementation work and analysis: A cy pres brochure and a more comprehensive cy pres toolkit are updated regularly and distributed at appropriate venues.

For more information, please contact: Stephanie Choy, Managing Director, Legal Services Trust Fund Program, State Bar of California, stephanie.choy@calbar.ca.gov, 415/538-2249

Entry updated: 8/17

Colorado

The Colorado Supreme Court amended Sec. 23(g) of the Colorado Rule of Civil Procedure in 2016 to state that “……In matters where the claims process has been exhausted and residual funds remain, not less than 50 percent of the residual funds shall be disbursed to the Colorado Lawyer Trust Account Foundation (COLTAF) to support activities and programs that promote access to the civil justice system for low income residents of Colorado. The court may disburse the balance of any residual funds beyond the minimum percentage to COLTAF or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying
litigation or otherwise promote the substantive or procedural interests of members of the certified class.”

**Effective Date:** July 1, 2016

**Implementation work and analysis:** There are plans to begin to publicize the new rule. Hoping to use state rule to encourage federal court cy pres awards.

**For more information, please contact:** Diana Poole, Executive Director, Colorado Lawyer Trust Account Foundation, diana@legalaidfoundation.org, 303/863-9544

**Entry updated:** 8/16

**Connecticut**

*The Connecticut Supreme Court amended Sec. 9-9 of the Connecticut Superior Court Rules in 2014 to state that* “…Any order, judgment or approved settlement in a class action that establishes a process for identifying and compensating members of the class may designate the recipient or recipients of any such residual funds that may remain after the claims payment process has been completed. In the absence of such designation, the residual funds shall be disbursed to the organization administering the program for the use of interest on lawyers’ client funds pursuant to General Statutes 51-81c for the purpose of funding those organizations that provide legal services for the poor in Connecticut.”

**Effective Date:** January 1, 2015

**Implementation work and analysis:** Connecticut Bar Foundation (the IOLTA program) receives periodic awards from both state and federal class action cases. CBF sends letters to the state’s chief justice, the chief United States district court judge, the DBA’s federal practice and litigation sections and noted members of the class action bar.

**For more information, please contact:** Don Philips, Executive Director, Connecticut Bar Foundation, don@cbf-1.org, 860/722-2494

**Entry updated:** 8/16

**Hawaii**

*The Hawaii Supreme Court amended Rule 23 of Hawaii’s Rules of Civil Procedure,* in January, 2011, to state that “…it shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds, as agreed to by the parties, including nonprofit tax exempt organizations eligible to receive assistance from the indigent legal assistance fund under HRS section 607-5.7 (or any successor provision) or the Hawaii Justice Foundation, for distribution to one or more of such organizations. Judges may approve the distribution of residual funds to legal aid organizations or to the Hawaii Justice Foundation to disburse to one or more of such organizations.”
Effective date: July 1, 2011

Implementation work and analysis: In 2011, the Hawaii Access to Justice Commission prepared a Toolkit.

For more information, please contact: Bob LeClair, Executive Director, Hawaii Justice Foundation, hjf@hawaii.rr.com, 808/537-3886

Entry updated: 8/16

Illinois

Legislature amended Section 5 of the Code of Civil Procedure to add new Section 2-807 (735 ILCS 5/2-807), to establish a presumption that residual funds in class actions will go towards organizations that improve access to justice for low-income Illinois residents. Courts have the discretion to award up to 50% of the funds to other organizations that serve the public good as part of a settlement if the court finds good cause to do so, but at least 50% of these funds must go to support legal aid.

Effective date: July 1, 2008

Implementation work and analysis: The Chicago Bar Foundation has developed educational materials and sample language that they distribute to area judges, class action lawyers and other relevant parties (e.g., claims administrators). CBF website provides detailed information.

For more information, please contact: Bob Glaves, Executive Director, Chicago Bar Foundation, bglaves@chicagobar.org, 312/554-1205.

Entry updated: 8/16

Indiana

New language in Rule 23 of the Indiana Rules of Civil Procedure, adopted by the Indiana Supreme Court, reads, in part: “In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its pro bono districts. The court may disburse the balance of any residual funds beyond the minimum percentage to the Indiana Bar Foundation or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.”

Effective date: January 1, 2011

Implementation work and analysis: Completed education campaign. Discussed federal courts local rule. Rule is seen as influencing local federal courts.
Kentucky

The Kentucky Supreme Court amended Civil Rule 23.05 to add subsection (6) which states in part “In matters where the claims process has been exhausted and residual funds remain, not less than 25% of residual funds shall be disbursed to the Civil Rule 23 Account maintained by the Kentucky IOLTA Fund Board of Trustees pursuant to Supreme Court Rule 3.830(20).” The funds are allocated to Kentucky legal aid organizations based on the poverty population formula established by the Legal Services Corporation.

Effective date: January 1, 2014

Implementation work and analysis: The new rule was published in the state bar magazine in November, 2013, and judges were advised of the new rule at their annual colleges.

For more information, please contact: Amelia Martin Adams, Executive Director, Kentucky IOLTA Fund, aadams@kybar.org, 800/874-6582.

Entry updated: 8/16

Louisiana

The Louisiana Supreme Court enacted Rule XLIII, which states in part: “In matters where the claims process has been exhausted and Cy Pres Funds remain, such funds may be disbursed by the trial court to one or more non-profit or governmental entities which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, including the Louisiana Bar Foundation for use in its mission to support activities and programs that promote direct access to the justice system.”

Effective date: September 24, 2012

Implementation work and analysis: LBF staff provided judges throughout the state with materials regarding the rule when it became effective. LBF Presidents attend annual Judicial College events to advise judges about the rule and the value of using cy pres awards to benefit civil legal aid through gifts to the LBF. Information about the rule is posted on the LBF website.

For more information, please contact: Donna Cuneo, Executive Director, Louisiana Bar Foundation, donna@raisingthebar.org, 504/561-1046, or Laura Sewell, Development Director, Louisiana Bar Foundation, laura@raisingthebar.org, 504/561-1046

Entry updated: 8/16
Maine

The Maine Supreme Judicial Court has amended Civil Rule 23(f)(2) as follows: “The parties may agree that residual funds be paid to an entity whose interests reasonably approximate those being pursued by the class. When it is not clear that there is such a recipient, unless otherwise required by governing law, the settlement agreement should provide that residual fees, if any, be paid to the Maine Bar Foundation to be distributed in the same manner as funds received from interest on lawyers trust accounts…..”

**Effective date:** March 1, 2013

**Plans for implementation:** MBF and providers to talk about heightening awareness of the new rule.

**For more information, please contact:** Diane Scully, Executive Director, Maine Bar Foundation, dscullly@mbf.org, 207/622-3477

**Entry updated:** 7/14

Massachusetts

*New language in Rule 23 of the Massachusetts Rules of Civil Procedure, adopted by the Supreme Judicial Court of Massachusetts,* reads, in part: “In matters where the claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, or to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts.” The rule was revised in 2015 to require in cases with residual funds that the plaintiff provide notice to IOLTA for the purpose of allowing IOLTA to be heard on whether it ought to be a recipient of any or all residual funds.

**Effective date:** January 1, 2009; revised July 1, 2015

**Implementation work and analysis:** With the revised rule mandating that the IOLTA Committee receive notice, IOLTA staff sent a letter to most plaintiff attorneys who engage in class actions, placed an article in the Lawyers Weekly, did a press release, updated the cy pres toolkit, and did presentations to the Boston Bar Council, Association of Legal Administrators and other relevant organizations.

**For more information, please contact:** Jayne Tyrrell, Executive Director, Massachusetts IOLTA Committee, jtyrrell@maiolta.org, 617/723-9093

**Entry updated:** 8/16
Minnesota

*The Minnesota Supreme Court amended Rule 23 of the Minnesota Rules of Civil Procedure* to require notice be given to legal services providers (and any other potential recipient of residual funds identified by the parties or the court) when the district court is considering the possible distribution of cy pres funds.

**Effective date:** July 1, 2018

**Implementation work and analysis:**

*For more information, please contact:* Bridget Gernander, IOLTA Program Director, bridget.gernander@courts.state.mn.us; 651/284-4379

**Entry updated:** 3/18

Montana

*The Montana Supreme Court amended Rule 23 of the Montana Rules of Civil Procedure* to state that “In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to an Access to Justice Organization to support activities and programs that promote access to the Montana civil justice system. The court may disburse the balance of any residual funds beyond the minimum percentage to an Access to Justice Organization or to another non-profit entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.”

**Effective date:** January 1, 2015

**Implementation work and analysis:**

*For more information, please contact:* Niki Zupanic, Executive Director, Montana Justice Foundation, nzupanic@mtjustice.org, 406/523-3920

**Entry updated:** 12/14

Nebraska

*The Nebraska Legislature amended section 30-3839 of Revised Statutes Cumulative supplement, 2012,* to provide that: “Prior to the entry of any judgment or order approving settlement in a class action described in section 25-319, the court shall determine the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise to further the purposes
of the underlying cause of action, shall direct the defendant to pay the sum of the unpaid residue to the Legal Aid and Services Fund”.

**Effective date:** April, 2014

**Implementation work and analysis:** None to date.

**For more information, please contact:** Milo Mumgaard, Executive Director, Nebraska Legal Aid, mmumgaard@legalaidofnebraska.org, 402/504-6444

**Entry updated:** 8/16

**New Mexico**

*The New Mexico Supreme Court adopted new language in Rule 23 of the New Mexico Rules of Civil Procedure:* The new language provides that residual class action funds may be distributed to non-profit organizations that provide legal services to low income persons, the IOLTA program, the entity administering the pro hac vice rule and/or educational entities that provide training, teaching and legal services that further the goals of the underlying causes of action on which relief was based. Funds also may go to other non-profit organizations that support projects that benefit the class or similarly situated persons consistent with the goals of the underlying causes of action on which relief was based.

**Effective date:** May 11, 2011

**Implementation work and analysis:** Held a CLE on cy pres at the 2013 annual bench & bar conference - panelists include judges and private attorneys.

**For more information, please contact:** Richard Spinello, General Counsel, State Bar of New Mexico, rspinello@nmbar.org, 505/797-6050.

**Entry updated:** 7/14

**North Carolina**

*Legislature amended Subchapter VIII of Chapter 1 of the General Statutes to add new Article 26B,* which reads, in part: “Prior to the entry of any judgment or order approving settlement in a class action established pursuant to Rule 23 of the Rules of Civil Procedure, the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise consistent with its obligations under Rule 23 of the Rules of Civil Procedure, shall direct the defendant to pay the sum of the unpaid residue, to be divided and credited equally, to the Indigent Person’s Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents.”
**Effective date:** October 1, 2005

**Implementation work and analysis:** In 2012, the North Carolina Access to Justice Commission prepared a toolkit, which is accessible online and has been distributed to judges and attorneys.

**For more information, please contact:** Evelyn Pursley, Executive Director, North Carolina IOLTA, epursley@ncbar.gov, 919/828-0477

**Entry updated:** 8/16

---

**Oregon**

*The legislature amended section 32 of the Oregon Code of Civil Procedure to add a new section O,* which provides that, in class action cases where residual funds exist, at least 50 percent of the amount not paid to class members be paid to the Oregon State Bar for the funding of legal services. The remainder will be paid to any entity for purposes that the court determines are directly related to the class action or directly beneficial to the interests of class members

**Effective date:** March 4, 2015

**Implementation work and analysis:** Oregon has not yet taken steps to implement the rule change by educating judges and lawyers. They hope to do so in the near future.

**For more information, please contact:** Judith Baker, Director of Legal Services Program, Oregon State Bar, jbaker@osbar.org, 503/431-6323

**Entry updated:** 8/16

---

**Pennsylvania**

*The Supreme Court of Pennsylvania has revised Chapter 1700 of the Rules of Civil Procedure,* directing that at least 50% of residual funds in a given class action shall be disbursed to the Pennsylvania IOLTA Board to support activities and programs which promote the delivery of civil legal assistance. The balance may go to IOLTA, or to another entity for purposes that have a direct or indirect relationship to the objectives of the underlying class action, or which otherwise promote the substantive or procedural interests of the members of the class.

**Effective date:** July 1, 2012

**Implementation work and analysis:** IOLTA developed a toolkit that has been distributed to Pennsylvania trial judges. They also are working on an educational plan for the class action bar and the federal and state trial bench.

**For more information, please contact:** Stephanie Libhart, Executive Director, Lawyer Trust Account Board, stephanie.libhart@pacourts.us, 717/238-2001

**Entry updated:** 8/16
Puerto Rico

*Legislature amended the Puerto Rico Rules of Civil Procedure to add Rule 20.6* which provides that residuals shall be deposited in the Access to Justice Fund, which was created to be distributed among programs that provide legal assistance to low-income individuals in cases involving civil, family or administrative matters, or for purposes of addressing matters that have a direct or indirect relationship to the objectives of the underlying class action litigation, or that otherwise promote the substantive or procedural interests of the member of the class.

**Effective date:** July, 2017

**Implementation work and analysis:**

**For more information, please contact:**

**Entry updated:** 3/1/18

South Carolina

*The Supreme Court of South Carolina has amended the Rules of Civil Procedure* to provide that “In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent of residuals must be distributed to the South Carolina Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of South Carolina.” The balance may be distributed to any other entities for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive and procedural interests of members of the class.

**Effective date:** April 27, 2016

**Implementation work and analysis:** Bar Foundation is planning to do outreach to attorneys in summer, 2016.

**For more information, please contact:** Megan Seiner, Executive Director, South Carolina Bar Foundation, mseiner@scbar.org, 803/576-3786

**Entry updated:** 8/16

South Dakota

*Legislature approved Section 16-2-57 of its codified laws on the settlement of class action lawsuits* to provide that “Any order settling a class action lawsuit that results in the creation of a common fund for the benefit of the class shall provide for the distribution of any residual funds to the Commission on Equal Access to Our Courts. However, up to fifty percent of the residual funds may be distributed to one or more other nonprofit charitable organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of the settlement.”
**Effective date:** 2008

**Implementation work and analysis:** There are relatively few class action cases in South Dakota.

**For more information, please contact:** Thomas Barnett, Executive Director and Secretary Treasurer, State Bar of South Dakota, thomas.barnett@sdbar.net, 605/224-7554

**Entry updated:** 7/14

---

**Tennessee**

*Laws legislature amended the Tennessee Code Annotated, Title 16, Chapter 3, Part 8,* to create the Tennessee Voluntary Fund for Indigent Civil Representation and authorize it to receive contributions from several sources, including: “The unpaid residuals from settlements or awards in class action litigation in both state and federal courts, provided any such action has been certified as a class action under Rule 23 of the Tennessee Rules of Civil Procedure or Rule 23 of the Federal Rules of Civil Procedure;” In 2009, Rule 23.08 was amended to clarify that judges and parties to class actions may enter into settlement decrees providing for unclaimed class action funds to be paid to the Tennessee Voluntary Fund for Indigent Civil Representation.

**Effective date:** September 1, 2006

**Implementation work and analysis:**

**For more information, please contact:** Ann Pruitt, Executive Director, Tennessee Alliance for Legal Services, apruitt@tals.org, 615/627-0956

**Entry updated:** 7/14

---

**Washington**

*New language in Rule 23, adopted by the Washington Supreme Court,* reads, in part: “Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of any residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents of Washington State. The court may disburse the balance of any residual funds beyond the minimum percentage to the Legal Foundation of Washington or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.”

**Effective date:** January 3, 2006

**Implementation work and analysis:** Staff and volunteers of the Legal Foundation of Washington and LAW Fund continually educate judges and lawyers about the rule and about the
value of using cy pres to benefit access to justice through gifts to the Legal Foundation of Washington.

For more information, please contact: Caitlin Davis Carlson, Executive Director, Legal Foundation of Washington, caitlindc@legalfoundation.org, 206/624-2536, ext 288

Entry updated: 8/16

West Virginia

The West Virginia Supreme Court amended Rule 23 of the West Virginia Rules of Civil Procedure to state that, “When the claims process has been exhausted and residual funds remain, then 50% of the amount of residual funds shall be disbursed to Legal Aid of West Virginia. The court may, after notice to counsel of record and a hearing, distribute the remaining 50% to one or more West Virginia nonprofit organizations, schools within West Virginia universities or colleges, or foundations, which support programs that will benefit the class consistent with the objectives and purposes of the underlying causes of action upon which relief was based.”

Effective Date: March 8, 2017

Implementation work and analysis:

For more information, please contact: Adrienne Worthy, Executive Director, Legal Aid of West Virginia, aworthy@lawv.net, 304/343-3013, ext. 2128

Entry updated: 5/17

Wisconsin

The Wisconsin Supreme Court amended Wisconsin Statute 803.08 to state that, “In class actions in which residual funds remain, not less than fifty percent of the residual funds shall be disbursed to the Wisconsin Trust Account Foundation to support direct delivery of legal services to persons of limited means in non-criminal matters. The circuit court may disburse the balance of any residual funds beyond the minimum percentage to WisTAF for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.”

Effective date: January 1, 2017

Implementation work and analysis:

For more information, please contact: Jeff Brown, Staff Coordinator, State Bar of Wisconsin, jbrown@wisbar.org, 608/250-6177

Entry updated: 6/16