

# As Near as Possible?

## Applying Best Philanthropic Practice to Judicial Disbursement of Residual Funds in Class Action Lawsuits via the *Cy Pres* Doctrine

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## Executive Summary

Translated from the legal French, *cy pres* means “as close” or “as near as possible.” In the context of class action jurisprudence, the term refers to the process by which leftover or “residual” funds that had been awarded to a plaintiff class either through settlement or a court judgment are granted not to harmed individuals but to nonprofit organizations. Residual funds accumulate if members of the class or their heirs cannot be identified or after all individual claims from class members have been paid. The “near as possible” refers to the awarding of money to nonprofit organizations that aspire to remedy the injustice or tend to the social concern at the heart of a particular class action lawsuit. Since the first such *cy pres* case in 1986, courts across the nation have become de facto philanthropists with judges granting millions to nonprofit organizations.

Investigations into recent *cy pres* practice, however, reveal a lack of uniform guidelines for the process of disbursement. This raises a series of important questions. Have courts directed funds in ways that actually assist class members? Have the grants been aligned with solving the problems the cases sought to remedy? Do *cy pres* distributions promote improper incentives for agents of the court? These unresolved matters have forced a more fundamental question: Should *cy pres* be used at all in class action lawsuits? Some states have responded to this disorderly terrain by placing restrictions on the use of residual funds.

The short history of *cy pres* in the class action context, though, demonstrates that it indeed has potential to be an entirely appropriate and effective way to distribute funds that remain from class action suits. To this end, we argue here that courts’ decisions should be informed by established best practices in social justice philanthropy. This will help ensure that *cy pres* processes are fair, equitable, and have the maximum benefit for members of the original class.

Despite a lack of institutionalized regulations around class action residual funds, the implementation of *cy pres* in *In re Black Farmers Discrimination Litigation* suggests that carefully considered and equitable distribution is attainable. In this case, the U.S. District Court for the District of Columbia considered whether *cy pres* was appropriate and then worked collaboratively with class members’ attorneys to ensure that funds were distributed in ways that aligned with class members’ interests. This has had a unifying effect on the greater African American agricultural community and has advanced the interests of the original class.

In weighing policy options to create proper regulations for the distribution of class action residuals, this brief weighs each of three *cy pres*-related proposed policies and practices against four metrics. The first metric is the practice or policy’s ability to make distributions that are as near as possible in meeting the intent of the settlement. The second is whether a policy or practice preserves the judge’s discretion, which is important both because of the judge’s established authority and their intimate

knowledge of the case. The third metric is the practice or policy's impact on the class and the feasibility of implementing the disbursement in a way that empowers said class. The final measure is the monetary cost of the policy or practice, which is important since it affects feasibility.

The three policies considered here are drawn upon existing proposals, including: (1) the establishment of reserve funds in state treasuries; (2) a plan modeled on California's policy that restricts a portion of funds to state and federal agencies for access-to-justice initiatives and the improvement of the justice system; and (3) a policy reforming the state and federal codes of civil procedure based on language proposed by the American Antitrust Institute for the federal Rule 23, which dictates the administration of class action suits. This third policy—reforming the rules of civil procedure—receives the highest scores on each of the metrics. It has a high likelihood that distribution will align with the facts of the case, preserves judicial discretion, has a moderate likelihood for empowering the class, and exacts relatively low costs.

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It is vital that our judiciary act to implement this policy as soon as possible to ensure that the public good is preserved in class action lawsuits.

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Currently, federal and state institutions continue to restrict distribution of residuals through patchwork measures. This makes it all the more crucial that the Judicial Conference amend Rule 23 of the Federal Rules of Civil Procedure and that state judiciaries follow suit. The Judicial Conference opened an amendment process in 2015 but failed to enact changes.

Pressure for reform continues to mount. In April 2018, the U.S. Supreme Court accepted a petition to hear an appeal of a *cy pres*-only settlement, *Frank v. Gaos*. While current *cy pres* practice is far from ideal, it's conceivable that a Supreme Court ruling could end the use of *cy pres* for residual funds altogether. This makes swift action ever more imperative. The change we recommend here requires simple action by a non-partisan federal body. It is vital that our judiciary act to implement this policy as soon as possible to ensure that the public good is preserved in class action lawsuits.



## Introduction

Over the past three decades, the *cy pres* doctrine has become a well-established tool for disbursing unclaimed funds won through class action lawsuits. In 1986, the California Supreme Court took up a case involving price fixing<sup>1</sup> that had harmed consumers (see Appendix A). Citing a provision courts had typically used to guide dissolution of trusts, the court ruled that leftover class action funds should be used in a manner as close as possible (the legal term is *cy pres*) to the original intent of the lawsuit.<sup>2</sup> With this ruling, *cy pres* doctrine entered the growing world of tort and class action law.

Since that original settlement in California, courts across the nation have become de facto philanthropists, as judges grant millions to nonprofit organizations whose missions address the challenges at the center of particular class action lawsuits. At their best, courts have directed funds to organizations that protect consumer rights, advocate for African American farmers, ensure digital rights, and much more. At their worst, courts have granted funds back to the defendants who had exacted harms.

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1 State of California v. Levi Strauss & Co. 41 Cal. 3d 461 (Cal. 1986).

2 Ted Frank, "Cy Pres Settlements," American Bar Association, 2011. Retrieved from: [www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016\\_sac/written\\_materials/6\\_cy-pres\\_settlement.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016_sac/written_materials/6_cy-pres_settlement.authcheckdam.pdf).

Most discussion in the first 20 years of the use of *cy pres* in class action revolved around when the process should be used. Lawyers asked such questions as: Under what circumstances would it be appropriate to not make further disbursements to eligible claimants or revert remaining funds to a defendant? This discussion culminated in the widespread acceptance of the American Law Institute’s Principles of the Law of Aggregate Litigation.<sup>3</sup> This 2010 document proposed that *cy pres* should only be used in “circumstances in which direct distribution to individual class members is not economically feasible, or where funds remain after class members are given a full opportunity to make a claim”<sup>4</sup> (see Appendix B). As scrutiny of class action suits intensifies, legal scholars and practitioners now regularly argue about whether the *cy pres* doctrine should be used at all.

To the extent that it can ensure that funds go to organizations that fight against injustice, *cy pres* can be a powerful and efficient tool for addressing problems and making reparations at a systemic level. Thus, the current debate over whether *cy pres* should be used obscures the true crux of the problem with *cy pres* provisions—that there are no guidelines or operating standards for how beneficiaries should be chosen and funds granted. Typically, these decisions are left in the hands of lawyers who make recommendations to the court and the judge who makes the final ruling. Lawyers and judges carry hard-won credentials, but typically lack experience as practitioners of philanthropy. Unfortunately, this unregulated, unsystematic process provides ammunition to critics who would like to see an end to *cy pres* in class action lawsuits. If we fail to develop a fair, efficient process for fund disbursement under *cy pres*, we risk losing this potentially valuable avenue for achieving social justice, which is particularly relevant in civil rights cases. Establishing a set of recommendations for the courts for how *cy pres* funds should be implemented, based on the best practices of people-centered philanthropy, maximizes the social good and preserves this useful, practical doctrine into the future.

## Background

The application of the *cy pres* doctrine in class action settlements is relatively new. But its use in other areas of law has a long history. Some accounts trace the principle back to ancient Rome.<sup>5</sup> By the 16th century, the use of *cy pres* in estates was already well recognized in England. In these cases, if resolving an estate was impractical or ran counter to legal principles, the court had a right to intervene to ensure the estate was executed *cy pres* or “as near as” the intent of the deceased as was possible or legal.<sup>6</sup> The process of accepting the *cy pres* doctrine in the United States was slow

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3 American Law Institute, *Principles of the Law of Aggregate Litigation* (St. Paul, MN: American Law Institute, 2010).

4 *Ibid.*, 217.

5 Edith L. Fisch, “Changing Concepts and *Cy Pres*,” *Cornell Law Quarterly* 44, no. 3 (1958-1959): 382-393.

6 H. L. Manby, “The *Cy Pres* Doctrine,” *Law Magazine and Law Review* 15, no. 3 (May 1890): 199-223.



and checkered. By 1950, however, the majority of jurisdictions on both the federal and state levels upheld *cy pres* powers for courts.<sup>7</sup> Unlike other nations, though, courts used it primarily to disburse funds remaining from failed trusts<sup>8</sup> until the California Supreme Court's historic ruling in 1986.

The adoption of *cy pres* in the class action context may seem unprecedented, but there is just cause for its adoption. In 1966, in the midst of the civil rights movement, the Advisory Committee on Civil Rules<sup>9</sup> revised Rule 23 of the Federal Rules of Civil Procedure. Before this revision, members of a class had to be easily identifiable and would have had to personally join onto a case in order to pursue a claim through the courts. But the 1966 revision allowed one or more representatives to represent members of a plaintiff class in circumstances under which it would be difficult for all potential members of a class to join a lawsuit. (See Figure 1.) The revision also gave courts authority to define a class and brought under the class umbrella all defined members who did not actively request exclusion.<sup>10</sup> It is particularly important to understand the link between Rule 23 reform and civil rights class action. Previously, states were able to avoid school desegregation because only individuals who had actively joined a school desegregation case would be considered class members deserving of a remedy. But under the revised rule, any person harmed by segregation would be automatically included as a member of the class unless they actively sought to be excluded. The amended Rule 23, then, gave courts the authority and the mechanism by which to issue rulings and remedies, thereby allowing for desegregation to be achieved on a broader scale.<sup>11</sup>

This change in the federal codes created challenges. First, it created a category of "silent class" members who might be eligible to make claims, but, in many cases, were difficult to identify or contact. Second, were they identified, the members might not be able to meet the burden of proof to make a successful claim. From these challenges grew yet another. Awards are based in part on total damages to the class. And this class, now defined as a larger group, more often opened the possibility that a portion of eventual settlement funds might go unclaimed. By the 1970s and through the 1980s, both courts and legal scholars struggled with this problem regularly. *Cy Pres*, at the time commonly referred to as "fluid recovery," offered a possible solution.<sup>12</sup> Concurrently, the State of California brought an antitrust suit against Levi

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7 Fisch, "Changing Concepts and *Cy Pres*."

8 Ibid.

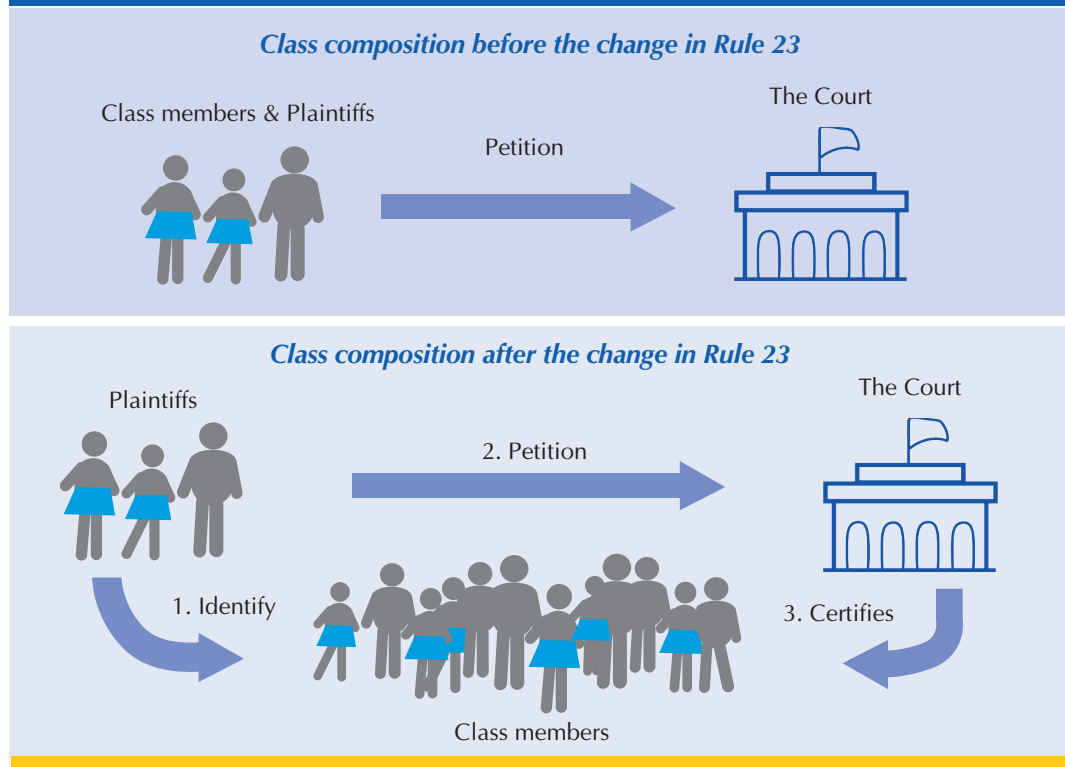
9 The Advisory Committee on Civil Rules is part of the Judicial Conference, which is the primary policy-making body for the federal courts. The Chief Justice appoints members of the committee from federal judges, lawyers, professors, state chief justices, and members of the Department of Justice.

10 Federal Rules of Civil Procedure Rule 23, 1966, U.S.C.

11 Suzette M. Malveaux, "The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today," *University of Kansas Law Review* 66, no. 2 (December 2017): 325-398.

12 Nyal D. Deems, "The *Cy Pres* Solution to the Damage Distribution Problems of Mass Class Actions," *Georgia Law Review* 9, no. 4 (Summer 1975): 893-929; Anna L. Durand, "An Economic Analysis of Fluid Class Recovery Mechanisms," *Stanford Law Review* 34, no. 1 (November 1981): 173-202; Stewart R. Shepherd, "Damage Distribution in Class Actions: The *Cy Pres* Remedy," *University of Chicago Law Review* 39, no. 2 (Winter 1972): 448-465.

**FIGURE 1. EFFECT OF THE 1966 CHANGE IN RULE 23**



Strauss & Co. alleging that the company pressured retailers to overcharge consumers. Given the complexity of the facts of the case, the litigation made its way to the California Supreme Court. The court decided to enact fluid recovery through one form of *cy pres*, a consumer trust. The California Supreme Court recognized the historic nature of its decision, stating, "Today's ruling will serve as a source of guidance for both the trial court on remand and for other courts in confronting the

**FIGURE 2: THE CY PRES PROCESS**



largely uncharted area of fluid recovery in consumer class actions.”<sup>13</sup> With the affirmation of the use of *cy pres* from a high court at the state level, this decision became precedent for subsequent lawsuits.

The importance of responsive implementation in class action cases that intersect with deeply entrenched social justice challenges cannot be understated. In situations where marginalized groups have been exploited by the government or by private actors, a lack of inclusion or a disbursement that does not align with the interest of the class can further harm the class. Furthermore, in these cases, nonprofit organizations whose missions are to serve the relevant communities often face outsized burdens of supporting the class as they experience illegal practices and as they pursue litigation. Community-based organizations can thus be left resource-strapped, unable to sustain adequate levels of advocacy or services for class members. Thus, ensuring that funds go to organizations that, from class members’ own perspectives, truly serve the class, is vital to promote the long-term health of the community of class members and the organizations that serve them.

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## Criticisms of *CyPres*

*Cy pres* in class action lawsuits is a point of controversy among some judges, legal scholars, lawyers, and class members alike. The most common complaint among detractors is that it gives too much discretion to judges on how to distribute funds and that such decisions likely won’t always accord with the “as near as” *cy pres* doctrine. For instance, detractors point to dozens of cases where judges ruled that residual funds should go to legal institutions, such as state bar foundations and law schools, despite having tenuous connections to the litigations with which they were associated.<sup>14</sup>

In other cases, a court may rule that *cy pres* funds be distributed to nonprofit organizations, but the choices may be fraught with a judge’s unstudied assumptions and subjective feelings about the needs of class members. In the case of *Fears v. Wilhelmina Model Agency*, for example, a judge ordered that residual funds in an antitrust case brought by models against their agency go toward medical centers for women’s health, eating disorders, and substance abuse, which were not matters

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13 State of California v. Levi Strauss & Co. 41 Cal. 3d 461 (Cal. 1986).

14 Daniel Blynn, “*Cy Pres* Distributions: Ethics & Reform,” Georgetown Journal of Legal Ethics 25, no. 3 (Summer 2012): 435-448.

relevant to the litigation.<sup>15</sup> This problem arises, in the opinion of some legal scholars, because of a judge's outsider status. As Daniel Blynn points out in the Georgetown Journal of Legal Ethics, judges are experts in matters of law and are tasked with adjudicating conflict—not determining the interests of a class, understanding the societal context in which a case was brought, or executing strategic and responsive philanthropy.<sup>16</sup>

Potential ethical problems can also arise with the widespread adoption of *cy pres*. For instance, attorneys typically receive fees based on the total value of a settlement. Some legal scholars have posited that *cy pres* can be used to inflate attorneys' fees to the detriment of the class. Further, judges sometimes toe an ethical line in *cy pres* grantmaking. For example, judges have donated *cy pres* funds to their alma maters or organizations with which they are familiar, regardless of whether the organizations benefit the class or the closeness of the organizational missions to the intent of the settlement or judgment.<sup>17</sup> In this environment of outsized judicial discretion, stories have emerged of nonprofits lobbying to direct residual funds to their particular cause.<sup>18</sup> If valid, these reports point to another powerful voice being in the mix that is dedicated to the goals of specific causes or ideologies rather than to the interest of the class.

Former U.S. Circuit Judge of the Seventh Circuit Court of Appeals and legal scholar Richard Posner, a critic of *cy pres*, argued in his opinion on *Mirfahisi v. Fleet Mortgage Corp.* that the very method of fluid recovery is flawed because it is purely punitive in nature.<sup>19</sup> Posner posits that recovery exists so that defendants in class action suits do not walk away without injury if the distribution of claims is complex. Posner seems to assume that if money does not go directly to class members, they cannot benefit from disbursement in other ways. But Posner overlooks the reality on the ground of people affected by discriminatory or illegal practices. Often, nonprofits play a crucial role in supporting the class during the unfair practices and act as organizers over the course of the litigation for the benefit of the class. Furthermore, nonprofit advocacy groups can act as watchdogs to prevent further unfair practices. This watchdog role is one that class members may not have the time, expertise, or desire to take on. Thus, there are clear mechanisms by which the class receives indirect benefit from third parties.

Recently, *cy pres* has become a focus of national discourse about class action lawsuits. In his comments denying certiorari in one class action case, U.S. Supreme

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15 *Fears v. Wilhelmina Model Agency, Inc.* No 02 Civ. 4911 (S.D.N.Y. 2007).

16 *Ibid.*

17 Frank, "Cy Pres Settlements."

18 Wilber H. Boies and Latonia Haney Keith, "Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions," *Virginia Journal of Social Policy & the Law* 21, no. 2 (Spring 2014): 267-294.

19 *Mirfahisi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

Court Chief Justice John Roberts noted the need for the Court to establish clear guidelines for *cy pres* relief.<sup>20</sup> In part a response to the Chief Justice's concerns, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules suggested amending Rule 23 to establish clear guidelines for the use of *cy pres* in class action litigations.<sup>21</sup> Ultimately, however, the committee did not adopt any changes, thereby failing to create guidelines.

Clearly, there are flaws in the current system for determining *cy pres* beneficiaries. Without a change to Rule 23, excess funds and invisible class members will continue to exist. But *cy pres* still stands as the best method available to disburse such funds. It is reform of this distribution method, not the abolishment of it, that offers the best course of action to ensure that the social problem that a class action lawsuit brought to light is actually addressed.

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## Current Judicial Practice

As noted previously, in current class action-related practice, judges have discretion over how they allocate remaining funds. Typically, however, the actual process of developing and implementing *cy pres* provisions is more complicated. In settlements, for example, a plaintiff may be open to settlement and then defendants' lawyers negotiate with plaintiffs to determine the terms of the settlement agreement. Judges often exert influence on these terms by signaling what kind of settlement outcome they might find acceptable. In some class action cases, *cy pres* provisions are written in at this point of negotiation. If codified in the settlement agreement, the terms of the provisions are often stronger as they require another act of the court to amend the specifics. In other cases, lawyers do not foresee the need for *cy pres* provisions, leaving the court to determine what to do with residual funds. Attorneys typically have some input at this juncture. But in some cases, as in *Marek v. Lane*, a class action privacy case against the social media site Facebook, courts have determined that all settlement funds be distributed in full through *cy pres*.<sup>22</sup>

In this unregulated "wild west" of legal grantmaking, practices and outcomes differ dramatically depending on the structure of the *cy pres* laid out in the class action's settlement agreement and the decisions made by individual actors. While each class action *cy pres* is complex and draws on input from many different actors, the

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20 *Marek v. Lane*, 134 S. Ct. 8 (U.S., 2013).

21 Rule 23 Subcommittee, "Rule 23 Subcommittee Report," United States Courts, April 2015. Retrieved from: <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2015>.

22 *Marek v. Lane*, 134 S. Ct. 8

**FIGURE 3. EXAMPLES OF DIFFERING PRACTICES IN CY PRES GRANTMAKING**

<p><i>In re Black Farmers Discrimination Litigation (2011)</i></p>	<p>The preceding case, <i>Pigford v. Glickman</i>, was a historic event in which African American farmers sued the USDA for discrimination in its farm loan programs. At the time, it was the largest civil rights class action settlement in the history of the United States. Originally simply a claims process with no defined maximum, low response and poor outreach prompted a second case, <i>In re Black Farmers Discrimination Litigation</i>. This re-opened the the claims process with defined allocated funds from Congress. Lead class counsel, responsible for the identification of <i>cy pres</i> beneficiaries, implemented a strategy to engage class members and the nonprofits that supported them so they could influence decisions about how <i>cy pres</i> fund got spent.</p>
<p><i>Fears v. Wilhelmina Model Agency (2007)</i></p>	<p>A class action case in which models sued the top New York modeling agencies for conspiracy to fix their commission rates. The identified class was only 5 models, while every model who had worked for the agencies were class members. The judge decided to distribute remaining funds to organizations for women’s health. This decision has been used as ammunition against <i>cy pres</i> due to its distribution that was poorly aligned with the facts of the case.</p>
<p><i>Marek v. Lane (2015)</i></p>	<p>A case against Facebook regarding its controversial Beacon program, which revealed personal purchasing information of Facebook users. This case was particularly contentious, as no claims process was defined for class members. Instead, all settlement funds went to a nonprofit to be founded by Facebook for the purpose of funding organizations working in digital privacy rights.</p>

decisions made by each party can either support class members or have no remedial system for the people who have suffered harm. At their best, class actions that utilize *cy pres* can engage class members to help them through the claims process and also advance their a harmed group’s long-term goals. When implemented poorly, the *cy pres* can have little effect on remedying the specific problems faced by the class that led to the litigation in question. At its worst, however, *cy pres* can be used to subvert a claims process and vest money under the control of the people who allegedly caused harm to the class (Figure 3).

In recent years, momentum has built to establish uniform guidelines on the use of *cy pres*. In 2010, the American Law Institute (ALI) published general guidelines for *cy pres* in its Principles of Aggregate Litigation, stating that *cy pres* should be reserved for specific situations.<sup>23</sup> ALI suggests, first, that if class members can be identified with reasonable effort and the group is large enough to make such distribution economically viable, funds should go directly to the class. Second, ALI recommends that if funds remain after a claims process, the settlement should require that the

money go to participating class members. Third, ALI recommends that if individual distributions are not viable based upon the previous two criteria, funds could be disbursed through *cy pres*—but that the court should require parties to identify a beneficiary, with interests that reasonably approximate those of the class.<sup>24</sup> ALI states that the court should approve an unrelated recipient only if there is no plausible recipient with reasonably approximate interests after research and analysis. These guidelines were controversial but have since been used in many jurisdictions and were the basis for the Rule 23 Subcommittee’s proposed amendment to Rule 23.<sup>25</sup> State legislatures have also stepped in to fill the regulatory void involving *cy pres*.<sup>26</sup> Washington State, for instance, mandates that at least 25 percent of any residual funds be granted to the Legal Foundation of Washington to support programs for indigent clients. (After that 25 percent, remaining funds can be distributed at the discretion of the court.) In South Dakota, if a settlement is reached by both parties, all residual funds default to the Commission on Equal Access to Our Courts. Only if courts in South Dakota find “good cause” to distribute funds to charity can they do so. However, if the case goes to trial, courts in South Dakota still have discretion over residual funds from class action judgments. In North Carolina, residual funds must be split between the Indigent Person’s Attorney Fund and the North Carolina Bar to

**FIGURE 4. EXAMPLES OF STATE REGULATIONS ON CY PRES**

State	Percentage Restricted	Method for Grants to Nonprofits
Washington	25%	Portion restricted for indigent representation. Remaining may be granted at the discretion of the courts.
South Dakota	0-100%*	Funds default to Commission on Equal Access to Our Courts. Courts must establish “good cause” to grant to nonprofits.
Illinois	50-100%	At least 50% must go to organizations promoting access to the justice system. Only if “good cause” is established can remains go to nonprofits.
California	100%	25% must go to fund for improvement and modernization of trial courts. 25% must go to fund for equal access to justice. Additional funds restricted by the types of organizations they can benefit. Certain types of nonprofits are among them.
North Carolina	100%	Entirety of residual funds must go to support legal services for the state’s indigent clients. No provision for grants to nonprofits.

\* South Dakota’s *cy pres* restriction does not apply to class action cases where a judge has made a ruling; it only applies to class actions that have avoided judgment through settlements.

23 American Law Institute, *Principles of the Law of Aggregate Litigation*.

24 *Ibid.*, 217.

25 Rule 23 Subcommittee, “Rule 23 Subcommittee Report.”

26 Emily C. Baker and Lynsey M. Barron, “*Cy Pres*... Say What? State Laws Governing Disbursement of Residual Class-Action Funds,” Jones Day, Spring 2011

provide legal services to indigent clients. In California, half of residual funds must be split between grants for access to justice and a fund for improvement of trial courts. The other half must go to specific types of organizations, including charities that benefit class members or “similarly situated persons” such as organizations that promote the law that underlies the cause of the lawsuit, child advocacy programs, or legal services entities that serve indigent clients.<sup>27</sup> Illinois is similar to South Dakota in that half of funds must go to organizations promoting access to the legal system, and only with good cause can the other portion go to other organizations promoting the public good.<sup>28</sup>

Though all of these states have clear guidelines related to *cy pres*, the guidelines do not have uniform effects on the class. From the vantage point of the class, reverting funds to state associations for indigent clients have a similar effect as sending residual funds to state treasuries. While some class members may plausibly benefit from additional funds for indigent representation, the effect upon them is diluted by the benefit to other residents of the state. By making half of all residual funds open for granting to nonprofits, California’s statutes offer the best of the state-legislative solutions. That said, there is room for improvement. As noted, legal professionals are not experts in philanthropy. Thus, if courts can integrate principles of social justice philanthropy, there is greater chance for *cy pres* funds to effectively address the concerns of both identified and unidentified class members.

## Principles of Social Justice Philanthropy

In the United States, the field of philanthropy has evolved through several different traditions depending on the predominant social mores of the time.<sup>29</sup> Grantmaking as relief was the first philanthropic tradition to rise in the United States. Aligning with social programs that were meant help the worst-off people, this tradition sought to provide basic assistance to people suffering poverty. This met important needs, but this form of philanthropy did not to pave a path for people to build assets or enter the middle class. In the 1920s, the rise of wealthy capitalists such as Andrew Carnegie spurred the development of a new tradition of philanthropy as a method of overall life improvement. Moving beyond the provision of basic needs, proponents of this form of philanthropy viewed grantmaking as investment in what is now called human capital. This led to investments in training and development programs so that people would be able to “pull themselves up by their bootstraps and make a way for themselves without long-term aid.”<sup>30</sup> Both of these traditions, however, assumed that people, after receiving relief or development, would have access to a clear path to move forward in a capitalist economy. In the late 20th century, many foundations

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27 California Code of Civil Procedure § 384 (Cal. 2015).

28 Baker and Barron, “*Cy Pres... Say What?*”

29 Elizabeth Lynn and Susan Wisley, “Four Traditions of Philanthropy,” in *The Civically Engaged Reader: A Diverse Collection of Short Provocative Readings on Civic Activity*. (Chicago: Great Books Foundation, 2006).



came to understand that structural problems, including historical and contemporary racial discrimination, wage stagnation, market deregulation and so on, impeded people who were experiencing poverty. This inspired some grantmakers to see philanthropy as a mechanism for realizing social reform. These philanthropists looked at social problems and individual struggles within the context of a complex, highly imperfect society. Accordingly, they sought to identify and address the underlying causes of poverty, certainly, but also other related problems such as racial discrimination and policies and practices that create and sustain social inequality. Finally, in the early 2000s, a handful of foundations took a new approach at creating localized solutions. This tradition, often referred to as philanthropy of civic engagement, makes investments in organizations at the local level so communities can build the power and skills to address their own needs and realize self-determination.<sup>31</sup>

Aligned with this newer tradition of philanthropy is a particular subset of the philanthropic sector called “social justice philanthropy.” This is a broad term that encompasses many different approaches to making investments to solve the most pressing problems that face Americans. Albert Ruesga and Deborah Puntteney of the Philanthropy for Social Justice and Peace Working Group define social justice philanthropy as a family of practices with many different traditions underpinning its work. Social justice philanthropy seeks to address the most pressing needs of communities to create a more equitable world; however, the philosophy that underpins this work often differs as does the form of such work. Social justice philanthropic practice ranges from addressing structural injustice by funding intensive organizing and policy advocacy to more market-friendly “triple bottom line” efforts in which for-profit businesses seek to gain greater profits by promoting social good in the process.<sup>32</sup>

The Washington, DC-based think tank and watchdog group National Council for Responsive Philanthropy (NCRP) uses the term “responsive philanthropy” to refer to the practice of directing funds to organizations working to create an America that “embodies our core values of equity, democracy and justice for all.”<sup>33</sup> For all intents and purposes, “responsive philanthropy” as described here aligns with the vision and values driving social justice philanthropy, so much so that many practitioners use the terms interchangeably. Responsive philanthropy, NCRP stresses, promotes accountability through openness and transparency and supports philanthropic practice that is responsive to communities with the least wealth and access to opportunity. These two overlapping categories of progressive philanthropic

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30 Ibid.

31 Ibid.

32 Albert Ruesga and Deborah Puntteney, “Social Justice Philanthropy: An Initial Framework for Positioning This Work,” Ford Foundation Working Group on Philanthropy for Social Justice and Peace, 2010.

33 National Committee for Responsive Philanthropy, “Strategic Framework,” 2018. Retrieved from: <https://www.ncrp.org/about-us/strategic-framework>.

practice—responsive philanthropy and social justice philanthropy—also apply, at least in some grantmaking categories, to some of the nation’s most prominent and powerful foundations, including the Ford Foundation, the W.K. Kellogg Foundation, and the Open Society Foundations.<sup>34</sup>

The following five practices and priorities are common to social justice philanthropy (SJP) and responsive philanthropy though may not necessarily be a component of every grant or every grantmaker concerned with realizing social justice.

- 1) SJP involves the people affected by a social problem in decisions about how to spend money.
- 2) SJP attempts to attack the root causes of measurable inequalities and injustices.
- 3) SJP nurtures relationships with, funds, and publicly supports organizers and advocates trying to change unjust laws, policies and practices.
- 4) SJP aspires to invest its assets in socially responsible ways that do not contribute to the injustices that grantmaking is trying to remedy.
- 5) SJP attempts to make the philanthropic sector itself more racially and culturally diverse and more accessible to historically marginalized people and groups.

These underlying values and practices can offer much-needed guidance for distributing *cy pres* funds to assist class members in ways that are aligned with the intent of the original class action litigation. The contemporary example of a class action lawsuit that illuminates the harm of racial discrimination, explored in the next section, offers an instructive case study.

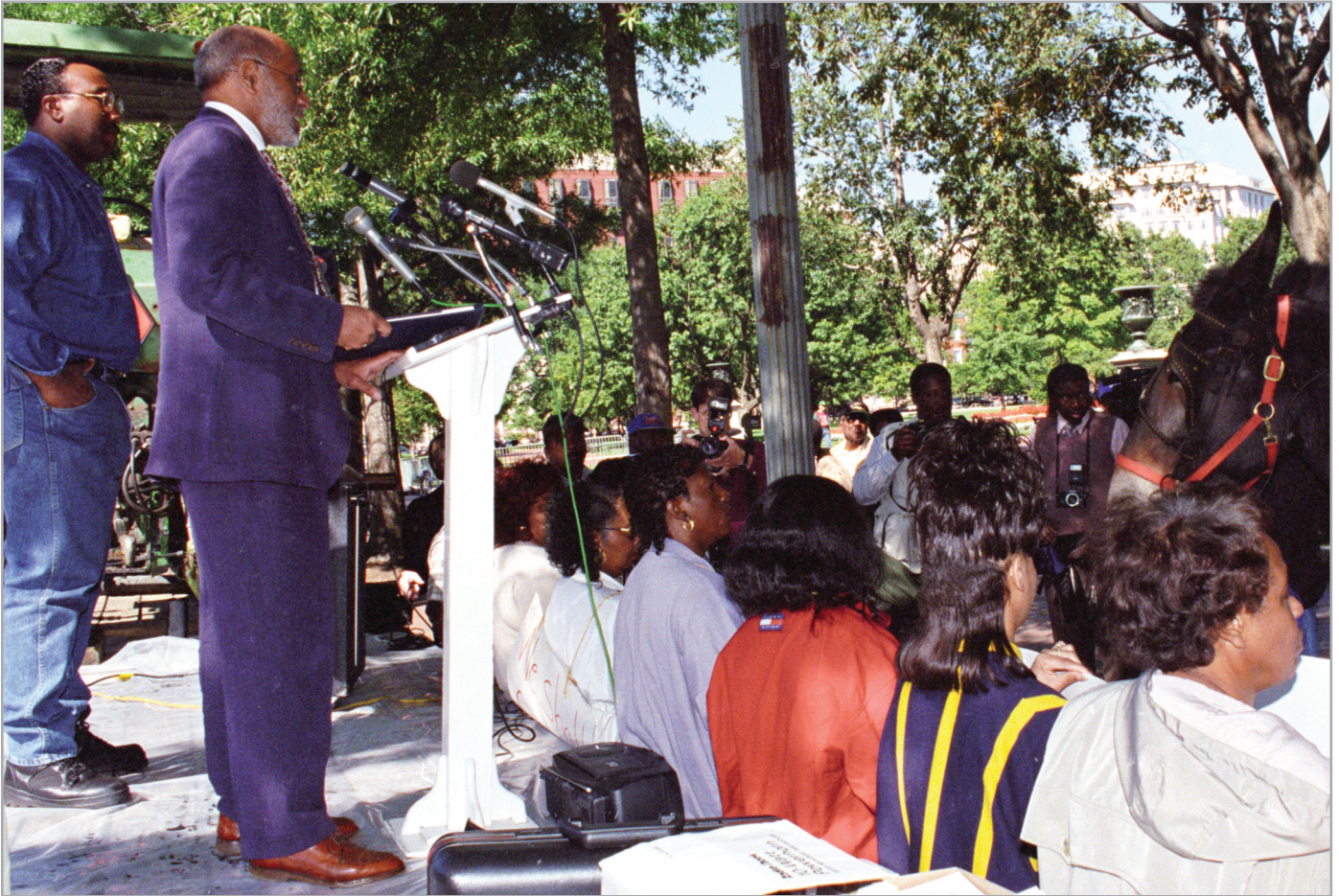
## **Black Farmers Discrimination Litigation: Practicing Social Justice Philanthropy in a *CyPres* Process**

Perhaps unwittingly, judges and lawyers in several class action settlements and judgments have indeed been practitioners of social justice grantmaking. A particularly helpful example is the implementation of the *In re Black Farmers Discrimination Litigation* (BFDL) *cy pres* provision.<sup>35</sup> This case is an extension of the well-known *Pigford v. Glickman* case, in which African American farmers and ranchers sued the USDA for discrimination in its farm credit programs. In BFDL, the parties reached a settlement worth approximately \$1.25 billion. In the original *Pigford* decision, *cy pres* was not necessary, since the court simply laid out a claims process by which African American farmers and ranchers who had experienced discrimination between 1981 and 1996 could seek remedy.<sup>36</sup> The U.S. District Court for the District of Columbia distributed more than \$1 billion to 16,000 successful claimants in *Pigford*. However, more than 61,000 people filed late claims and thus

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34 Ibid.

35 The author was involved in this process as a project coordinator for the nonprofit organization Farm Aid, which was engaged to aid Lead Class Counsel with the administration of Phase I of the *cy pres* fund.



Black farmers protest at Lafayette Park across from the White House in Washington, D.C. on September 22, 1997. Protesters alleged the U.S. Department of Agriculture (USDA) denied black farmers equal access to farm loans and assistance based on their race. North Carolina farmer Timothy Pigford and 400 other black farmers filed the *Pigford v. Glickman* (Pigford I) class-action lawsuit against USDA in 1997. The USDA settled *Pigford I* in 1999. USDA photo by Anson Eaglin.

were unable to collect any money.<sup>37</sup> After a decade of advocacy by farmers and nonprofits, Congress waived the statute of limitations on discrimination claims to permit late-filers to bring another case against the USDA. This appropriated up to \$100 million for the settlement of such claims.<sup>38</sup> The Claims Resolution Act of 2010 set aside an additional \$1.15 billion for the settlement of late *Pigford* claims.<sup>39</sup>

This high level of funding made it likely that there would be residual funds. Foreseeing this, the U.S. District Court for the District of Columbia wrote a *cy pres* provision into the settlement agreement that allowed for attorneys representing the class to designate “*Cy Pres Beneficiaries*” to receive any remaining funds after the claims had been settled.<sup>40</sup> Recognizing the debate around *cy pres*, the court ordered that both lead class counsel and attorneys representing the USDA each file briefs addressing the following: (1) whether class members should receive additional funds

36 *Pigford v. Glickman*. 97-1978, (D.D.C., 1999).

37 In re Black Farmers Discrimination Litigation, 08-0511, (D.D.C., 2011).

38 Food, Conservation, and Energy Act of 2008. H.R.2419, 110th Congress (2008).

39 Claims Resolution Act of 2010. H.R.4783. 111th Congress (2010).

instead of implementing a *cy pres* process; (2) if *cy pres* were permissible under both acts of Congress that allowed for the second litigation; and (3) whether class members should be invited to share their views on a *cy pres* process.<sup>41</sup> Relevantly, in its order for parties to file briefs on the *cy pres* provision, the court cited the American Law Institute’s Principles of Aggregate Litigation and the proposed amendment to Rule 23. The court ultimately ruled that the *cy pres* provision should go forward.<sup>42</sup>

It would be Lead Class Counsel’s responsibility to provide funding recommendations to the court for some \$12 million in residual funds. Counsel proposed disbursement in two phases. The first, consisting of approximately \$4 million, would be granted by the end of 2017 to assist relevant organizations that had immediate financial needs. Counsel proposed granting the remaining \$8 million two years later. This two-pronged process allowed for organizations with the most urgent needs to be stabilized and sustained while a longer-term strategy would allow organizations to develop “innovative, impactful and collaborative programs”<sup>43</sup> that might take longer to develop than the short period allowed by the first phase. It would also allow for Lead Class Counsel to engage farmers and their advocates and allies to inform strategic funding priorities to advance and support African American farmers and ranchers. Finally, it would enable Lead Class Counsel and its partners to review the results for the first phase of grantees.<sup>44</sup>

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Conference participants did not make decisions about what to fund. However, people with the direct experience of racial discrimination in agriculture were provided power and voice, and a process was established for continued engagement in decisions about how to spend *cy pres* funds.

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This two-phase process, and the methods by which Lead Class Counsel would arrive at the second phase, is perhaps the most relevant implementation of a *cy pres* process aligned with, if not grounded in, principles of social justice philanthropy. Lead Class Counsel proposed that, directly after disbursement of the first phase of grants, a conference be held for up to 100 African American farmers and other stakeholders so that a shared vision could be established, and priorities could be developed for a prosperous African American farming community. In its motion to designate *cy pres* beneficiaries, Class Counsel identified three desired outcomes for the conference: (1) African American farmers and ranchers and their affiliated nonprofit service organizations would build stronger bonds; (2) barriers to success would be identified and strategies would be developed to eliminate them and expand communal support and resources; and (3) a shared vision could be developed on how existing capital, both financial and otherwise, could be used to sustain a successful African American agricultural community.<sup>45</sup> The court approved Lead Class Counsel’s motion and the conference was held on

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40 In re Black Farmers Discrimination Litigation, 08-0511.

41 In re Black Farmers Discrimination Litigation, 08-0511 Dkt 438 (D.D.C., 2015).

42 In re Black Farmers Discrimination Litigation, 08-0511 Dkt 458 (D.D.C., 2016).

43 In re Black Farmers Discrimination Litigation, 08-0511 Dkt 500 (D.D.C., 2018).

44 Ibid.

45 Ibid.

March 16-17, 2018. Approximately 75 African American farmers and representatives from organizations that serve them attended the conference, representing multiple geographies and practices.<sup>46</sup> At this conference, participants nominated members to a Black Farmer Council. This was made up of farmers and representatives of the organizations that serve them, that will provide guidance to Lead Class Counsel during second phase of grantmaking. Additionally, participants drafted a vision statement to help guide Lead Class Counsel in strategic decision-making in the future. Specific details or a timeline regarding Phase II have yet to be announced.



Ben Burkett, photo: © New York Times

This conference allowed for class members and nonprofits to unite outside of the litigative process and upend the power imbalance that occurs when individuals interact with nonprofits. Both groups came together to discuss their history related to the class action lawsuits that brought the funds, to identify the problems that hinder success for African American farmers, and to explore how funds might improve how both groups operate. Conference participants did not make decisions about what to fund. However, people with the direct experience of racial discrimination in agriculture were provided power and voice, and a process was established for continued engagement in decisions about how to spend *cy pres* funds.

## Building a Social Justice-Informed Framework for *Cy Pres* Provision

The previous discussions of the legal foundation of the *cy pres* provision, philanthropy, and the example of *In re Black Farmers Discrimination Litigation* provide a starting point from which the formulation of an overarching framework for evaluation of *cy pres*-related practice and policy can be developed. First and foremost, any policy should be evaluated by whether or not it fits the definition of *cy pres*. That is, does the proposed policy allow for funds to be disbursed “as near as” the intent of the class action suit as possible? Second, any policy that sets boundaries on the use of *cy pres* must be weighed against its ability to preserve judicial decision-making. Judges not only have intimate knowledge of a case or settlement, but also have the power to ensure that its provisions, including any *cy pres*, are enacted fairly and with due consideration to the class and context of the case. Third, the potential impact of the funds on class members, both identified and invisible, should also be considered in

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46 Federation of Southern Cooperatives, “2018 Black Farmers Conference Report,” April 2018.

any proposed policy. Finally, monetary cost is an important consideration in the implementation of any policy.

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The *cy pres* doctrine, vetted by legal scholars, still stands as the best option for the expenditure of residual funds in class action litigation.

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The *cy pres* doctrine, vetted by legal scholars, still stands as the best option for the expenditure of residual funds in class action litigation. An alternative—redirecting unclaimed funds to the defendant who is either shown to be guilty of, or has been alleged to have carried out, illegal practices—undermines one effect of class action litigations, namely the prevention of harmful behavior by organizations. As other critics have noted, it also encourages a defendant to fight to make the number of claimants as small as possible, thereby minimizing losses.<sup>47</sup> A second alternative—distributing remaining funds to successful claimants—ignores unnamed class members and creates a perverse incentive for plaintiffs to keep the pool of claimants small. A third alternative to *cy pres*—directing remaining funds to the state—dilutes the benefits to class members since people not affected by illegal practices would also benefit from the funds.<sup>48</sup> A final alternative is to implement a remedy through the private market. In such a case, a corporation might agree to take damages by reducing the price of its goods until a certain benchmark is met. This, however, distorts the market, hurts innocent competitors, and, as Stewart Shepherd points out, assumes that class members are still purchasing or participating in whatever economic practice caused them harm in the first place.<sup>49</sup> Thus, as it currently stands, *cy pres* enables funds to be used as near as the intent of the lawsuit without causing undesirable secondary effects.

It's important to judge a policy against its ability to preserve judicial discretion. This is because judges have intimate knowledge of the facts of these cases, and have final say on which organizations receive *cy pres* funds and the process by which beneficiaries are determined. Additionally, the role of judges in acting as a check on the interests of class counsel and defendants is crucial to ensuring the best outcome for residual funds. Finally, providing for judges to have a say in the disbursement of residual funds may make adoption and acceptance of a policy governing *cy pres* more palatable within the legal community.

As class action cases are designed to redress an injustice, consideration of the potential impact a policy would have for enriching the lives of class members must be considered. This metric for evaluation is close to but differs from the *cy pres* metric. While the *cy pres* metric measures the ability of the policy to direct residual funds “as near as” the intent of the litigation as possible, the impact metric considers the policy’s ability to effectively empower affected individuals and communities to address problems and advocate for themselves in the future, thereby preventing similar injustices from being repeated. This evaluation measure aligns with the

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47 Boies and Keith, “Class Action Settlement Residue and *Cy Pres* Awards.”

48 Ibid.

49 Shepherd, “Damage Distribution in Class Actions.”

principles of social justice philanthropy by not only meeting basic needs or acting as a remedy, but by allowing groups to coalesce around a wrong and correct it over the long term by building and sustaining power.

Finally, as with any policy, its monetary cost is an important evaluation metric. In today's political environment where budgets are at the center of political debate, the cost of a policy can be the make-or-break factor for effective implementation.

## Policy & Practice Options

This discussion focuses on three options grounded in existing frameworks. These are: (1) *cy pres* reserve funds; (2) California's model for restricting *cy pres* disbursements; and (3) amendment of Rule 23 of the Federal Rules of Civil Procedure to formally integrate principles of social justice philanthropy with strategies for *cy pres* disbursement.

### Cy Pres Reserve Funds

The first policy option is for state and federal treasuries to create a dedicated *cy pres* reserve. After class actions or judgments are approved and claims processes end, residual funds could be directed to that reserve, which would then have the responsibility for effective administration of that fund. While such a model has never been enacted by a state treasury, there is an example in the grantmaking world that could be adopted on the state or federal level. Ohio Lawyers Give Back, a dedicated *cy pres* grantmaker sponsored by a law firm, pools residual funds from class action cases its sponsor has won or settled and makes grants to nonprofits across the nation. Thus far, this single organization has been able to distribute over \$32 million to nonprofits in several interest areas.<sup>50</sup>

Such a system could be enacted on a broader scale by state governments or the federal government. Under such a practice, all residual funds would go to *cy pres* reserves managed, at the state level, by the department responsible for the administration of the state treasury for class actions in state jurisdictions. In federal cases, reserves would go to the U.S. Department of the Treasury for class actions. At their most basic, these reserves could operate like other governmental grantmaking agencies by holding regular requests for proposals from nonprofits or community-based organizations in common class action interest areas, such as consumer protection, discrimination, antitrust, or access to justice, so that funds go to nonprofits supporting the interests of potential class members.

To ensure that residual funds are used as near as the intent of the litigations, however, would require close cooperation between administrators of the fund, lead class counsel, the defendants, and the judge in a way that might be too burdensome to implement. Thus, the ability for a *cy pres* reserve to meaningfully meet the criteria of

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50 "About Ohio Lawyers Give Back," Ohio Lawyers Give Back, 2018, <https://ohiolawyersgiveback.org/about-olgb/>.

*cy pres* doctrine would be limited by the amount of funds appropriated for administration. If the administration of the reserve were highly funded, employees of the reserve could enact a double-sided strategy, working with attorneys and judges to understand the extent of the case and set boundaries around grant eligibility. The grantmakers would also have the resources to identify and reach out to potentially eligible organizations so that the full field of effective nonprofits that serve class members could be considered. Thus, a highly-funded reserve would have the potential to receive a high score on the *cy pres* metric. On the other hand, a reserve with a low level of funding directed toward administration would likely be unable to meet the *cy pres* provision. It would have to do more generally focused, less carefully considered, and potentially far less inclusive grantmaking that would risk being unconnected to the facts and details of the class.

A major drawback to such a policy is that judges would not have final discretion over disbursement of residual funds in either situation. In the high-resource situation, judges would be able to give some level of input, working with fund administrators to make disbursement decisions. However, in a low-resource environment, residual funds would likely go directly to the reserve. At best, they could be sorted and earmarked by litigation topic areas. Thus, if bad actors seem to manifest in one particular sector, such as, say, finance or housing, non profit organizations could be funded to advocate for and protect potential victims and act as watchdogs so as to prevent wrongdoing that gives rise to class action in the first place. At worst, they might be treated like funds collected by Ohio Lawyers Give Back, granted to organizations regardless of the type of class action from which they derived. In the high-resource option, judges have at best a minor level of discretion. Once funds are disbursed by the court in accordance with the settlement agreement, they are out of the judge's hands. Unless the funds are misappropriated, and another case is brought up against the grantee, the best case is that additional staff could be hired to liaise with the court and take the judge's input. However, this would require funds to pay for highly knowledgeable staff, likely with legal backgrounds. If enough funds are not disbursed, such as in the low-resource environment, there would simply not be enough funding to facilitate this type of advising situation. Thus, either way, the reserve option does not adequately meet the need for judicial discretion.

The impact on class members is also questionable under this model. Even for a reserve with adequate administrative costs covered, impact would be limited to meeting the financial needs of organizations in the way that government grantmakers have done traditionally. At best, it could identify appropriate organizations and assist them in applying in a potentially burdensome federal or state grant process. It would be nearly impossible for a state or federal agency to take the extra step to unify and organize class members to collaboratively build a better environment for themselves or to meaningfully contribute to a long-term strategy for sustainable funding and support. In the low-funding scenario, the impact on the class itself would go no farther than the organizations that have the knowledge and skills to apply for such a grant.



Finally, in either case, the cost of creating and staffing a reserve fund would be high. The average salary for a grants manager working within the federal government is about 102,000.<sup>51</sup> A good model for staffing requirements of such a fund is the Office of Justice Programs (OJP), which makes grants to local and state governments and to community-based and national nonprofits for the implementation of crime reduction programs. In 2017, the OJP disbursed approximately \$3 billion in grants with staffing costs of \$80.91 million.<sup>52</sup> Staffing is only part of the cost equation, as overall management and administration at OJP was budgeted for \$224 million in 2017.<sup>53</sup>

**FIGURE 5: EVALUATION OF CY PRES RESERVE FUNDS**

Type	Cy Pres	Discretion	Impact	Cost
High Administrative Funding Reserve	Moderate	Mild	Moderate	Very High
Low Administrative Funding Reserve	Low	None	Low	High

There would still be significant startup costs, as systems would have to be identified and staff hired before establishing the reserve fund. Furthermore, to maximize the benefit to the class, funds should not be pulled from the reserve for administrative purposes. This would require that state and federal governments appropriate money annually for this purpose. Thus, both scenarios seem unfeasible.

### Amended California Model

Of course, the existing problems with *cy pres* could plausibly be remedied by state and federal legislatures. California offers a compelling model. Prior to 2017, California simply restricted residual funds to certain kinds of nonprofits that serve residents of the state.<sup>54</sup> However, in late 2017, the California State Assembly added requirements for class action residuals, such that 25 percent of residual funds must be diverted to the Trial Court Improvement and Modernization Fund, and 25 percent must go to the Equal Access Fund, a fund administered by the State Bar of California, which makes grants to legal aid societies that assist indigent clients. The final half can go to nonprofits or foundations that benefit class members or similarly situated people, to causes that benefit the underlying problem at the center of the litigation, to child advocacy groups, or to groups providing indigent civil legal services.<sup>55</sup>

However, not every state has a foundation for indigent civil representation or civil legal assistance. Thus, the policy would require modification from state to state. In

51 "Grants Manager - Federal Salaries of 2017," FederalPay.org, 2018, <https://www.federalpay.org/employees/occupations/grants-management>.

52 Office of Justice Programs, "OJP Award Data," 2017. Retrieved from: <https://ojp.gov/funding/Explore/OJPAwardData.htm>.

53 Department of Justice, "Office of Justice Programs FY 2017 Budget Request at a Glance," 2017.

54 Baker and Barron, "Cy Pres... Say What?"

55 California Code of Civil Procedure § 384 (Cal. 2015).

states where civil legal defense groups do exist, 25-50 percent could be required to go to nonprofits, legal advocacy groups, or state commissions that promote access to justice or reform. If such groups do not exist, residual funds could be directed to a state's Legal Services Corporation (LSC). Once a department nested under the Office of Economic Opportunity, the LSC is now an independent, partially public, partially nonprofit organization in each state that supports access to justice for indigent clients, primarily through grantmaking to nonprofits.<sup>56</sup> Nationally, options are clearer. The Criminal Justice Reform Incentive Initiative, within the Office of Justice Programs, could be a proxy for California's Trial Court Improvement and Modernization Fund. The Legal Services Corporation, a federally funded nonprofit, could act as a substitute for California's Equal Access Fund. The rule restricting the additional 50 percent would need no modification, as its broad guidelines would likely be acceptable to the federal government and most states.

This distribution policy, by its very nature, restricts the ability to distribute funds in line with the facts of the case to only 50 percent of the residual funds. Thus, a modified California policy could at most receive a moderate rating on the *cy pres* measure. For the remaining 50 percent, the decision would be left to the court to fall within the statute. However, the statute gives leeway. The courts can choose between nonprofits that serve the class or similar people and several other groups that may have nothing to do with the social problem that is being litigated. So, the ability to indirectly benefit unidentified class members could be hindered by where the courts direct residual funds.

On the other hand, compared to a reserve fund, an amended California model does offer the court more discretion. Under it, judges and other agents of the court could strategically disburse 50 percent of funds in ways that assist all members of the class. This is also better than the current system because there are generalized guidelines the court must meet to help certain parties, whether that be the class, children, or indigent clients. Because this is restricted to only half of the fund, however, this policy receives only a moderate rating on this measure.

This model has limited ability to benefit class members. There are complications with directing 50 percent of funds to existing agencies for access to justice, representation, or justice reform. Legal scholars debate whether directing funds to state and national agencies is an effective solution for class members. Early in post-1966 legal debates of how to treat residual funds from fluid recovery, legal scholar Anna Durand pointed out that since money is fungible, funds given to existing state agencies can simply be absorbed into budgets and the positive effects nullified.<sup>57</sup> For instance, if a federal agency receives \$2 billion from class action residuals, Congress may simply reduce the agency's funding by that same amount, as the agency would be viewed as having

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56 Legal Services Corporation, "About LSC," 2018. Retrieved from: <https://www.lsc.gov/about-lsc>.<sup>57</sup> Durand, "An Economic Analysis of Fluid Class Recovery Mechanisms."

57 Durand, "An Economic Analysis of Fluid Class Recovery Mechanisms."

less need. Also, granting funds to improve the justice system or help indigent clients has no discernable effect on unidentified class members or those unable to meet the burden of proof in the claims process.

For the 50 percent of funds that can be directed to nonprofits, there is opportunity for funds to be distributed in ways that meet the standards of social justice grantmaking. If the judge and lead class counsel work to deliberately build power among the class, this can have a positive effect for the class in that it increases the changes that similar injustices are prevented. However, under this law, there is no mandate for this to happen. Neither is it stipulated that money go to organizations addressing the problems the class faced. Thus, this policy receives a low score for impact.

Such a policy would incur little to no cost to the public. Though additional staff may need to be hired to administer 50 percent of funds going to existing agencies, there would be no need to create and staff an entire office. Courts may need to direct more money to the common fund to adequately compensate Class Counsel for continued involvement in the *cy pres* process. But such money would come from the defendant, not from federal or state treasuries. In cases where the defendant is found guilty or is willing to settle a case, this may be acceptable to all parties involved. Thus, this policy receives a low (favorable) score for cost.

**FIGURE 6: EVALUATION OF REVISED CALIFORNIA MODEL**

Type	Cy Pres	Discretion	Impact	Cost
Amended California Model	Moderate	Moderate	Low	Low

### Expanded Rule 23 Amendment

Finally, the court could revise and implement the Rule 23 amendment already put before the Judicial Conference. During the period for input for an amendment to Rule 23, the American Antitrust Institute (AAI) in 2015 recommended further promising amendments to the *cy pres* clause of Rule 23 (see Appendix B). The proposed language allowed for *cy pres* to be used in a situation where administrative challenges might limit the possibility for individual distribution to claimants. It also would have allowed courts to consider whether mitigating circumstances might “outweigh” the possibility for individual distribution.

This is an important deviation from the American Law Institute’s language in the Principles of Aggregate Litigation. Instead of *cy pres* being an *only if* possibility, wherein *cy pres* can be used only under certain conditions, the AAI’s proposal allows for courts to use *cy pres* if they find it appropriate. The Institute offers examples for when this might be the case. In this change, AAI’s language recognizes the possibility that circumstances might *necessitate* distribution to *cy pres* beneficiaries. Additionally, the AAI proposal would further limit the definition of beneficiaries to

ensure that funds go to the *next best class* of beneficiaries. Instead of beneficiaries simply *reasonably approximating* the interest of the class, as the ALI language prescribes, the court, under AAI's proposal, must consider whether the mission of the recipients is consistent with the litigation, so that the defined class as a whole, including unidentified members, is likely to benefit from the distribution. Also, the proposed change would require a beneficiary's service area to be consistent with the location of class members identified and those that might not have been identified. The court also must determine that the funds, once distributed, are free from control of the parties in the case and subject to accounting.<sup>58</sup>

This proposed amendment is valuable because it recognizes the important role of *cy pres* distributions and creates an implementation system by which funds can be distributed, free of control, to those organizations that serve class members in ways that are aligned with the facts of the case. One point that could be better addressed in this proposed amendment is the fact that there is no mechanism for encouraging courts to seek and act upon input from class members. If the language stating that courts may consider any other pertinent matter were revised to read "may consider any other matter pertinent to ensuring that the *cy pres* distribution is appropriate, including direct input from members of the class," the benefit to class members might be even larger. If such a policy were implemented by the Judicial Council on the federal level and state legislatures on the state level, this would provide a viable option for correcting the problems with the current *cy pres* process. We will now turn to an evaluation of this refined proposed amendment to Rule 23.

This policy states that courts must consider whether proposed recipients of funds have a mission consistent with the litigation and underlying claims, "such that the indirect interests of the class, taken as a whole, are likely to be benefitted."<sup>59</sup> It also ensures that the people served by the funded organizations are actually class members. It does this by making courts consider whether the organizations receiving funds operate in areas where class members are located. By making courts consider these factors, this revised code comes closer to the intent of *cy pres* than the current unrestricted practices. Thus, this policy scores high on the *cy pres* metric.

Further, this policy allows courts to retain control over final decisions about class action residuals. It also allows the court to consider any other matter that might be important to an appropriate *cy pres* distribution. For instance, if class members who were not able to be identified were more likely to fall in the lower end of the socioeconomic spectrum, the court would be permitted to consider whether grantees actually serve people in that category. Additionally, by requiring the court to consider whether funds are free of control of the parties of the case, it becomes the court's responsibility to ensure that funds will not be controlled by a group responsible for

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58 American Antitrust Institute, "Re: Potential Amendments to Federal Rule of Civil Procedure 23," March 16, 2015.

59 Ibid, 4.

the unfair or illegal action, as happened in the privacy case against Facebook, *Marek v. Lane*. This policy receives a high score on the discretion metric.

The impact on the class under this proposal would depend in large part upon how the court wishes to administer the *cy pres* fund, per the discretion outlined above. However, the details of the proposed policy suggest that it would more substantially empower the class than the current policy. First, the proposed policy allows that invisible class members be considered in both the decision to implement a *cy pres* and in the consideration of the geographical location(s) of the class. This reduces the likelihood that class members would be left out of the consideration of where *cy pres* funds should go. Second, the language requires the court to consider how the *cy pres* distribution aligns with the facts of the case, making it impossible to sidestep this central question. It is still ultimately up to judges to determine what input class members or relevant community members have and whether or not funds will be distributed in a way that empowers the class. By including language encouraging courts to take input from class members, this possibility for input is increased, but courts don't have to follow this recommendation. Thus, this policy proposal receives a score of "moderate" for impact.

**FIGURE 7: EVALUATION OF RULE 23 AMENDMENT**

Type	Cy Pres	Discretion	Impact	Cost
Rule 23 Amendment	High	High	Moderate	Low

Finally, there is no direct monetary cost to implementing this policy. Any costs associated with the attorney's provision of additional information to the court to make an appropriate *cy pres* distribution would come from the funds already set aside for the administration of the class action fund and any additional administrative costs can be further levied against the defendant. Thus, the cost of this policy is low.

## Recommendation

From the evaluation of policy options, it is clear that an amendment to Rule 23 per AAI's recommendations and the inclusion of class member input is the clear frontrunner (see Figure 8). It mandates that funds be used for the benefit of both identified and unidentified class members. It retains judicial discretion over the use of funds. It takes steps to ensure that funds go to organizations serving class members. It costs the federal government nothing. Once Rule 23 is amended, state governments will likely follow suit, as federal judicial rules of procedure tend to be quickly adopted by lower courts.

If the goal of the courts is to have the maximum level of benefits to class members, they should model the distribution of class action residuals after the *In re Black Farmers* class action, making distributions in a way that meets needs on the ground,

**FIGURE 8: FINAL EVALUATION OF PROPOSED POLICIES**

Type	Cy Pres	Discretion	Impact	Cost
High Administrative Funding Reserve	Moderate	Mild	Moderate	Very High
Low Administrative Funding Reserve	Low	None	Low	High
Amended California Model	Moderate	Moderate	Low	Low
Rule 23 Amendment	High	High	Moderate	Low

while allowing for the class to be involved in the overall strategic process. While this can engender a longer and often complex process, it would ensure the greatest and most sustainable benefits to the class through *cy pres*.

### Conclusion - Why We Should Address *Cy Pres* Now

There is a clear need for a revision of the rules surrounding *cy pres* distribution. Unfettered discretion and unclear guidelines have pressured legislatures to enact rules that don't benefit the class and have caused unnecessary conflict and controversy. None of this benefits class members. While the Judicial Conference took

There is a clear need for a revision of the rules surrounding *cy pres* distribution. Unfettered discretion and unclear guidelines have pressured legislatures to enact rules that don't benefit the class and have caused unnecessary conflict and controversy.

steps to amend Rule 23 in 2015, going so far as to hold public hearings and accept testimony, it decided to table the proposal. On June 5, 2017, U.S. Attorney General Jeff Sessions released a memo prohibiting the Department of Justice from agreeing to any settlement that provides for *cy pres* payments to be made.<sup>60</sup> While this may make the possibility for implementation of such a *cy pres*-related policy seem bleak, it should increase the pressure to implement this new policy. Sessions' memo is a policy that is internal to the Department of Justice. It is not an actual amendment to the Rules of Civil Procedure. When the next presidential administration is in power, Sessions' guideline could simply be reversed and the problems that vex the *cy pres* process will remain. Sessions' internal policy-setting memo is relevant only to situations in which citizens enter a class action against the federal government and refers only to settlement agreements, not to judgments and awards made through a trial process. If no action is taken, advocates could certainly push for this internal Department of Justice policy to become federal procedure through amendment to Rule 23. At that point the policy would apply to class action lawsuits between private parties as well. If the Judicial Conference wishes to retain the ability to ensure that anyone harmed as a result of illegal actions would receive benefit from civil litigation—including unidentified class members—it must act soon to implement a reparative

<sup>60</sup> Office of the Attorney General, "Prohibition on Settlement Payments to Third Parties," 2017. Retrieved from: <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-third-party-settlement-practice>.

policy. Otherwise judges have few tools for remedying ills in cases where there are residual funds. Further, it is vital that U.S. citizens concern themselves more with the legal sphere, not only educating themselves about civil litigation, but advocating to ensure that this pathway to justice is kept clear.

As of this writing, in September 2018, the U.S. Supreme Court has agreed to hear the case *Frank v. Gaos*. This case challenges the propriety of the \$8.5 million *cy pres*-only settlement in *Gaos v. Google*. As noted, none of the funds in this settlement went to class members. Rather, attorneys were compensated for their time, and the remainder of funds were disbursed to nonprofit organizations. The petitioner in this case, Ted Frank of the Center for Class Action Fairness, argues that this settlement did not meet the criteria of “fair, reasonable, or adequate” under the current formulation of Rule 23.<sup>61</sup> The propriety of this settlement is indeed questionable, given the fact that class members received nothing. But there is a risk that the Supreme Court may go too far in its decision, deterring the use of *cy pres* in class actions altogether. This would be unfortunate since *cy pres* is a tested method for resolving the question of how residual funds should be put to use. It would be better for the Supreme Court to decide *cy pres*-only settlements do not meet the requirements of Rule 23 and then for the Judicial Conference to codify better practices in class action *cy pres* funds.

Legal groups, including the American Law Institute and the American Antitrust Institute, have long advocated for amendments to Rule 23 in a way that benefits the class. In his opinion denying *certiorari* in *Marek v. Lane*, Chief Justice Roberts, who heads the Judicial Conference, suggested his desire for reform as well. As would be expected, DRI, a Chicago-based membership and advocacy group for defense attorneys, has opposed the changes. In a 2015 testimony to the Judicial Conference, DRI said no rule should be made codifying *cy pres* as an appropriate measure for addressing the issue of residual funds, as courts already consider the constraints proposed by the American Law Institute and because the group believes that residual funds should go back to the defendant.<sup>62</sup>

But explicit *cy pres* regulations are still necessary so as to provide maximum benefits to the class. Given that the policy-making body on the federal level is apolitical and

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Courts are now de facto philanthropists, making grants to nonprofit organizations that serve groups of people who have experienced harm from an organization, corporation, or the government. Thus, any amendment to Rule 23 should integrate the best practices of social justice philanthropy into *cy pres* disbursements.

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61 *Frank v. Gaos*, 2018.

62 DRI, “Comment to the Rule 23 Subcommittee, Advisory Committee on Civil Rules,” 15-CV-DD, 2015.

lower courts and their policy-making bodies tend to follow the lead of federal courts, the feasibility of implementing an amendment to Rule 23 is quite high. To ensure that both identified and unidentified class members receive the maximum benefit, the Judicial Conference should immediately restart the process of amending Rule 23 using a slightly modified version of the American Antitrust Institute’s language. Such a policy will allow for tailoring to the specifics of a case, preserve judicial authority, positively impact the class over the long term, and incur low or no monetary cost. Until then, courts will continue to act inefficiently, state and federal agencies will unnecessarily restrict the use of *cy pres*, and the relatively small number of identified class members will be the only ones to benefit from class action lawsuits.

Courts are now de facto philanthropists, making grants to nonprofit organizations that serve groups of people who have experienced harm from an organization, corporation, or the government. Thus, any amendment to Rule 23 should integrate the best practices of social justice philanthropy into *cy pres* disbursements. This will further engage the class, keeping them from feeling alienated by class action procedures. Perhaps more importantly, it can build a pathway whereby the organizations that serve class members are empowered to provide better programs and have more effective advocacy on behalf of those they serve. Through this, class members can have lasting benefits from *cy pres*.

## Appendix A – Relevant Class Action *CyPres* Cases

**State of California v. Levi Strauss & Co.** (1986) – An antitrust class action case in which the State of California sued the clothing company Levi Strauss for pressuring retailers to charge higher-than-market prices in violation of state and federal antitrust laws. Given a number of difficult events, this case took a significant time to conclude, and consumers were eligible for only \$2.00 per pair of jeans purchased. The court, thus, affirmed a plan to establish a consumer trust fund with remaining funds, and in a historic move, established precedence for the use of *cy pres* in class action cases.

**Mirfahisi v. Fleet Mortgage Corporation** (2004) – A class action case in which people with home mortgages from Fleet Mortgage alleged that personal information was sent to telemarketing companies without their consent in violation of consumer protection statutes. Circuit Court Judge Richard Posner ruled that residual funds should go back to the defendant, as *cy pres* provisions were, by their nature, punitive, and class members could not benefit indirectly from a payment to a third party.

**Fears v. Wilhelmina Model Agency** (2007) – A class action case in which models sued the top New York modeling agencies for conspiracy to fix their commission rates. The identified class was only 5 models, while every model who had worked for the agencies were class members. The judge decided to distribute remaining funds to organizations for women’s health. This decision has been used as ammunition against *cy pres* due to its distribution that was poorly aligned with the facts of the case.



**Pigford v. Glickman** (1999) and *In re Black Farmers Discrimination Litigation* (2011) – A historic case in which African American farmers sued the USDA for discrimination in its farm loan programs. At the time, it was the largest civil rights class action settlement in the history of the United States. Originally simply a claims process with no defined maximum, low response and poor outreach prompted a second case, *In re Black Farmers Discrimination Litigation*. This re-opened the claims process with defined allocated funds from Congress.

**Marek v. Lane** (2013) – A case against Facebook for its controversial Beacon program, which revealed personal purchasing information of Facebook users. In this case, all settlement funds went to a nonprofit to be founded and controlled by Facebook.



## Appendix B – Proposed Amendments to Rule 23

### American Antitrust Institute’s Proposed Amendment to Rule 23 (2015)

(3) A class action settlement may provide for a *cy pres* distribution for all or part of the class fund in appropriate circumstances, including: (a) where direct payments to members of the class are not economically or administratively feasible or (b) where funds remain after an initial distribution has been made to qualified claimants and a further distribution may be economically and administratively feasible, but the benefits and fairness of a further distribution to the same claimants are outweighed by the benefits and fairness to the entire class or a portion thereof of a proposed *cy pres* distribution. In determining the propriety of a *cy pres* distribution, the court:

- (a) must consider:
  - 1. whether the mission of the proposed *cy pres* recipient(s) is consistent with the purpose of the litigation and the underlying legal claims, such that the indirect interests of the class, taken as a whole, are likely to be benefitted;
  - 2. whether the location or geographic service area of the proposed *cy pres* recipient(s) is consistent with that of the class, or the portion of the class that cannot be located;
  - 3. whether the funds, once distributed to the *cy pres* recipient(s), will be free of any control by the parties and subject to a reasonable process for accounting; and
- (b) may consider any other matter pertinent to ensuring that the *cy pres* distribution is appropriate.

## The American Law Institute's Proposed Amendment to Rule 23 (2010)

A court may approve a settlement that proposes a *cy pres* remedy even if such a remedy could not be ordered in a contested case.

The court must apply the following criteria in determining whether a *cy pres* award is appropriate:

- (a) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members.
- (b) If the settlement involves individual distributions to class members and funds remain after distributions (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.
- (c) If the court finds that individual distributions are not viable based upon the criteria set forth in subsections (a) and (b), the settlement may utilize a *cy pres* approach. The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class. If, and only if, no recipient whose interests reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class.

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