CONFOUNDING INTERESTS: NEXT-BEST ALTERNATIVES TO THE UNATTAINABLE NOTION OF COMPLETE FAIRNESS IN *CY-PRES*-ONLY CLASS ACTION SETTLEMENTS

INTRODUCTION

Taken to its idealistic extent, the American legal system is designed to provide relief from harms through an efficient, effective, and fair process.[1] It is designed to weigh the interests of the parties against statutory and common law, purporting to resolve disputes in the most just way. The system does not always meet, but often falls short of, its goal of fairness. When complete fairness is unattainable, what is the next-best alternative?

Class actions present this type of problem: they are at once an efficient mechanism for resolving mass disputes and at the same time a failure of complete fairness. On the one hand, class actions ensure defendants are held to account for proven misfeasance. In the face of wrongdoing to thousands, and often millions, of people, defendants should be liable. Class actions provide a mechanism to hold defendants meaningfully liable without thousands of costly lawsuits. But on the other hand, class actions can result in legally acceptable yet intuitively unsatisfying outcomes for wronged members of the class seeking to be compensated for the harm they have suffered.[2] All too often, class members release their claims to relief in exchange for meager monetary benefits or no concrete relief at all.[3]

Where class sizes are large and unwieldy, courts may approve settlements with monetary figures going partly or entirely to nonprofit organizations—a mechanism known as *cy pres*.[4] *Cy pres* has deep roots, having been used in varying contexts and legal systems, including pre-Constantinian Roman law and French and Spanish civil law.[5] The name is derived from the phrase "*cy pres comme possible*," which means "as near

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1. *See* JUD. CONF. OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 3 (2020), https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf [https://perma.cc/2SCX-LDM6].

2. *See infra* Section I.B and Part III.

3. *See infra* Part III; *see also In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1107–09 (9th Cir. 2021) (affirming approval of a class action settlement including only injunctive relief and a $13 million *cy pres* distribution where the class was composed of sixty million members).

4. *Cy Pres*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[C]ourts . . . use[] cy pres to distribute class-action-settlement funds not amenable to individual claims or to a meaningful pro rata distribution to a nonprofit charitable organization whose work indirectly benefits the class members and advances the public interest.").

5. EDITH L. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 3–4 (1950).

as possible" in Norman French.[6] In the United States, *cy pres* was first used as a "saving device" for charitable trusts when the settlor's intent could not be effectuated.[7] To carry out the intention of the settlor as best as possible, trust property would be designated to charities that aligned with the settlor's charitable intention.[8] In this context, the doctrine of *cy pres* was only invoked if three requirements were met: (1) a valid charitable trust was established, (2) it was "impossible, or impractical to carry out the specific purpose of the trust," and (3) the settlor effectuated a general charitable intention.[9]

Cy pres was extended as a class action settlement mechanism used to distribute settlement funds to nonprofit organizations when classes are too large for "meaningful pro rata distribution[s]" to class members or it is unworkable for class members to submit claims.[10] For example, approximately sixty million members of a class relinquished their claims to sue Google on data privacy grounds in exchange for injunctive relief and *cy pres* distributions to nonprofits championing data privacy protection efforts.[11] Though the relief was distributed to the "'next best' class of beneficiaries,"[12] class members were not adequately compensated for their claims, given the expensive and unworkable task of identifying all sixty million class members and distributing mere pennies on the dollar to each claimant.[13]

Though *Google Street View* is a stunning example of a *cy-pres*-only settlement[14] cutting against notions of fairness and justice for claimants through compensation, the use of *cy pres* was likely the best option, given the inapplicability of several common alternatives.[15] Various alternatives

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6. *Id.* at 1 (citing Ironmongers' Co. v. Att'y Gen. [1844] 10 Cl. & F. 908 (HL) 922 (appeal taken from Eng.)).

7. *Id.*

8. RESTATEMENT (SECOND) OF TRUSTS § 399 (AM. L. INST. 1959).

9. FISCH, *supra* note 5, at 128. The commentary to the Restatement (Second) of Trusts section 399 notes that there must be evidence to accompany an assertion of a general charitable intention. RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. d (AM. L. INST. 1959).

10. *See supra* note 4 and accompanying text.

11. *In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1109 (9th Cir. 2021).

12. *Id.* at 1111 (quoting Nachshin v. AOL, LLC, 663 F.3d 1034, 1036 (9th Cir. 2011)).

13. *See id.* at 1113–15.

14. Note, however, that the Ninth Circuit did not consider *Google Street View* a *cy-pres*-only settlement, given the approval of injunctive relief in addition to the *cy pres* distribution. *See id.* at 1113. The *cy pres* challenges identified in this Note largely concern the lack of direct and indirect compensation for class members. Therefore, for purposes of this Note, "*cy-pres*-only" refers to settlements where the only monetary relief ends up in the hands of third parties, rather than class members, regardless of the approval of any equitable relief.

15. *Cy pres* was also likely the best option in *Google Street View* because the charitable organizations selected to receive the distribution aligned closely with the interests of the class. *See id.* at

exist for distributing unclaimed class settlement funds, though none are applicable to classes where no members can be readily identified to make a claim. Escheat to the state, reversion to the defendant, and pro-rata distributions to class members who make claims are only useful where class members can be effectively notified.[16]

In many class action settlements, some members of the class can be identified, making it easier for those identified individuals to receive notice and then submit claims for settlement distributions.[17] Where unclaimed settlement funds remain after a claims period ends, *cy pres* awards can be a useful tool to distribute the remainder.[18] However, *cy pres* is also often used where no class members can be identified without burdensome effort or where distributions to the class would be negligible,[19] leading to the use of *cy-pres*-only settlements,[20] like in *Google Street View*.

Cy pres is the least of several evils in distributing unclaimed class action settlement funds and is often the only feasible mechanism for achieving deterrence where no class members make claims; however, it remains a flawed mechanism that strips class members of their claims for a mere approximation of meaningful relief in many cases.[21] At least *Google Street View* distributed funds to an organization aligning with the underlying purpose of the class action.[22] The same cannot be said for many other *cy pres* distributions, where funds are distributed to favored charities of class counsel or causes wholly unrelated to the class claims.[23]

This Note argues for a fairness-forward alternative—inspired in part by devices common in the laws of trusts and testate succession—to be employed by courts to mitigate these flaws and protect the interests of

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1109, 1120 (finding that the award to data privacy organizations at the District Court complied with the requirement that *cy pres* distributions are influenced by the underlying statute and the absent class members' interests) (citing *Nachshin*, 663 F.3d at 1039).

16. *See infra* Section I.B.

17. *Cf.* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 102–03 (2014) (recognizing this proposition's inverse: that where class members are unidentified, "it is impossible to provide them with individual notice of the opportunity to file a claim").

18. *See id.* at 117 (identifying *cy pres* as a "potential solution" to distributing unclaimed settlement funds, but also recognizing its flaws).

19. *See id.* at 100, 103–04.

20. *In re* Google Referrer Header Priv. Litig., 869 F.3d 737, 741–42 (9th Cir. 2017) (citing Lane v. Facebook, Inc., 696 F.3d 811, 819 (9th Cir. 2012)), *vacated on other grounds and remanded sub nom.* Frank v. Gaos, 139 S. Ct. 1041 (2019).

21. *See infra* Part III.

22. *See In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1107 (9th Cir. 2021) (approving a settlement distributing funds to nine internet privacy advocacy groups in a class action alleging the illegal collection of internet users' Wi-Fi data).

23. *Cf.* Ted Frank, *Cy Pres Settlements*, AEI (Apr. 10, 2008), https://www.aei.org/articles/cy-pres-settlements/ [https://perma.cc/Z7BJ-ARKS] (identifying situations where class counsel have ensured *cy pres* distributions are made to nonprofit organizations they support or are connected to).

absent class members. In trust law, general interests of a settlor can be discovered through the language in the gift, making it easier to designate a *cy pres* award. In class actions, a similar throughline can be used to ensure a better fit between class members' interests and the *cy pres* awards given. One solution to the problems of *cy pres* is to approximate class members' interests by considering the goals behind statutory or common law causes of action in class action complaints.[24] By considering the goals behind a statute, or other reasons why a class action is being litigated, courts can identify default lists of presumptively approved *cy pres* award recipients for particular types of class actions. These organizations would be selected based on proposals meeting criteria that map on to some judges' current considerations in evaluating proposed recipients. These default recipients, after initial selection, would be subject to another layer of scrutiny in each settlement, with the court performing a close analysis of the default recipient as related to the case at bar. Much like intestate succession inheritance laws can be circumvented by wills or other distributive devices, if the class settlement parties were not satisfied with any of the default recipients, they could always settle around the defaults by naming a charitable organization that has not been preapproved in their settlement, subject to similar proposal and judicial-evaluation requirements. These reforms would limit the problems of inadequate safeguards for class interests, judicial discretion, and party self-interests, while providing arguably more satisfactory relief to the class.

In the face of the *cy pres* doctrine's flaws, this Note will address the basis for *cy pres* in class actions,[25] courts' current approaches to *cy pres*,[26] the problems with *cy pres* making it an imperfect relief mechanism,[27] scholars' suggested reforms,[28] and the aforementioned fairness-forward alternative to the existing *cy pres* mechanism.[29]

I. THE NEED FOR *CY PRES* IN CLASS ACTIONS

In class action settlements, two key conditions reveal the need for distribution alternatives to individual compensation: where massive class

24. *See* Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 452 (1972) ("[C]ourts may seek to apply their own version of cy pres by effectuating as closely as possible the intent of the legislature in providing the legal remedies on which the main cause of action was based.").

25. *See infra* Part I.

26. *See infra* Part II.

27. *See infra* Part III.

28. *See infra* Part IV.

29. *See infra* Part V. This Note focuses predominantly on *cy pres* settlements in federal courts based on federal causes of action, rather than state courts or state causes of action.

sizes prevent members from being reasonably identified or where meaningful settlement distributions are mathematically impossible. These individual compensation alternatives include *cy pres*, escheat, reversion, and pro-rata distributions. *Cy pres*, though flawed, is the best option.

A. Large Class Sizes & Impractical Distributions

Class definitions often encompass so many potential members that it would be extremely burdensome to identify each class member or incredibly expensive to distribute the funds to each of them.[30] One of the "prerequisites" for a class action under Rule 23 is the impracticality of joining the individual claims of each individual class member,[31] and the existence of unidentifiable classes is thus an oft-expected feature. The Third Circuit recognized an unidentifiable class in *In re Google Inc. Cookie Placement Consumer Privacy Litigation*, where the nationwide class definition encompassed any person who used Safari or Internet Explorer to access a website where allegedly improper cookies were placed.[32] The court acknowledged the district court's determination that compensating the class could be "complicated by the substantial problems of identifying the millions of potential class members,"[33] and ultimately determined that district courts could approve *cy-pres*-only settlements under these circumstances.[34]

Moreover, sometimes a class is so large that the settlement funds, if distributed, would be negligible.[35] Even in the digital age, many settlement payments are distributed via paper check,[36] which could mean that the payment is less than the postage and administrative costs to send it.[37]

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30. *See* Wasserman, *supra* note 17, at 103–04.

31. FED. R. CIV. P. 23(a)(1).

32. 934 F.3d 316, 321 (3d Cir. 2019). The cookies were allegedly improper because they "may have operated even if the user configured privacy settings to prevent it from tracking data." *Id.* at 320.

33. *Id.* at 324 (quoting *In re* Google Inc. Cookie Placement Consumer Priv. Litig., Civ. No. 12-MD-2358 (SLR), 2017 WL 446121, at *4 (D. Del. Feb. 2, 2017)).

34. *Id.* at 328. In making this determination, note that the Third Circuit also considered that this was a Rule 23(b)(2) class, where "injunctive or declaratory remed[ies] . . . provide relief to all class members equally" and does not lend itself to "individualized determinations of liability or damages." *Id.*

35. Wasserman, *supra* note 17, at 104.

36. Isha Marathe, *Class Action Settlements Still Paid Largely in Paper Checks. But Plaintiffs Bar Is Pushing for Change*, LAW.COM (Feb. 18, 2022, 12:00 PM), https://www.law.com/legaltechnews/2022/02/18/class-action-settlements-still-paid-largely-in-paper-checks-but-plaintiffs-bar-is-pushing-for-change/ [https://perma.cc/G3F6-TWG8].

37. *See* Wasserman, *supra* note 17, at 104. Note, however, that in recent history, some class settlements have been distributed using online payment services such as Venmo or Paypal. *See, e.g.*, *Check Your Email: You May Have Received Money as Part of an Illinois Class-Action Suit Involving Google*, NBC CHI. (July 13, 2023, 11:34 AM), https://www.nbcchicago.com/news/local/illinois-class

Distributing funds to class members in these situations—either through direct distribution or a "'claims-made' process"[38]—would be an illogical and ineffective mechanism for serving the interests of class members. In *Nachshin v. AOL, LLC*, sixty-six million members of a consumer class could have recovered only three cents if payments had been distributed.[39] This shows the need for alternative distribution mechanisms to ensure class members obtain redress of their grievances where settlement funds cannot be effectively distributed.

B. Non-Cy Pres Alternative Distribution Mechanisms

Scholars and courts have long recounted three alternatives, aside from *cy pres*, that attempt to correct the challenges of large, possibly unidentifiable, class sizes and nominal settlement distributions: escheat to the government, reversion to the defendant, and pro-rata distributions to identified class members.[40] All three of these options utilize the unclaimed remainders of settlement funds after class members are given an opportunity to submit claims. This implies that, when one of these methods is utilized, at least some class members submitted claims. However, in *cy-pres*-only settlements, where no class members make claims, there is no true remainder because the entire fund remains intact with no class members receiving any compensation at all.

Escheat is a long-used property doctrine allowing states to take title to abandoned or unclaimed property.[41] The version of escheat in class action settlements functions the same way, where unclaimed portions of a settlement fund, assuming claims have already been made by some class members, transfer to the government.[42] Class members have a property

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-action-google-settlement-paypal-venmo-zelle-mastercard-how-to-receive/3183203/ [https://perma.cc/NA82-3ZU8].

38. The Federal Trade Commission identifies distributions via check to "well-defined and well-known" classes and "claims-made process[es]" as mechanisms through which class members can be compensated. FED. TRADE COMM'N, CONSUMERS AND CLASS ACTIONS: A RETROSPECTIVE AND ANALYSIS OF SETTLEMENT CAMPAIGNS 6 (2019), https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf [https://perma.cc/G8PV-4VUS]. Claims-made procedures force class members to file a claim in order to receive compensation from the settlement. *Id.*

39. 663 F.3d 1034, 1037 (9th Cir. 2011) (noting that "[t]he cost to distribute these payments would far exceed the maximum potential recovery" from AOL's unjust enrichment).

40. *See, e.g.*, *In re* Google Inc. St. View Elec. Comme'ns Litig., 21 F.4th 1102, 1110–11 (9th Cir. 2021).

41. *See* 30A C.J.S. *Escheat* § 13 (2023) ("Subject to constitutional limitations, a state may take property within its reach which is unclaimed or abandoned, or which belongs to unknown persons or persons whose addresses or existence are unknown.").

42. *See* Abraham B. Dyk, *A Better Way to Cy Pres: A Proposal to Reform Class Action Cy Pres Distribution*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 635, 641 (2018).

interest in settlement funds,[43] and therefore the undistributed funds are unclaimed property ripe for escheat.[44] The prime justification for this method is that it continues to deter misconduct by the defendant—by ensuring they pay—and can have a positive impact on communities, depending on how the state uses the funds.[45] The prime critique of escheat in class action settlements is that it merely fills government coffers and bears no relation to the interests of the class.[46]

Reversion describes the process where unclaimed settlement funds are returned to the defendant,[47] though this method is highly disfavored.[48] Reversion is diametrically opposed to class interests because it allows the party presumably at fault to avoid truly paying the full settlement figure the parties agreed upon[49] while failing to effectuate deterrence—one significant purpose of class actions.[50]

Pro-rata distributions are equal distributions of unclaimed funds made to class members who already filed settlement claims.[51] This method comes closer than escheat and reversion to effectuating class interests and fairness in class action settlements, ensuring that the whole settlement fund is distributed to members of the class and defendants are deterred to the full extent of the settlement amount.[52] As a direct comparison to *cy pres*, pro-rata distributions ensure that members of the class receive a tangible benefit,

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43. WILLIAM B. RUBENSTEIN, 4 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS JUNE 2023 UPDATE § 12:30 (6th ed. 2023) ("[T]he settlement fund does not truly belong to the class as a whole, but rather to the class members individually.").

44. *See id.* § 12:31 ("[T]he general approach to unclaimed funds throughout society is that these funds escheat to the state, so using escheat for unclaimed recoveries would bring class action law in line with the law in most jurisdictions concerning unclaimed funds.").

45. Dyk, *supra* note 42, at 641 (citing *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013)).

46. *See id.*

47. RUBENSTEIN, *supra* note 43, § 12:29.

48. *Id.* ("Such funds are disfavored, but no court has ruled that approval of such a fund is legally prohibited." (citations omitted)). Several courts have disapproved class action settlements with reversion clauses. *See, e.g.*, Roes, 1–2 v. SFBSC Mgmt., LLC, 944 F.3d 1035, 1060 (9th Cir. 2019); Diamond Chem. Co. v. Akzo Nobel Chems. B.V., 517 F. Supp. 2d 212, 218 (D.D.C. 2007).

49. *See* Dyk, *supra* note 42, at 641 ("There is also a normative objection to reversion, since 'funds should not be retained by an entity that obtained them through illegal acts.'" (quoting James R. McCall, Patricia Sturdevant, Laura Kaplan & Gail Hillebrand, *Greater Representation for California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 HASTINGS L.J. 797, 808 (1995))). Of course, fault has not been actually litigated at the settlement stage, and in some cases, settlement is merely a device of convenience or economic efficiency, not an admission or finding of wrongdoing by the defendant.

50. RUBENSTEIN, *supra* note 43, §12:29; *see also* Nicholas Almendares, *The Undemocratic Class Action*, 100 WASH. U. L. REV. 611, 633 (2023) ("At least as important to class well-being is deterring wrongdoing.").

51. *See* RUBENSTEIN, *supra* note 43, § 12:30.

52. *Id.*

while *cy pres* distributions line the pockets of third parties from a fund designed for class members.[53]

Despite these positive characteristics, pro-rata distribution is still not a completely fair alternative distribution mechanism. Rule 23(e)(2)(D) requires courts to consider whether class members are treated "equitably relative to each other" for the settlement proposal to be approved by the court.[54] Pro-rata distributions retrospectively fail to meet this standard. Identifiable and relief-claiming class members could end up with a windfall of additional compensation over their unidentifiable and non-claiming counterparts, despite having comparable harms.[55] The underlying assumption of this method is that only those who file claims—the ones who care enough to pay attention—should benefit from the settlement fund, though significant barriers may exist that deter class members from filing claims.[56] Moreover, non-claiming class members retain a property interest in the funds that are redistributed pro rata to their class peers under this distribution mechanism.[57] Under pro-rata distribution, claiming class members receive a windfall by superseding the property rights of non-claiming class members. Even if pro-rata distributions could be justified as a fairer option than escheat or reversion, this method is entirely inapplicable in *cy-pres*-only settlements, where class members cannot be efficiently identified, and therefore no class members can file claims.[58]

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53. *Id.*

54. FED. R. CIV. P. 23(e)(2)(D).

55. Wasserman, *supra* note 17, at 113. *But see* RUBENSTEIN, *supra* note 43, § 12:30 ("[F]ew class settlements pay individual class members the full value of their claims, so redistribution is more likely to bring the class members closer to that value rather than to be a windfall." (citations omitted)).

56. Class members in claims-made settlements may frequently fail to file claims because convoluted and onerous claims procedures are not outweighed by the negligible potential recovery. Elizabeth Cabraser & Andrew Pincus, *Claims-Made Class-Action Settlements*, 99 JUDICATURE, no. 3, 2015, at 81, 83. Cabraser and Pincus emphasize Judge Richard Posner's view that low claims rates do not reflect class members' approval of a settlement, but instead "show[] oversight, indifference, rejection, or transaction costs." *Id.* (quoting Redman v. RadioShack Corp., 768 F.3d 622, 628 (7th Cir. 2014)). These barriers may be illustrated to their extreme by one 2012 class with over 100 million members, but 290 total claims, only an estimated eleven of which were valid—an ultimate rate of valid claims of 0.000011%. *See In re* Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., 851 F. Supp. 2d 1040, 1047, 1050 (S.D. Tex. 2012). For a more general articulation of claims rates, consider *Keil v. Lopez*, 862 F.3d 685, 697 (8th Cir. 2017), in which the court notes that "a claim rate as low as 3 percent is hardly unusual in consumer class actions and does not suggest unfairness."

57. *See* RUBENSTEIN, *supra* note 43, § 12:30 ("[A]n individual's presence as a class member in a class action hardly expands her property rights to include the property of the other class members.").

58. *See* Dyk, *supra* note 42, at 644.

C. *Cy Pres Is the Best Option*

None of the above options adequately serve two of the key motivations behind class actions: compensation and deterrence.[59] Moreover, they fail to reflect the interests of absent class members, a purportedly important aspect of the federal class action scheme, given that Rule 23 requires class representatives to protect class interests "fairly and adequately."[60] This requirement, as a threshold for any class to be certified in federal court, highlights the importance of protecting class interests throughout the whole class representation, not simply at the outset. When the class size makes identifying class members excessively burdensome or any monetary distributions negligible, the mechanism used to dispose of settlement funds should reflect the interests of the class, just as Rule 23's threshold requirement urges.

Cy pres awards are portions of the settlement fund designed, in theory, to be distributed to causes that align "as near as possible" to the class members' interests and purposes.[61] In doing so, *cy pres* stands above its alternatives as the mechanism most effectively pursuing complete fairness. This is true even though, as discussed in a later section, *cy pres* settlement awards still fall short of the complete fairness ideal.[62]

II. EXISTING COURT APPROACHES TO *CY PRES* SETTLEMENTS

Rule 23(e)(2) requires courts to ensure that each class action settlement is "fair, reasonable, and adequate" to the class members.[63] To do so, courts take varied approaches to identify a nexus between class members' harms and the benefits provided by the *cy pres* recipient.[64] The American Law

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59. Compensation and deterrence are identified as two goals of class actions. *See, e.g.*, D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475, 480 (2016). *But see* Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT'L L.J. 141, 155–56 (2010) (identifying the goals of class actions as "disgorgement and deterrence," rather than compensation and deterrence, because of the "small value of the recovery amount in a great deal of these settlements, as well as the fact that parties place relatively little value on their recovery as evidenced by the low levels of opt-outs and collection within class actions"). The failures of escheat, reversion, and pro-rata distribution to serve compensation and deterrence goals have been explored in the literature. *See, e.g.*, John Goodlander, Note, *Cy Pres Settlements: Problems Associated with the Judiciary's Role and Suggested Solutions*, 56 B.C. L. REV. 733, 740 (2015).

60. FED. R. CIV. P. 23(a)(4).

61. Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and* Cy Pres *Awards: Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POL'Y & L. 267, 269 (2014).

62. *See infra* Part III.

63. FED. R. CIV. P. 23(e)(2).

64. *See* RUBENSTEIN, *supra* note 43, § 12:33.

Institute (ALI) recognizes that recipients should be selected if their interests "reasonably approximate those being pursued by the class."[65]

The First Circuit conducts this analysis by using the "'reasonable approximation' test," which comprises six nonexclusive factors[66]:

> [T]he 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 reasons why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the *cy pres* recipient.[67]

Courts generally assess the nexus requirement under five core themes, with the First Circuit "captur[ing] the spectrum of these concerns."[68] First, the nexus must exist between the *cy pres* recipient and the claims.[69] Second, courts consider the geography of the class members compared to the geographic scope of the nonprofit.[70] Third, a nexus does not always have to exist for a *cy pres* settlement to be approved.[71] Fourth, some courts consider the proposed nonprofit's financial integrity.[72] Fifth, courts prefer to avoid conflicts of interest between the recipient organization and the parties or judge.[73]

These themes and considerations, whether those weighed under the First Circuit's approach or those used in some other variation,[74] indicate efforts

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65. PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 3.07 (AM. L. INST. 2010).

66. *In re* Lupron Mktg. & Sales Pracs. Litig., 677 F.3d 21, 33 (1st Cir. 2012).

67. *Id.* (emphasis added).

68. RUBENSTEIN, *supra* note 43, § 12:33.

69. *Id.*

70. *Id.*

71. *Id.* By way of example, courts have approved settlements where nonprofit organizations entirely unrelated to the litigation at hand, much less the particular class interests, are selected as *cy pres* beneficiaries. *See, e.g.*, *In re* Crocs, Inc. Sec. Litig., No. 07-CV-02351-PAB-KLM, 2013 WL 4547404, at *1, *5 (D. Colo. Aug. 28, 2013) (approving a settlement conveying undistributed funds to St. Jude Children's Research Hospital in a lawsuit alleging violations of the Securities Exchange Act of 1934); *In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1395, 1399 (N.D. Ga. 2001) (approving *cy pres* distributions in a NASCAR souvenir price fixing suit to organizations including "Make–a–Wish, The American Red Cross, Race Against Drugs, Atlanta Legal Aid, Children's Healthcare of Atlanta, Georgia Legal Services Program, KIDS' CHANCE, Duke Children's Hospital and Health Center, and the Lawyers Foundation," while attempting to identify charities that "at least indirectly benefit" the class without explaining such indirect benefits). The recipients selected in these types of settlements certainly champion noble causes and benefit individuals in need. The problem is that they fail to benefit the class members.

72. RUBENSTEIN, *supra* note 43, § 12:33.

73. *Id.*

74. Other variations could include the Third Circuit's approach. Consider *In re Baby Products Antitrust Litigation*, 708 F.3d 163, 174 (3d Cir. 2013), in which the court noted its consideration of "the

to ensure that *cy pres* recipients align with the absent class members' interests. Even still, *cy pres* awards suffer from problems that make them fall short of fairness for the class.

III. *CY PRES* IS A MERE APPROXIMATION OF MEANINGFUL RELIEF

Though *cy pres* is the best of four imperfect distribution mechanisms and courts scrutinize *cy pres* recipients to a certain degree, the doctrine's existing imperfections cannot be ignored. These imperfections include self-interested class representation, incomplete Rule 23 safeguards for absent class members, pervasive judicial discretion in approving *cy pres* settlements, and negative incentives for defendants. These challenges clarify that *cy pres*, as it currently stands, is a mere fabrication of meaningful relief for absent class members.

The doctrine of res judicata prevents an individual from relitigating a claim that has already been decided by a final judgment on the merits,[75] and any settlement, accompanied by court approval, constitutes a final judgment for claim preclusion purposes.[76] An individual who is not a party to the suit establishing the final judgment cannot be bound by that judgment because they have not had a "full and fair opportunity to litigate."[77] One key exception to this rule involves those who are "adequately represented by someone with the same interests who [wa]s a party," meaning that class actions can preclude class members from asserting their claims independently.[78] In a *cy-pres*-only settlement, absent class members exchange their claims for indirect and imperfect redress.[79] *Cy pres* settlements "imperfectly" satiate class interests because the class is not

number of individual awards compared to both the number of claims and the estimated number of class members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards," as part of its analysis.

75. *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892 (2008).

76. *See, e.g.*, Arizona v. California, 530 U.S. 392, 414 (2000) ("[C]onsent agreements ordinarily are intended to preclude any further litigation on the claim presented . . . ."); Juris v. Inamed Corp., 685 F.3d 1294, 1340 (11th Cir. 2012) ("For purposes of determining res judicata, an order approving a settlement agreement provides a final determination on the merits.").

77. *Taylor*, 553 U.S. at 892–93 (quoting Montana v. United States, 440 U.S. 147, 153–54 (1979)).

78. *See id.* at 894 (alteration in original) (quoting Richards v. Jefferson County, 517 U.S. 793, 798 (1996)).

79. *See* Frank v. Gaos, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting) (arguing that the *cy-pres*-only settlement was "a vehicle through which to extinguish the absent class members' claims without providing them any relief").

actually compensated at all,[80] despite class members' subjection to claim preclusion.

A. *Self-Interested Class Representatives*

Inherent party self-interests underlie all class action settlements, though *cy pres* settlements in particular emphasize the dangers of self-interested class representatives. In class actions, ownership over the rights to be vindicated and control over the methods of vindication are divided. Class members have rights but rely on class counsel and representatives to vindicate them.[81] Separating ownership from control creates costs, namely "the risk that the manager will pursue her own self-interest at the expense of the owners."[82] In economics, this risk, coupled with the costs of mitigating it, is known as "agency cost."[83] The existing *cy pres* settlement distribution model allows class counsel and class representatives to select recipients of *cy-pres*-only funds, with limited incentives to best reflect the interests of the absent class members. As a result, class members inadvertently rely on judges to serve as a check on their self-interested agents—class counsel and representatives—and protect class interests.[84]

"[A]dequate representation . . . overlaps substantially with the inquiry into the fairness of the class settlement."[85] Class representatives and counsel may be influenced by their own self-interests in allocating *cy pres* awards, undercutting both the adequacy of the representation and the fairness of the settlement. There is a risk that class counsel could negotiate a *cy pres* beneficiary that connects to or directly benefits class counsel in some way.[86] For example, a Tennessee lawyer's *cy pres* scheme, in which he ensured millions of dollars in remainder settlement funds were awarded to various

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80. *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 169 (3d Cir. 2013); *see also In re* Google Inc. Cookie Placement Consumer Priv. Litig., 934 F.3d 316, 327 (3d Cir. 2019) (noting that *cy pres* risks "misalignment of interests: the settlement clearly benefits the defendant (who obtains peace at a potentially reduced cost), class counsel (who are guaranteed payment in the settlement), and the named representatives (who are given an incentive award in the settlement), while any benefit to other class members is indirect").

81. *See* RICHARD A. NAGAREDA, ROBERT G. BONE, ELIZABETH CHAMBLEE BURCH & PATRICK WOOLLEY, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 43 (Saul Levmore et al. eds., 3d ed. 2020) (citing PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 1.04 (AM. L. INST., Preliminary Draft No. 3, 2005)).

82. *Id.* at 42.

83. *Id.*

84. *Id.* at 44; *see also* Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004) (determining that "class actions are rife with potential conflicts of interest" which requires judges to "give careful scrutiny to the terms of proposed settlements" and ensure "that class counsel are behaving as honest fiduciaries for the class").

85. NAGAREDA ET AL., *supra* note 81, at 105.

86. *See* Frank, *supra* note 23.

universities and other nonprofits, prompted a Tennessee state judge to describe the process as a "racket."[87] Gordon Ball, a known class action attorney in the state, proposed *cy pres* distributions to several favored charities. These charities included state universities that have honorary campus rooms and structures named after Ball, though it is unclear in some instances whether the naming honors came from using *cy pres* funds or strictly personal donations.[88] Regardless, Ball is a clear supporter of the institutions he asked courts to award *cy pres* settlement funds to. In various cases, Ball even directed *cy pres* funds to the alma maters of the judges approving the settlements.[89] Perhaps most egregiously, Ball ensured that *cy pres* distributions were awarded to the medical schools at the University of Miami, University of Louisville, and Vanderbilt University during a time period in which he was reportedly seeking personal medical treatment from all three institutions.[90] A federal judge recently cracked down on Ball's self-interested attempts to steer *cy pres* funds to favored charities, rejecting a settlement doing just that.[91] Crafty class representatives and counsel, like Ball, can propose that their favorite nonprofits benefit from class settlements. Class action settlements, however, should reflect the class representative and class counsel's duty to adequately represent the absent class members and avoid "disproportionate benefit[s] 'at the expense of the unnamed plaintiffs.'"[92] In class action *cy pres* settlements, class representatives and counsel have incentives to promote their interests, damaging the quality and propriety of class recovery.

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87. Tyler Whetstone, *How a Tennessee Attorney Sent Cash from Class Action Lawsuits to His Favorite Universities*, KNOX NEWS (May 3, 2023, 5:04 PM), https://www.knoxnews.com/in-depth/news/local/2023/05/01/attorney-gordon-ball-sent-class-action-lawsuit-cash-to-tennessee-universities/7904464001/ [https://perma.cc/7FEV-FJ73].

88. *Id.*

89. *Id.*

90. *Id.*

91. Tyler Whetstone, *Federal Judge Ends Attorney's Attempt to Funnel Class Action Money to UT Knoxville*, KNOX NEWS (Aug. 9, 2023, 5:14 AM), https://www.knoxnews.com/story/news/local/2023/08/09/judge-ends-attorneys-attempt-to-funnel-class-action-money-to-ut-knoxville/70552251007 [https://perma.cc/LXU8-2L56].

92. Carlin v. DairyAmerica, Inc., 380 F. Supp. 3d 998, 1017 (E.D. Cal. 2019) (quoting Lane v. Facebook, Inc., 696 F.3d 811, 819 (9th Cir. 2012)); *see also* Kerry Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591, 1597–98 (1987) ("[I]ntra-class equities should be preserved; that is, the rights of absentee class members should not be subordinated to those of identifiable plaintiffs."); Frank v. Gaos, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting) ("[T]he fact that class counsel and the named plaintiffs were willing to settle the class claims without obtaining any relief for the class—while securing significant benefits for themselves—strongly suggests that the interests of the class were not adequately represented.").

B. Incomplete Safeguards in Rule 23

Rule 23(e) provides several safeguards in class action settlements that further notions of complete fairness,[93] yet fall short in most large class actions. These shortcomings are particularly aggravated in the *cy pres* context. Per the rule, court approval is required to finalize any proposed settlement the parties reach in their negotiations.[94] Class members must receive notice of the proposed settlement when two conditions are met: first, the proposed settlement is likely to be approved by the court, and second, the court is likely to certify the class.[95] Notice, if given, must be directed to the class "in a reasonable manner."[96] Moreover, court approval is only given after a hearing and finding by the judge that the settlement is "fair, reasonable, and adequate."[97] In making that finding, Rule 23 requires courts to consider, among other things, whether the settlement proposal was negotiated at arm's length.[98]

Court oversight of class action settlements is vital to the pursuit of fairness, and Rule 23(e) provides some protection for absent class members.[99] These procedural safeguards protect absent class members to an extent, but also reflect the inherent impossibility of achieving complete fairness in a *cy-pres*-only class action settlement. Rule 23(e) uses "process as a proxy for substantive fairness."[100] After all, district courts need not ensure the settlement is as close to complete fairness as possible, but need

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93. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997) ("Rule 23(e) . . . protects unnamed class members 'from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise.'" (quoting 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1797, at 340–41 (2d ed. 1986))); *see also* Russell M. Gold, *"Clientless" Lawyers*, 92 WASH. L. REV. 87, 114 (2017) (identifying procedural functions of class certification and settlement that protect absent class members, including claim and defense alignment between class representatives and absent members, elimination of conflicts of interest between class members, fair and adequate representation, numerosity, and impracticability of individual joinder).

94. *See* FED. R. CIV. P. 23(e).

95. FED. R. CIV. P. 23(e)(1)(B).

96. *Id.*

97. FED. R. CIV. P. 23(e)(2). Several considerations drive this finding, including: the adequacy of class counsel and named plaintiffs in representing the class; the propriety and fairness of settlement negotiations; the sufficiency of the relief, considering the efficiency and risk of trial, the distribution method, the attorney's fees, and any Rule 23(e)(3) agreements; and the equality of treatment for each class member. *See id.*

98. *Id.* Some posit, however, that this language in the rule is superfluous, as consideration of the parties' conflicts of interest in negotiating the settlement is inherent in the finding that the settlement is "fair." *See* Asher A. Cohen, Note, *Settling Cy Pres Settlements: Analyzing the Use of Cy Pres Class Action Settlements*, 32 GEO. J. LEGAL ETHICS 451, 463 (2019).

99. *See supra* note 93 and accompanying text.

100. Russell M. Gold, *"Clientless" Prosecutors*, 51 GA. L. REV. 693, 728 (2017).

only establish the settlement is "fair, reasonable, and adequate when considered from the perspective of the class as a whole."[101]

The "chose in action" is a property right belonging to a plaintiff,[102] meaning that unadjudicated claims benefit from due process protection.[103] A plaintiff's decision to sue, or not, is contained within the "overall bundle of the claimholder's ownership interest."[104] Consider the Due Process requirements for Rule 23(b)(3) classes[105]: (1) "the best practicable" notice and an opportunity to be heard, (2) an opportunity to opt-out, and (3) adequate representation by the named plaintiff.[106] Class action settlement classes and 23(b)(3) classes must receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[107] For settlements in particular, courts must provide notice "in a reasonable manner" to class members who would be bound by the settlement proposal.[108] This notice is mandatory if the court is likely to approve the proposal and certify the class for settlement.[109]

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101. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 174 (3d Cir. 2013).

102. A "chose in action" is, put simply, the right to sue. *See Chose in Action*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "chose in action" as "[t]he right to bring an action to recover a debt, money, or thing"); 63C AM. JUR. 2D *Property* § 26 (2023) (describing "chose in action" as "another way of describing a right to sue or cause of action"). This property right is constitutionally protected. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) ("[A] chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs." (citing Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950))).

103. Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 619–20 (2015) ("The Court has repeatedly reaffirmed that unadjudicated legal claims constitute a property interest falling within the protection of the Constitution's Due Process Clauses." (citing numerous cases)).

104. *Id.* at 623.

105. A Rule 23(b)(3) class is one certified based on common questions predominating over individual questions and the class action device being the superior adjudication method. FED. R. CIV. P. 23(b)(3).

106. *Shutts*, 472 U.S. at 812 (first citing *Mullane*, 339 U.S. at 314–15; and then citing Hansberry v. Lee, 311 U.S. 32, 42–43, 45 (1940)). Notice under the *Mullane* standard is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

107. FED. R. CIV. P. 23(c)(2)(B); *see also* Williams, *supra* note 103, at 606–07 (noting that "rulemakers expressly require" notice and opt-out to absent class members in 23(b)(3) classes); *Shutts*, 472 U.S. at 810–11 ("In most class actions an absent plaintiff is provided at least with an opportunity to 'opt out' of the class, and if he takes advantage of that opportunity he is removed from the litigation entirely."). Opting out, however, is rare. *See* Almendares, *supra* note 50, at 625. A study of 159 published class action cases from 1993 to 2003 showed opt outs at a rate of less than one percent. NAGAREDA ET AL., *supra* note 81, at 121 (citing Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004)).

108. FED. R. CIV. P. 23(e)(1)(B).

109. *Id.*

In classes with easily identifiable members, very little justification can be given for not providing actual notice.[110] However, the defining characteristic of large class actions generally, and especially *cy-pres*-only settlements, is that the class cannot be efficiently identified.[111] Under those circumstances, actual notice would be incredibly burdensome or even impossible. Actual notice is not required in all circumstances—constructive notice will sometimes suffice.[112] Even where class members are unascertainable, however, constructive notice must still be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[113] Constructive notice, then, is considered permissible under the Due Process Clause, with a recognition that actual notice is the better option.[114] In a *cy-pres*-only settlement where the class cannot be easily identified, the class members are receiving constructive notice that, while legally sufficient, is inherently less effective than the actual notice that would otherwise be given to an identifiable class. While constructive notice is permissible under the Due Process Clause,[115] it is largely a legal fiction that is designed to make class members aware of the settlement but may do so in actuality for only a portion of the class.[116]

Merely receiving constructive notice effectively limits class members' ability to seize their opportunity to object and vindicate their interests,[117] should those interests diverge from those advanced by the *cy pres*

110. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175 (1974) ("[T]he names and addresses of 2,250,000 class members are easily ascertainable, and there is nothing to show that individual notice cannot be mailed to each.").

111. *See supra* notes 30–34 and accompanying text.

112. Hecht v. United Collection Bureau, Inc., 691 F.3d 218, 224 (2d Cir. 2012). The court in *Hecht* noted that "[t]he standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Id.* (quoting Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 113 (2d Cir. 2005)). This means that "[c]onstructive notice by publication may be sufficient to satisfy due process 'as to persons whose whereabouts or interests c[an] not be determined through due diligence.'" *Id.* (second alteration in original) (quoting *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 168 (2d Cir. 1987); *cf. In re* Apple Inc. Device Performance Litig., 50 F.4th 769, 779 (9th Cir. 2022) ("[N]either Rule 23 nor the Due Process Clause requires actual notice to each individual class member." (quoting Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1128 (9th Cir. 2017))).

113. *Hecht*, 691 F.3d at 224 (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)).

114. Individual notice must be given to any class members who can be reasonably identified, which implies that actual notice is viewed as better than other notice, which may be "practicable under the circumstances." FED. R. CIV. P. 23(c)(2)(B).

115. *See supra* note 112 and accompanying text.

116. *See* RUBENSTEIN, *supra* note 43, § 8:29 (recognizing that constructive notice is a legal fiction that "hardly guarantees actual notice" while still satisfying Due Process and adequate representation requirements).

117. Plaintiff class members are guaranteed a right to object to a settlement proposal. *See* FED. R. CIV. P. 23(e)(5)(A).

settlement. This emphasizes that the procedural safeguards to protect absent class members' interests fall below the optimal standard of fairness in the *cy pres* settlement context and urges consideration of bolstered mechanisms for safeguarding those interests.[118] Class members are sacrificing a property right, and in a *cy-pres*-only settlement, receiving only an indirect benefit in return. Indirect, fabricated compensation is no compensation at all.

C. Judicial Discretion

Courts use varying approaches to determine which *cy pres* recipients satisfy an essential nexus with the class members,[119] creating the conditions for judicial discretion[120] and imperfect relief for class members. This exercise of discretion is not unique to the class action *cy pres* context but was among the chief fears in the early use of *cy pres* for charitable trusts as well.[121] Courts in charitable trust distribution utilized a "fictional intent" as a "cloak behind which the judge disposes of the trust fund" in the manner "most desirable to him[self]."[122] Judges in class action *cy pres* settlements are not necessarily stopped from distributing funds to their favorite nonprofits,[123] just like class representatives and counsel.[124] Such nonprofits may include law schools, hospitals, or charities that have lobbied the judiciary, which may be only "tangentially related to the subject of the

118. An alternative argument is that class members who are not actually notified are represented by those who do receive notice, who would then vindicate class interests, reducing the need for further safeguards. While this may be true, this Note argues not that constructive notice should be deemed impermissible in the class action settlement context—it would be impossible to provide actual notice to every class member under these circumstances—but rather that additional considerations outside of notice could protect absent class members where notice fails to do so.

119. *See supra* Part II; RUBENSTEIN, *supra* note 43, § 12:33.

120. *See* Goutam U. Jois, *The Cy Pres Problem and the Role of Damages in Tort Law*, 16 VA. J. SOC. POL'Y & L. 258, 265 (2008); *cf.* Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007), https://www.nytimes.com/2007/11/26/washington/26bar.html [https://perma.cc/X9TX-K3ZS].

121. FISCH, *supra* note 5, at 116 ("This early antagonism to the doctrine of cy pres was largely due to the mistaken idea that the doctrine could be applied only by means of the uncontrolled prerogative power of the king. To the new nation, anything that savored of the prerogative power of the English sovereign was vehemently condemned and cast aside, often without so much as a cursory examination.").

122. *Id.* at 159.

123. *See* Liptak, *supra* note 120 (quoting a former federal judge saying "[i]t made me more than a little uncomfortable that groups would solicit me for consideration as recipients of cy pres awards"). The Eighth Circuit has sought to cabin this risk by making settlements granting judges sole authority to select a *cy pres* beneficiary void. *See In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1066 (8th Cir. 2015).

124. *See supra* notes 85–93 and accompanying text.

lawsuit."[125] This practice converts judges into grant makers and functions as "an invitation to wild corruption of the judicial process."[126]

Class action *cy pres* distributions can lead to the "appearance of impropriety" among judges who are simply trying to advance the public good—by making distributions to "virtuous" charities[127]—in part because of judges' varying approaches. With courts' documented concern for judicial economy,[128] some circuits utilize what could be described as a more ad hoc approach, in lieu of a more time- and resource-consuming process for assessing *cy pres* recipients.[129] Judge Richard Posner once alluded to a similar idea, saying, "[a] time-saving alternative might be a class action with the stated purpose, at the outset of the suit, of a collective award to a specific charity."[130] Professor Bruce Green questions generally "whether the measures courts take in the name of judicial economy have too high a cost"[131] and notes that "judicial efficiency arguably comes at the expense of fairness to a party" in certain contexts.[132] *Cy pres* settlement awards may be one of those contexts.

This is certainly not to say that every judge tasked with approving a *cy pres* settlement is wielding their discretion improperly. Judges have both limited time and limited information, and accordingly may view "negotiated resolutions of disputes as preferable to litigated ones."[133] This preference

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125. Liptak, *supra* note 120.

126. *Id.* (quoting Samuel Issacharoff, a professor at New York University School of Law).

127. *See* Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011). The *Nachshin* court also noted that, "[t]hese courts have awarded *cy pres* distributions to myriad charities which, though no doubt pursuing virtuous goals, have little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved." *Id.* at 1038–39.

128. Bruce Green, *The Price of Judicial Economy in the US*, 7 OÑATI SOCIO-LEGAL SERIES 790, 800–01 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035295 [https://perma.cc/JT5L-5AZV].

129. Consider Judge Richard Posner's articulation of the Seventh Circuit approach, that if "there's not even an indirect benefit to the class from the defendant's payment of damages, the 'cy pres' remedy . . . is purely punitive," which is permissible. Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672, 676 (7th Cir. 2013). Judge Posner notes, however, that other circuits "require the charity or other recipient to have an interest parallel to that of the class." *Id.* (first citing *In re* Lupron Mktg. & Sales Pracs. Litig., 677 F.3d 21, 33 (1st Cir. 2012); and then citing *Nachshin*, 663 F.3d at 1038–39). This is not to say that the Seventh Circuit does not require any real judicial scrutiny of a proposed *cy pres* recipient, but rather that the approach is not as clearly articulated as in other circuits. *Compare* Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004) (noting that district judges should consider "warning signs" and "give careful scrutiny" in approving class action settlements), *with* RUBENSTEIN, *supra* note 43, § 12:33 (noting that "most circuits require that there be a connection—or nexus—between the harm that the plaintiffs have suffered and the benefit the *cy pres* distribution will provide" and that this nexus involves five themes).

130. *Hughes*, 731 F.3d at 678.

131. Green, *supra* note 128, at 800.

132. *Id.* at 802.

133. Gold, *supra* note 93, at 116.

applies to class action settlements, and judges' interest in docket management can foster deference to the proposed class action settlement.[134]

D. Perverse Incentives for Defendants

Class action defendants use settlement negotiations as an opportunity to mitigate their exposure from the current litigation and minimize the scope of future litigation, creating incentives to benefit their interests alone. These incentives further call *cy-pres*-only settlements' legitimacy into question. With *cy pres* recipients, the defendant may be involved in the creation and management of the recipient charity.[135] In *Lane v. Facebook*, the social networking company was sued for violation of several privacy laws.[136] Facebook and the class representative entered a settlement agreement for $9.5 million, with $6.5 million paid to a nonprofit devoted to education on digital privacy control.[137] The catch? Facebook set up the entity, and its first board of directors included Facebook's own Director of Public Policy.[138] Class members would be hard pressed to favor the class action defendant creating and exercising attenuated control over the organization that should be serving their interests. Because a settlement agreement "necessarily reflect[s] the interests of both parties to the settlement," Facebook was able to retain "its say in how *cy pres* funds will be distributed," even beyond the approved settlement itself.[139]

Additionally, defendants see benefits from *cy pres* awards, including tax breaks and publicity for donations.[140] Publicity derived from corporate citizenship may drive economic benefits for a company.[141] Corporate benefits resulting from philanthropy can include:

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134. *Id.* at 116, 133.

135. Lane v. Facebook, Inc., 696 F.3d 811, 817 (9th Cir. 2012); *see also* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 872 (2016).

136. *Lane*, 696 F.3d at 816.

137. *Id.* at 817.

138. *Id.*

139. *Id.* at 821.

140. Wasserman, *supra* note 17, at 120 ("[T]he defendant enjoys the good will and good publicity (and possibly even the tax deduction) associated with making a charitable gift, while the class members receive little, if any, benefit from the charity's activities."); *see also* Jasminka Kalajdzic, *The State of Reform in First and Second Generation Class Action Jurisdictions*, *in* CLASS ACTIONS IN EUROPE: HOLY GRAIL OR A WRONG TRAIL? 303, 313 (Alan Uzelac & Stefaan Voet eds., 2021) (emphasizing reputational benefits to defendants from public *cy pres* "donations" and amendments to the Israeli *cy pres* procedure that recognize such benefits).

141. *See* Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV. (Dec. 2002), https://hbr.org/2002/12/the-competitive-advantage-of-corporate-philanthropy [https://perma.cc/R6UC-NM9L]; Dwane Hal Dean, *Consumer Perception of*

> (1) [C]reation of goodwill with the community, (2) differentiation of the corporate image and its brands from competitors, (3) greater customer acceptance of price increases, (4) increase in employee and channel member morale, (5) recruitment of new employees, (6) use as a shield against public criticism in times of crisis, (7) winning over skeptical public officials (an aid in lobbying), and (8) increased revenues and profits.[142]

While it seems plausible that these reputational and other benefits from corporate philanthropy may be diminished by public knowledge of the class action and perception surrounding the defendant's alleged conduct,[143] the prospect of some benefit may incentivize defendants to propose *cy pres* distributions in class action settlements. These incentives indicate that *cy pres* settlements need greater protection for class interests.

IV. PROPOSED APPROACHES FOR ALLOCATING *CY-PRES*-ONLY AWARDS

Legal minds have long grappled with the *cy pres* conundrum, with some recommending solutions that enable *cy pres* awards to better reflect class interests and engage third-party administrators.

Scholars have proposed reforms to enhance the fit between beneficiaries of *cy pres* awards and class members. Rhonda Wasserman, in particular, proposed four "pragmatic recommendations" that would reduce the size of *cy pres* awards and ensure that class members' interests are at the forefront.[144] Her recommendations included "presumptively reduc[ing] attorneys' fees" where a settlement includes *cy pres* awards,[145] requiring class counsel to disclose certain information during the settlement approval

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Corporate Donations: Effects of Company Reputation for Social Responsibility and Type of Donation, J. ADVERT., Winter 2003–04, at 91, 92. Note however that these reputational benefits may be diminished by public knowledge of the class action.

142. Dean, *supra* note 141, at 92.

143. *See* Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997, 2047 (2016) ("When a defendant settles a class action, its reputation may be harmed internally with its employees and externally with customers and business associates.").

144. Wasserman, *supra* note 17, at 163.

145. *Id.* at 141. This action could incentivize class counsel to zealously advocate for class members to receive more of the settlement fund, *id.* at 142, and limit conflicts of interest for class counsel who are "principally motivated to maximize [their] fee," *id.* at 136.

process,[146] appointing a "devil's advocate" to challenge *cy pres* awards,[147] and approving *cy pres* awards only when certain ALI Principles are satisfied.[148] Gerson H. Smoger advocates for class representatives, and never defendants, to select proposed *cy pres* recipients, who would then be vetted by the court using several factors.[149] Smoger's factors are (1) the lawsuit's objectives and interests of the class, (2) the statutory purpose, if a statutory violation is involved, (3) loss to class members, and (4) class geographic considerations.[150] Michael J. Slobom proposes yet another approach, asserting that "courts should focus on the broader purpose of the statute—specifically, whether the legislature intended the statute to compensate injured parties or deter misconduct" in assessing the nexus requirement between the claims of class members and the *cy pres* recipient.[151]

Others have recommended organized, somewhat extra-judicial administration mechanisms to solve some of the problems in *cy pres* settlements. In a 1987 student note, Kerry Barnett proposed the use of the equitable trust as a vehicle to serve or promote the interests of the class, with the goal of achieving "the most accurate 'fit.'"[152] In Barnett's model, the court would obtain proposals to form the trust, appoint a third party to manage the trust, and establish monitoring mechanisms for use of the fund.[153] Natalie A. DeJarlais posited a similar idea, also in a 1987 student note, advocating for the use of a consumer trust fund to distribute *cy pres* awards.[154] One of DeJarlais's options for organizing the trust was to

146. *Id.* at 148–49. These disclosures would include (1) providing data-backed information about potential claimants, claim amounts, total amounts the defendant agreed to pay, amounts class members could individually claim, and administration costs for claim distribution; (2) explaining the means used "to identify and notify the absent class members"; (3) describing the steps taken to increase the number of class members who make claims; (4) detailing the actual or proposed actions taken to increase payments for class members who do make claims; and (5) identifying and reporting on the nonprofit organizations selected in the event of a *cy pres* award. *Id.* at 148–51.

147. *Id.* at 155–56. The devil's advocate would highlight weaknesses in the actions taken by the parties, suggest alternatives to *cy pres*, and emphasize why a recipient does not properly reflect the class, among other things. *Id.*

148. *Id.* at 158–59.

149. Gerson H. Smoger, *The Importance of* Cy Pres *in Modern Class Action Jurisprudence and Myths Concerning Its Use*, 24 LEWIS & CLARK L. REV. 595, 603–06 (2020).

150. *Id.* at 606.

151. Michael J. Slobom, *Recalibrating* Cy Pres *Settlements to Restore the Equilibrium*, 123 DICK. L. REV. 281, 304–05 (2018).

152. *See* Barnett, *supra* note 92, at 1603.

153. *Id.* at 1602, 1605.

154. Natalie A. DeJarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 759 (1987).

establish something akin to "a foundation that solicits grant proposals and then funds projects most in accordance with its goals."[155]

V. A FAIRNESS-FORWARD ALTERNATIVE

Drawing from and building upon the aforementioned efforts to enhance fairness in *cy pres* settlements, a fairness-forward alternative involving default recipients, categorized and identified based on the specific underlying purposes of the litigation and subject to multiple layers of scrutiny, would mitigate the imperfections of the *cy pres* mechanism as it currently exists.

A. Default Lists of Cy Pres Recipients

The class action *cy pres* doctrine borrows from trust law at its foundation.[156] The existing *cy pres* mechanism can be enhanced by borrowing from another area of the law—intestacy. Intestacy statutes attempt to anticipate and implement the intentions of the average decedent, functioning as default rules for the transfer of property at death.[157] These defaults are overcome through the use of other preplanned estate documents, such as wills.[158] Likewise, default rules could advance fairness to absent class members in *cy-pres*-only settlements, being overcome only by settlements that provide detailed information on their proposed *cy pres* awardee to the court, and could ensure that awardees receive funds that actively reflect class interests, rather than passively reflecting the goals of class actions generally.

Default rules within this context should include default lists of presumptively approved nonprofits that incorporate the intentions of class

155. *Id.* Barnett referenced a similar idea, arguing for the creation of "a foundation that would allocate the funds as grants to deserving organizations for projects that comply with guidelines stipulated by the court." Barnett, *supra* note 92, at 1605; *cf.* Jennifer Johnston, Comment, Cy Pres Comme Possible *to Anything Is Possible: How* Cy Pres *Creates Improper Incentives in Class Action Settlements*, 9 J.L. ECON. & POL'Y 277, 302 (2013) (arguing that after two rounds of sending notice to class members, *cy pres* should be used to create a third-party administered fund to "solicit bids from outside organizations" and "base the decision on what will be most beneficial to absent class members").

156. *See supra* notes 5–9 and accompanying text.

157. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 65 (11th ed. 2022) ("[T]he primary objective in designing an intestacy statute is to carry out the probable intent of the typical intestate decedent—that is, to provide majoritarian default rules for property succession at death.").

158. *See id.* at 271 (noting that wills allow a testator to "direct the distribution of his probate property at death, avoiding the default distribution of intestacy").

members within particular class action types.[159] For purposes of this Note, "class action types" refers to subgroupings of legal areas or types of statutes that commonly result in class action litigation.[160] The class actions that fall within these subgroups might have common underlying purposes, particularly if they are brought under statutory causes of action. For example, the Fair Credit Reporting Act (FCRA)[161] may be a basis for class action litigation.[162] The express purpose of this statute is to ensure that consumer reporting organizations have procedures in place to meet commerce needs of consumers in a "fair and equitable" manner, considering "confidentiality, accuracy, relevancy, and proper utilization of such information."[163] The Supreme Court has noted that this purpose includes "protect[ing] consumer privacy."[164] Potential nonprofit organizations that further those purposes could include those focused on promoting enhanced security for payment cards and on training financial institutions on how to prevent data leaks.[165]

As a thought experiment, choosing a common class action type, considering the purposes behind the litigation, and selecting nonprofits that reflect and advance those purposes is simple. In practice, however, the inquiry becomes more challenging and leads to further questions: Who determines the class action type subgroups? How often do they convene to update the lists? What is the geographic scope of the list? How does the court implement it? No *cy-pres*-only reform will perfectly achieve complete

159. Christine P. Bartholomew briefly asserted a similar proposition in an article on charitable settlements. Christine P. Bartholomew, *Saving Charitable Settlements*, 83 FORDHAM L. REV. 3241, 3284 (2015) ("One alternative is to identify a list of presumptively appropriate recipients, which advances the nexus requirement by ensuring a relationship between the proposed recipient and charitable distribution."). I argue that this method should more comprehensively focus on the purposes behind particular class action types, rather mainly identifying general legal aid organizations. *See id.* at 3284 n.291; *see also In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1067 (8th Cir. 2015) (finding that a legal services organization, though "unquestionably . . . worthy," was a "totally unrelated charity" and not an "acceptable 'next best' recipient" without thoroughly exploring alternatives).

160. Potential categories may include products liability, consumer protection, environmental law, securities, and antitrust, among others. *See* Kenneth M. Kliebard et al., *Class/Collective Actions in the United States: Overview*, THOMSON REUTERS PRAC. L. (Sept. 1, 2020), https://uk.practicallaw.thomsonreuters.com/4-617-9264?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_pageContainer [https://perma.cc/392F-NAMJ].

161. 15 U.S.C. § 1681.

162. *See, e.g.*, *In re* Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., 851 F. Supp. 2d 1040 (S.D. Tex. 2012); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781 (7th Cir. 2004); Singleton v. Domino's Pizza, LLC, 976 F. Supp. 2d 665 (D. Md. 2013).

163. § 1681(b).

164. United States v. Bormes, 568 U.S. 6, 7 (2012) (quoting Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 52 (2007)).

165. *See Heartland Payment Sys., Inc.*, 851 F. Supp. 2d at 1050–51 (distributing *cy pres* funds to three data privacy focused nonprofit organizations in a FCRA class action).

fairness or be free from critique, but a fairness-forward, next-best alternative may be possible if these questions are asked and answered.[166]

1. Categorizing Class Action Interests

To implement default lists of presumptively approved *cy pres* recipients, members of the bench, bar, and public[167] should have influence over the research, proposal, and selection process. Federal district courts have the ability to craft local rules of procedure, pursuant to the requirements of 28 U.S.C. §§ 2071 and 2072, as well as Rule 83.[168] District courts are authorized to craft rules "for the conduct of their business" only after giving opportunity for public commentary, which may include advisory committees.[169] The influence of public commentary makes the local rulemaking process an ideal mechanism for crafting default lists of *cy pres* recipients.[170]

The members of the advisory committee would start by grouping class action types, considering the most common areas of law and statutes that result in class actions. At present, class action litigation often occurs in the areas of products liability, consumer protection, environmental law,

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166. *Cf.* Charles N. W. Keckler, *Cy Pres and Its Predators*, *in* THE PURSUIT OF JUSTICE: LAW AND ECONOMICS OF LEGAL INSTITUTIONS 217, 219 (Edward J. López ed., 2010) ("As the modern class action has emerged over the past 40 years, it has become another instance where courts are asked to find 'second-best' solutions in circumstances where the 'best' solution, as designated by a legal instrument, cannot be achieved.").

167. The United States Courts utilize public comment procedures in promulgating the Federal Rules of Civil Procedure, drawing on "the [b]ench, [b]ar, and [p]ublic" to provide commentary on proposed amendments. *Overview for the Bench, Bar, and Public*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [https://perma.cc/LYJ4-GZ3V]. Utilizing the bench, bar, and public similarly in crafting default lists ensures that varied perspectives are taken into account when choosing between nonprofit organizations.

168. The Federal Rules confer authority upon district courts to promulgate rules "consistent with," but not duplicative of, "federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075." FED. R. CIV. P. 83. Rules must be "general rules of practice and procedure" that do "not abridge, enlarge or modify any substantive right." § 2072.

169. § 2071(a). Rules are effective "only after giving appropriate public notice and an opportunity for comment." § 2071(b). The advisory committee notes on Rule 83 specify that district courts may use varied forms of consultation, including advisory committees. In fact, district courts are required to utilize advisory committees to study the courts' rules and "make recommendations to the court concerning [the] rules and procedures" that the court promulgates. 28 U.S.C. § 2077(b).

170. In her brief recommendation of a similar idea, Christine P. Bartholomew suggested that the ALI or the Judicial Conference of the United States could create a list of valid recipients, which would give settling parties "increased certainty about proposed recipients." Bartholomew, *supra* note 159, at 3284. Utilizing federal district courts' local rulemaking procedures is an alternative mechanism that would ensure that specific recipients are the default in a particular jurisdiction, rather than providing mere guidance to the parties in selecting their own recipients.

securities, and antitrust, among others.[171] Federal statutes that produce class action litigation often include the FCRA, Fair Debt Collection Practices Act, Americans with Disabilities Act, and Employee Retirement Income Security Act, among other securities, employment and labor, and consumer protection laws.[172]

After determining categories of class action types, the advisory committee would research statutory text, legislative history, and previous class action complaints to identify the underlying purposes for possible class action litigation in each of the categories.[173] Statutes may explicitly state the purpose of the law[174] and such purposes may be clarified by courts through interpretation of the legislative history.[175] Complaints in class action litigation may also provide clear evidence of the purposes behind the litigation itself, and the interests of the class that are at stake, which can then be applied, in theory, to future classes within the same class action type category.

2. *Requesting Proposals, Vetting Applicants & Approving Default Awardees*

With tangible purposes and class interests identified for each of the categories, the group would be ready to issue a request for proposals. In a process similar to that used for grantmaking, which has been suggested as a

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171. *See* Kliebard et al., *supra* note 160; *see also* Keckler, *supra* note 166, at 231 (noting that antitrust and consumer litigation are "the bulk of class actions producing unclaimed funds"). Workplace class action litigation, which includes wage disputes, has increased in the wake of the COVID-19 pandemic. Edward Segal, *Workplace Class Action Settlements Set New Record in 2021: Report*, FORBES (Jan. 4, 2022, 5:00 AM), https://www.forbes.com/sites/edwardsegal/2022/01/04/workplace-class-action-settlements-set-new-record-in-2021-report/?sh=20247edc40b8 [https://perma.cc/3WST-4GCY].

172. Brian T. Fitzpatrick studied class action settlements approved in 2006 and 2007, grouping the settlements by case type based on the underlying causes of action in particular statutes or categories of laws. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 818 (2010).

173. Michael J. Slobom suggested a similar concept, urging courts to focus on the broad statutory purposes in designating *cy pres* recipients. Slobom, *supra* note 151, at 304–05. Slobom recommends that where the statutory objective is compensatory, the *cy pres* recipient should reflect the best interests of the class and where the statutory objective is deterrence, "anyone but the defendant" should be selected. *Id.* at 305. My recommendation is that *cy pres* recipients should always reflect class interests, while Slobom asserts that injury vindication and "general deterrence against similarly situated actors" are sufficient in cases with underlying purposes of deterrence. *See id.* at 305–06. For a similar idea suggested within the context of an equitable trust framework for *cy pres* awards, see Barnett, *supra* note 92, at 1602, arguing "the use of the fund can be tailored to mirror the same policy objectives as the statute or common law doctrine under which the action was brought."

174. *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. § 1681(b).

175. *See* Mark DeForrest, *Taming a Dragon: Legislative History in Legal Analysis*, 39 U. DAYTON L. REV. 37, 59 (2013) ("Not eschewing recourse to legislative history, purposivism sees the legislative record as one, but not the only, tool available to discern the purpose behind a statutory enactment.").

solution for *cy pres* settlements,[176] nonprofits would submit detailed proposals that describe how the organization aligns with the class action type categories and how their programs advance the purposes identified within each of those categories.

After receiving submissions, the group should vet nonprofits according to particular criteria, ultimately identifying the organizations that most clearly reflect the underlying interests and purposes of class members within each category.[177] Criteria may include whether the nonprofit has a defined program to support the underlying statutory purposes or is generally supportive of those purposes; the geographic scope of the nonprofit's work[178] and whether the organization could adequately serve indirect class interests for class actions that extend beyond the jurisdiction; and the nonprofit's financial acumen, which speaks to its ability to help safeguard and prudently manage *cy pres* funds it may receive.[179] Financial acuity could be gauged in a variety of ways, including third-party financial ratings of charitable organizations.[180] Vetting organizations according to these criteria helps ensure that presumptively approved *cy pres* beneficiaries meet a base level approximation of class interests in each class action type category.

3. *Double Scrutiny*

Once established as presumptively valid recipients, nonprofits would be subject to a second layer of scrutiny in each class action settlement where

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176. Others have analogized processes for distributing *cy pres* funds to grantmaking procedures. *See* Albert A. Foer, *Enhancing Competition Through the Cy Pres Remedy: Suggested Best Practices*, ANTITRUST, Spring 2010, at 86, 89; Cecily C. Shiel, Comment, *A New Generation of Class Action Cy Pres Remedies: Lessons from Washington State*, 90 WASH. L. REV. 943, 986 (2015) (arguing that a Washington case giving a foundation the ability to distribute *cy pres* funds as grants was a proper use of *cy pres*).

177. This mirrors, in part, the current nexus requirement that courts apply, see *supra* Part II, but would be done preemptively by the advisory committee.

178. *See* RUBENSTEIN, *supra* note 43, § 12:33; *In re* Lupron Mktg. & Sales Pracs. Litig., 677 F.3d 21, 33 (1st Cir. 2012).

179. *See* Michael Grant, *Cy Pres: Not the First Option, but "As Near As Possible,"* 32 GEO. J. LEGAL ETHICS 637, 655 (2019) (noting that courts should consider the "sound fiscal management" history of the prospective *cy pres* recipient (quoting Heekin v. Anthem, Inc., No. 05-CV-01908-TWP, 2012 WL 5472087, at *4 (S.D. Ind. Nov. 9, 2012))); RUBENSTEIN, *supra* note 43, § 12:33.

180. Bartholomew, *supra* note 159, at 3286 ("Preference should be given to charities rated by an independent organization."). Independent organizations that rate nonprofits include "the American Institute of Philanthropy, Better Business Bureau's Wise Giving Alliance, and Charity Navigator." *Id.* The American Institute of Philanthropy is now CharityWatch. *Mission & Goals*, CHARITYWATCH, https://www.charitywatch.org/about-charitywatch/mission-goals [https://perma.cc/GZA7-G6FY]. The Better Business Bureau's Wise Giving Alliance and Charity Navigator each issue ratings based on more than financial criteria. *See BBB Standards for Charity Accountability*, GIVE.ORG: BBB WISE GIVING ALL., https://www.give.org/charity-landing-page/bbb-standards-for-charity-accountability [https://perma.cc/FET6-FLA3].

they were awarded funds. Based on the list of recipients, judges should reevaluate the potential awardees based on the criteria they currently use for vetting recipients of *cy pres* settlements.[181] These existing vetting processes are already a step in the direction of fairness in *cy pres* settlements, and when coupled with the initial selection process, further solidify the protection of class interests.

Utilizing court officials, class action litigators, and members of the public to identify default lists of *cy pres* recipients will help align *cy-pres*-only settlement awardees with the underlying interests of the class. The double-vetting process, designed to carefully analyze nonprofits before they are placed on the default list and again before they are awarded settlement funds, ensures that only charitable organizations that stand up to scrutiny receive funds. Moreover, this method cabins the risks of judicial discretion—the root of perceived unfairness in many class action settlements.[182] One drawback to the default lists method is that it may increase administrative costs,[183] particularly on the front end. Ultimately, however, it would remove the need for the parties or the court to specify *cy pres* recipients in each case and would not increase judges' time commitment in approving settlements.[184]

B. Settling Around the Default with Detailed Proposals

When dealing with a *cy-pres*-only settlement, the parties may want to specify their own recipient, and they should be encouraged to do so,[185] bearing in mind that the absent class members' interests should be prioritized. Just like the intestacy statutes can be overcome through the use of a will,[186] the default lists of *cy pres* awardees could be overcome through settlements based on detailed proposals and the parties' agreement to award

181. *See supra* Part II.

182. *See supra* Section III.C.

183. *See* Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 KAN. L. REV. 913, 944 (2017) ("[T]he tighter the required nexus between the cy pres beneficiary and the class, the more costly it is to search for a suitable beneficiary.").

184. *Cf. In re* Google, Inc. Cookie Placement Consumer Priv. Litig., 934 F.3d 316, 326 (3d Cir. 2019) (identifying two competing interests weighed by judges in approving class action settlements: (1) the "parties reaching an amicable agreement and avoiding protracted litigation" and (2) the court's "obligation as a fiduciary for absent class members to examine the proposed settlement with care"). These two interests will be advanced using the default lists method because this method takes greater care to ensure the *cy pres* recipient will act for the indirect benefit of the class members, while also avoiding the self-interested bargaining tactics that may be present in protracted settlement conversations. *Cf. supra* notes 135–39 and accompanying text.

185. *See* Goodlander, *supra* note 59, at 761 (arguing that judge involvement in designating *cy pres* recipients could be cabined entirely if parties were required to select their own recipient).

186. SITKOFF & DUKEMINIER, *supra* note 157, at 271.

settlement funds to specific nonprofits.[187] This is perhaps the best option, because it removes the necessary levels of generality that exist in the default lists of presumptively approved recipients.[188]

Contracting around default rules indicates the parties' intent,[189] and this is evident here as well. Both class counsel and the defendants would have opportunities to indicate their intentions through an agreed-upon recipient,[190] and this is functionally identical to the mechanism currently used in *cy pres* settlements. However, the parties' intentions are not

187. Vanessa K. Fulton suggested a similar idea, based on statutes identifying specific legal aid organizations as *cy pres* recipients and the parties' ability to "contract around the rule" through "specific language" in settlement agreements. Vanessa K. Fulton, Note, *Beware of Cy Pres Bearing Gifts*, 56 ARIZ. L. REV. 925, 936 (2014). In my fairness-forward solution, the defaults would not be statutorily imposed and should include more diverse nonprofits than legal aid organizations, given that legal aid organizations do not always best reflect class interests. Grant, *supra* note 179, at 656 (arguing that legal aid organizations are not always necessary *cy pres* recipients and that "[c]ourts should always consider entities whose mission most relates to the purpose of the class"). Legal aid organizations, like class actions, advance the ability to vindicate legal rights among those for whom it would otherwise be impractical. Boies & Keith, *supra* note 61, at 291–93. However, they do not directly serve the class members, but rather the general public. *Cf.* Keckler, *supra* note 166, at 219 (arguing that one "innovation" in the *cy pres* doctrine "was to employ the distribution to maximize the *general* welfare rather than the welfare of the originally intended beneficiaries").

188. There will never be complete fit between the interests of the absent class and the function of the presumptively approved nonprofits precisely because they are defaults. The default lists would merely provide a baseline to limit unabashed judicial discretion. However, when the settling parties select a recipient, which is strictly vetted by the court, the fit and fairness may be more precise. Consider the following: The Western District of New York approved *cy pres* distribution to a 501(c)(3) providing employment services to formerly incarcerated individuals. Wentworth v. Metrodata Servs., Inc., No. 17-CV-594, 2022 WL 3371656, at *1 (W.D.N.Y. July 5, 2022). The class was defined as those whose consumer reports contained criminal records, other than convictions, that preceded the report by more than seven years, allegedly in violation of 15 U.S.C. § 1681c(a)(5). Order on Renewed Motion to Certify Class at 2, *Wentworth*, No. 17-CV-594, ECF No. 64. Because the suit alleged damages flowing from the harm to job applicants, Class Action Complaint at 2, *Wentworth*, No. 17-CV-594, ECF No. 1, it seems that the nonprofit organization aligns relatively closely with the interests of the class.

189. *See* Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Wells, 213 F.3d 398, 402 (7th Cir. 2000) ("[C]ontracts . . . are enacted against a background of common-sense understandings and legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' intent that they not govern.").

190. *See In re* Google Referrer Header Priv. Litig., 869 F.3d 737, 745 (9th Cir. 2017) ("[S]ettlement agreements 'necessarily reflect the interests of both parties to the settlement.'" (quoting Lane v. Facebook, Inc., 696 F.3d 811, 821 (9th Cir. 2012))). Rossman and Delbaum note that defendants should not have "a veto power" over the parties selected because this would "undermine[] two important goals of *cy pres*: disgorgement and deterrence." STUART T. ROSSMAN & CHARLES DELBAUM, CONSUMER CLASS ACTIONS § 14.9.4, at 330 (10th ed. 2020). However, "[s]ettlements are private contracts reflecting negotiated compromises," *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013), so to settle around the default, both the class representative and the defendants must assent to the recipient. The court dispels the actual risks that Rossman and Delbaum posit from having defendants involved in selection by "determin[ing] whether the compromises reflected in the settlement—including those terms relating to the allocation of settlement funds—are fair, reasonable, and adequate when considered from the perspective of the class as a whole." *Id.* at 174.

paramount; the absent class members' are.[191] Accordingly, parties should be required to provide detailed proposals showing how class members indirectly or directly benefit from the funded projects that align with the purposes of the litigation.[192] These proposals should include "a description of the organization, financial information, and relevant existing or proposed projects" of the selected nonprofit, and may include "a specific work plan with timetables for accomplishing and reporting that work."[193] These proposals should provide a similar level of detail to the proposals created by organizations for inclusion on the default recipients list, and should be sure to address the purposes underlying the cause of action. The detail provided in the proposals will enhance courts' ability to apply the criteria they already use in vetting recipients for fairness to the absent class members,[194] mitigating the risks of self-interested parties taking advantage of the *cy pres* mechanism.

Allowing the parties to settle around the default lists presents many benefits. The parties are able to choose the award recipients, which mitigates judicial discretion.[195] The traditional structures of the litigation process are also maintained when the parties can decide their own *cy pres* award recipient,[196] but must be cabined to avoid improvident self-interests making *cy pres* settlements more unfair for the absent class members.[197] The more detailed the parties' settlement proposals, the more information is available to the court before the distribution is made.

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191. *Cf. In re* Pet Food Prods. Liab. Litig., 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J., concurring and dissenting) (recognizing that testator's interests justified *cy pres* in the charitable trust context and that in the class action at issue, class members "never voiced any interest" in a charitable intent through *cy pres* distributions, making *cy pres* inappropriate).

192. ROSSMAN & DELBAUM, *supra* note 190, § 14.9.4, at 331; *see also* McCall et al., *supra* note 49, at 850 ("[C]ounsel should be prepared to show the court how that organization has the ability and competence to work for the interests the litigation was brought to protect.").

193. ROSSMAN & DELBAUM, *supra* note 190, § 14.9.4, at 331. *But see* Bartholomew, *supra* note 159, at 3286–87 ("Parties should provide a detailed plan on how to use the money as part of the settlement approval process. . . . Minute detail is not needed, but the court should be confident the recipient has a plan and is well-positioned to execute it.").

194. *See supra* Part II.

195. *See* ROSSMAN & DELBAUM, *supra* note 190, § 14.9.4, at 331 ("[A]t least two courts of appeal have expressed disapproval of settlements that give the court complete discretion to identify an appropriate *cy pres* recipient." (first citing *In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060 (8th Cir. 2015); and then citing *In re* Lupron Mktg. & Sales Pracs. Litig., 677 F.3d 21 (1st Cir. 2012))). The First Circuit noted that "the choice [of recipient] would have been better made by the parties initially and then tested by the court." *Lupron*, 677 F.3d at 38.

196. *See* Tim A. Thomas, Annotation, *Permissible Methods of Distributing Unclaimed Damages in Federal Class Action*, 107 A.L.R. Fed. 800 Art. II § 3[b] (1992) ("[T]he adversary process is better suited to the parties making the decisions and leaving less to the discretion of the judges." (quoting *Lupron*, 677 F.3d at 38)).

197. *See supra* Sections III.A. and III.D.

CONCLUSION

By taking a fairness-forward approach to *cy pres* settlement awards, courts can better ensure that absent class members are adequately represented, releasing their claims while receiving an indirect benefit that at least aligns with the purposes of the litigation. While no *cy pres* system will ever achieve complete fairness, the solution presented here operates with an eye to the absent class members. In a litigation mechanism which strips class members of the autonomy to control their own case—a property right—the law should take greater care to "fair[ly], reasonabl[y], and adequate[ly]" protect them.[198] The problems that exist in *cy pres* settlements can be mitigated by appointing and properly vetting presumptively valid recipients or allowing the parties to designate a nonprofit recipient subject to scrutiny. These steps will maintain the benefits of the *cy pres* device as compared to escheat, reversion, or pro-rata distributions, while also enhancing attention to class members' interests, which often go overlooked or underemphasized under the current regime. Class action settlements often place defendants, class counsel, and class representatives against the court and absent class members,[199] leaving a settlement ripe for conflicts of interest. In some cases, the settlement may already align with the interests of absent class members, but in a *cy pres* settlement especially, the court must take action to identify and safeguard confounding class interests that diverge from those of the parties. Doing so will bring class action *cy pres* settlements one step closer to complete fairness.

Lauryn Masters[*]

198. FED. R. CIV. P. 23(e)(2); *see also supra* notes 102–09 and accompanying text.

199. *See In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 77 (S.D.N.Y. 2000) (noting that once a settlement is agreed upon, "all have an interest in seeing it approved by the court" and "the adversary system typically abandons the judge, as plaintiffs' lawyers and defendants band together to convince the court to approve the settlement"); Almendares, *supra* note 50, at 650 ("[S]ettlement removes the adversarial process that courts rely on to make these assessments [of the case's merits].").

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