NOTES & COMMENTS

CLASS ACTION *CY PRES*: A CALL FOR REFORM AMIDST INCONSISTENCY AND CRITICISM

by
*Emily Potucek**

The prevalence of cy pres *awards in class action settlements has increased remarkably in the last several decades. However as class action* cy pres *practice has become more commonplace, so have the concerns for its propriety in the class action context. Indeed because these concerns were recognized by the U.S. Supreme Court without further clarity on how, and whether, they can be alleviated, the viability of class action* cy pres *practice is uncertain. In response to this uncertainty, this Comment presents an exhaustive inquiry into* cy pres *practice in class action settlements. It demonstrates that while certain courts'* cy pres *practices are distorting the purposes of the remedy and contributing to its myriad of criticisms, other courts' contrasting practices indicate that so long as* cy pres *is appropriately restricted, it can be a meaningful remedy for some class action settlements. It argues that if the limitations of these courts are uniformly implemented and accompanied by several further guidelines, the remedy warrants preservation.*

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* J.D., Lewis & Clark Law School, *summa cum laude*, 2023; B.A., *summa cum laude*, University of Oregon, 2020. The Author would like to thank Professor Robert Klonoff for his invaluable vision and mentorship on this Comment. The Author would also like to thank the staff of Lewis & Clark Law Review for their thoughtful, diligent editing. Finally, the Author would like to thank her parents. Without them, this and many other dreams would have remained just that.

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INTRODUCTION

Today, many courts rely on *cy pres* awards to distribute unclaimed settlement funds in class actions where direct distributions to class members are not practicable. However, as *cy pres* awards have increased in class action jurisprudence, *cy pres*'s doctrinal underpinnings have undergone a myriad of distortions that even the U.S. Supreme Court has noted raise "fundamental concerns" about its propriety in the class action context.[1] As recently as 2019, Justice Clarence Thomas expressed unbounded skepticism for the use of this device in class actions under any circumstances, questioning whether *cy pres* is capable of providing a meaningful remedy for the class members it seeks to redress.[2]

Nonetheless, the Court has still not been presented with an adequate opportunity to provide this clarity. Consequently, its criticisms have permeated lower courts' *cy pres* practice to varying degrees. Indeed, lower courts have imposed their own standards on *cy pres* practice with inconsistent doctrinal results in three important regards: when class action *cy pres* may be employed, how a *cy pres* recipient may be selected, and how attorney fee awards may be calculated when *cy pres* is used. These standards do not consistently alleviate *cy pres*'s "fundamental concerns" and, in some instances, may even exacerbate these concerns.[3]

Notwithstanding these criticisms, class action *cy pres* is the most effective mechanism to distribute otherwise non-distributable funds; it is necessary to ensure the viability of small-claim consumer class actions. Therefore, to alleviate the doctrine's criticisms and ensure it adheres to its foundational principles, uniform standards

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[1] Marek v. Lane, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., statement respecting denial of certiorari).

[2] Frank v. Gaos, 139 S. Ct. 1041, 1046–48 (2019) (Thomas, J., dissenting).

[3] Indeed, some of these inadequacies have even garnered the attention of the mainstream media. *See, e.g.*, Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007), https://www.nytimes.com/2007/11/26/washington/26bar.html (noting that judges regularly "enjoy distributing [*cy pres* awards] to favored charities, alma maters and the like"); George Krueger & Judd Serotta, *Our Class-Action System Is Unconstitutional*, WALL ST. J. (Aug. 6, 2008, 12:01 AM), https://www.wsj.com/articles/SB121798040044415147 (observing that as a result of judges' "unlimited discretion," they "have occasionally been known to order a distribution to some place like their own alma mater or a public interest organization that they happen to favor").

must be implemented that encourage heightened judicial involvement, prioritize direct distributions to class members, select recipients tethered to the nature of the class injury, and apply a critical lens toward potential abuses.

In response to the recent concerns raised by the Supreme Court, this Comment presents an exhaustive inquiry into *cy pres* use in class action settlements. It demonstrates that the patterns certain courts are implementing are destroying the legitimacy of the *cy pres* remedy and fueling its myriad of criticisms. It also argues that the contrasting practices in other courts demonstrate that with limitations, *cy pres* can be appropriately used in certain class action settlements. It argues that if the limitations of these courts are uniformly implemented in *cy pres* practice and accompanied by several further guidelines, the remedy warrants preservation. Part I of this Comment explains why the development of class action *cy pres* has garnered significant criticism. Part II then discusses the different *cy pres* standards courts have implemented in response to these criticisms. It demonstrates the inconsistent ability of those standards to alleviate the concerns for the settlements they produce. Finally, Part III argues that because of the important role *cy pres* serves in small claim consumer class actions, uniform guidance must be adopted by courts to appropriately restrict its practice and maintain its viability. In particular, that Part argues that if courts uniformly confine the remedy to perimeter of the settlement, select recipients using active class participation, and presume *cy pres* settlement fee awards should be reduced in proportion to the direct benefit class members receive, *cy pres* deserves to outlast the criticisms it is facing.

I. THE CRITICISMS TO CLASS ACTION *CY PRES* PRACTICE

The *cy pres* doctrine originally developed in the law of charitable trusts to alter the terms of a trust when its original charitable purpose was impossible to fulfill.[4] Under that doctrine, the court had the authority to modify the trust's terms so long as the modified terms remained "as near as possible" to the original trust's purpose.[5] Scholars and courts began drawing analogies from trust *cy pres* to class actions by the early 1970s, and its prevalence in class actions has increased significantly since 2000.[6] Under class action *cy pres,* when it is impossible to distribute class action funds directly to individual class members, these funds are redirected to a third party with interests that are "as near as possible" to those of the class members.[7] Courts

[4] PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 3.07 cmt. a (AM. L. INST. 2010) [hereinafter ALI].

[5] 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 12:32 (5th ed. 2014).

[6] Martin H. Redish, Peter Julian & Samantha Zyontz, Cy Pres *Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 624, 653 (2010).

[7] RUBENSTEIN, *supra* note 5, § 12:32.

and scholars that endorsed this practice believed that the *cy pres* remedy was preferable to the other mechanisms available to manage non-distributable settlement funds in small claim class actions—reversion and escheat—because at least to some degree, *cy pres* maintained the deterrence function and purported to deliver a remedy still connected to the class.[8]

However, the increase in class action *cy pres* practice has been accompanied by immense criticism that, over time, has inflicted uncertainty into its legitimacy. Indeed, this uncertainty has become undeniable since capturing the attention of the Supreme Court over the last decade. In 2013, Chief Justice John Roberts first opined on *cy pres*'s "fundamental concerns" in a statement respecting the denial of certiorari to a case involving a full *cy pres* settlement.[9] While Chief Justice Roberts agreed with the Court's decision to deny certiorari in that case, he posited that the Court would soon need to "clarify the limits" on class action *cy pres* in light of its growing concerns, beginning with "when, if *ever*" *cy pres* relief should be considered.[10] Notwithstanding this fundamental consideration, the Chief Justice suggested that the Court would need to set standards to maintain the fairness of such settlements, beginning with limitations to target the inherent conflicts between judges, the settling parties, and class members, and limitations to ensure *cy pres* recipients' interests corresponded to the interests of the class.[11]

Only six years later, Justice Thomas reiterated the Chief Justice's concerns in a forceful dissent to *Frank v. Gaos*.[12] In *Frank*, a *cy pres* settlement allocated $5 million to a *cy pres* recipient and awarded over $2 million to class counsel in fees, but gave no money from the settlement fund to absent class members.[13] The Court granted certiorari on the question of "whether a class action settlement that provides a *cy pres* award but no direct relief to class members satisfies the requirement that a settlement binding class members be 'fair, reasonable, and adequate.'"[14] Ultimately, the majority left that question unresolved because it vacated and remanded the case

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[8] *See, e.g.*, Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004) ("In the class action context the reason for appealing to *cy pres* is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement . . . to the class members."); *see also* RUBENSTEIN, *supra* note 5, § 12.32 (discussing *cy pres*'s core functions which made it a preferable device to manage non-distributable funds). For a more thorough comparison of *cy pres*, reversion, and escheat, see *infra* notes 105–116 and accompanying text.

[9] Marek v. Lane, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., statement respecting denial of certiorari).

[10] *Id.* (emphasis added).

[11] *Id.*

[12] Frank v. Gaos, 139 S. Ct. 1041, 1046–48 (2019) (Thomas, J., dissenting).

[13] *Id.* at 1043.

[14] *Id.* at 1045 (quoting FED. R. CIV. P. 23(e)(2)).

on standing grounds.[15] Justice Thomas, in a stand-alone dissent, disagreed with that outcome and evaluated the case in relation to the original question of certiorari. His evaluation captured the breadth of concerns that permeate *cy pres* practice, which can broadly be divided into two main categories: first, *cy pres* settlements do not provide any meaningful benefit to class members, and second, *cy pres* settlements impermissibly polarize the interests of class counsel and class members. Working in tandem, Justice Thomas's critiques echoed critics' concerns that *cy pres* settlements may violate a number of procedural and constitutional requirements.

First, Justice Thomas emphasized that the critical concern permeating *cy pres* practice is that class members inure no benefit from a payment, characterized as a remedy, to a third-party organization.[16] According to Justice Thomas, this indirect third-party benefit is no benefit, and it makes *cy pres* settlements neither fair nor reasonable under Rule 23(e)(2) of the Federal Rules of Civil Procedure (FRCP).[17]

This criticism has garnered the most traction in those *cy pres* settlements that designate funds to recipients that have no conceivable common interest with the class.[18] Examples of such untethered recipients abound, but several illustrations are

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15 *Id.* at 1046.

16 *Id.* at 1047 (Thomas, J., dissenting) ("[*C*]y *pres* payments are not a form of relief to the absent class members and should not be treated as such . . . .").

17 *Id.* ("[T]he lack of any benefit for the class rendered [the *cy pres* settlement at issue] unfair and unreasonable under Rule 23(e)(2)."). This position by Justice Thomas is not unique. Courts have repeatedly questioned whether class members are able to receive even an attenuated, indirect benefit from these awards to third parties. *See, e.g.*, Marek v. Lane, 571 U.S. 1003, 1004–06 (2013) (Roberts, C.J., statement respecting denial of certiorari) (questioning "when, if ever, [*cy pres*] relief should be considered" in light of ambiguity regarding "how to assess [*cy pres*'s] fairness as a general matter"); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004) ("There is no indirect benefit to the class from the defendant's giving the money to someone else."); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013) (suggesting that the benefit class members confer from *cy pres* awards is "at best attenuated and at worse illusory"); *In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1124 (9th Cir. 2021) (Bade, J., concurring) ("[D]espite the acceptance of the theory of indirect benefit, there is, in my view, a compelling argument that class members receive no benefit at all from a settlement that extinguishes their claims without awarding them any damages, and instead directs money to groups whose interests are purportedly aligned with the class members, but whom they have likely never heard of or may even oppose.").

18 ADVISORY COMM. ON CIV. RULES, REP. TO THE STANDING COMM. ON RULES OF PRAC. & PROC. 9 (Dec. 2, 2014), https://www.uscourts.gov/sites/default/files/fr_import/CV12-2014.pdf [hereinafter 2014 CIV. RULES ADVISORY COMM. REP.] ("One of the reasons for disquiet about cy pres awards is the perception that at times they are made to recipients that will use the award for purposes that have little or no relation to the interests of the class. Awards to educational institutions favored by counsel or the court are an example."); *see also* Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011) ("When selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court. Moreover, the

insightful. In one *cy pres* settlement, proceeds from a settlement that arose from a hotel fire were paid to the Animal Legal Defense Fund.[19] In another class action settlement against NASCAR souvenir vendors for alleged price fixing, the settlement awarded the fund to ten charities including the Make-A-Wish Foundation and the American Red Cross.[20] And, in an antitrust class action that alleged the National Football League (NFL) had impermissibly bundled its satellite television game offering, a $400,000 *cy pres* settlement was distributed to the NFL's Youth Education Town Centers, an organization partially funded by the defendants themselves.[21] Critics are quick to observe that such settlement recipients appear to serve the interests of the defendants more than the aggrieved class members.[22] Consequently, recipients of this nature fuel critics' concerns that defendants dictating *cy pres* arrangements may be unabashedly stifling *cy pres*'s deterrent function.[23] Further, selection of such recipients raises skepticism about the propriety of those courts that approve them.[24]

Some courts and scholars go so far as to assert that this attenuated remedial scheme violates both constitutional and procedural guarantees. For example, some critics argue that courts awarding damages to unharmed third parties violates the constitutional separation of powers and cases-or-controversy requirement of Article

specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.").

[19] *In re* San Juan Dupont Plaza Hotel Fire Litig., 687 F. Supp. 2d 1, 3 (D.P.R. 2010).

[20] *In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1395–99 (N.D. Ga. 2001).

[21] Schwartz v. Dall. Cowboys Football Club Ltd., 362 F. Supp. 2d 574, 577 (E.D. Pa. 2005).

[22] *See, e.g.*, Sec. & Exch. Comm'n. v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) (observing that in *cy pres* settlements of this nature, defendants routinely "channel money into causes and organizations in which they already have an interest").

[23] *See* Dennis v. Kellogg Co., 697 F.3d 858, 868 (9th Cir. 2012) (denouncing a settlement as a "paper tiger" in terms of deterrence because the *cy pres* award consisted of donations defendant had unrelatedly promised to make to the *cy pres* recipient prior to the settlement); *In re* Microsoft Corp. Antitrust Litig., 185 F. Supp. 2d 519, 528–29 (D. Md. 2002) (discussing the attempt of defendant Microsoft to fabricate a *cy pres* donation of its own software and computers to schools, which the court observed was an effort by Microsoft to manipulate its *cy pres* award into a competitive advantage by flooding the educational market with its own products).

[24] *See* Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 482 (5th Cir. 2011) (Jones, C.J., concurring) ("[D]istrict courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations."); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 180–81 n.16 (3d Cir. 2013) ("[W]e join other courts and commentators in expressing our concern with district courts selecting *cy pres* recipients."); *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 236 F.R.D. 48, 53 (D. Me. 2006) ("Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more 'deserving' of limited funds than others . . . .").

III[25] by transforming the judiciary's bilateral model—intended to remedy private injury—into a trilateral model intended to redistribute wealth for the benefit of society.[26] Others challenge *cy pres* settlements on Article III standing grounds, arguing that these remedies fail to redress the plaintiffs' injuries that gave rise to the claim.[27] From a separate constitutional lens, *cy pres* objectors and their amici have argued that, because absent class members play no role in determining what organizations the funds derived from their claims will be distributed to, the selection process amounts to impermissible compelled speech under the First Amendment[28] because it connotes their endorsement of the selected organization's purpose.[29] Finally, from a procedural standpoint, critics posit that *cy pres* awards may violate the Rules Enabling Act[30] by denying class members their substantive right to compensatory relief.[31]

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25 U.S. CONST. art. III, § 2, cl. 1.

26 *See Klier*, 658 F.3d at 481 (Jones, C.J., concurring) ("[*Cy pres* awards] present an Article III problem by transforming 'the judicial process from a bilateral private rights adjudicatory model into a trilateral process.'" (quoting Redish et al., *supra* note 6, at 641)); Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Petitioners at 11, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No. 17-961) (arguing that the cy pres settlement in *Frank* "[did] not involve the exercise of the court's remedial power on 'behalf' of unnamed class members, because it provided no relief to them"); Redish et al., *supra* note 6, at 642 ("[*Cy pres*] effectively transforms the court's function into a fundamentally executive role . . . .").

27 *See Klier*, 658 F.3d at 481 (5th Cir. 2011) (Jones, C.J., concurring) (noting that because *cy pres* award distributions "likely violate Article III's standing requirements," courts "should be troubled that a *cy pres* distribution to an outsider uninvolved in the original litigation may confer standing to intervene in the subsequent proceedings should distribution somehow go awry"); Redish et al., *supra* note 6, at 643 ("[R]equiring the defendant to donate to an uninjured charitable recipient amounts to a remedial non-sequitur. . . . Ordering the transfer of defendants' funds to the charitable third party . . . remedies no violation of anyone's legally protected rights.").

28 U.S. CONST. amend. I.

29 Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Petitioners, *supra* note 26, at 5–6 ("[C]lass members are forced by the terms of [*cy pres* settlements] to support speech and advocacy activity chosen by class counsel and approved by the judge . . . ."); Brief for Center for Individual Rights as Amici Curiae in Support of Petitioners at 6, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No. 17-961) ("[T]he requirement that class member affirmatively object to subsidizing a charity's political or ideological activities is in no way 'carefully tailored to minimize the infringement' of free speech rights,' as the First Amendment requires . . . ." (quoting Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 313 (2012))). *But see* Brief of Defendant-Appellee at 45–48, Jones v. Monsanto Co., 38 F.4th 693 (8th Cir. 2022) (No. 21-2292) (rebutting the argument that *cy pres* settlements amount to compelled speech because they require class members to subsidize third-party advocacy groups).

30 28 U.S.C. § 2072.

31 *Klier*, 658 F.3d at 481 (Jones, C.J., concurring) ("*Cy pres* distributions arguably violate the Rules Enabling Act by using a wholly procedural device—the class-action mechanism as prescribed in Rule 23—to transform substantive law."); Brief of the Attorneys General of Arizona et al., as Amici Curiae in Support of Petitioners at 10, Frank v. Gaos, 139 S. Ct. 1041 (2019)

The second widespread concern Justice Thomas emphasized was that *cy pres* awards heighten the inherent conflict of interest in class action settlements between unnamed class members and class counsel.[32] In *cy pres* settlements, class counsel's financial incentives remain connected to the size of the settlement award overall, regardless of whether that award confers direct relief upon the class or the more attenuated *cy pres* remedy.[33] On the other hand, class members' incentives are premised foremost on obtaining direct relief.[34] Because of these polarized interests, critics assert that in *cy pres* settlements, class members are especially vulnerable to routinely inadequate representation.[35]

II. THE EXISTING *CY PRES* LANDSCAPE: COURT RESPONSES TO THE CRITICISM

Lower courts have responded to these increasingly prevalent *cy pres* criticisms inconsistently. Many courts purport to restrict *cy pres* practice in accordance with the guidance provided by the American Law Institute (ALI).[36] This guidance explains that *cy pres* awards should only be employed when additional distributions to class members are not feasible and that the *cy pres* recipient must have interests that "reasonably approximate" the interests of the class.[37]

(No. 17-961) (asserting that *cy pres* settlements "enlarge the substantive rights of the plaintiffs" in violation of the Rules Enabling Act because the settlement funds are "directed towards third parties"); Redish et al., *supra* note 6, at 648 ("[U]se of Rule 23 to authorize radical modification in the mode of penalization or enforcement is itself a violation of the Enabling Act's restriction.").

[32] Frank v. Gaos, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

[33] *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013) (noting that "the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class"); Lane v. Facebook, Inc., 696 F.3d 811, 834 (9th Cir. 2012) (Kleinfeld, J., dissenting) ("[T]he larger the cy pres award, the easier it is to justify a larger attorneys' fees award."); *see also* Redish et al., *supra* note 6, at 640 ("[I]t is surely reasonable to speculate that one of the primary effects, if not purposes, of class action *cy pres* is to inflate the size of class attorneys' fees.").

[34] Pearson v. NBTY, Inc., 772 F.3d 778, 787 (7th Cir. 2014) (observing that class members "pecuniary interest is in the award to the class").

[35] *Frank*, 139 S. Ct. at 1047 (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.").

[36] ALI, *supra* note 4, § 3.07. The widespread adoption of the ALI *cy pres* guidelines has even reached the attention of the FRCP Rules Advisory Committee. It noted in its own evaluation of class action *cy pres* that the ALI principles "have been more often cited and relied on by courts than any other of the Principles." MINUTES OF THE CIV. RULES ADVISORY COMM., OCT. 2014 COMM. MEETING, REP. OF RULE 23 SUBCOMM. 36 (Oct. 30, 2014), https://www.uscourts.gov/sites/default/files/fr_import/CV10-2014-min.pdf.

[37] ALI, *supra* note 4, § 3.07(c).

However, while many courts purport to endorse these standards, courts have developed divergent formulations of what exactly these standards entail. First, while courts generally agree that the feasibility of direct distributions to class members should be taken into account when determining whether *cy pres* is permissible, courts have adopted inconsistent standards for what "feasible" actually means.[38] Second, while courts uniformly require the purpose of a *cy pres* recipient to be closely connected to the harms suffered by the class, some courts permit these recipients to also maintain affiliations with the court, class counsel, and the defendant.[39] Finally, while many courts acknowledge that *cy pres* settlements amplify conflicts between class counsel and the class, some courts refuse to take these conflicts into account in their valuations of attorney fees.[40] These inconsistencies in some courts appear to be aggravating the core criticisms the prevailing guidance intends to redress.

A. Determining When, if Ever, Class Action Cy Pres *Is Warranted*

So far, no courts have endorsed Justice Thomas's position that class action *cy pres* may be altogether impermissible. However, many courts do acknowledge the imperfectness of this remedy for the class. Consequently, these courts have imposed a range of restrictions on when *cy pres* may be used. In some circuits, this has limited *cy pres*'s applicability to a narrow scope of settlements.

For example, the Third Circuit mandates that, if employed at all, *cy pres* awards should typically only "represent a small percentage of total settlement funds," because settlements must prioritize the "direct benefit provided to the class."[41] While the Third Circuit acknowledges that in some consumer class actions, *cy pres* may be necessary to allocate "excess settlement funds," the circuit nonetheless believes *cy pres* should be discouraged, "[b]arring sufficient justification."[42] This justification must derive from a fact-intensive judicial inquiry, rooted in the presumption that the "degree of benefit to the class" must be significant, and often can be further increased with the requisite judicial scrutiny.[43] If a court is not able to determine

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[38] *See infra* notes 46–64 and accompanying text.

[39] *See infra* notes 73–86 and accompanying text.

[40] *See infra* Section II.C.

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

[42] *Id.* at 172, 174.

[43] *Id.* at 175 (vacating a district court's approval of a *cy pres* settlement because the court failed to determine "the amount of compensation that [would] be distributed directly to the class" and thus did not have the requisite factual basis to determine that the *cy pres* settlement was warranted); *see also In re* Google Inc. Cookie Placement Consumer Priv. Litig., 934 F.3d 316, 328 (3d Cir. 2019) (noting that this analysis must be "a practical inquiry rooted in the particular case's facts and procedural posture").

the benefit to the class "with reasonable accuracy," the court must delay final settlement approval until the requisite facts are available.[44] Further, if these findings reveal that direct payments to the class are meager compared to the proposed *cy pres* award, the settling parties are expected to restructure the settlement to ensure the class receives additional direct benefits prior to settlement approval.[45]

The Second, Fifth, Seventh, and Eighth Circuits adopt the ALI-endorsed "feasibility" standard to determine whether a *cy pres* award is permissible in a proposed settlement.[46] Like the approach used by the Third Circuit, this standard prioritizes the direct benefit conferred on the class and heavily limits the propriety of *cy pres.*[47] It advises that *cy pres* awards should only be permissible when further distributions to class members are not "economically viable" or otherwise "impossible."[48] Further distributions to class members remain feasible if actions such as providing additional notice or streamlining the claims process are possible, even if these actions are costly or are only anticipated to confer de minimis recovery for class members.[49] Moreover, like the Third Circuit, courts are expected to conduct a scrupulous judicial review to determine whether a particular settlement satisfies this standard.[50] As a result, *cy pres* awards in these circuits are generally disfavored unless further individual distributions are nearly impossible, or when additional pro rata distributions to class members would provide a windfall.[51]

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[44] *In re Baby Prods.*, 708 F.3d at 174.

[45] *Id.*

[46] *See* ALI, *supra* note 4, § 3.07 cmt. b.

[47] *See, e.g.*, Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 475 (5th Cir. 2011) (stating that *cy pres* awards are only permissible "if it is not possible to put [settlement] funds to their very best use: benefitting the class members directly").

[48] ALI, *supra* note 4, § 3.07(b).

[49] *See, e.g.*, Pearson v. NBTY, Inc., 772 F.3d 778, 783–84 (7th Cir. 2014) (vacating a *cy pres* settlement because an additional ten cents could have been "feasibly" awarded to individual class members if the settlement provided broader notice or simplified the claims process).

[50] *See, e.g.*, *id.* at 787 (emphasizing that "judges must be both vigilant and realistic in [*cy pres* settlement] review"); *In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1067 (8th Cir. 2015) (stating that district courts must conduct a "thorough investigation" to determine whether a *cy pres* settlement meets that circuit's "rigorous standards" (citing ALI *supra* note 4, § 3.07 cmt. b))).

[51] *See, e.g.*, Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007) (vacating a *cy pres* settlement because there were no findings that "it would be onerous or impossible to locate class members" or that "individual distribution [was] economically impracticable"); *Klier*, 658 F.3d at 475 ("Where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so, except where an additional distribution would provide a windfall . . . ."); *Pearson*, 772 F.3d at 784 ("A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries, here consisting of the class members."); *In re BankAmerica Corp.*, 775 F.3d at 1064 ("[A] *cy pres* distribution to a third party of unclaimed settlement funds is permissible '*only* when it is not feasible to make further distributions to class members.'" (quoting *Klier*, 658 F.3d at 475)).

However, the Eighth Circuit's recent use of this standard in *Jones v. Monsanto Co.*[52] demonstrates that it is still periodically applied inconsistently. In a settlement arising from allegations that Monsanto deceptively labeled one of its herbicide products, the parties in *Jones* agreed that Monsanto would pay class members "50% of the average weighted retail price for the items they purchased," and that the settlement would distribute any remaining funds to three *cy pres* recipients.[53] After the notice and claims period had concluded, an objector contended that it was inappropriate to distribute the remaining funds to the *cy pres* recipients because, in accordance with the feasibility standard, it was possible to provide broader notice, and further, the already-identified class members were entitled to more than 50% of the weighted retail price as pro rata distribution prior to a distribution to the *cy pres* recipients.[54] The court rejected each of these arguments based on reasoning that undermines the parameters of the feasibility standard. First, the court concluded that the district court did not abuse its discretion by rejecting that the expanded notice proposal was feasible, although the basis for the district court's rejection was that the objector's proposal "was unlikely to be effective," although it was not impossible nor economically unviable.[55] Further, the court concluded that pro rata distributions of more than 50% of the weighted retail price were inappropriate because there was a possibility that those distributions would give class members a windfall.[56] Because the nature of class members' damages made the value of their claims lower than the full price they had originally paid for the product, and because these damages were unliquidated and therefore difficult to calculate with precision, the court refused to even consider whether pro rata distribution on top of the original 50% reimbursement to class members would be justified.[57] In that conclusion, the court appeared to disregard the presumption under the feasibility standard that "few settlements award 100 percent of a class member's losses" and therefore, "it is unlikely in most cases that further distributions to class members [will] result in more than 100 percent recovery for those class members."[58]

The Ninth Circuit also purports to use a variation of the feasibility standard to determine when *cy pres* remedies are appropriate. However, the way it has applied that standard in practice is distinguishable from the general approach of the aforementioned circuits, notwithstanding the Eight Circuit's decision in *Jones*. For example, the Ninth Circuit does not require that pro rata distributions be a dispositive

52 Jones v. Monsanto Co., 38 F.4th 693, 698–99 (8th Cir. 2020).

53 *Id.* at 697, 699.

54 *Id.* at 697–98.

55 *Id.* at 698 (discussing Jones v. Monsanto Co., No. 19-0102-CV-W, 2021 WL 2426126, at *5 (W.D. Mo. May 13, 2021)).

56 *Id.* at 699.

57 *Id.*

58 ALI, *supra* note 4, § 3.07 cmt. b.

factor in its feasibility analysis.[59] Moreover, rather than prioritizing the direct benefit any *cy pres* settlement confers on class members, the Ninth Circuit only requires a showing that further distributions to class members would be "burdensome or costly."[60] In practice, this standard dismisses the opportunity for direct distributions to class members in lieu of *cy pres* in circumstances that directly contradict the outcomes of the standards employed in the aforementioned circuits.[61] Further, in contrast to the expectation in other circuits that *cy pres* awards should typically represent only a small percentage of the total settlement fund, the Ninth Circuit approach more readily endorses *cy pres* awards that dispose of the entirety of the settlement fund.[62] This may in part be propelled by the Ninth Circuit's position, contrasted to the aforementioned circuits, that heightened judicial scrutiny for *cy pres* settlements compared to other class settlements is unnecessary.[63]

This more permissive application of the feasibility standard may be reinforcing critics' concerns that class members fail to receive relief from *cy pres* distributions. Courts that approve *cy pres* awards only because further distributions to class members may be costly or burdensome or courts that are too eager to depart from the presumption that *cy pres* awards should generally only represent a small percentage

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[59] *See, e.g.*, *In re* Easysaver Rewards Litig., 906 F.3d 747, 761 (9th Cir. 2018) (acknowledging that "[i]t might be technically feasible to distribute the [remaining settlement] funds" pro rata to class members, but declining to do so because each class member's recovery would be "*de minimis*" (quoting Lane v. Facebook, Inc., 696 F.3d 811, 821 (9th Cir. 2012))).

[60] *Lane*, 696 F.3d at 824.

[61] *Compare In re* Google Referrer Header Priv. Litig., 869 F.3d 737, 742 (9th Cir. 2017) (affirming the district court's determination that an additional four cents in direct distributions to individual class members did not warrant rejection of a *cy pres* settlement under the Ninth Circuit's burdensome and costly feasibility standard), *vacated and remanded sub nom. on other grounds,* Frank v. Gaos, 139 S. Ct. 1041 (2019), *with* Pearson v. NBTY, Inc., 772 F.3d 778, 783–84 (7th Cir. 2014) (concluding that an additional ten cents in direct distributions to individual class members warranted rejection of a *cy pres* settlement under the Seventh Circuit's feasibility standard).

[62] *See, e.g.*, *Lane*, 696 F.3d at 825 (court affirming approval of a *cy pres* settlement where the entire $9.5 million settlement fund was awarded to the *cy pres* recipient because it would have been "'burdensome' and inefficient" to make direct distributions to class members); *In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1114–15 (9th Cir. 2021) (court affirming approval of a *cy pres* settlement that did not provide any direct payments to absent class members because of the "unusually difficult" and "expensive" nature of such payments (quoting *In re* Google LLC St. View Elec. Commc'ns Litig., No. 10-md-02184, 2020 WL 1288377, at *11 (N.D. Cal. Mar. 18, 2020))).

[63] *See, e.g.*, *Lane*, 696 F.3d at 819 ("The district court's review of a class-action settlement that calls for a *cy pres* remedy is not substantively different from that of any other class-action settlement . . . .").

of settlement funds, appear to abandon the premise that settlement funds are foremost the property of the class.[64]

B. Selecting the Cy Pres *Recipient*

Conscientious of *cy pres*'s indirect benefits for the class, the vast majority of courts require *cy pres* recipients' purposes to maintain a close connection to the harms suffered by the class.[65] This requirement attempts to ensure that *cy pres* funds will actually be used to remedy the injuries shared by the class, despite class members not receiving this remedy through direct distributions.[66] Courts qualify exactly how close this connection must be through various specifications. For example, some courts require that the recipients' scope mirror the geographic breadth of the class to ensure that the fund has the capacity to reach the entire class.[67] This requirement

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[64] *See* ALI, *supra* note 4, § 3.07 cmt. b ("[F]unds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members."); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 474 (5th Cir. 2011) ("The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.").

[65] As discussed above, most courts endorse the ALI's recommendation that a recipient must have a "close nexus" to the class's interests. ALI, *supra* note 4, § 3.07 cmt. b; *see, e.g.*, *In re* Lupron Mktg. & Sales Pracs. Litig., 677 F.3d 21, 33 (1st Cir. 2012) (adopting the "reasonable approximation test"); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) (requiring *cy pres* awards to be "used for a purpose related to the class injury"); *Klier*, 658 F.3d at 471 (explaining that *cy pres* beneficiaries must possess "a sufficient nexus to the underlying substantive objectives" of the litigation); *In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1067 (8th Cir. 2015) (requiring a *cy pres* recipient's purpose to be "consistent with the nature of the underlying action and with the judicial function" (quoting *In re* Katrina Canal Breaches Litig., 628 F.3d 185, 196 (5th Cir. 2010))); Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011) (noting that *cy pres* recipients must be "tethered to the nature of the lawsuit and the interests of the silent class members").

[66] *See* RUBENSTEIN, *supra* note 5, § 12:33.

[67] *In re BankAmerica Corp.*, 775 F.3d at 1067 ("[A] district court must carefully weigh all considerations, including the geographic scope of the underlying litigation . . . ."); *Nachshin*, 663 F.3d at 1040 ("The *cy pres* distribution also fails to target the plaintiff class, because it does not account for the broad geographic distribution of the class."); Koby v. ARS Nat'l Servs., Inc., 846 F.3d 1071, 1079–80 (9th Cir. 2017) (finding that a magistrate judge abused her discretion by approving a *cy pres* settlement, in part because the location of the recipient had "no geographic nexus to the class"); Houck v. Folding Carton Admin. Comm., 881 F.2d 494, 502 (7th Cir. 1989) (invalidating a *cy pres* settlement and instructing the district court on remand to "consider to some degree a broader nationwide use of its *cy pres* discretion"); *In re* Motor Fuel Temperature Sales Pracs. Litig., 286 F.R.D. 488, 504 (D. Kan. 2012) (noting that one consideration courts take into account when evaluating a proposed recipient for a nationwide settlement is the recipient's "geographic diversity"); *In re* Citigroup Inc. Sec. Litig., 199 F. Supp. 3d 845, 853 (S.D.N.Y. 2016) (approving a recipient with geographic scope that paralleled the scope of the plaintiff class by reasoning that "the [settlement] funds are likely to be more immediately

recognizes that the geographic bias of the forum can influence the recipient the parties and the court select.[68] Other courts encourage class member participation in the recipient selection process.[69] Some courts even independently inquire into the legitimacy of recipients to make their own determination of whether the recipients will make productive use of the settlement fund.[70] Under this inquiry, courts express a preference towards those recipients that have reputations for a "history of sound fiscal management," strong governance and leadership, widespread social impact, and limited "red flags such as adverse publicity or governmental investigations,"[71] or recipients that promise to pursue such characteristics if they are created from the settlement itself.[72]

Where courts most noticeably diverge, however, is regarding whether this connection is undermined when the recipient has affiliations to the court, class counsel, or the defendant. Some courts endorse the position that these affiliations have the potential to "raise substantial questions about whether the selection of the recipient was made on the merits" and require that the court thoroughly investigate any accusations that such conflicts exist prior to approving these settlements.[73] This investigation requires judges to give due regard to objectors' challenges and place the

impactful when directed to a narrow geographic area than if they were directed to an organization with a national footprint").

[68] "Even where a class is national in scope, cy pres awards tend to be distributed to charities within the district in which the case was brought." *In re* Thornburg Mortg., Inc. Sec. Litig., 885 F. Supp. 2d 1097, 1110 (D.N.M. 2012).

[69] *See, e.g.*, *In re BankAmerica Corp.*, 775 F.3d at 1066 ("[T]he district court should make a *cy pres* proposal publicly available and allow class members to object or suggest alternative recipients before the court selects a *cy pres* recipient."); *In re* Google Inc. Cookie Placement Consumer Priv. Litig., 934 F.3d 316, 331 (3d Cir. 2019) (suggesting that "parties may also want to involve class members or a neutral participant in the selection of recipients to ward off any appearance of impropriety").

[70] 4 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 12:33 (6th ed. 2022).

[71] *See, e.g.*, Heekin v. Anthem, Inc., No. 05-CV-01908, 2012 WL 5472087, at *4 (S.D. Ind. 2012) (citing *In re* Xpedior Inc., 354 B.R. 210, 241 (Bankr. N.D. Ill. 2006)); Superior Beverage Co., Inc. v. Owens-Illinois, Inc., 827 F. Supp. 477, 479–87 (N.D. Ill. 1993); *see also In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1396 (N.D. Ga. 2001) (evaluating nine proposed *cy pres* recipients according to their "impact upon the community and the proposed use of the settlement funds").

[72] *In re* Folding Carton Antitrust Litig., 744 F.2d 1252, 1253–54 (7th Cir. 1984) (invalidating a *cy pres* distribution to a recipient that the settling parties proposed would be created upon the settlement for antitrust research because "[t]here ha[d] already been voluminous research" on that topic); Diamond Chem. Co. v. Akzo Nobel Chems. B.V., Nos. 01-2118 & 02-1018, 2007 WL 2007447, at *4 (D.D.C. 2007) (approving a *cy pres* distribution to a recipient that would be created upon the settlement because the settling parties had "successfully demonstrate[d] the relevance and possible import of its proposed *cy pres* recipient").

[73] ALI, *supra* note 4, § 3.07 cmt. b.

burden on the allegedly affiliated parties to demonstrate that no conflict actually exists.[74]

For example, in *In re Google Inc. Cookie Placement Consumer Privacy Litigation*, the Third Circuit remanded a *cy pres* settlement because the district court declined to investigate an objector's challenges to the affiliation between the defendants, class counsel, and the *cy pres* recipients.[75] In that case, an objector challenged the selection of four of the six *cy pres* recipients in a full *cy pres* settlement, alleging that the defendant and class counsel had conflicting prior associations with these recipients that made the settlement unfair.[76] The district court ultimately dismissed this allegation "in a single sentence with no analysis."[77] The Third Circuit reversed, concluding that this approach did not possess the requisite "scrupulous" examination required from courts in the face of such allegations.[78] The Third Circuit explained that "if challenged by an objector, a district court must review the selected *cy pres* recipients to determine whether they have a significant prior affiliation with any party, counsel, or the court" and that, when conducting this review, "[t]he parties seeking settlement approval bear the burden of explaining to a court why the *cy pres* selection was fair . . . ."[79]

On the other hand, based on the premise that settlements should remain left to the private negotiations between the settling parties, some courts do not view these affiliations as problematic.[80] These courts continue to approve *cy pres* recipients that have intimate connections to judges, defendants, and class counsel. For example in *Lane v. Facebook*, the Ninth Circuit allowed the defendant's preferences to dictate the recipient selection process based on the view that a judge investigating

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[74] *See In re Google Inc. Cookie Placement*, 934 F.3d at 316.

[75] *Id.* at 331–32.

[76] *Id.* at 330.

[77] *Id.*; *see In re* Google Inc. Cookie Placement Consumer Priv. Litig., No. 12-MD-2358, 2017 WL 446121, at *4 (D. Del. Feb. 2, 2017) ("Likewise, the court finds no conflict of interest that would undermine the selected *cy pres* recipients.").

[78] *In re Google Inc. Cookie Placement*, 934 F.3d at 330.

[79] *Id.* at 331. Other courts have also imposed this heightened scrutiny when they are concerned the *cy pres* settlement was produced by conflicted class counsel. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013) ("Where a court fears counsel is conflicted, it should subject the settlement to increased scrutiny."); Better v. YRC Worldwide Inc., No. 11-2072, 2013 WL 6060952, at *6–7 (D. Kan. Nov. 18, 2013) (denying plaintiffs' request for preliminary class certification and settlement approval in part because settling parties did not provide sufficient evidence to discredit that they had no "pre-existing relationship or connection" to the proposed recipients and therefore, the court was unable "to determine whether the parties ha[d] designated the beneficiary at arms length").

[80] *In re Baby Prods.*, 708 F.3d at 173 ("Settlements are private contracts reflecting negotiated compromises."); Sec. & Exch. Comm'n v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) ("Distributing grants and reviewing the effectiveness of their use is not an appropriate use of judicial resources and transforms courts into eleemosynary institutions.").

the settlement's propriety on these grounds would amount to "an intrusion into the private parties' negotiations" that "would be improper and disruptive to the settlement process."[81] There, the court affirmed a full *cy pres* settlement where the lone *cy pres* recipient was a new entity that the defendants themselves promised to create upon settlement approval.[82] The distributions of settlement funds were to be monitored by this new entity's board, which was comprised of class counsel and the defendant.[83] The court found that class members' objections to the fairness of this arrangement were unwarranted, explaining that the settlement's fairness was not contingent upon the "settling parties select[ing] a *cy pres* recipient that the court or class members would find ideal."[84] Therefore, the court held that "the district court properly declined to undermine those negotiations by second-guessing the parties' [selection of the *cy pres* recipient] as part of its fairness review."[85] This approach disregards the concern that defendants dictating *cy pres* arrangements may unabashedly stifle *cy pres*'s deterrent function and even contradicts some of the Ninth Circuit's other decisions on the issue.[86]

Further, notwithstanding the "nascent dangers" at play when settling parties select recipients with affiliations to themselves or the court, the Ninth Circuit keeps the burden on objectors to challenge the impropriety of these affiliations.[87] While

[81] Lane v. Facebook, Inc., 696 F.3d 811, 821 (9th Cir. 2012).

[82] *Id.* at 822.

[83] *Id.* at 817, 821.

[84] *Id.* at 821.

[85] *Id.* at 821–22. For examples of courts that have demonstrated a similar indifference for intimate connections between the recipient and the court itself, see *In re* Easysaver Rewards Litig., 906 F.3d 747, 762 (9th Cir. 2018) (affirming a nationwide *cy pres* settlement that ordered distribution to three recipients in the district judge's hometown, one of which was the alma mater of three class attorneys); Perkins v. Am. Nat'l Ins. Co., No. 3:05-CV-100, 2012 WL 2839788, at *1 (M.D. Ga. July 10, 2012) (approving a $1.5 million *cy pres* distribution to the district judge's alma mater); *In re* Google Buzz Priv. Litig., No. 10-00672, 2011 WL 7460099, at *3 (N.D. Cal. Jun. 2, 2011) (adding a university center where the district judge taught as a law professor as a *cy pres* recipient).

[86] For example, in *Dennis v. Kellogg Co.*, the Ninth Circuit rejected a similar *cy pres* settlement structure based on the observation that a defendant dictating the recipient undermined the deterrence function of the settlement. Dennis v. Kellogg Co., 697 F.3d 858, 868 (9th Cir. 2012). In that case, the defendant had already promised to make donations to the recipient it selected, and the settlement distributions were merely a reiteration of that already-promised amount. *Id.*

[87] *See In re* Google Referrer Header Priv. Litig., 869 F.3d 737, 750 (9th Cir. 2017) (Wallace, J., concurring in part and dissenting in part) (observing that under the standard adopted by the majority, "the burden is entirely on the objectors to show that the settlement might be tainted"), *vacated and remanded sub nom. on other grounds,* Frank v. Gaos, 139 S. Ct. 1041 (2019); *In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1119 (9th Cir. 2021) (rejecting objector's contention that defendant's previous donations to a proposed *cy pres* recipient amounted to a disqualifiable connection between the recipient and the defendant after noting that

concerns for unproductive objectors' ability to inhibit otherwise valuable settlements undoubtedly underly this approach,[88] by not requiring heightened, independent review of these affiliations, these courts sacrifice their opportunity to address concerns that "the specter of judges . . . dealing in the distribution and solicitation of settlement money may create the appearance of impropriety."[89]

C. Awarding Attorney Fees in Cy Pres *Settlements*

In an attempt to better align class counsel's interests with the class, some courts have held that attorney fees should be reduced in *cy pres* settlements in proportion to the actual value the class directly receives.[90] The Seventh Circuit, for example, takes the position that proportionately reducing fees incentivizes class counsel to "maximize the settlement benefits actually received by the class, rather than to connive with the defendant" solely to increase the *cy pres* award, and in turn their fees.[91] Therefore, the Seventh Circuit presumes that fee awards "should not exceed a third or at most a half of the total amount" of the fund distributed directly to the class.[92] Under this approach, "the 'ratio that is relevant'" when comparing the aggregate value of the settlement to a given fee award "is the ratio of (1) the fee to (2) the fee plus what the class members received."[93] Relying on this ratio, the circuit remanded a $1.93 million fee award in a $20.2 million *cy pres* settlement.[94] While that fee constituted only 9.6% of the settlement's total value, because the class members only received $865,284 of the $20.2 million, the fee under the ratio constituted an "outlandish" and "excessive" 69% of the settlement's real value.[95]

"we have affirmed *cy pres* provisions involving much closer relationships between recipients and parties than anything [objector] alleges here").

88 *See* Robert Klonoff, *Class Action Objectors: The Good, the Bad, and the Ugly*, 89 FORDHAM L. REV. 475, 477 (2020) (explaining how unproductive objectors can "impose serious, and sometimes irreparable, harm on the class action process").

89 *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 180–81 n.16 (3d Cir. 2013) (quoting Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011)).

90 The ALI endorses this approach, explaining that "because cy pres payments . . . only indirectly benefit the class, the court need not give such payments the same full value for purposes of setting attorneys' fees as would be given to direct recoveries by the class." ALI, *supra* note 4, § 3.13 cmt. a. It has also gained traction in some lower courts. *See, e.g.*, *In re* Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) ("The class benefit conferred by cy pres payments is indirect and attenuated. That makes it inappropriate to value cy pres on a dollar-for-dollar basis.").

91 Pearson v. NBTY, Inc., 772 F.3d 778, 781 (7th Cir. 2014).

92 *Id.* at 782.

93 *Id.* at 781 (quoting Redman v. RadioShack Corp., 768 F.3d 622, 630 (7th Cir. 2014)).

94 *Id.*

95 *Id.*

Other courts more narrowly propose that *cy pres* awards warrant fee reductions when there are explicit concerns that class counsel's financial incentives overbore its efforts to obtain a real benefit for the class.[96]

Conversely, some courts do not believe the potential conflicts posed by *cy pres* ever justify fee reductions, even when those fee awards are based on those full *cy pres* settlements where class counsel has not conferred any direct benefit on the class.[97] These courts take the position that "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class."[98] While undoubtedly, counsel's efforts in full *cy pres* settlements in some instances warrant these full fee awards, courts approving them indiscriminately may be reinforcing the inherently collusive nature of these settlements.[99]

III. REFORMING EXISTING *CY PRES* PRACTICE

Because of the lack of uniform guidance in *cy pres* practice, the self-imposed limitations courts are devising are inconsistent and, in some instances, may exacerbate the challenges to the doctrine's viability in class action jurisprudence. Indeed, its unrestricted nature in some courts has caused the doctrine to divorce from its ideological underpinnings: adopting lenient definitions of "non-distributable" may be withholding settlement funds from the settlement's intended beneficiaries when unwarranted; allowing the settling parties to select *cy pres* recipients with which they have close affiliations raises doubts about deterrence and conferring even an indirect benefit on the class; unquestioningly awarding full attorney fees even in *cy pres*-only

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[96] *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 178 (3d Cir. 2013) ("Where a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class, . . . it [is] appropriate for the court to decrease the fee award."); Dennis v. Kellogg Co., 697 F.3d 858, 868 (9th Cir. 2012) ("The issue of the valuation of [attorney fees in *cy pres* settlements] must be examined with great care to eliminate the possibility that it serves only the 'self-interests' of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious.").

[97] *See, e.g.*, *In re* Google Inc. St. View Elec. Commc'ns Litig., 21 F.4th 1102, 1121 (9th Cir. 2021) (affirming a 25% award of fees to class counsel in a *cy pres* settlement after concluding that "where the settlement fund is non-distributable, counsel should not be penalized for fashioning a *cy pres*-only settlement that stands to accomplish some good." (quoting *In re* Google Inc. St. View Elec. Commc'ns Litig., No. 10-md-02194, 2020 WL 1288377, at *8 n.6 (N.D. Cal. Mar. 18, 2020))); *In re* Google Referrer Header Priv. Litig., 869 F.3d 737, 747 (9th Cir. 2017) ("[T]here is no support for Objectors' view that the settlement should have been valued at a lower amount for the purposes of calculating attorneys' fees simply because it was *cy pres*-only."), *vacated and remanded sub nom. on other grounds,* Frank v. Gaos, 139 S. Ct. 1041 (2019).

[98] Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 437 (2d Cir. 2007).

[99] *See, e.g.*, *In re Google Referrer Header*, 869 F.3d at 748 (Wallace, J., concurring in part and dissenting in part) (dissenting from the majority's unquestioning approval of a full fee award in a *cy pres*-only settlement despite 47% of the *cy pres* fund being awarded to three of class counsel's alma maters).

settlements heightens the risk that potentially conflicted counsel can permissibly abandon efforts to garner some direct benefit for the class.

Nonetheless, even confronted by these flaws in its current application, class action *cy pres* cannot be eliminated altogether. In light of the alternatives that *cy pres* critics propose—refusing certification, escheat, reversion, and lotteries—*cy pres* continues to be the mechanism that has the most doctrinal potential to achieve the functions of deterrence, remedying private harms, and judicial economy at the core of class action jurisprudence.

The first alternative, preferred by Justice Thomas, is to never certify class action settlements that will not distribute the settlement funds directly to class members.[100] This alternative invokes the broader premise that class actions that only reap tangible benefits for class counsel but nothing for the class "should be dismissed out of hand."[101] However, this is not a preferable alternative to *cy pres* for two reasons. First, even if courts attempted to follow this front-end approach, foolproof adoption is impracticable; it will not be able to account for those settlements where unclaimed or non-distributable funds inadvertently arise upon their implementation.[102] Second, and more fundamentally, refusing to ever certify these settlements would obliviate the small claim consumer class actions that are a touchstone of class action jurisprudence. Class actions are the vehicle of empowerment for injured persons who individually do not have the capacity to seek judicial vindication for a violation of their legal rights.[103] Aggregate litigation is intended to "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[104] Restricting the availability of class actions when small recoveries are at issue does not "overcome" this problem.

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[100] *Frank,* 139 S. Ct. at 1048 (Thomas, J., dissenting) ("[B]ecause the class members here received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims, I would hold that the class action should not have been certified, and the settlement should not have been approved."); *see also* Redish et al., *supra* note 6, at 665 ("[T]he proper way to deal with a situation in which there remain significant unclaimed funds in a class action is to avoid the situation in the first place, by simply not certifying the class.").

[101] *In re* Walgreen Co. S'holder Litig., 832 F.3d 718, 724 (7th Cir. 2016).

[102] *See* ADVISORY COMM. ON CIV. RULES, REP. TO THE STANDING COMM. ON RULES OF PRAC. & PROC. 22 (May 2, 2015), https://www.uscourts.gov/sites/default/files/cv05-2015_0.pdf [hereinafter 5-2015 CIV. RULES ADVISORY COMM. REP.] ("One recurrent reality is that any claims procedure creates a possibility that a residue will be left once distributions are made in accordance with settlement guidelines to all class members who seek compensation through the claims process."); Redish et al., *supra* note 6, at 665 ("Even if the federal courts . . . follow this front-loaded recommendation, cases will no doubt arise in which a portion of the award or settlement fund will remain unclaimed . . . .").

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

[104] *Id.* (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

The second alternative is to escheat non-distributable settlement funds. Proponents of escheat argue that the government is better positioned to provide services that indirectly benefit class members compared to privately selected, unaccountable third parties.[105] Under that view, unclaimed money escheating to the state may more closely align with traditional legal and equitable principles.[106] Further, it could remove the problematic discretion associated with selecting *cy pres* recipients,[107] but still serve the goals of deterrence and enforcement.[108] However, escheat is not preferable to *cy pres* because it fails to target the private grievances class actions are intended to redress.[109] Rule 23, and the adversary system more broadly, are each premised on the vindication of private rights.[110] Consequently, implementing the class action device to pursue a public benefit may be incompatible with both the Rules Enabling Act and the theoretical underpinnings of the legal system at large.[111]

A third alternative is to revert unclaimed funds to the defendant. Proponents of reversion assert that, unlike *cy pres*, reversion does not overcharge defendants beyond those harms that have been suffered by class members directly.[112] And unlike escheat, reversion maintains the private rights adjudicatory model because the defendant keeps its entitlement to the settlement award unless that award is claimed by the plaintiff class.[113] Further, reversion may limit abuses of attorney fees when unclaimed funds are at issue.[114] Nonetheless, reversion is also an inadequate alternative because it undermines the deterrent function of class actions.[115] Particularly

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[105] *See generally* RUBENSTEIN, *supra* note 5, § 12:31.

[106] *In re* Pet Food Prods. Liab. Litig., 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J., concurring in part and dissenting in part).

[107] RUBENSTEIN, *supra* note 5, § 12:31.

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

[109] ALI, *supra* note 4, § 3.07 cmt. B ("[Escheat] would benefit all citizens equally, even those who were not harmed by the [defendant]."); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) ("[Escheat] benefits the community at large rather than those harmed by the defendant's conduct."); Redish et al., *supra* note 6, at 665 ("To take defendant's money solely for purposes of escheat to the state effectively turns the private compensatory model . . . into the equivalent of a civil fine.").

[110] FED. R. CIV. P. 23(b); *see* Redish et al., *supra* note 6, at 665.

[111] Redish et al., *supra* note 6, at 665.

[112] *See, e.g.*, Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 482 (5th Cir. 2011) (Jones, C.J., concurring) ("[Reversion] corrects the parties' mutual mistake" but does "not effectuate transfers of funds from defendants beyond what they owe *to the parties* in judgments or settlements.").

[113] Redish et al., *supra* note 6, at 665.

[114] *Id.*

[115] *See* Redish et al., *supra* note 6, at 650 ("[T]here would exist no civil mechanism by which to deter similar unlawful behavior—either by the same or other wrongdoers—in the future.").

in small claim consumer class actions where claims rates are low, reversionary settlements permit defendants to ameliorate their wrongdoings at little to no cost.[116]

Finally, the more novel class member lottery proposal is also not a superior alternative to *cy pres*. In a lottery system, leftover funds would be randomly distributed to a percentage of class members.[117] Proponents of this mechanism argue that it is preferable to *cy pres* because rather than the settlement fund being used to indirectly provide a speculative benefit for the entire class, the lottery allocates the settlement funds directly to at least some class members.[118] However, a lottery would not alleviate the economic burdens inherent in small claim consumer class actions that often create the issue of non-distributable funds to begin with.[119] Moreover, a lottery system raises concerns for fairness between class members[120] and does not empower class members in the course of settlement.[121]

Compared to refusing certification, escheat, reversion, and lottery systems, the fundamental functions of *cy pres* make it the most opportune mechanism available to courts when direct distributions are impossible. Therefore, it cannot be altogether removed from class action jurisprudence. That approach contravenes the policies underlying class actions, and it is inconsistent with the conclusions reached by the Rules Advisory Committee and Congress. They have each considered *cy pres* and, in those considerations, have implicitly affirmed its appropriateness as a device under Rule 23. Between 2013 and 2015, the Rules Advisory Committee "developed a fairly lengthy sketch of both a possible rule amendment and a possible Committee Note" to govern *cy pres* settlements, demonstrating its understanding that *cy pres*

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116 *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) ("Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement."); ALI, *supra* note 4, § 3.07 cmt. b (disfavoring reversion because it "would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable").

117 *See generally* Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065 (2011); Brief for Petitioners at 44–45, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No. 17-961).

118 *See* Brief for Petitioners, *supra* note 117, at 45.

119 Brief for Class Respondents at 34, *Frank*, 139 S. Ct. 1041 (No. 17-961) ("The class still must be given notice of the lottery and means of entering; claims must be verified; and some number of winners must be sent their winnings.").

120 *Id.* at 35 ("[I]t is unseemly to benefit some by denying any benefit to others.").

121 *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, 665 (2018) (arguing that a lottery "does not give class members a voice or an exit" and "it lowers the incentive of objectors to police potential conflicts of interest over the design of the lottery drawing").

settlements should not be prohibited by Rule 23.[122] At one point during those years, it even noted that "although it would be possible to adopt a rule that forbids cy pres distributions, *that probably is not a good idea*."[123] Further, in 2017 Congress considered a bill to limit attorney fee awards in *cy pres* settlements.[124] That attempt to regulate an aspect of *cy pres* practice at all reflects a presumption among that Bill's sponsors that Rule 23 should not altogether prohibit this practice.

Therefore, while *cy pres* is a valuable device in class action practice and should not be prohibited altogether, its application must be consistently restricted to ensure it preserves its fundamental appeal. However, these restrictions should not be imposed through codified rules; rigid reformation would be incapable of accounting for the dynamic nature of Rule 23 class action settlements, and it would not align with the equitable nature of the *cy pres* remedy, which requires flexibility and discretion to implement on a case-by-case basis. The Rules Advisory Committee's own treatment of *cy pres* accords with these conclusions. As introduced above, in a series of discussions between 2013 and 2015, it considered whether codifying *cy pres* "criteria and guidelines" into Rule 23 was necessary to "address [the] concerns" plaguing *cy pres* practice.[125] However, it ultimately concluded that Rule 23 was an inappropriate mechanism for *cy pres* reform for three reasons: the "uncertainty" for whether guidance beyond the ALI was necessary in light of the judicial trends towards the adoption of its standards; the insusceptibility of *cy pres* to the confines of rules; and "concerns about the proper limits" for new procedural provisions on *cy pres* practice that could accord with the Rules Enabling Act.[126]

Eight years later, each of these conclusions by the Rules Advisory Committee still caution against codified standards for *cy pres* practice: courts continue to converge around the ALI guidelines, settlements that implement *cy pres* are dynamic, and *cy pres* overlaps with the substantive entitlements of class members to a degree that challenges its amenability by Rule 23. However, these conclusions do not caution against additional guidelines for this practice. Indeed, the Committee's prediction that the "fair questions" associated with *cy pres* practice could be resolved by continued court convergence around the ALI guidelines has not been enough.[127]

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[122] ADVISORY COMM. ON CIV. RULES, REP. TO THE STANDING COMM. ON RULES OF PRAC. & PROC. 25 (Dec. 11, 2015), https://www.uscourts.gov/sites/default/files/2015-12-11-cv_rules_committee_report_0.pdf [hereinafter 12-2015 CIV. RULES ADVISORY COMM. REP.].

[123] MINUTES OF THE CIV. RULES ADVISORY COMM., APR. 2015 COMM. MEETING 27 (Apr. 9, 2015), *reprinted in* 5-2015 CIV. RULES ADVISORY COMM. REP., *supra* note 102 (emphasis added).

[124] *See* Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 1718(b).

[125] 5-2015 CIV. RULES ADVISORY COMM. REP., *supra* note 102, at 22.

[126] 12-2015 CIV. RULES ADVISORY COMM. REP., *supra* note 122, at 26.

[127] When the Committee first began discussing a *cy pres* amendment to Rule 23 in 2013 and 2014, it felt compelled to intervene because while "[s]ome courts ha[d] already adopted the

Courts continue to interpret and manipulate these guidelines in ways that distort their purposes,[128] and have been reluctant to embrace them in full.[129] If unremedied by additional guidance on the permissible bounds for *cy pres* practice, these lingering inconsistencies, even in only a minority of courts, will encourage *cy pres* abuse.[130]

This guidance must begin with the standardized expectation that any *cy pres* settlement cannot garner approval absent "undiluted, even heightened, attention" towards its potential abuses.[131] Courts should not approve these awards unless there is evidence "firmly supporting" that they are warranted;[132] they cannot dismiss *cy pres* to the confines of private negotiation and view anything more than minimal judicial involvement as "improper and disruptive."[133] Indeed, judges are often the most impartial participants capable of applying the requisite scrutiny in light of the concerns that conflicting financial incentives may motivate the private negotiations of the settling parties.[134] This scrutiny imposes the requisite accountability on class

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approach recommended in the ALI . . . fair questions remain[ed]." 2014 CIV. RULES ADVISORY COMM. REP., *supra* note 18, at 9. However, by 2015, it expressed more hesitancy for this involvement, questioning "whether there [was] any need for a rule" because of this same observation that several circuits had already expressly adopted the ALI approach, compounded with the additional observation that it was "not clear" in 2015 that any circuit had expressly rejected it. 12-2015 CIV. RULES ADVISORY COMM. REP., *supra* note 122, at 25.

[128] *See supra* notes 36–89 and accompanying text.

[129] For example, while the Third Circuit agrees that the ALI's feasibility standard is one helpful way to determine whether a *cy pres* settlement is permissible, it rejects the ALI's recommendation that *cy pres* awards are only warranted when settlements align with that standard. *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013) ("Although we agree with the ALI that *cy pres* distributions are *most* appropriate where further individual distributions are economically infeasible, we decline to hold that *cy pres* distributions are *only* appropriate in this context.") (emphasis added).

[130] *See* Brief of Attorneys General of Arizona et al., *supra* note 31, at 2 ("Given the nature of nationwide class action litigation, and the ability of class counsel to forum shop cases, even one circuit applying an under-protective standard to *cy pres* settlement arrangements will detrimentally affect consumers across the nation and undercut any efforts . . . to protect consumers from class action settlement abuse.").

[131] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997).

[132] 5-2015 CIV. RULES ADVISORY COMM. REP., *supra* note 102, app. at 22; *see also* Rhonda Wasserman, Cy Pres *in Class Action Settlements*, 88 S. CAL. L. REV. 97, 158 (2014) ("I propose that courts approve class action settlements with cy pres features only upon finding that they satisfy the requirements of section 3.07 of the ALI Principles.").

[133] Lane v. Facebook, Inc., 696 F.3d 811, 821 (9th Cir. 2012).

[134] *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 236 F.R.D. 48, 50 (D. Me. 2006) ("[T]he court's role in [*cy pres* settlements] requires the court to ensure that the chosen recipients and distributions have a relationship to the original purposes of the class action, to avoid favoritism, and to ensure that the monies are properly used.").

counsel, to ensure that their efforts are directed at inuring the most substantial benefit for the class.[135]

In order to ensure *cy pres* is properly restricted, courts must direct this scrutiny to three areas in particular. First, courts should only permit *cy pres* awards when direct distributions are virtually impossible and after identified class members have received pro rata distributions. Second, if a *cy pres* award must be used, courts should ensure that the interests of the proposed recipient are closely aligned to those interests of the class by giving class members a voice in the selection process both at the forefront and within objections. Finally, to acknowledge the conflicts that are inherent in *cy pres* settlements, courts should presume that the fee awards in these settlements should often not warrant the same value as settlements that distribute settlement funds directly to class members.

A. *Standardizing When* Cy Pres *Is Warranted*

In light of *cy pres*'s indirect benefits for class members, these awards must be confined to the perimeter of settlement. When further distributions are possible if broader notice, simplified claims processes, or other similar mechanisms are provided, *cy pres* must remain offstage. Courts' discrediting these mechanisms as too "costly" or "burdensome" does not accord with the low costs they now entail because of technological developments.[136]

Additionally, pro rata distributions should be implemented prior to *cy pres* because this approach prioritizes distribution to settlements' primary beneficiaries, diminishes the possibility for collusion, and ensures deterrence. Indeed, many courts already prioritize this redistribution over *cy pres*.[137] Courts that do not prioritize pro rata distributions for the concern that class members may receive a windfall disre-

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[135] *See generally* Alison Frankel, *By Restricting Charity Deals, Appeals Courts Improve Class Actions*, REUTERS (Jan. 12, 2015, 2:32 PM), https://www.reuters.com/article/idIN41040166342 0150112.

[136] 5-2015 CIV. RULES ADVISORY COMM. REP., *supra* note 102, app. at 22 ("[The court] should take account of the possibility that electronic means may make identifying class members and distributing proceeds to them inexpensive in some cases."); Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 854 (2017) ("With the marginal cost of additional communication approaching zero, class notices may be transmitted electronically, without the former logistical and cost inhibitions of mass mailings.").

[137] These courts prohibit *cy pres* settlement approval when the settling parties fail to demonstrate that pro rata distributions are not possible. *See, e.g.*, *In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1065 (8th Cir. 2015); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 475 (5th Cir. 2011); *In re Compact Disc*, 236 F.R.D at 52–53; *In re* Hydroxycut Mktg. & Sales Pracs. Litig., Nos. 09md2087, 09cv1088, 2013 WL 6086933, at *4 (S.D. Cal. Nov. 19, 2013); Better v. YRC Worldwide Inc., No. 11-2072, 2013 WL 6060952, at *6 (D. Kan. Nov. 18, 2013).

gard that most settlements do not entirely compensate class members for their injuries to begin with.[138] Indeed, "it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery for those class members."[139]

B. Standardizing the Cy Pres *Recipient Selection Process*

When further distributions really are not possible because feasible actions to provide these distributions have been exhausted, courts must be critical of the recipient proposed by the settling parties. While most courts only approve *cy pres* recipients that demonstrate some adherence to the nexus requirement, there are several ways courts could bolster this requirement to ensure these recipients represent only a "modest alteration" to the original goal of the settlement at issue: to directly remedy each class member's injury.[140]

First, courts should uniformly consider the preferences of class members during the recipient selection process by welcoming their opinions both upfront and when posed in objections. Encouraging class participation in selecting the recipient at the forefront may help mitigate the possibility of collusive recipient selections by the court and settling parties.[141] Courts could even go beyond encouraging class participation in recipient selection. For example, courts could implement a binding voting system for class members to select the *cy pres* recipient,[142] or require class member consent to the *cy pres* settlement. The Rules Advisory Committee has even approvingly considered the latter approach. It discussed that the settlement process could accommodate *cy pres* procedures to procure explicit class member consent or, alternatively, that class members' lack of objections to class notice could imply this consent, so long as that notice explained the *cy pres* nature of the settlement in detail and enabled objections.[143] The Committee reasoned that if only a limited number of class members indeed did object in response to a notice of that nature, the majority of class members not objecting implied that majority's consent.[144] In addition

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[138] *See, e.g.*, Jones v. Monsanto Co., No. 19-0102-CV-W, 2021 WL 2426126, at *5–6 (W.D. Mo. May 13, 2021), *aff'd*, Jones v. Monsanto Co., 38 F.4th 693 (8th Cir. 2020); *In re* Easysaver Rewards Litig., 906 F.3d 747, 760–61 (9th Cir. 2018); Van Gemert v. Boeing Co., 553 F.2d 812, 815–16 (2d Cir. 1977).

[139] ALI, *supra* note 4, § 3.07 cmt. b.

[140] Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004).

[141] For several examples of courts that already endorse this approach, *see supra* note 69.

[142] *See* Dyk, *supra* note 121, at 655 (arguing that a voting system would "provide sufficient organizational protections to the class through voice and exit" and "provide compensation to the class" by granting class members voting rights).

[143] 12-2015 CIV. RULES ADVISORY COMM. REP., *supra* note 122, at 51.

[144] *Id.*

to preserving the accountability of the court and settling parties to the class, requiring class member ratification of the recipient would indicate that the class members themselves believe the third-party recipient's use of settlement funds will to some extent help remedy their own harms.

Further, all courts should consider any class member objections of selected recipients to the vigorous extent that a handful of courts have posited is necessary. To echo the words of Judge Richard Posner, "[o]bjectors play an essential role in judicial review of proposed settlements."[145] The courts that currently dismiss objectors' contentions without further judicial inquiry fail to employ "the 'scrupulous' examination required of a court acting as a fiduciary for absent class members."[146] Even when this approach is founded in attempts to control unproductive objections, courts "must be careful that . . . they do not deter legitimate objectors."[147] In light of the 2018 amendments to Rule 23,[148] there are a variety of safeguards in place that diminish the prevalence of the most problematic, unfounded objections that previously could have justified this dismissiveness.[149]

Moreover, when objecting class members raise concerns that the selection of a *cy pres* recipient was founded on collusive affiliations with the court or settling parties, the burden should be on the settling parties to show that, despite any connection, the recipient was nonetheless selected on the merits alone.[150] Shifting this burden from objectors to the settling parties reallocates responsibility to the settlement participants that are most susceptible to the conflicts permeating settlements of this nature. Additionally, because of the settling parties' extensive involvement in the recipient selection process throughout settlement negotiations, they are in the best

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[145] Pearson v. NBTY, Inc., 772 F.3d 778, 787 (7th Cir. 2014).

[146] *In re* Google Inc. Cookie Placement Consumer Priv. Litig., 934 F.3d 316, 330–31 (3d Cir. 2019).

[147] Klonoff, *supra* note 88, at 483.

[148] FED. R. CIV. P. 23(e)(5) advisory committee's note to 2018 amendments.

[149] Amended Rule 23(e)(5) implements three protections that guard against frivolous objections: it requires objectors to be transparent about any side agreements that may have warranted their objections, it requires objectors to describe the specific grounds for their objections, and it requires objectors to specify whether their objections pertain to the entire class. *See* Klonoff, *supra* note 88, at 494–95 (citing *id.* 23(e)(5)).

[150] *See In re Google Inc. Cookie Placement*, 934 F.3d at 331; *In re* Google Referrer Header Priv. Litig., 869 F.3d 737, 749 (9th Cir. 2017) (Wallace, J., concurring in part and dissenting in part) (proposing "that the burden should be on class counsel to show through sworn testimony, in an on-the-record hearing, that the prior affiliation played *no role* in the negotiations"), *vacated and remanded sub nom.* Frank v. Gaos, 139 S. Ct. 1041 (2019); Brief for Petitioners, *supra* note 117, at 55–56 ("The better rule is to require settling parties to have the burden to demonstrate that neither the court nor any 'party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits.'" (quoting ALI, *supra* note 4, § 3.07 cmt. b)).

position to demonstrate "what role, if any, each [settling party's purported] affiliation played in the *cy pres* selection process; whether other recipients were sincerely considered; and why these recipients are the proper choice."[151] This is particularly true in relation to objectors. Because of their removed position from settlement negotiations, they possess a "lack of access to virtually any [of the] relevant evidence" that is necessary to satisfy that burden themselves.[152]

C. *Standardizing Fee Award Considerations*

Finally, particularly in full *cy pres* settlements, courts should at least uniformly consider reducing attorney fee awards in proportion to the actual benefit conferred on the class. This consideration will help minimize any concerns that class counsel's financial incentives overbore its efforts to obtain direct benefits for the class. Indeed, "*cy pres* payments are not a form of relief to the absent class members and should not be treated as such (*including when calculating attorney's fees*)."[153]

Importantly, encouraging courts to consider reducing fee awards should not compel courts to implement this reduction in every *cy pres* settlement. There will inevitably be settlements that leave non-distributable funds despite exhaustive efforts by class counsel to inure benefit on the class. Class counsel should not be penalized when this is the case. Moreover, imposing fee reduction mandates in all *cy pres* settlements may altogether discourage class counsel from bringing those small claim consumer class actions where *cy pres* is most prevalent.[154]

However, expecting courts to at least consider reducing fee awards is warranted. As a component to the "active judicial involvement" required under Rule 23, "[s]ettlements involving nonmonetary provisions for class members . . . deserve careful scrutiny to ensure that these provisions have actual value to the class" that justify the proposed fee award.[155] If courts uniformly implemented this consideration, it would communicate to class counsel that courts are presumptively skeptical towards full fee awards in *cy pres* settlements, which may help realign class counsel's financial

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151 *In re Google Inc. Cookie Placement*, 934 F.3d at 331.

152 *In re Google Referrer Header*, 869 F.3d at 750 (Wallace, J., concurring in part and dissenting in part).

153 *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting) (emphasis added).

154 *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 178 (3d Cir. 2013) (declining to impose "a rule requiring district courts to discount attorneys' fees" in all *cy pres* settlements because the court did not want to penalize class counsel for *cy pres* settlements that arose for reasons "unrelated to the quality of representation they provided," and because it did not "want to discourage counsel from filing class actions in cases where few claims are likely to be made but the deterrent effect of the class action is equally valuable").

155 FED. R. CIV. P. 23(h) advisory committee's note to 2003 amendment.

incentives with the interests of the class. Class counsel may be more eager to prioritize settlements that directly benefit the class, because those settlements would not garner the same skepticism that could put this incentive at risk.[156]

Endorsing a presumption for reduced fee awards is not novel to those settlements that curtail direct class benefits. In analogous contexts, reduced fee awards are not merely presumed, but required. For example, the Class Action Fairness Act limits fee awards in coupon settlements to "the value to class members of the coupons that are redeemed."[157] Further, the Securities Act of 1933 limits fee awards in securities cases to "a reasonable percentage of the amount of any damages . . . actually paid to the class."[158] Finally, in 42 U.S.C. § 1988 cases, fee awards may not be justified based on the public benefit to non-parties alone.[159] Those cases require the fee applicant to also show that they obtained some private relief for the parties to the litigation.[160]

Beginning with the presumption adopted by the Seventh Circuit would be a useful maxim to standardize this consideration. In that circuit, courts presume fee awards should generally not exceed half of the amount directly distributed to class members.[161] Or, a court could begin with the presumption used in civil rights law that the loadstar value of class counsel's hourly services is an appropriate baseline for measuring the award.[162]

Further, to ensure courts precisely calculate the class members' direct benefit, courts should not award fees until they can determine with finality how much of the fund will be directly distributed, even if this requires the court "to delay a final assessment of the fee award . . . until the distribution process is complete."[163] While implementing these presumptions would not mandate fee reductions in every case, they would serve as useful guidance. They would help courts flag those larger fee awards that require additional scrutiny to ensure the award was not a product of illicit motivations.

CONCLUSION

A lack of clarity in the limits to class action *cy pres* has allowed courts to adopt divergent standards regarding the circumstances that should warrant *cy pres* awards,

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156 *See* Wasserman, *supra* note 132, at 144.

157 28 U.S.C. § 1712(a).

158 15 U.S.C. § 77z–1(a)(6).

159 42 U.S.C. § 1988(b); *see also* Farrar v. Hobby, 506 U.S. 103, 111–12 (1992).

160 *See, e.g.*, *Farrar*, 506 U.S. at 105, 114–15; Hewitt v. Helms, 482 U.S. 755, 759–60 (1987).

161 *See supra* notes 90–95 and accompanying text.

162 *See* Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 546, 553–54 (2010).

163 *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 179 (3d Cir. 2013) (quoting MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.71 (2008)).

what criteria may be used to select *cy pres* recipients, and how to evaluate the attorney fees that correspond to these awards. As a result, the standards adopted in some courts appear to be exacerbating the core concerns this remedy poses, such as whether class members receive any benefit from these distributions, whether these awards actually deter defendants, and whether these settlements are a product of underlying conflicts among the settling parties. Nonetheless, *cy pres* is a valuable mechanism in small claim consumer class actions that, in light of the alternatives, remains the most viable tool by which to distribute otherwise non-distributable funds, so long as the proper restrictions are uniformly implemented.