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Via Electronic Delivery Only to ADMcomment@courts.mi.gov
Larry S. Royster
Supreme Court Clerk
Michigan Hall of Justice
925 W. Ottawa Street
Lansing, Michigan 48915

Re: ADM File No. 2018-02,
Proposed Amendment of MCR 3.501

Dear Mr. Royster:

The Michigan Supreme Court is considering amending MCR 3.501 to require the payment of at least 50% of the unclaimed residual funds in class actions to the Michigan State Bar Foundation or another charity. This proposal raises a number of significant questions including:

(1) whether this Court has the authority to amend the Michigan Court Rules either to authorize or require the use of the *cy pres* remedy to pay a portion of class action proceeds to persons that are not parties to the litigation;

(2) whether this Court should authorize or require the use of the *cy pres* remedy if this Court does possess the authority to amend the Michigan Court Rules in the manner suggested;

(3) whether this Court should amend MCR 3.501 to require the proposed distribution to the Michigan State Bar Foundation; and

(4) whether this Court should add additional safeguards to limit the risks of abuse inherent in requiring that settlement payments be made to non-parties instead of to litigants.

Last year, these same issues were briefed to the United States Supreme Court in *Frank v Gaos*, US Supreme Court Docket No 17-961. One issue in *Frank* was whether federal courts ever have the authority to the use the *cy pres* remedy in class action litigation. This issue had been highlighted by the Chief Justice of the United States in, where he concurred in denial of writ of petition for certiorari to review a challenge to a settlement involving Facebook because the case "might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of [cy pres] remedies in class action litigation, **including when, if ever, such relief should be considered** . . . .". *Marek v Lane*, 571 US 1003 (2013) (emphasis added).

None of the *cy pres* issues raised in *Frank* were resolved because the United States Supreme Court concluded that the lower federal courts needed to resolve questions about Article III before the Supreme Court could consider the substantive issues. *Frank v Gaos*, _____ US ____; 139 S Ct 1041, 1046; 203 L Ed 2d 404 (2019). Therefore, the United States Supreme Court took the unusual step of remanding the case after full briefing and argument. *Id.* The Ninth Circuit has only recently remanded *Frank* to the originating district court, which has yet to begin its review of the standing issues. As a result, *Frank* may never reach, let alone resolve, any of the *cy pres* issues that were raised, briefed and argued in the United States Supreme Court last year.

In *Frank*, I was privileged to serve as counsel of record for the Manhattan Institute, which submitted an *amicus curiae* brief explaining why the federal courts only have the authority to use the *cy pres* remedy when Congress or a state legislature has expressly authorized the use of this remedy. I have adapted the *amicus* brief primarily to explain why this Court does not have the authority to amend the Michigan Court Rules to replace the remedies available under Michigan law with the *cy pres* remedy. The other issues listed above, however, are major concerns that should also be considered if this Court concludes that it has the authority to amend the Michigan Court Rules in the manner proposed.

INTRODUCTION

Westlaw research indicates that Michigan courts have rarely used the *cy pres* remedy, a subject discussed below. Federal courts certainly are using the *cy pres* remedy, and there are many valid concerns regarding how the federal courts are using the *cy pres* remedy in class action litigation. In *Klier v Elf Atochem North America, Inc*, 658 F3d 468, 480-482 (5th Cir 2011), the Honorable Edith Jones summarized many of these concerns in her concurring opinion. A copy of this opinion is being submitted with this statement because of how comprehensively and eloquently Judge Jones addressed these concerns. If this Court decides that it has the authority to amend the Michigan Court Rules to authorize the use of the *cy pres* remedy in class actions, it modify the proposed amendment to address the issues raised by Judge Jones.

Before considering any of these objections, however, this Court should first decide if it has the authority to require per permit Michigan courts to use the *cy pres* remedy in class action litigation. The *cy pres* remedy has a long history of being used to handle charitable gifts and trusts that have become impossible to administer in accordance with their express terms. Some federal courts have concluded that it is also an effective remedy for problems that arise during class actions. But, the federal Rules Enabling Act prohibits the use of the federal rules to substitute the *cy pres* remedy for the remedies authorized by statute or the common law. The Revised Judicature Act does not authorize this Court to issue court rules that change the substantive law of remedies. Therefore, this Court should find that it cannot amend the Michigan Court Rules to authorize the use of the *cy pres* remedy in class action settlements or to dispose of unclaimed portion of a class action judgment.

A. Michigan Probate Courts, and other American state courts having jurisdiction over charitable trusts, are expressly authorized by state statutes to use the *cy pres* remedy in a limited set of circumstances.

A brief review of the historical use of the *cy pres* remedy may be helpful in understanding the problems that arise when applied to class actions. When it affirmed the district court decision approving the use of *cy pres* payments in settlement of this case known in the Supreme Court as *Frank v Gaos*, the Ninth Circuit explained the origins of this remedy and its use in class actions as follows:

> *Cy pres*, which takes its name from the Norman French expression *cy pres comme possible* (or "as near as possible"), is an equitable doctrine that originated in trusts and estates law as a way to effectuate the testator's intent in making charitable gifts. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). In the class action settlement context, the *cy pres* doctrine permits a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the "next best" class of beneficiaries for the indirect benefit of the class. *Id*.

In re Google Referrer Header Privacy Litigation, 869 F.3d 737, 741 (9th Cir 2017), vacated and remanded sub nomine *Frank v Gaos*, 139 S Ct 1041, 203 L. Ed. 2d 404 (2019). The Seventh Circuit has explained that "This doctrine [*cy pres*] is based on the idea that the settlor would have preferred a modest alteration in the terms of the trust to having the corpus revert to his residuary legatees. So there is an indirect benefit to the settlor." *Mirfasihi v Fleet Mortgage Corp*, 356 F3d 781, 784 (7th Cir 2004).

In England, the Chancellor had a supervisory role over charitable trusts and used his broad equitable powers to prevent charitable trusts from completely failing. Hamish Gray, *The History and Development in England of the Cy-Pres Principle in Charities*, 33 BU L Rev 30, 32 (1953); Edith Frisch, *The Cy Pres Doctrine in the United States*, § 2.01 (Mathew Bender 1950). By the time that America won its independence, Parliament had enacted the Statute of Uses, which codified the common law use of *cy pres* in the English Courts of Chancery. Gray, 33 BU L Rev at 35. American states were initially hesitant to adopt *cy pres*. Frisch, § 2.01. Over time, however, state courts having jurisdiction over charitable trusts were authorized to use the *cy pres* remedy when the purpose of the trust has been frustrated. *Id.*, §§2.00 et seq.

One example is the Michigan Estates and Protected Individuals Code ("EPIC"),[1] which governs charitable trusts. MCL 700.7405. EPIC expressly authorizes the Probate Court to use *cy pres* "if a particular charitable purpose becomes unlawful, impracticable, or impossible to achieve,

[1] These sections of EPIC related to the *cy pres* remedy are based upon the Uniform Trust Code, which has been adopted by 32 states and the District of Columbia. http://uniformlaws.org/Legislative FactSheet.aspx?title=Trust%20Code (last visited July 8, 2018).

no alternative taker is named or provided for, and the court finds the settlor had a general, rather than a specific, charitable intent. . ." MCL 700.7413(1). Under these circumstances, a Michigan Probate Court may "modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's general charitable intent." MCL 700.7413(1)(c). In addition, EPIC also allows the settlor to create a trust that the Probate Court is not permitted to authorized using *cy pres*. MCL 700.7413(2). Other states have similar statutory authorization and limitations.[2]

In summary, the *cy pres* remedy is an equitable remedy that was designed to handle the unique problems that arise when administering charitable gifts or trusts that long outlive their settlors. This remedy may only be used when specific conditions are met, and the settlor has chosen not to prevent its use to modify the express intent of the trust.

B. Although federal courts are using the *cy pres* remedy in class action litigation, there are significant concerns regarding whether the Rules Enabling Act allows them to do so.

Unlike state courts having jurisdiction over charitable trusts, federal courts lack the general statutory authorization to use the *cy pres* remedy in class actions. Moreover, they are expressly prohibited from using the federal rules to substitute the *cy pres* remedy for the remedies created by the substantive law. Despite this, the federal courts have been using the *cy pres* remedy in *Frank* and many other cases. Some United States Supreme Justices have expressed concerns about this issue, but the Supreme Court has not yet resolved the issue.

1. Federal courts have used their equitable powers to import the *cy pres* remedy into the administration of class action litigation.

Cy pres payments are now frequently used in the administration of federal class actions. Before adopting the *cy pres* remedy for class actions, however, the federal courts barely mentioned *cy pres* at all. A July 6, 2018 search of the Westlaw All Federal database identified 1458 cases in which the phrase "*cy pres*" appears. Only 125 of these cases were decided before 1978. In many of the 19th century cases, the phrase was mentioned, but was not the basis or the decision. See, e.g., *Loring v Marsh*, 15 F Cas 905, 907, 909-914 (D Mass 1865) (counsel's argument referenced *cy pres*, but Court did not apply doctrine). In others, federal courts discussed *cy pres* because an issue of state law had arisen. *See, e.g., John v Smith*, 102 F 218, 221-222, 223-224 (9th Cir 1900). In a substantially similar manner, federal courts have occasionally used *cy pres* to determine how to handle the assets of charitable trusts whose express purposes were barred by the Fourteenth Amendment. See, e.g., *Wachovia Bank & Trust Co v Buchanan*, 346 F Supp 665, 667-668, 671 (DDC 1972) (applying *cy pres* after determining that it was unlawful for North Carolina public

[2] Cal Prob Code § 15409 (2016); Mass Gen Laws ch 214, §10B; NY Est Powers & Trusts 8-1.1 (c) (1); and 20 Pa Cons Stat § 7740.3 (2016).

officials[3] to administer testamentary trust to provide scholarships to the University of North Carolina for "white boys and girls").

The post-1978 explosion in the number of federal cases using the phrase "*cy pres*" results from the remedy being used in class action lawsuits. The decision to import the *cy pres* remedy into class actions is generally attributed to a 1972 law review comment, which suggested that courts use this remedy to distribute class action proceeds that were not collected by class members. This comment recommended that the "court may seek to apply their own version of cy pres by effectuating as closely as possible the intent of the legislature in providing the legal remedies on which the main cause of action was based." Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U Chi L Rev 448, 452 (1972). The 1972 Comment does not identify any legal authority that would allow federal courts to use this remedy.

Soon afterwards, federal courts began to evaluate whether to use the *cy pres* remedy in class actions. One of the first federal court decisions approving a settlement that applied the *cy pres* remedy was *Miller v Steinbach*, No 66 CIV 356, 1974 WL 350 (SDNY Jan 3, 1974). *Miller* was a shareholder's derivative suit that was certified as a class action. *Id.* * 1. The parties reached a settlement in which all of the net settlement proceeds, after paying approved costs and fees, would be paid to the Trustee of the retirement plan of the entity on whose behalf the stockholder's derivative suit was being pursued. *Id.*, * 2. In deciding whether it could approve the settlement, *Miller* found that:

> As to any legal prohibition, while neither counsel nor the Court has discovered precedent for the proposal–at least in a case such as this where distribution to the class of plaintiffs was theoretically possible if not in a practical sense feasible–nor have we been made aware of any precedent that would prohibit it.

*Id., * 2*. Having concluded that it was not prohibited from doing so, *Miller* approved the settlement because it was "fair and reasonable". *Id.*

After *Miller*, other federal court decisions have considered whether to use the *cy pres* remedy. Like *Miller*, these cases often contain no more than minimal discussion of the authority that allows them to award this relief. For example, in *Van Gemert v Boeing Co*, 739 F2d 730, 756-758 (2d Cir 1984), the court reviewed the potential use of *cy pres* in the distribution of the unclaimed portion of a class action judgment. *Van Gemert* held that two statutory provisions[4] did not control the distribution of the unclaimed funds. *Id.* at 735-736. Instead, the district court was found to have "broad discretionary powers in shaping equitable decrees". *Id.* at 737. Ultimately,

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[3] There was a Fourteenth Amendment issue because almost all the members of the administrative group that selected the scholarship recipients were persons holding state elective or appointed public office. 346 F Supp at 667.

[4] 28 USC 2041- 2042

Van Gemert affirmed the district court decision not to use *cy pres*, but instead to return unclaimed judgment to the defendant, Boeing. *Id.* at 736-738.

In *Powell v Georgia-Pacific Corp.*, 119 F3d 703, 706-707 (8th Cir 1997), the circuit court affirmed the district court decision to use *cy pres* to distribute unclaimed funds from a class action settlement. In reaching this decision, *Powell* held -- without citing any authority -- that "the [district] court correctly turned to traditional principles of equity to resolve the case." *Id.* at 706. It then relied upon a treatise[5] to find that *cy pres* remedy was one of the four ways that the district court could have exercised its discretion to disburse the uncollected funds. *Id.* Subsequent circuit court decisions have relied upon the prior decisions from other circuits as the authority for finding that the *cy pres* remedy may be used. See, e.g., *In re Pharmaceutical Industry Average Whole Price Litigation*, 588 F3d 24, 33-35 (1st Cir 2009) (approving use of *cy pres* in class action settlement); and *Masters v Wilhelmia Model Agency, Inc*, 473 F3d 423, 436 (2d Cir 2007) (explaining when *cy pres* distributions may be used).

Therefore, the only federal courts that have considered the original authority for federal courts to use the *cy pres* remedy have relied upon the general equitable authority of district courts to administer remedies.

2. <u>The Rules Enabling Act should prevent Rule 23 from being used to modify the remedies authorized by substantive law.</u>

The English Chancellor possessed broad equitable powers. The Michigan Probate Court and similar state courts are expressly authorized to use the *cy pres* remedy as part of their supervisory authority over charitable trusts. Federal courts not only lack the same express authorization to use broad equitable remedies, but they are also prohibited by the Rules Enabling Act from using procedural devices to modify the controlling substantive law.

The United States Supreme Court has recognized that "Rule 23's requirements must be interpreted in keeping with Article III's constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.' 28 USC § 2072(b)." *Amchem Products, Inc v Windsor*, 521 US 591, 613 (1997). "As nothing more than a Federal Rule of Civil Procedure, however, the class action device [Rule 23] may do no more than enforce existing substantive law as promulgated either by Congress or, in diversity suits, by applicable state statutory or common law." Martin Redish, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla L Rev 617, 623 (2010) (quoted with approval in the concurring opinion of the Honorable Edith H. Jones in *Klier v. Elf Atochem North-America, Inc.*, 658 F3d 468, 481 (5th. Cir 2011)).

In *Tyson Foods, Inc v Bouaphakeo*, 577 US ___, 136 S Ct 1036, 1046 (2016), the petitioners requested that this Court "announce a broad rule against the use in class actions of what

[5] 2 Newberg and Conte, *Newberg on Class Actions* § 10.15 at 10–38, 10–39 (3d ed).

the parties call representative evidence." This Court applied the Rules Enabling Act to reject this argument, finding that:

> In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot "abridge ... any substantive right." 28 U.S.C. § 2072(b).

136 S Ct at 1046. *See also Broussard v Meineke Disc Muffler Shops, Inc*, 155 F3d 332, 345 (4th Cir 1998) (concluding that "[i]t is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members."). It follows that the Rules Enabling Act also prevents federal courts from (1) applying a remedy in a claim pursued as part of a class action unless that remedy could be used by an individual bringing the same claim and (2) using Rule 23 to reduce the substantive rights of class members. Using the *cy pres* remedy to extinguish the claims of absent class members necessarily reduces class members' substantive rights, as discussed below.

3. The use of *cy pres* in class action litigation substitutes charitable payments for the remedies available under the substantive law.

The United States Supreme Court has held that the Rules Enabling Act limits the ability of the federal courts to use the Rule 23 procedures to approve the settlement of a class action lawsuit. *See Amchem*, 521 US at 628-629 (finding that district court could not use Rule 23(e) settlement approval to create "nationwide administrative claims processing regime . . . [for] compensating victims of asbestos exposure" because of limitations of Rules Enabling Act).[6] See also *In re General Motors Corp Engine Interchange Litigation*, 594 F2d 1106, 1135-1136 (7th Cir 1979) (finding that district court's approving settlement that dismissed claims of non-consenting class members "contravene[d] the Rules Enabling Act . . . by abridging the substantive rights of those who did not accept the settlement offer"). In *Frank*, we asked the Supreme Court to hold that the Rules Enabling Act prevents the district court's approval of a settlement that substitutes the *cy pres* remedy for the remedy existing under the substantive law for two reasons.

First, the substantive law includes the remedy for its violation. All substantive law consists of two elements: prohibition and enforcement. *Redish*, *supra*, 62 Fla L Rev at 644. By enacting a law, a legislature chooses among different enforcement methods, such as compensation, punitive damages, civil fines and criminal punishment. *Id.* at 645. When a district court approves a *cy pres* settlement, the court is substituting a fine made payable to a charity for the substantive law's remedy, which is usually compensation paid to the injured persons. *Id.* at 645-646. In other words,

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[6] Despite this decision, some circuit courts have concluded that the Rules Enabling Act simply does not apply to the district court's approval of a settlement. *See In re: Motor Fuel Temperature Sales Practices Litigation*, 872 F.3d 1094, 1116 (10th Cir. 2017); and *Marshall v. National Football League*, 787 F.3d 502, 511 n.4 (8th Cir. 2015).

the use of *cy pres* modifies the substantive law because it punishes the defendant with a fine rather than compensates the allegedly injured persons.[7]

The proponents of *cy pres* do not dispute this. In fact, they argue that using *cy pres* to punish a defendant is a feature, not a bug. After the 1966 revisions to Rule 23, a class action judgment "binds all class members who have not acted to exclude themselves from the suit." Comment, 39 U Chi Law Rev at 448.[8] Despite being bound by the judgment, many class members do not take any action at all with respect to the class action lawsuits "even after a judgment or settlement in their favor has been reached and do not attempt to collect their shares of the recovery." *Id.* Because many class members do not make a claim, a portion of the sums set aside to pay the judgment or the settlement is not claimed and collected.

If an individual plaintiff does not take steps to enforce that judgment, the plaintiff does not recover anything. Therefore, the defendant retains money that the plaintiff has chosen not to collect, which was the ultimate result in *Van Gemert*. 739 F2d at 736-738. The 1972 Comment characterized the defendant's retaining the unclaimed funds as "unjust enrichment" and argued that "distribution to the next-best class would be preferable." 39 U Chi L Rev at 459. Circuit courts approving of *cy pres* distributions of unclaimed funds use similar justifications. *In re Baby Prod Antitrust Litigation*, 708 F3d 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.").

The same risk applies in any lawsuit where the plaintiff does not enforce the judgment or cash the settlement check. But, it is only in lawsuits certified as class actions under Rule 23 that federal courts use the *cy pres* remedy to punish defendants. Therefore, a procedural device is being used to change the substantive remedy enacted to deter persons from performing the acts prohibited by that substantive law.

Second, class action settlements differ from most private settlements in two important ways. One, the settlement negotiations are not conducted by all the parties that will be bound by the outcome of the case. Instead, they are only conducted by the named parties, some of whom are charged with acting on behalf of all class members. Therefore, all the parties are not expressly consenting to replace compensatory payments with payments to charities. Two, district courts must approve class action settlements before they become binding upon the entire class and discharge the defendant's liability to that class. Fed R Civ P 23(e). As the Fifth Circuit has explained:

> A class settlement is not a private agreement between the parties. It

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[7] This same principle applies if the use of *cy pres* replaces a criminal penalty or changes the recipient of the fine from a governmental entity to a private charity.

[8] *See also Amchem*, 521 U.S. at 614–15 ("Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded.").

> is a creature of Rule 23, which authorizes its use to resolve the legal claims of a class "only with the court's approval." . . . In granting approval, the court must, as always, adhere to the precepts of Article III and the Rules Enabling Act. While a "welcome byproduct" of deciding cases or controversies on a class-wide basis, the goal of global peace does not trump Article III or federal law. . . . Courts do not have the authority to create a cause of action (and their corresponding subject-matter jurisdiction over it) and then give peace with regard to that cause of action.

In Re Deepwater Horizon, 732 F3d 326, 343 (5th Cir 2013).

The district court is permitted to approve a class action settlement only after giving "notice in a reasonable manner to all class members" and holding a hearing. Fed R Civ P 23(e)(1), (2) and (5). Therefore, the federal district court is performing an adjudicative act when it determines that a particular settlement is "fair, reasonable and adequate" under Rule 23(e)(2). Accordingly, if the district court substitutes a new remedy – *cy pres* – in whole or in part for the authorized remedy, then the district court's application of Rule 23(e) violates the Rules Enabling Act just as creating a new remedial process violates this Act. *Amchem*, *supra*, 521 US at 628-629.

Frank presented a good example of both problems. First, the primary cause of action that the plaintiffs alleged was that Google had violated the federal Stored Communications Act, 28 USC 2702. In this statute, Congress outlawed specified conduct. *Id.* Congress also authorized – as part of the substantive law that it was enacting -- the following remedies for violations of this Act: (a) preliminary and injunctive relief, (b) actual damages up to $1,000 per violation and (c) reasonable attorney fees. 18 USC 2707 (b), (c). But the settlement neither enjoined Google from any violation of this Act nor required Google to pay any actual damages to the persons harmed.[9]

Instead, as suggested by the 1972 Comment, the settlement substitutes the *cy pres* remedy for all of the remedies that Congress authorized. 39 U Chi L Rev at 452. In its decision affirming the district court approval of the *cy pres* distributions, the Ninth Circuit found that *cy pres* only settlements are "appropriate where the settlement fund is 'non-distributable' because 'the proof of individual claims would be burdensome or distribution of damages costly.' " 869 F3d at 741-742 (citing *Lane v Facebook, Inc.*, 696 F3d 811, 819 (9th Cir 2012)). It then found that the use of the *cy pres* remedy is consistent with the requirements of class certification because certification is proper when "the recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis. . . ." *Id.* at 743.

In other words, the Ninth Circuit implicitly held that federal courts may use one federal rule (authorizing approval of class action settlements) to modify the remedy created by Congress because a second federal rule (authorizing class certification) makes it infeasible to apply the

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[9] The attorney fees were included in the settlement pursuant to the class action procedures under Rule 23(h), not 18 U.S.C. § 2707(b)(3). *See* District Court Order Approving Settlement, App. 52-58.

remedy created by Congress. Doing so violates the clear language of the Rules Enabling Act, as previously applied by *Amchem* and *Tyson*.

To conclude this section, the federal courts imported the *cy pres* remedy into class action litigation despite lacking the express authority to do so. Their reliance upon general equitable powers is inconsistent with the limitations imposed by the federal Rules Enabling Act. This failure to abide by these limitations has raised a significant number of questions, including whether to bar the use of the *cy pres* remedy. See *Marek*, *supra*, 571 US 1003 (Roberts, CJ, concurring).

C. The Michigan Supreme Court should not approve the proposed amendment to MCR 3.501 because it lacks the authority to do so and because resolving the issues raised by the proposed amendment requires resolving political issues best left to the Michigan Legislature.

There is very little Michigan case law directly related to the use of the *cy pres* remedy in class actions. A review of both the Michigan Constitution and the Revised Judicature Act, however, reveals that this Court does not have the authority to make the proposed amendment. Finally, even if this Court had the authority, it should decline to resolve the inherently political disputes inherent in the proposal, but instead leave this task to the Michigan Legislature.

1. There is extremely limited Michigan authority, consisting primarily of dicta, which considers the *cy pres* remedy in class actions.

There is extensive federal case law considering the *cy pres* remedy, and most commentators focus upon class actions issues that arise in federal courts. By contrast, a Westlaw search for the phrase "cy pres" on August 30, 2019 found only two putative class actions cases that were filed in Michigan and that mention the phrase.[10] The most recent case, *Ren v Phillips Morris Inc*, 2002 WL 1839983 (Wayne Cir June 11, 2002) is a Wayne Circuit Court opinion and order denying a motion for class certification. A review of the Court of Appeals website shows that the Court of Appeals denied an Application for Leave to appeal the order denying class certification. Court of Appeals Docket No 243647 (Oct 25, 2002). A subsequent appeal as of right of the granting of summary disposition was resolved by stipulation. Court of Appeals Docket No 251310 (Jan 14, 2004).

The second case was the subject of two separate appeals, under different names. In the first appeal, *Grigg v Robinson Furniture Co*, 78 Mich App 712, 729 n 12; 260 NW2d 898, (1977), the Court of Appeals "reject[ed] any suggestion that the computation difficulties can be avoided by employing some variation of the "fluid class" concept." After a remand, the case was appealed for a second time under the name *Cicelski v Sears, Roebuck & Co*, 132 Mich App 298; 348 NW2d 685 (1984). In the second appeal, the Court of Appeals determined that the first appeal's finding regarding the "fluid class" concept was *dicta*. *Id.* at 306. It further believed that the first panel

[10] There were almost 30 Michigan cases discussing the discussing the *cy pres* remedy in its traditional trusts and estate use. As discussed below, the Michigan Legislature has specifically authorized the use of *cy pres* by Probate Courts.

"was sometime hasty in its condemnation of the fluid recovery[11] idea", suggested that a better approach would be to consider the propriety of the remedy on a case-by-case basis and then affirmed the trial court's decision "not to invoke the fluid recovery method." *Id.* at 306-307, 309. This Court denied the application for leave to appeal. 422 Mich 916; 369 NW2d 194 (1985). In his dissent from this order, Justice Levin stated that this Court should have granted leave to resolve potential issues related to the use of the *cy pres* remedy. *Id.* at 917-919.

Therefore, there is very little Michigan authority considering the *cy pres* remedy in class actions, and no Michigan authority expressly considers whether Michigan courts have the authority to use this remedy.

2. <u>This Court does not have the express authority under the Michigan Constitution or the Revised Judicature Act to modify the substantive remedies for causes of action by promulgating or modifying the Michigan Court Rules</u>.

The authority of this Court, and all Michigan courts, to act is created by the Michigan Constitution and governed by the Revised Judicature Act. Neither authorizes this Court to modify the remedies that are available to litigants in Michigan courts by issuing or amending the Michigan Court Rules.

The people of the state of Michigan decided that "the judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court [and other inferior courts]." Constitution of 1963, Art VI, § 1. The people have also directed this Court to "**by** general **rules establish**, modify, amend and simplify the **practice and procedure** in all courts of this state." *Id.*, § 5 (emphasis added). Therefore, the people of the state of Michigan have authorized this Court to issue rules to govern to procedures by which Michigan courts carry out their judicial function. They have not authorized this Court to amend Michigan substantive law by enacting or modifying a court rule.

The Revised Judicature Act recognizes that this Court "has all the powers and jurisdiction conferred upon it by the constitution and laws of this state." MCL 600.212. Moreover, consistent with the Article VI, this Act also recognizes that this Court "has authority to promulgate and amend general rules governing practices and procedure in the supreme court and all other courts of record . . ." MCL 600.223. The Legislature provides a non-exclusive list of the types of rules that this Court may promulgate or amend that includes the power to "prescribe forms of . . . process." MCL 600.223(1). The Court's rulemaking authority also includes prescribing "the practices and procedures. . . concerning: (a) methods of review, (b) special verdicts, (c) the granting of new trials, (d) motions in arrest of judgment, (e) taxation of costs, (f) giving notice of special motions and other proceedings, (g) the staying of proceedings, (h) hearing of motions, (i) imposing of terms

[11] *Cicelski* believed the "terms '*cy pres*' and 'fluid recovery', in the context of class action suits, have been employed interchangeably." 132 Mich App at 304.

on motions granted, (j) discovery procedure, and (k) other matters at its discretion." MCL 600.233(2).

Therefore, the Revised Judicature Act does not expressly prohibit this Court from issuing rules that "abridge, enlarge or modify any substantive right" as the federal Rules Enabling Act expressly provides. See 28 USC 2072(b). But, the Revised Judicature Act also does not expressly authorize this Court to "abridge, enlarge or modify any substantive right". Instead, the Revised Judicature Act, consistent with Article VI, § 5 of the Michigan Constitution, authorizes this Court to issue rules that affect how cases are decided, not what the substantive law controlling those cases are.

The procedures in federal Rule 23 and MCR 3.501 are not identical, but they are very similar. Most importantly, after a class is certified, the lawsuit may not be compromised or dismissed without court approval. MCR 3.501(E). The approval of the terms of the settlement of a class action pending in a Michigan court is a judicial act. Accordingly, if a Michigan court approves a settlement that includes *cy pres* payments, the court extinguishes the claims of all class members because a charitable donation has been made to a third-party. Therefore, approving such a settlement replaces the remedy authorized by Michigan law, such as paying monetary compensation to the injured party or issuing injunctive relief, with a charitable donation to a person that is not a party to the litigation.

Subject to limitations imposed by the Michigan Constitution and Michigan statutory law, this Court can certainly modify the remedies available under the Michigan common law by deciding a Michigan tort case. But, this Court does not have the similar authority to modify the remedies created by Michigan substantive law through issuing or modifying the Michigan Court Rules. Therefore, this Court should conclude that it does not have the authority to modify MCR 3.501 in the matter proposed.

3. <u>Even if this Court had the authority to modify the remedies available under Michigan law by promulgating or amending a Michigan Court Rule, this Court should decline to do so because this issue is better left to the Michigan Legislature</u>.

Even if this Court concludes it has the authority to amend MCR 3.501 in the manner proposed, it should decline to do so because resolving questions about the proper remedies in class actions is a task better left to the Michigan Legislature. As explained above, despite the initial reluctance to do so, Michigan and many other states have authorized the use of the *cy pres* remedy for charitable trusts under limited circumstance because they concluded that its use was equitable under those circumstances.

Some states have also decided to authorize the use of the *cy pres* remedy in class actions pending in those courts. *See* 4 Newberg on Class Actions § 12:35 (5th ed) (stating that "at least a dozen states" have a statute authorizing the use of *cy pres* payments in class actions). In addition, Congress has also authorized the use of the *cy pres* remedy in one limited circumstance in class action litigation. The Class Action Fairness Act of 2005 governs settlements that involve the distribution of coupons to class members. 28 USC 1712. It expressly authorizes the federal courts

to "require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties." 28 USC 1712(e).

The enactment of legislation involved a series of compromises among competing interests. The proponents of using the *cy pres* remedy in class actions describe important benefits that can be achieved with charitable donations. The opponents of using *cy pres* in class actions raise legitimate concerns regarding the potential abuse of these payments. The Class Action Fairness Act of 2005 was enacted after resolving a few of these contentious disputes, which were political in nature.

One of the concerns raised by opponents of *cy pres* payments is how they affect the attorney fees paid to class counsel. In *Frank*, the Ninth Circuit affirmed the district court's approval of a settlement in which (1) the three class representatives received a total of $15,000, (2) none of the others class member received a penny, (3) an injunction was not issued to prohibit Goggle from performing unlawful acts, (4) Google agreed to make *cy pres* payments exceeding $6 million to charities and (5) the attorneys were paid $2.15 million. A $15,000 recovery does not justify the payment of $2.15 million in attorney fees, but the recovery of over $6 million makes these fees seem reasonable. This means, however, that class counsel in *Frank* were going to be rewarded for providing a significant benefit to persons other than their clients while providing almost no benefit at all to their clients. It does not require an ethics expert to see the potential conflict of interest here. *Frank* was an extreme case, but it certainly shows the potential risks of settlements that include *cy pres* payments.

When Congress passed the Class Action Fairness Act, it decided that "[t]he distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section." 28 USC 1712(e).[12] Resolving the numerous conflicting interests related to c*y pres* settlements involves resolving a series of similar political disputes. The Michigan Legislature much better suited to consider and resolve these conflicting political interests than this Court through its rulemaking process.

This is especially the case because the process of amending the Michigan Court Rules is one that primarily concerns attorneys that practice regularly in Michigan courts. This proposed amendment to the Michigan Court Rules will increase the potential attorney fees that Michigan attorneys are able to earn because it provides an incentive to file class actions in Michigan courts. Therefore, this amendment is in the financial interests of the members of the State Bar of Michigan as a whole. On the other hand, if adopted, this proposed amendment will benefit some Michiganders while burdening others. Given the disparity in impacts, it is in the institutional interest of this Court to allow the Michigan Legislature, which represents all the citizens of this state, to determine whether the Michigan substantive law should include the *cy pres* remedy in class actions.

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[12] This Act also provides detailed instruction on how attorney fees are to be calculated and awarded. 28 U.S.C. § 1712(b), (c).

In conclusion, this Court does not have the authority to enact the proposed amendment to MCR 3.501. Moreover, even if it did, the proposed amendment raises issues that are better resolved by the Michigan Legislature. Therefore, this Court should decide not to adopt the proposed amendment.

Please let me know if you have any questions regarding this.

Very truly yours,

/s/ C. Thomas Ludden, Esq.

Enclosure

658 F.3d 468
United States Court of Appeals,
Fifth Circuit.

Ralph KLIER, Appellant,
v.
ELF ATOCHEM NORTH AMERICA, INC.,
Defendant–Appellee.

No. 10–20305.
|
Filed Sept. 26, 2011.
|
Revised Sept. 27, 2011.

Synopsis

Background: Class action was brought in state court against owner of agrochemicals plant, seeking compensation for exposure to arsenic and other toxic chemicals allegedly emitted by the plant. Case was removed, and a settlement agreement was entered that allocated the settlement between three subclasses, including one class that could opt to participate in a medical monitoring program. After the medical monitoring program came to a close with approximately $830,000 unused, the United States District Court for the Southern District of Texas, Lynn N. Hughes, J., pursuant to Cy Pres doctrine, ordered that the unused funds be given to three charities suggested by the defendants and one selected by the Court. A member of the first subclass, whose members had lived or worked near the plant and had contracted cancer, suffered certain birth defects, or had a stillborn child, appealed.

[Holding:] The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that District Court abused its discretion by ordering a cy pres distribution of unused funds to charities, instead of distributing them to another subclass whose members had suffered cancer and other injuries from exposure.

Reversed and remanded.

Edith H. Jones, Chief Judge, filed a concurring opinion.

West Headnotes (13)

[1] **Deposits in Court**
Disposition under judgment or order of court

In the class action context, it may be appropriate for a court to use cy pres principles to distribute unclaimed funds; in such a case, the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated.

11 Cases that cite this headnote

[2] **Deposits in Court**
Disposition under judgment or order of court

In the class-action context, a cy pres distribution is designed to be a way for a court to put any unclaimed settlement funds to their next best compensation use, that is, for the aggregate, indirect, prospective benefit of the class.

20 Cases that cite this headnote

[3] **Federal Courts**
Class actions

Court of appeals reviews for an abuse of discretion a district court's decision to resort to the cy pres doctrine for the distribution of unclaimed class-action settlement funds.

27 Cases that cite this headnote

[4] **Federal Courts**
Abuse of discretion in general

Federal Courts
Questions of Law in General

A district court abuses its discretion when it makes an error of law or applies an incorrect legal standard; as to errors of the latter type, review by court of appeals is de novo.

5 Cases that cite this headnote

[5] **Federal Courts**
Compromise and Settlement

Court of appeals' review of the district court's interpretation of an unambiguous settlement agreement is de novo.

Cases that cite this headnote

[6] **Federal Civil Procedure**
Class Actions

Class action rule must be construed narrowly, and applied with the interests of absent class members in close view. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[7] **Compromise and Settlement**
Construction, operation, and effect; supervision
Constitutional Law
Compromise and settlement

A class action settlement generates property interests, and each class member has a constitutionally recognized property right in the claim or cause of action that the class action resolves; the settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members. U.S.C.A. Const.Amend. 14; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

5 Cases that cite this headnote

[8] **Deposits in Court**
Disposition under judgment or order of court

Because settlement funds in a class action settlement are the property of the class, 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; where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so, except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

25 Cases that cite this headnote

[9] **Deposits in Court**
Disposition under judgment or order of court

A cy pres distribution of class action settlement funds puts such funds to their next-best use by providing an indirect benefit to the class; that option arises only if it is not possible to put those funds to their very best use, which is benefiting the class members directly. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

9 Cases that cite this headnote

[10] **Compromise and Settlement**
Judicial Approval

Because a district court's authority to administer a class-action settlement derives from Federal Rules of Civil Procedure, the court cannot modify the bargained-for terms of the settlement

agreement; that is, while the settlement agreement must gain the approval of the district judge, once approved its terms must be followed by the court and the parties alike. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

1 Cases that cite this headnote

[11] **Compromise and Settlement**
Factors, Standards and Considerations; Discretion Generally
Compromise and Settlement
Construction, operation, and effect; supervision

The district judge must abide the provisions of a class action settlement agreement, reading it to effectuate the goals of the litigation. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[12] **Compromise and Settlement**
Construction, operation, and effect; supervision
Deposits in Court
Disposition under judgment or order of court

The terms of a class action settlement agreement are always to be given controlling effect; the cy pres doctrine comes on stage only to rescue the objectives of the settlement when the agreement fails to do so, and even then, the court's discretion remains tethered to the interest of the class, the entity that generated the funds. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[13] **Deposits in Court**
Disposition under judgment or order of court

Where funds in class action settlement involving exposure to toxic chemicals from agrochemicals plant were allocated into three subclasses, and one subclass of members who had suffered no physical injury at time of agreement did not use $830,000 allocated for medical monitoring, court abused its discretion by ordering a cy pres distribution of unused funds to charities, instead of distributing them to another subclass whose members had suffered cancer and other injuries from exposure; although protocol for settlement distribution stated that money left over in any subclass fund should be distributed to claimants in that subclass, such distribution was not feasible, settlement documents did not authorize cy pres distribution, settlement administrator had previously petitioned to disburse unused funds to subclass whose members had suffered injury, and members of that subclass had not been fully compensated, as their distribution was pro rata. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

4 Cases that cite this headnote

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Appeal from the United States District Court for the Southern District of Texas.

Before JONES, Chief Judge, and HIGGINBOTHAM and SOUTHWICK, Circuit Judges.

Opinion

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This appeal arises from the settlement of a class action. The defendant paid substantial sums for res judicata protection from the claims of persons assertedly injured

by the toxic emissions of an industrial plant near Bryan, Texas. The monies were allocated among three subclasses, one of which was to receive medical monitoring. Upon the monitoring program's completion, substantial sums remained unused. The district court denied the settlement administrator's request to distribute the unused medical-monitoring funds to another subclass of persons suffering serious injuries. Instead, the court repaired to the doctrine of *cy pres* and ordered that the money be given to three charities suggested by the defendant and one selected by the court.

The gift of class funds to charity is attacked on two fronts: that the district court moved too quickly from the terms of the settlement agreement to a *cy pres* distribution, and alternatively that the district court neglected a prerequisite of the *cy pres* doctrine by not selecting charities with a sufficient nexus to the underlying substantive objectives of the class suit. Persuaded by the first contention, we do not reach the second. We hold that the district court abused its discretion by ordering a *cy pres* distribution in the teeth of the bargained-for terms of the settlement agreement, which required residual funds to be distributed within the class. We reverse the district court's order distributing the unused medical-monitoring funds to third-party charities and remand with instructions that the district court order that the funds be distributed to the subclass comprising the most seriously injured class members.

I.

Lillian Hayden and five others instituted this action in April of 1992 by filing suit in state district court in Brazos County, Texas. Seeking to represent themselves and a class of others similarly situated, they sought compensation for exposure to arsenic and other toxic chemicals alleged to have been emitted into the air around Bryan, Texas, by an agrochemicals plant owned and operated by the defendant, Arkema, Inc. (formerly known as Elf Atochem North America, Inc.). The defendant removed the case to federal court supported by diversity jurisdiction.

Settlement of this aging suit had several iterations as it confronted the changing jurisprudence of federal class actions. The first settlement, confected three years after the filing of the state-court suit, proposed to terminate the suit with about $55 million in payments to a class certified under Federal Rule of Civil Procedure 23(b)(2) with no opt-out provisions.[1] This class was quickly undercut on appeal by our intervening decision in *Allison v. Citgo Petroleum Corp.*[2] There we made plain that where the predominant relief sought is an award of money damages, class certification must proceed through the (b)(3) gate, with its mandatory opt-out provisions. ***472** [3] On remand from this Court and now proceeding under Rule 23(b)(3), the parties entered into a new settlement agreement. The settlement was reduced to $41.4 million, a reduction reflecting the value of individual settlements reached with opting-out class members.

1 *See generally* FED.R.CIV.P. 23(c)(2)(B)(v).

2 151 F.3d 402 (5th Cir.1998), *adopted by Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011).

3 *Id.* at 413.

The settlement agreement created three subclasses and allocated to each subclass a portion of the $41.4 million settlement. The agreement allocated $23.34 million to Subclass A, which was defined to include all persons who lived or worked near the plant between 1973 and 1995 and had contracted any form of cancer, endured a pregnancy that ended in stillbirth, or suffered from any of several enumerated birth defects. A settlement administrator appointed by the district court distributed the funds pro rata pursuant to an agreed-upon grid deployed to score illness, its onset, and its seriousness. Ralph Klier, our appellant here, was a member of Subclass A. Klier had lived close to the plant and suffered from peripheral neuropathy and leukemia, the treatments for which so weakened his heart that he required open-heart surgery in 2003. He received $6,500 in settlement proceeds.

The settlement agreement allocated approximately $6.46 million to Subclass B. Its members were not required to demonstrate physical injury; the district court referred to Subclass B as the "nuisance-exposure/future claims" subclass. If its members met proximity-to-plant and exposure standards, they could either recover a small compensation sum or elect to participate in a medical-monitoring program, which was funded by $2 million of the proceeds allocated to the subclass. The remaining $4.46 million funded payments to the more than 12,000 subclass members who elected not to participate in the program. Responsive to the risk of latent

illness, the settlement also gave members of Subclass B—who by definition had suffered no injury or illness as a result of their arsenic exposure as of the signing of the agreement—back-end opt-out rights. Any member of Subclass B who later developed an arsenic-related cancer or birth defect for which they could meet standards of general causation retained the right to file a new lawsuit against Arkema.

Finally, $10.6 million was allocated to Subclass C, which included all class members who, during the class time frame, owned property that was located within the portion of the class area that was exposed to the highest levels of arsenic emissions. The funds were to compensate members of Subclass C for property damage and diminution in property value.

At issue on this appeal is the district court's use of the *cy pres* doctrine to dispose of approximately $830,000 that went unused during the administration of the medical-monitoring program created for the benefit of Subclass B. The program allowed members of Subclass B to forego receipt of a small cash payment and instead enroll in a program through which they would receive regular checkups and physician visits over a five-year period. The aim was to assist members of the subclass in monitoring their health for any indication that they were developing an arsenic-related illness. Two primary factors contributed to the program's not exhausting its allocated funds. First, the initial participation rate was low. Some 329 members of Subclass B—less than three percent of the total subclass membership—opted to receive medical monitoring in lieu of a cash payment; just 221 attended their first monitoring examination. Second, in the course of this monitoring, no significant health problems were ***473** found. Among those who initially chose to participate, demand for monitoring greatly diminished, yielding a high dropout rate. Only 46 class members participated in all three rounds of screening as scheduled.

As activity in the case subsided, the settlement administrator filed a status report in which he stated that the medical-monitoring program had come to a close and that approximately $830,000 had gone unused and needed to be distributed by the district court. The parties were in agreement that an additional distribution to the members of Subclass B was not economically feasible. The district court asked the parties for proposals for distribution of remaining funds. Taking an inexplicably narrow view of their duty to the class, class counsel did not respond. The defendant proposed seven entities as potential beneficiaries of a *cy pres* distribution: five local charities, the Bryan Independent School District, and the city of Bryan.

Klier opposed the proposal. He urged that the monies set aside but not drawn down for medical monitoring be distributed pro rata to members of Subclass A. Klier argued that an additional distribution to the members of Subclass A was economically feasible and would be equitable since the members of Subclass A had been found to suffer from arsenic poisoning, related cancers, and birth defects that are compensable under the settlement. In the alternative, Klier argued that the defendant's proposed charities were not proper recipients under the doctrine of *cy pres*, lacking a sufficient nexus to the injuries of the class or the principles the class action sought to vindicate. Klier proposed that the money instead be used to fund arsenic-pollution research at Texas A & M University.

In April of 2010, some eighteen years after this litigation commenced and fourteen years after the closing of the plant, the district court ordered distribution of the remaining funds to three of the charities proposed by the defendant: a scholarship program called Arkema New Horizons Scholarships and two museums. The court then added a charity of its own, a local history and genealogy library. The money was to be distributed in four equal shares. Despite having pledged several years before to consider a proposal to reallocate the medical-monitoring funds to other members of the class,[4] the court never addressed Klier's primary request that the monies be distributed to the members of Subclass A, denying it only implicitly. Instead, the district court proceeded directly to Klier's alternative proposal that the money be donated to Texas A&M, which it rejected because it would not benefit the Bryan community. The district court expressed its view that the distributions it ordered would provide benefits "perhaps to friends and relatives of the claimants, perhaps to total strangers who happen to live in Bryan."

[4] The content of and reasons for this earlier pledge are detailed *infra*, op. at 477.

II.

[1] [2] When modern, large-scale class actions are resolved via settlement, money often remains in the settlement fund even after initial distributions to class members have been made because some class members either cannot be located or decline to file a claim. Federal district courts often dispose of these unclaimed finds by making what

are known as *cy pres* distributions. *Cy pres* is an equitable doctrine that has been imported into the class-action context from the field of trust law:

> The *cy pres* doctrine takes its name from the Norman French expression, *cy* ***474** *pres comme possible*, which means "as near as possible." The doctrine originated to save testamentary charitable gifts that would otherwise fail. Under *cy pres*, if the testator had a general charitable intent, the court will look for an alternate recipient that will best serve the gift's original purpose. In the class action context, it may be appropriate for a court to use *cy pres* principles to distribute unclaimed funds. In such a case, the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated.[5]

[5] *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir.2002) (internal citations and quotation marks omitted).

In the class-action context, a *cy pres* distribution is designed to be a way for a court to put any unclaimed settlement funds to their " 'next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.' "[6]

[6] *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir.2007) (quoting 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 10.17 (4th ed. 2002) (emphasis omitted)).

[3] [4] [5] We review for an abuse of discretion a district court's decision to resort to the *cy pres* doctrine for the distribution of unclaimed class-action settlement funds.[7] By definition, a district court abuses its discretion when it makes an error of law or applies an incorrect legal standard.[8] As to errors of this latter type, our review is de novo,[9] as is our review of the district court's interpretation of an unambiguous settlement agreement.[10]

[7] *See Wilson v. Sw. Airlines, Inc.*, 880 F.2d 807, 811 (5th Cir.1989); *see also In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 185 (2d Cir.2005) (per curiam); *Powell v. Ga.–Pac. Corp.*, 119 F.3d 703, 706 (8th Cir.1997).

[8] *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

[9] *Benavides v. Chi. Title Ins. Co.*, 636 F.3d 699, 701 (5th Cir.2011).

[10] *Guidry v. Halliburton Geophysical Servs., Inc.*, 976 F.2d 938, 940 (5th Cir.1992).

A.

[6] [7] We begin our analysis with a return to basic principles. As we will explain, these core principles control and decide this appeal. First there is the ever-antecedent and overarching limitation on class-action litigation, the Rules Enabling Act. The Federal Rules of Civil Procedure cannot work as substantive law.[11] This core stricture demands a narrow construction of Rule 23, which must be "applied with the interests of absent class members in close view."[12] Second, a class settlement generates property interests. Each class member has a constitutionally recognized property right in the claim or cause of action that the class action resolves.[13] The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.[14]

[11] 28 U.S.C. § 2072.

[12] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

[13] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807–08 & 812–13, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428–30, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

[14] *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (hereinafter, "ALI PRINCIPLES") § 3.07 cmt. b (2010) ("[F]unds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members ....").

***475** [8] [9] These precepts define the first—and often the last—arena of analysis, imposing foundational limitations on a district court's discretion as it administers a class-action settlement. Because the settlement funds are the property of the class, 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."[15] Where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so,[16] except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution.[17] A *cy pres* distribution puts settlement funds to their next-best use by providing an indirect benefit to the class. That option arises only if it is not possible to put those funds to their very best use: benefitting the class members directly.

[15] *Id.* § 3.07 cmt. a; *see also* 3 WILLIAM B. RUBENSTEIN ET AL., NEWBURG ON CLASS ACTIONS § 10.17 (4th ed. 2002, Westlaw updated through June 2011) ("When all or part of the common fund is not able to be fairly distributed to class members, the court may determine to distribute the unclaimed funds with a *cy pres* ... approach."). In large class actions, substantial administrative costs attend the distribution of settlement funds. As the settlement funds are disbursed and the amount still available for distribution to the class declines, there comes a point at which the marginal cost of making an additional pro rata distribution to the class members exceeds the amount available for distribution. *See, e.g., In re Am. Tower Corp. Secs. Litig.*, 648 F.Supp.2d 223, 224 n. 1 (D.Mass.2009). It is only at this point that a district court has discretion to order a *cy pres* distribution. *See* ALI PRINCIPLES § 3.07 cmt. b (explaining that *cy pres* awards are appropriate "only when direct distributions to class members are not feasible—either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable").

[16] *See* ALI PRINCIPLES § 3.07 cmt. b ("[A]ssuming that further distributions to the previously identified class members would be economically viable, that approach is preferable to cy pres distributions."); *cf.* EDWIN S. NEWMAN, LAW OF PHILANTHROPY 27 (1955) ("*Cy pres* is only a last resort, to be invoked where it is totally impossible for a trustee to realize the objectives of the trust's creator through reasonable interpretation of the trust agreement."), *quoted in* Danshera Cords, *Charitable Contributions for Disaster Relief: Rationalizing Tax Consequences and Victim Benefits*, 57 CATH. U.L.REV. 427, 461 n. 240 (2008).

[17] *See Wilson*, 880 F.2d at 812–13 (noting that the class members could not assert an equitable claim to the unclaimed settlement funds because all class members who came forward had been paid the full amount of their liquidated back-pay damages); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34–35 (1st Cir.2009) (affirming a *cy pres* distribution as part of a settlement agreement in an antitrust class action where the settlement paid all class members treble damages). This limitation is an important component of the decision principle in *Wilson:* a *cy pres* distribution of unclaimed settlement funds is appropriate only when it is not feasible to distribute those funds to any party to the class action who has a persuasive equitable claim to those funds. *See infra* note 21 and accompanying text. A party whose liquidated-damages claim has been fully satisfied cannot make a persuasive equitable claim to any residual settlement funds.

[10] [11] [12] Because a district court's authority to administer a class-action settlement derives from Rule 23, the court cannot modify the bargained-for terms of the settlement agreement.[18] That is, while the settlement agreement must gain the approval of the district judge,[19] once approved its terms must be followed by the court and the parties alike. The district ***476** judge must abide the provisions of the settlement agreement, reading it to effectuate the goals of the litigation. This is not a free exercise of *cy pres*, but a determination of how the settlement agreement's many provisions define the class's property interests and allocate those interests once created.[20] The terms of the settlement agreement are always to be given controlling effect.[21] *Cy pres* comes on stage only to rescue the objectives of the settlement when the agreement fails to do so. Even then, the court's discretion remains tethered to the interest of the class, the entity that generated the funds.

[18] *Evans v. Jeff D.*, 475 U.S. 717, 726–27, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986).

[19] *See* FED.R.CIV.P. 23(e).

[20] The concurrence usefully recites important concerns now being voiced regarding the use of *cy pres* by district courts managing class settlements. The concurrence's focus is on the problems attending the unfettered use of *cy pres.* When a court looks beyond or must resolve uncertainty in the terms of the settlement agreement, complications will arise. But as long as courts attend to the fact that they are allocating the class members' property, there should be little occasion to sail near those shoals.

[21] Of course, the district court has inherent equitable authority to resolve any issues that are not covered by the terms of the settlement agreement. *See* MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.66, at 334 (Federal Judicial Center 2004).

B.

[13] It is apparent from its structure that the settlement contract between Arkema and the class contemplated that each subclass would first draw upon the sums allocated to it. The parties memorialized their settlement in two documents: the Class Action Settlement Agreement ("the Agreement") and the Protocol for Distribution of Settlement Fund ("the Protocol"). As relevant here, the Agreement created and defined the three subclasses and allocated a designated portion of the total settlement proceeds to the three subclass funds. Class members were eligible for payments from the subclass funds pursuant to the procedures and processes set forth in the Protocol. The Agreement specifies that each subclass fund shall be used to fund payments to the members of its assigned subclass. Arkema points out that paragraph 27 of the Protocol directs that any money left over in any subclass fund "shall be distributed pro rata to all Claimants in that subclass." Arkema argues that this ends the matter: Abiding the contract, the district court had no authority to allocate funds not drawn down by one subclass to the members of another subclass, even Subclass A, whose members were the most grievously injured and had not been fully compensated.

Arkema's argument is flawed at several junctures. To begin with, Arkema concedes that paragraph 27's directive could not have been followed here: the leftover funds were allocated to Subclass B, and it is not economically viable to distribute those funds pro rata to the 12,657 members of Subclass B. Arkema accepts the precept that even an explicit directive of the settlement contract need not be followed if it is not feasible to do so.

Even if the Protocol stopped here, and it did not, the contention that want of feasibility freed the district court to donate the residual property interest of the class to charity is mistaken. This is not a case where the settlement agreement itself provides that residual funds shall be distributed via *cy pres.*[22] Quite the opposite: the ***477** district court's decision to distribute the unused funds via *cy pres* finds no support in the text of the settlement documents. Indeed, Arkema itself would appear to have a greater claim to the funds than a charity, however worthwhile the charity, absent a contrary directive from the property-interest-defining settlement agreement.[23]

[22] *See, e.g., Gates v. Rohm & Haas Co.,* No. 06–1743, 2011 WL 1103683, at *1 (E.D.Pa. Mar. 24, 2011) (unpublished) (making a *cy pres* distribution where the settlement agreement provided that the district court was to pay over any "excess undistributed Medical Monitoring Settlement Class funds" to "a local Section 501(c)(3) charity for the benefit of" the village that encompassed the class area).

[23] *See Wilson,* 880 F.2d at 816 (holding that it is an abuse of discretion for a district court to order a *cy pres* distribution when any party to or participant in a class action—including the defendant and class counsel—has a valid equitable interest in the unclaimed settlement funds).

But the Protocol is not so silent as the defendant would have it. Paragraph 28 provides: "The District Court may make changes to the terms of this protocol as necessary for the benefit of the Settlement Class Members."[24] This provision is but a limited grant of authority to the district court. Importantly, the limitation imposed is that the district court must act for the benefit of the class as a whole. Neither its authority nor its duty[25] is cabined off on a subclass-by-subclass basis. If it is not feasible to distribute the funds under paragraph 27, paragraph 28 controls, and it authorizes the district court to provide a benefit to the settlement-class members. "There is no indirect benefit to the class from the defendant's giving the money to someone else,"[26] and Arkema falls silent on the reality that it was feasible to allocate the funds to

Subclass A.

[24] The Agreement defines the term "Settlement Class Members" to include the members of all three subclasses.

[25] *See In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 194 (3d Cir.2000) ("In a class action settlement, a court retains special responsibility to see to the administration of justice.").

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

This is enough, but there is more in this Protocol. Paragraph 29 further provides, "The Settlement Administrator may petition the District Court for reallocation of available funds among the [subclasses] on a showing of good cause if ... he determines that considerations of equity and fairness require reallocation." About a year after medical monitoring began, the settlement administrator did exactly that, seeking leave to disburse any unused funds to other class members, "particularly those who are most seriously affected by exposure to chemicals." The district court denied this request, stating instead that it would "decide later what to do with the remainder of the medical monitoring fund." When that later date arrived, the court made no attempt to reconcile its decision to distribute the residue of the fund to third-party charities with the settlement administrator's prior request under paragraph 29.

The Protocol did more than merely empower the district court to allocate medical-monitoring funds unused by members of Subclass B to members of other subclasses—it required the court to do so for as long as further distributions were feasible and equitable. That it was not feasible to distribute these funds to members of Subclass B is not disputed. The feasibility of a further distribution to members of Subclass A is likewise conceded. And equity strongly favors an additional distribution to Subclass A. The members of Subclass B suffered no injuries or illnesses; those in Subclass A suffered serious personal injuries.[27] Claimants in Subclass A ***478** have already received some measure of compensation for their injuries, but it is far from full. The appellant here endured cancer, nerve damage, and a heart transplant and received $6,500 for his trouble. Subclass A's damages claims were non-liquidated and included claims for both actual and exemplary damages.

[27] The members of Subclass C suffered economic injury: damage to and loss of the value of property. These liquidated claims were fully compensated under the terms of settlement. Accordingly, none contends that the claimants in Subclass C have a persuasive equitable claim to the unused medical-monitoring funds. *See supra* note 16 and accompanying text.

The very structure of Subclass B supports the entitlement of Subclass A. As we have explained, Subclass B was created to address the fears of latent disease harbored by persons who lived or worked within a defined proximity to the plant but who were asymptomatic. Access to medical monitoring, coupled with a back-end opt-out right to sue should injury later arrive, were the relief afforded. Both Subclass A and Subclass B addressed injury to the person. Members of the former had already incurred physical injury. Members of the latter were asymptomatic persons with a risk that injury of the type compensated in Subclass A might be later suffered. Addressing the risk of latent injury by definition meant dividing settlement monies between the two subclasses. The risk of Subclass B members was never realized. When significant injuries did not manifest themselves among members of Subclass B, the already light use of medical monitoring by its members declined even further, leaving the funds now at issue unspent. By the agreement, these monies were to provide a service to Subclass B members, not to compensate them for a later-arriving disease. In that event, they could sue, not having released their claims in the settlement. Members of Subclass A, by contrast, were prohibited from later opting out of the agreement. Res judicata protection against their claims was the most valuable consideration Arkema received in exchange for agreeing to the settlement.

Read, as they must be, with our core precepts at hand, the relevant provisions of the Protocol shape the property interest created by the Agreement and thereby constrain the district court's discretion in disposing of that property. The Protocol is an affirmation that funds initially allocated to a particular subclass are to be used, in the end, for the interests of the entire settlement class. We hold that the settlement agreement did not authorize the district court to make a charitable gift of the unused medical-monitoring funds and that the district court erred when it rejected the settlement administrator's request that the funds be reallocated to the members of Subclass A.

Our decision lies comfortably with prior decisions of this

Court and our sister circuits,[28] which have necessarily taken case-specific approaches to the role of the federal district judge in the distribution of monies left unclaimed after administration of a class settlement. As we turn to the fit of the present case within the broader decisional line, we remind of the case's dimension. Here we treat a distinct category of such cases, in which funds have gone unused by a particular subclass.[29] ***479** Subclass B's failure to fully draw down the medical-monitoring fund did not constitute an abandonment or relinquishment by the class of its property interest in the settlement.[30] The funds were unused by Subclass B, not unclaimed by the class as a whole.[31] Proceeding from the premise that the settlement of damage claims in a class action both creates contractual obligations and defines property, we have emphasized the terms of the settlement agreement as approved by the district court. That agreement preserved for the class something akin to a reversionary interest in funds unused by a particular subclass. Where the terms of a settlement agreement are sufficiently clear, or, more accurately, insufficient to overcome the presumption that the settlement provides for further distribution to class members,[32] there is no occasion for charitable gifts, and *cy pres* must remain offstage.

28 *E.g.*, *Masters*, 473 F.3d at 436 (holding that the district court abused its discretion by ordering a *cy pres* distribution where neither side contended that "each class member's recovery would be so small as to make an individual distribution economically impracticable").

29 Thus, this is not a case where it was not feasible to make further distributions to any of the class members. *See, e.g.*, *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619, 621 (8th Cir.2001); *Powell*, 119 F.3d at 706–07; *see also Masters*, *supra* note 15. Nor does this case implicate the line of authority giving careful scrutiny to class settlement agreements in which the parties agree to a *cy pres* distribution. *See, e.g.*, *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 363 (3d Cir.2010) (Weis, J., concurring in part and dissenting in part); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 30–32, 34–36; *Six (6) Mexican Workers v. Az. Citrus Growers*, 904 F.2d 1301, 1304 & 1307 (9th Cir.1990).

30 *Accord In re Holocaust Victim Assets Litig.*, 424 F.3d 158, 166–69 (2d Cir.2005) (affirming the district court's decision to reallocate settlement funds so as to directly benefit the neediest class members instead of making a *cy pres* distribution to charity).

31 Put differently, while the funds were *allocated* to Subclass B, they *belonged* to the entire class. It follows that there is no unclaimed or abandoned by property available to be claimed by the state or others via escheat or otherwise. *See generally All Plaintiffs v. All Defendants (In re Lease Oil Antitrust Litig.)*, 645 F.3d 329 (5th Cir.2011). On some golf courses there are signs reminding those who walk or jog the cart trails that a golf ball is not lost until it stops rolling. This ball is still rolling.

32 *See* ALI PRINCIPLES § 3.07(b).

C.

Arkema pushes back with three counter-arguments. None is sufficient to carry the day. First, Arkema argues that paragraph 28 of the Protocol authorizes the district court to make changes to the terms of the Protocol, not the Agreement, and that it is the Agreement that fixes the amount of money to be allocated to each subclass. It was the Agreement that made the initial allocation of money among the three subclasses. But it is paragraph 27 of the Protocol that controls the allocation of any monies remaining after the initial distribution. In addition, Arkema's argument turns a blind eye to the language of paragraph 29, which expressly authorizes the district court, upon a request from the settlement administrator, to reallocate funds one subclass to another. Deciding to reallocate funds from the subclass with nuisance-exposure claims to the subclass with serious personal-injury claims was not beyond the scope of the authority that the Protocol conferred on the district court.

Next, Arkema argues that the members of Subclass A have already been fully compensated because they were paid in full according to the terms of the Agreement. Not so. The fact that the members of Subclass A have received the payment authorized by the settlement agreement does not mean that they have been fully compensated. As a general matter, "few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery for those class members."[33] Moreover, the Agreement does not even purport to provide full, individualized ***480** compensation. It authorized pro rata distributions that

were dictated by a formula that was designed to ensure, within the limits of the fund, that each claimant obtained some relief. It valued each injury in relative terms, not absolute terms.

[33] *Id.* § 3.07 cmt. b.

Finally, Arkema argues that equity weighs in favor of a *cy pres* distribution because distributing the unclaimed funds to members of Subclass A would deprive Subclass B of its settlement benefits. This argument is a straw man. All agree that additional distributions to the members of Subclass B were not economically viable. No proposal before the district court would have allowed Subclass B to receive the full value allocated to it by the original agreement. The choice was not between a distribution to Subclass A and a distribution to Subclass B; the choice was between a distribution to Subclass A and a distribution to charity. Although it is generally true that additional "distributions to class members better approximate the goals of the substantive laws than distributions to third parties that were not directly injured by the defendant's conduct,"[34] the district court had no need for that principle. The settlement agreement required the court to reallocate the funds among the subclasses of the class that generated the settlement fund.

[34] *Id.*

III.

The district court abused its discretion by ordering a *cy pres* distribution instead of distributing the unused medical-monitoring funds to the members of Subclass A. We reverse the district court's *cy pres* order and remand with instructions that the residual funds be distributed to the members of Subclass A consistently with the terms of the settlement agreement.

REVERSED and REMANDED.

EDITH H. JONES, Chief Judge, concurring:

I concur in Judge Higginbotham's able opinion and in the conclusion that the invocation of *cy pres* here was an abuse of discretion remediable, under these particular facts, only by a pro rata distribution to subclass A. I write separately, however, to suggest that if the defendant had not waived its right to request a refund, it would have been entitled to the excess.

As Judge Higginbotham explains, the *cy pres* doctrine originated in the field of trust law "to save testamentary charitable gifts that would otherwise fail." *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir.2002). It has been imported into the class action context to distribute unclaimed funds "for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *Id.* at 682–83. It is inherently dubious to apply a doctrine associated with the voluntary distribution of a gift to the entirely unrelated context of a class action settlement, which a defendant no doubt agrees to as the lesser of various harms confronting it in litigation. *See* Martin H. Redish et al., *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L.Rev. 617, 621 (2010). *See also Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir.2004) (Posner, J., describing *cy pres* in this connection as "badly misnamed.").

The opportunities for abuse have been repeatedly noted. *See, e.g.*, *Securities & Exchange Comm'n v. Bear, Stearns & Co., Inc.*, 626 F.Supp.2d 402 (S.D.N.Y.2009) ("While courts and the parties may act with the best intentions, the specter of ***481** judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety."). *See In re Pharm. Indust. Average Wholesale Price Liti.*, 588 F.3d 24 at 34 (1st Cir.2009) (*cy pres* distributions are controversial); Adam Liptak, *Doling Out Other People's Money*, N.Y. Times Nov. 26, 2007, at A14 *available at* http://www.nytimes.com/2007/11/26/washington/26bar.html (describing particular distributions, "giving the money away to favorite charities with little or no relation to the underlying litigation is inappropriate and borders on distasteful"); Editorial, *When Judges Get Generous*, Wash. Post, Dec. 17, 2007, at A20, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/12/16/AR2007121601433.html; George G. Krueger & Judd A. Serotta, *Money For Nothing*, Legal Times, June 2, 2008; Sam Yospe, Note, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L.Rev. 1014, 1027–41 (2009); Goutam U. Jois, *The Cy Pres Problem and the Role of Damages in Tort Law*, 16 Va. J. Soc. Pol'y & L. 258, 259 (2008). Whatever the superficial appeal of *cy pres* in the class action context may have been, the reality

of the practice has undermined it. It is time for courts to rethink the justifications of the practice.

The panel opinion holds that the Rules Enabling Act places an "overarching limitation on class-action litigation" and demands "a narrow construction of Rule 23." Professor Redish has put the point more bluntly:

> Use of *cy pres* simultaneously violates the constitutional dictates of separation of powers by employing a Federal Rule of Civil Procedure to alter the compensatory enforcement mechanism dictated by the applicable substantive law being enforced in the class action proceeding. It has somehow become common practice among many courts, scholars, and members of the public to view the modern class action as a free-standing device, designed to do justice and police corporate evildoers. As nothing more than a Federal Rule of Civil Procedure, however, the class action device may do no more than enforce existing substantive law as promulgated either by Congress or, in diversity suits, by applicable state statutory or common law. Yet in no instance of which we are aware does the underlying substantive law sought to be enforced in a federal class action direct a violator to pay damages to an uninjured charity.

Redish et al., *supra*, at 623 (footnote omitted). *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 "from a compensatory remedial structure to the equivalent of a civil fine." *Id.* They present an Article III problem by transforming "the judicial process from a bilateral private rights adjudicatory model into a trilateral process." *Id.* at 641. In addition, such 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 the distribution somehow go awry.

Whether *cy pres* distributions violate the Constitution or Rules Enabling Act has not, to my knowledge, been fully litigated in any court,[1] and these questions are neither briefed nor presented for review here. ***482** Hence, I refrain from a more rigorous analysis and suggest instead that district courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations.

[1] At least one court has concluded that "fluid recovery" judgments—which differ materially from *cy pres* distributions—do not violate the Rules Enabling Act. *See Schwab v. Philip Morris USA, Inc.*, No. CV 04–1945, 2005 WL 3032556 (E.D.N.Y. Nov. 14, 2005).

The preferable alternative, illustrated partially in *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir.1989), is to return any excess funds to the defendant.[2] The class action settlement fund in *Southwest Airlines* retained a balance of over $500,000 after all claimants had been reimbursed in full. *Id.* at 810. Claims were made against the balance by class counsel for additional claims administration fees and by Southwest for a return of the excess. *Id.* The district court rejected both claims and ordered a *cy pres* distribution to a local charity. Shortly thereafter, Southwest and class counsel entered a settlement that would divide the remaining funds between Southwest and the class counsel. *Id.* at 811. This court reversed the district court's judgment and approved the settlement. The opinion noted that Southwest "clearly renounced its legal claim to any residual funds" in the settlement agreement and therefore had no "legal right" to the balance. *Id.* at 812. Neither the plaintiffs nor counsel had a legal right to the balance either. As a result, this court ordered that the fund should be distributed to the party with the stronger equitable claim. *Id.* That party was the defendant:

[2] This approach, of course, was not available in today's case for reasons explained in the panel opinion.

> Southwest's equitable claim is premised on the fact that all the money in the fund originally belonged to it. Southwest turned over the money for the specific and limited purpose of compensating the class. It did so in the expectation that compensating the class would exhaust the fund. The record of the fairness hearing reveals that Southwest and class counsel both wrongly assumed that claims alone would amount to $900,000

> or more of the fund, exclusive of expenses. Since Southwest turned over its money in the clear and reasonable expectation that the money was required for the specific purpose of compensating the class, its equitable claim to any money remaining after the accomplishment of that purpose is compelling.
>
> *Id.* at 813.

In the ordinary case, to the extent that something must be done with unclaimed funds, the superior approach is to return leftover settlement funds to the defendant. This corrects the parties' mutual mistake as to the amount required to satisfy class members' claims. Other uses of the funds—a pro rata distribution to other class members, an escheat to the government, a bonus to class counsel, and a *cy pres* distribution—all result in charging the defendant an amount greater than the harm it bargained to settle. Our adversarial system should not effectuate transfers of funds from defendants beyond what they owe *to the parties* in judgments or settlements.

All Citations

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