

CY PRES RELIEF AND THE PATHOLOGIES OF THE MODERN CLASS ACTION: A NORMATIVE AND EMPIRICAL ANALYSIS

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I. INTRODUCTION: CY PRES AND THE PROBLEMS OF FASHIONING CLASS-WIDE RELIEF	

The purpose of the modern class action, a procedural aggregation device authorized by Rule 23 of the Federal Rules of Civil Procedure, is to collectivize individual claims into a single proceeding, with the overwhelming majority of the plaintiffs assuming a purely passive role in the proceeding. The procedure is thereby designed to assure efficient resolution of claims too numerous to be joined and too burdensome to be litigated individually. As worthwhile as this concept may sound in theory, however, the harsh realities of the modern class action have demonstrated that its implementation has been far from simple in practice.

In many class actions, the claims of the individual class members are extremely small. Of course, one might argue that it is for exactly such claims that the class action procedure is so well suited, for the very reason that individual suit in such cases would be infeasible.¹ The serious complicating factor, however, is that notifying individual class members of their right to file a claim into a class-wide settlement or award fund will often prove to be both difficult and inefficient. Moreover, even when individual class members have received notification of their rights to compensation from a general fund, their claims will often be so small that their size fails to justify the effort and expense of pursuing those claims on an individual basis. Finally, since generally individual class members will have become part of the class not by affirmatively choosing to enter it but

1. Such suits are usually referred to as “negative value” or “Type B” claims. In contrast, class claims large enough to stand on their own are referred to as “Type A” claims. See MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 131–32 (2009).

rather by failing to opt out of the class,² the court can never be certain that the absent class members are even fully aware of their inclusion in the class in the first place. This is so despite the fact that they likely received formal notification of the suit.

If, for these reasons, a large majority of claimants never receive compensation for the harm defendants have inflicted, courts might fear that even defendants who have been found liable may never have to pay for their violations of the law. Courts, plaintiffs' attorneys, and class action scholars have therefore struggled to come up with radical ways in which defendants in class actions can be forced to pay for their violations of the law.³ The desire to fashion such relief may be understandable, given the available alternatives to these creative remedial developments. Absent resort to such radical fashioning of relief, four alternatives would appear to exist: (1) having the remainder of the unclaimed fund revert to the defendant, who, presumably the court has already determined, has violated the law; (2) allowing the unclaimed portion of the damage fund to escheat to the state, much as most unclaimed property does after a specified period of time; (3) increasing the pro-rata share of the class members who do file claims until the remainder of the damage fund is consumed; or (4) refusing to authorize the class proceeding in the first place. Under alternatives 1 and 4, whatever deterrent effect the substantive law was designed to have will either be completely defeated or at the very least seriously diluted. Alternative 2 may well achieve the substantive law's goal of deterrence, since the defendant is still forced to pay fully for the harm it has caused. However, it will likely not come close to compensating or aiding the

2. FED. R. CIV. P. 23(c)(2) (requiring notice and the right of absent class members to opt out in Rule 23(b)(3) classes). In class suits falling within the Rule 23(b)(1) and (b)(2) categories, opt-out is not permitted. *Id.*

3. For a discussion of one of these alternative methods, so-called "fluid class recovery," see *infra* Part V. Note that often these creative methods are employed as part of a settlement between the parties, rather than as part of a coercive judicial award against a defendant. However, our criticisms of these creative damage alternatives draw no distinction between the two contexts, for three reasons. First, any settlement agreed to by a class defendant is entered into in the shadow of controlling substantive and procedural law that would likely be applied were the suit to be litigated. Thus, a defendant's agreement to use of an alternative method of collective relief cannot be deemed a purely voluntary act if one assumes that a court possesses the legal authority to impose such relief coercively on a defendant as part of a fully litigated action. At the very least, then, before such a settlement could be accepted as a truly voluntary agreement by a defendant, it would need to be firmly established that such relief would be unavailable as court ordered litigation relief. Second, in any event, under Rule 23(e) a court must supervise and approve any settlement of a class action. Thus, unlike a settlement of an individual suit where the parties have totally free reign to enter into an extra-judicial contract as a means of resolving the action, in settlement of a class suit the court's inherent and pervasive involvement effectively renders the settlement an action of the court, rather than merely a voluntary agreement entered by the parties. Finally, even in the settlement context the due process rights of absent class members are implicated, and for reasons that will be discussed, most of these alternative compensation methodologies will present serious threats to those rights. See *infra* Part IV.C.

victims who have been injured by the defendant's unlawful behavior. Finally, alternative 3 amounts to an unjustified windfall to the plaintiffs who have filed claims, since they will receive considerably more than their properly allotted damages.

In place of what many perceive to be unsatisfying alternatives, courts and scholars have proposed a variety of radical methods to determine and administer class-wide relief. Usually, the terms used to describe these radical methods are "fluid class recovery" or "cy pres," with the two concepts on occasion being treated by courts and commentators as fungible.⁴ While a broad definition of both concepts does render them largely equivalent, it is important to discern subtle but significant differences. As an abstract matter, both concepts refer to efforts to provide the "next best" form of relief in cases where it is impractical or impossible to directly compensate the injured class members. In more recent times, however, the term cy pres has generally referred to an effort to provide unclaimed compensatory funds to a charitable interest that is in some way related to either the subject of the case or the interests of the victims, broadly defined. In contrast, "fluid class recovery," in the sense in which we use the term here, refers to efforts to fashion relief to those who will be impacted by the defendant in the future, in an effort to roughly approximate the category of those who were injured in the past. Thus, both concepts involve some form of "second best" relief. However, in the sense we employ the terms (and as modern courts often, though not always, employ them) fluid class recovery represents a far more disciplined effort to indirectly compensate injured victims (through future approximations of who those victims were) than does cy pres, which in its modern form demands merely some generic link of the proposed recipient charity to the nature of the suit.⁵

Today, of these alternative methods, cy pres relief appears to be the one most often employed by federal class action courts. While there has been a fair bit of legal controversy over fluid class recovery,⁶ there has been only occasional concern expressed, either by courts or scholars, about the dramatic turn in modern class actions toward the use of cy pres relief. Though it is difficult to know for certain why the practice's growth has

4. See, e.g., *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1254 (7th Cir. 1984) ("It was appropriate for the district court to consider the *cy pres* doctrine or Fluid Class Recovery to achieve an equitable disposition of the reserve fund.").

5. While beyond the scope of our inquiry, it is worth mentioning that in addition to cy pres and fluid class recovery, two other methods of dealing with the impracticalities of class-wide relief have been suggested or employed, albeit with at best limited success: (1) determination of class-wide damages through adjudication of individual suits chosen scientifically by methods of statistical sampling combined with class-wide extrapolation of the average findings; and (2) "liability-only" determinations in the class proceeding itself, with damage determinations left for post-class individualized suits.

6. See *infra* Part V.

gone nearly unnoticed, much less criticized, by the scholarly world, we can postulate a number of possible explanations. First, unlike fluid class recovery, the cy pres concept has venerable origins in the law, having roots in the law of estates and trusts as far back as Roman times and reaching its zenith in the period following the Middle Ages.⁷ Second, unlike its biggest remedial competitor, fluid class recovery, which is expressly designed as a means for determining damages for an injured class, cy pres relief is purportedly invoked merely as a means of disposing of unclaimed property. Traditionally, the disposition of unclaimed property has been considered to be wholly distinct from the underlying substantive law on which the proceeding giving rise to the award was grounded.⁸

There are significant problems with both rationales for giving class action cy pres a virtual free pass. Initially, while it is true that the doctrine finds its origins in the ancient law of trusts, that historical grounding in no way logically justifies its extension to the radically different context of modern class action adjudication. In fact, this radical extension did not occur until as recently as the 1970s—and even then solely by resort to strained analogy.⁹

Secondly, though it is generally true that treatment of unclaimed awards is considered conceptually distinct from the substantive merits of the litigations that led to those awards,¹⁰ class action cy pres presents a dramatically different situation from the normal unclaimed property context. In the normal case, when an award is made or settlement established, the reasonable expectation is that the plaintiffs who have actively pursued that award by affirmatively choosing to file suit will claim it once they have won their suit. In the relatively rare case where that does not happen, it is perfectly reasonable to treat the unclaimed funds as the law would treat any other unclaimed property (which usually means escheat to the state). In the class action context, in contrast, for reasons we will discuss, there is no such reasonable expectation.¹¹

It is easy to grasp the role that cy pres is designed to play in implementing and vindicating the modern class action. In its modern form, cy pres relief is uniquely and intentionally designed to bridge the often enormous gap between a finding of liability and the distribution of damages in a class action. Indeed, in many class actions it is solely the use of cy pres that assures distribution of a class settlement or award fund sufficiently large to guarantee substantial attorneys' fees and to make the entire class proceeding seemingly worthwhile. Absent the possibility of a sizable award to charity created by cy pres, plaintiffs' attorneys and courts

7. *See infra* Part II.A.

8. *See infra* Part II.B.

9. *Id.*

10. *See infra* Part IV.B.

11. *See infra* Part II.B.4.

might reasonably fear that many of these class proceedings would be widely perceived as failing either to punish the wrongdoer or compensate the victims. Absent a public perception of success, class action advocates could reason, the viability of the modern class action as a weapon against corporate illegality could be seriously undermined. Therefore, class action attorneys and supporters might believe that with *cy pres*, the class proceeding still punishes the wrongdoer and that even if it fails to compensate actual victims, at the very least it uses the wrongdoer's money for worthy purposes. In this important sense, use of *cy pres* represents an integral—indeed, often essential—element of the class action process, rather than merely a neutral method of unclaimed property disposition that happens to be applied in the class action context.

It is this integral role of *cy pres* that renders it so troubling a part of the modern class action. In a variety of ways, use of *cy pres* threatens to create or foster “pathologies” of the modern class action. By the term “pathology,” we refer to three different harms to the interests of the nation's constitutional democracy which the modern class action can be distorted to bring about: a use of the class proceeding that is either (1) inconsistent with the limits of the procedure's legal source—i.e., the Federal Rules of Civil Procedure, as well as the Rules Enabling Act,¹² which authorizes and limits creation of those rules; (2) a perversion or distortion of the underlying substantive law being enforced in the class proceeding; or (3) a violation of the constitutional dictates that control and limit the procedure. These “pathologies” derive from threats to the case-or-controversy requirement of Article III,¹³ the dictates of separation of powers that inhere in the Constitution's limited grants of authority to each branch of federal government, and the Due Process Clause of the Fifth Amendment.¹⁴ Thus, the “pathologies” of the modern class action, then, refer to all the ways in which the class action has been structured or applied to exceed the bounds of the limitations legally placed upon it in order to preserve both constitutional democratic values and the rule of law.

Cy pres furthers the pathologies of the modern class action in two important ways—what can appropriately be labeled “intrinsic” and “instrumental.” The former term concerns pathologies to which use of *cy pres* inherently gives rise, while the latter involves ways in which *cy pres* facilitates or provides cover for political and constitutional pathologies associated with the modern class action itself. In both contexts, *cy pres* gives rise to serious problems of constitutional law and democratic theory. By awarding defendant's money to a charity, *cy pres* introduces into the class adjudication an artificially interested party who has suffered no injury at the hands of the defendant. In so doing *cy pres* contravenes the adversary

12. 28 U.S.C. § 2072 (2006).

13. U.S. CONST. art. III, § 2.

14. U.S. CONST. amend. V.

“bilateralism” constitutionally required by the adjudicatory process embodied in Article III’s case-or-controversy requirement.¹⁵ 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.¹⁶ 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.

In addition to evincing its own inherent constitutional pathologies, cy pres simultaneously facilitates the flaws and defects in general class action jurisprudence, and in this sense operates instrumentally. Cy pres creates the illusion of class compensation. It is employed when—and only when—absent its use, the class proceeding would be little more than a mockery. To be sure, the defendants would still gain the protections of *res judicata* and collateral estoppel, and the class attorneys would most assuredly still get at least some fees. But in cases in which cy pres is deemed necessary it is very likely that the bulk of the class of victims will go uncompensated. This is due to the simple fact that, purely as a practical matter, in at least certain situations there simply exists no way that a class proceeding can effectively aggregate and satisfy the small claims of individual right holders. Yet when the class action court introduces a wholly extraneous but sympathetic charitable actor into the suit, purportedly on the basis of its authority under a procedural rule, the redistributive goals of the substantive law are somehow assumed to be satisfied. But the substantive law authorizes no such relief; no legislative body has expressly chosen to abandon its compensatory enforcement mode in favor of some directive of a charitable contribution as punishment for a defendant’s unlawful behavior. Cy pres, then, is far more than the neutral disposition of unclaimed property that it is thought to be.

The remainder of this Article is divided into four parts. Part II explores the origins of cy pres in the law of trusts, and its transformation—in a radically different form—in the modern class action. Part III then considers the serious structural and constitutional problems to which use of cy pres

15. U.S. CONST. art. III, § 2; *see infra* Part III.B.

16. *See, e.g.*, David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 916–18 (1998) (arguing that classes should be conceptualized as the equivalent of business associations).

gives rise, in both the intrinsic and instrumental senses. Part IV examines the available empirical evidence concerning the use of cy pres in the modern class action. Because of the limited data available we make no claim that our empirical findings provide scientific support for our conclusions. They nevertheless provide valuable insights into the manner in which class action cy pres fosters the pathological aspects of the modern class action. Part V contrasts a fluid class recovery model with cy pres. Our analysis leads to the ultimate conclusion that resort to cy pres in the class action context contravenes important constitutional and procedural limitations, and must therefore be rejected. Indeed, we conclude that use of cy pres threatens core notions of our constitutional democratic system. Its use in the modern class action must therefore be rejected.

II. THE EVOLUTION OF CY PRES: FROM CHARITABLE TRUSTS TO CLASS ACTIONS

A. *The Origins of Cy Pres*

The term “cy pres” derives from the French expression “*cy pres comme possible*,” which means “as near as possible.” Cy pres developed originally in the law of trusts, where it is deeply rooted.¹⁷ It was only by way of recent analogy that cy pres was introduced into the area of class actions.¹⁸ After class action practice was revolutionized by the amendments to Rule 23 developed by the Rules Advisory Committee and adopted by the Supreme Court in 1966,¹⁹ large damage classes with large numbers of small claims held by claimants who had made no affirmative choice to participate in the class proceeding became a relatively common occurrence. Both courts and attorneys quickly became aware that there would be serious problems actually getting awards or settlements from defendants to their victims, or, in the alternative, at least finding some worthwhile way to dispose of those funds. By the early 1970s, scholarly commentary began to suggest drawing an analogy to cy pres in the law of trusts for these purposes, and it was expressly adopted by a number of state and federal courts starting in the mid-1970s and 1980s.²⁰ Wholly apart from the serious practical and conceptual problems to which the use of cy pres in the class action context gives rise,²¹ one may reasonably question the very basis for the analogy between cy pres in the law of trusts and cy pres in the class action context. In numerous ways, the trusts and class actions contexts are the equivalent of apples and oranges. To understand the logically faulty nature of the analogy, however, it is first necessary to

17. *See infra* Part II.A.

18. *See infra* Part II.B.

19. FED. R. CIV. P. 23.

20. *See infra* Part II.B.

21. *See infra* Part III.

explore the origins and development of cy pres in both contexts. This Part will trace the history of cy pres, first in the law of trusts, and then its development in class actions.

1. The Development of Cy Pres in Trust Law

Pursuant to cy pres in its original context of trust law, when a valid charitable trust specified a charitable gift that had been rendered impossible or impractical because of exigent circumstances, courts would attempt to give effect to the testator's intent by putting the funds to the next closest use.²² For example, if a testator designated funds for a school for orphans in Chicago, but no such school existed, then a court may give the funds to a school for orphans in nearby Cicero in an effort to find a charity that is closest to the testator's intent.

The origins of cy pres are obscured by time, but it appears that the precursor of the modern form of cy pres originated in sixth century Rome.²³ Justinian's Digest contained a passage directing that a charitable gift given to celebrate games that had since become illegal be put to a legal use to keep the deceased's memory alive. In more modern times, much of cy pres' development in England derives from a combination of the special place held by charitable gifts in history and the historical connection between trusts and the church.²⁴ In fourteenth century England, it was understood that a dying man would often discuss with his priest where he wanted to be buried and how he wanted to distribute his estate, which the church was responsible for administering.²⁵ The man frequently made a charitable bequest because of "his own concern for the future of his soul."²⁶ The church established a custom that any property left without a specific designation would be used "*pro salute animae*"—"for the good of the testator's soul."²⁷ From this premise, it was only a relatively short step to the classic doctrine of cy pres: where the testator's dying designation could not reasonably or legally be achieved, authorities would seek out the closest feasible alternative.

Scholars have suggested two theories to explain why England adopted cy pres. The first asserts that cy pres derives from society's preference for charities above all other institutions.²⁸ Because of this preference, courts gave charitable gifts special treatment and began to give gifts to charities

22. Edith L. Fisch, *The Cy Press Doctrine in the United States* § 1.00 (Matthew Bender 1950).

23. *Id.* § 1.02.

24. Hamish Gray, *The History and Development in England of the Cy-Pres Principle in Charities*, 33 B.U. L. REV. 30, 32 (1953).

25. *Id.*

26. *Id.* at 33.

27. *Id.*

28. *Id.* at 32.

the same consideration as gifts to persons.²⁹ Accordingly, a gift to a charity that was rendered impossible was to be accomplished in another way, much like a gift to a person who had died might pass to the person's heirs.³⁰ Under this theory, cy pres developed naturally out of the law that provided charities special status.

A second possible theory for English trust law's adoption of cy pres is grounded in the relationship between the church and the courts.³¹ Following the reformation, charities were controlled by the chancellor,³² who was a legal official deemed heir to ecclesiastical knowledge, including the Roman law that provided for ensuring that charitable trusts do not fail in order to ensure the perpetuation of the testator's memory.³³ In the Middle Ages, individuals purchased their salvation through indulgences from the church.³⁴ If a testator's charitable intent was motivated in part by the desire to purchase an indulgence, church officials may have reasoned that allowing the trust to fail, thereby failing to give effect to the testator's intent, would unjustly deprive the deceased of salvation. This would have been considered an especially unjust result, since the loss of salvation under these circumstances would not have been the fault of the deceased.³⁵ Even if the original motivation for the trust's creator was not receipt of an indulgence, the church may have reasoned that denying a person an improved chance at salvation was unjust. Under this theory, scholars hypothesize, because the chancellor simultaneously served as an official of the church, he would have had the twin incentives of saving the person's soul *and* keeping the funds within the church.³⁶ This combination of piety and greed may have prompted the creation of cy pres in the English law.³⁷ Thus, while the precise path that lead to the adoption of cy pres in England has been lost to the ages, both theories concur that the adoption was motivated by a historical presumption favoring charity.

2. Two Forms of Cy Pres in England

In England, cy pres took two forms: judicial and prerogative.³⁸ Judicial

29. FISCH, *supra* note 22, § 1.03; *see* Gray, *supra* note 24, at 30 ("One of the striking distinctions which the Law draws between the Private Trust and the Charitable Trust is found in the principle that in circumstances in which a Private Trust would be defeated a Charitable Trust is not allowed to fail.").

30. FISCH, *supra* note 22, § 1.03.

31. Gray, *supra* note 24, at 32.

32. *Id.*

33. *See id.*

34. FISCH, *supra* note 22, § 1.03.

35. *Id.*

36. *Id.*

37. Comment, *A Revaluation of Cy Pres*, 49 YALE L.J. 303, 309 (1939).

38. FISCH, *supra* note 22, § 1.01.

cy pres was exercised exclusively by the chancellor, who would examine the underlying intent behind a filed charitable trust whose directive could not, for whatever reason, be implemented.³⁹ Once the chancellor had determined that intent, he would designate the trust's corpus to a charity or worthy project that most closely approximated the testator's intent behind the original gift.⁴⁰ For example, if a testator designated a gift to an astronomy department at a college, but the department had closed before the testator's death, the chancellor would attempt to determine the testator's intent behind the gift. If he concluded that the intent had been to give the funds to astronomy research, then he would donate the funds to an astronomy department at another college. If, on the other hand, he decided that the intent was to give the funds to the particular college, then he would donate the funds to another department at the same college.

The other form of the doctrine, prerogative cy pres, was exercised by the king as *parens patriae*.⁴¹ Unlike the narrow discretion afforded the chancellor under judicial cy pres, under prerogative cy pres the king could, in his discretion, appropriate failed charitable gifts and designate the funds to other, usually marginally related purposes.⁴² Later, the chancellor assumed the King's prerogative, acting as his proxy.⁴³ Prerogative cy pres was invoked when no option was available that would approximate the testator's intent or the intent was to donate to an illegal activity.⁴⁴ An example is the case of *Da Costa v. De Pas*.⁴⁵ There a decedent had, during his life, designated a sum of money to establish a yeshiva (a Jewish religious school) in England.⁴⁶ At the time of the decedent's death, no gift could be given to any religious institution other than the Church of England.⁴⁷ The chancellor, acting as a proxy for the king, appropriated the gift for the purpose of instructing boys in the Christian religion at a founding hospital.⁴⁸

3. Cy Pres in American Trust Law

The adoption of cy pres in America was restrained by a fear that it would vest too much power in the judiciary.⁴⁹ This perception was inspired

39. Comment, *supra* note 37, at 304–05.

40. *Id.* at 305.

41. FISCH, *supra* note 22, § 2.03, at 56–57.

42. *Id.* This seems to foreshadow some of the marginally related uses of cy pres in the class action context. *See infra* Parts II.B.3, III.

43. FISCH, *supra* note 22, § 2.03, at 56–57.

44. *Id.*

45. *Id.* § 2.03, at 60.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* § 2.03, at 60–61. These concerns foreshadow some of the pathologies endemic to cy pres in the class action context. *See infra* Part III.

in large part by the perceived abuses associated with prerogative cy pres,⁵⁰ and some were concerned that courts would change wills and bequests for mere convenience.⁵¹ The slow pace of adoption of cy pres in America was also due in part to the fact that American courts misconstrued the impact of the English Statute of Charitable Uses on cy pres.⁵² This statute codified the English cy pres common law, but many early American legal scholars mistook it for the exclusive source of the cy pres doctrine in English law.⁵³ Eventually, in *Trustees of the Philadelphia Baptist Ass'n v. Hart's Executors*, the Supreme Court incorrectly resolved confusion over whether cy pres was an equitable doctrine independent of the Statute of Charitable Uses.⁵⁴ The Court held that the doctrine was grounded only in the statute.⁵⁵ A number of states based their decision to reject cy pres on the Court's decision in *Hart's Executors*,⁵⁶ while other states rejected the law of charitable trusts in their case law.⁵⁷ In later years, states began slowly to "judicially affirm[]" cy pres.⁵⁸ Currently forty-six states and the District of Columbia have codified judicial cy pres.⁵⁹ Eighteen of those states adopted

50. See *supra* text accompanying notes 38–41.

51. See FISCH, *supra* note 22, § 2.03, at 59–60.

52. *Id.* § 2.01, at 9–10.

53. Gray, *supra* note 24, at 36.

54. 17 U.S. 1 (1819).

55. FISCH, *supra* note 22, § 2.01 at 12.

56. *Id.* §§ 2.01(a)–(e).

57. *Id.* §§ 2.01–2.03.

58. *Id.* § 3.00 at 92.

59. ALA.CODE § 19-3B-413 (1975); ARK. CODE ANN. § 28-73-413 (West 2009); CAL.PROB.CODE § 15409 (West 2009); CONN. GEN. STAT. ANN. § 45a-535e (West 2009); DEL. CODE ANN. tit. 12, § 3541 (2009); D.C. CODE § 19-1304.13 (2009); FLA. STAT. ANN. § 1010.10 (West 2009); GA. CODE ANN. § 53-12-113 (West 2009); HAW. REV. STAT. ANN. § 517E-6(b) (West 2009); IDAHO CODE ANN. § 33-5006 (2009); IND. CODE ANN. § 30-4-3-27 (West 2009); IOWA CODE ANN. § 633A.5102 (West 2009); KAN. STAT. ANN. § 58a-413 (2009); KY. REV. STAT. ANN. § 273.570 (West 2009); LA. REV. STAT. ANN. § 9:2331 (2009); ME. REV. STAT. ANN. tit.18-B, § 413 (2009); MD. CODE ANN., CORPS. & ASS'NS § 5-209 (2009); MASS. GEN. LAWS ANN. ch. 214, § 10B (West 2009); MINN. STAT. ANN. § 501B.31 (West 2009); MISS. CODE ANN. § 79-11-613 (West 2009); MO. ANN. STAT. § 456.4-413 (West 2009); MONT. CODE ANN. § 72-33-504 (2009); NEB. REV. STAT. ANN. § 30-3839 (West 2009); N.H. REV. STAT. ANN. § 498:4-a (2009); N.J. STAT. ANN. § 15:18-30 (West 2009); N.M. STAT. ANN. § 46A-4-413 (West 2009); N.C. GEN. STAT. ANN. § 36C-4-413 (West 2009); N.D. CENT. CODE § 59-12-13 (2009); OHIO REV. CODE ANN. § 5804.12 (West 2009); OKLA. STAT. ANN. tit. 60, § 76 (West 2009); OR. REV. STAT. ANN. § 130.210 (West 2009); 20 PA. CONS. STAT. ANN. § 7740.3 (West 2009); R.I. GEN. LAWS § 18-4-1 (2009); S.C. CODE ANN. § 33-31-1107 (2009); S.D. CODIFIED LAWS § 55-9-4 (2009); TENN. CODE ANN. § 35-10-206 (West 2009); UTAH CODE ANN. § 75-7-413 (West 2009); VT. STAT. ANN. tit. 14, § 413 (2009); VA. CODE ANN. § 55-544.13 (West 2009); W. VA. CODE ANN. § 35-2-2 (West 2009); WIS. STAT. ANN. § 701.10 (West 2009); WYO. STAT. ANN. § 4-10-414 (2009). *In re Estate of Vallery*, 883 P.2d 24, 29 (Colo. Ct. App. 1993); *In re Estate of Tomlinson*, 359 N.E.2d 109, 112 (Ill. 1976); *In re Estate of Rood*, 200 N.W.2d 728, 735 (Mich. Ct. App. 1972); *Conway v. Bowe*, 116 N.Y.S.2d 182, 188 (N.Y. Sup. Ct. 1952); *Moody v. Haas*, 493 S.W.2d 555, 560 (Tex. Civ. App. 1973).

the Uniform Trust Code version of cy pres⁶⁰ (and three of the four states which codified cy pres previously had such statutes).⁶¹

States generally require that three factors be established before courts may invoke cy pres in the enforcement of charitable trusts: (1) the gift must constitute a valid charitable trust; (2) the specified gift must be impossible or impractical; and (3) the testator must have a charitable intent in making the gift.⁶² The first element must satisfy two requirements: first, a charitable trust must have been created, and second, the trust must be valid.⁶³ A trust is invalid if the language makes it impossible to determine who the recipient is supposed to be, if execution of the trust would require the legislature pass or repeal a law, or if the trust would violate a law.⁶⁴ For the second element, a court may not find a trust impractical or impossible merely because its execution would be inconvenient, or the number of beneficiaries is declining, or for any other reason that unnecessarily distorts the testator's intent.⁶⁵ A court may attempt to carry out the trust until the gift becomes impossible, or it may invoke cy pres immediately upon its realization that the goal of the trust will inevitably become impossible or impractical to achieve.⁶⁶ The third element, that the testator must have a

60. U.T.C. § 413 (2005), which provides as follows:

(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

- (1) the trust does not fail, in whole or in part;
- (2) the trust property does not revert to the settlor or the settlor's successors in interest; and
- (3) the court may apply cy pres to 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 charitable purposes.

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect:

- (1) the trust property is to revert to the settlor and the settlor is still living; or
- (2) fewer than 21 years have elapsed since the date of the trust's creation.

61. ALASKA STAT. § 34.27.010 (repealed 1994); ARIZ. REV. STAT. ANN. § 14-10413 (repealed 2004); WASH. REV. CODE ANN. § 24.44.060 (repealed 2009).

62. FISCH, *supra* note 22, § 5.00.

63. *Id.* § 5.01.

64. *Id.* § 5.01(b). If only the particular gift is illegal, but the general purpose of the trust is legal, then this does not make the trust invalid. *Id.* § 5.01(b), at 136.

65. *Id.* § 5.02.

66. *Id.*

charitable intent, is the most controversial of the three because it requires judges to engage in an exercise akin to mind reading.⁶⁷ Generally, courts will find this requirement not met if the gift is made for a non-charitable purpose.⁶⁸ Because of the difficulties in applying the third element, some states have limited or discarded it.⁶⁹ In Pennsylvania, the charitable intent requirement was legislatively removed from the state's cy pres requirements, and in Connecticut the state supreme court did away with the requirement.⁷⁰ Massachusetts has a strong presumption that the requirement is satisfied, unless another intent is expressed in the bequest.⁷¹

B. *Application of Cy Pres to the Class Action Context*

1. The Origins of Class Action Cy Pres

In its original form and for centuries thereafter, the cy pres doctrine was never thought to have anything to do with the structuring of relief awarded against a defendant who had been judicially found in an adversary proceeding to have violated the legal rights of the plaintiff. Its context, rather, was confined exclusively to the law of trusts and estates; it played no role in the adjudication of legal claims in an adversary setting. It most assuredly was never associated with either group litigation or the class action procedure. Thus, while the doctrine of cy pres has a venerable history in its original format, use of a venerable label cannot hide the practice's radical nature in the class action context.

In 1966, Federal Rule of Civil Procedure 23 was amended to dramatically revise and expand the class action procedure.⁷² The drafters recognized that, largely due either to inertia or confusion, many potential class members would fail to respond to notification of a class action. However, they reasoned that class members' silence did not necessarily reflect a choice not to participate in the suit. Therefore the amended rule provided that in non-mandatory classes,⁷³ absent class member inaction would lead to inclusion in, rather than exclusion from, the class.⁷⁴

67. *Id.* § 5.03(b).

68. *Id.*

69. Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 CLEV. ST. L. REV. 471, 476 (1998).

70. *See generally* Yale Univ. v. Blumenthal, 621 A.2d 1304 (Conn. 1993) (interpreting the Connecticut version of the Uniform Management of Institutional Funds Act).

71. Rudko, *supra* note 69, at 476.

72. FED. R. CIV. P. 23(c).

73. Classes certified under Rule 23(b)(1) or (b)(2) are mandatory, meaning that class members do not have the choice to remove themselves from the class. It is only in classes certified under Rule 23(b)(3) that potential class members are given the right to opt out.

74. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 397–98 (1967); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 101–03 (2003) (criticizing the role of inertia in class actions).

In cases in which a class-wide award is made or a class-wide settlement fund created, individual class members must be compensated out of the damage fund that has been established. On some occasions this will be more difficult than others. For example, where it is difficult to find the class members, or the amounts of their claims are too small or the paperwork required too burdensome to justify the effort required for them to collect from the fund, much of the fund will likely remain unclaimed. Courts therefore faced the problem of what to do with the unclaimed funds.⁷⁵ Traditionally, such funds would revert to a defendant—often an unpopular result because reversion of the funds undermines the deterrent effect of the suit and leaves the defendant largely with the benefit of his illegal activity.⁷⁶ This concern, combined with the desire to avoid compensating only a small percentage of class members who responded to notifications about class actions, led courts and commentators to seek to develop innovative ways to compensate injured class members. Only by doing so could they avoid allowing unlawful behavior to go unpunished.

Use of the cy pres doctrine in the class action context can be traced largely to a pioneering student Comment, published in the *University of Chicago Law Review* in 1972.⁷⁷ There it was argued that “[w]hen distribution problems arise in large class actions, courts 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.”⁷⁸ The writer saw three general ways in which traditional cy pres could be applied in the class action context as a means of disposing of uncollected damages: “(1) distribution to those class members who come forward to collect their damages, (2) distribution through the state in its capacity as *parens patriae* or by escheat, and (3) distribution through the market.”⁷⁹ The first option meant that the share of those plaintiffs who did file claims could be proportionally increased to consume the uncollected funds. The second option provided that either the unclaimed funds could simply escheat to the state or instead be utilized in a form of “conditional escheat,” meaning that the funds could go to the state on the condition that the state agreed to use the funds for the general benefit of citizens in the position of the plaintiff class members. The third option described what we call “future approximation fluid class recovery”:

75. Kaplan, *supra* note 74, at 398.

76. See, e.g., Kerry Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591, 1594–95 (1987); Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 448 (1972). For an example of a case where the remainder reverted to the defendant, see *Ill. Bell Tel. Co. v. Slattery*, 102 F.2d 58, 61–62 (7th Cir. 1939) (finding that a telephone company is entitled to keep \$1.69 million of damage fund that was not claimed).

77. See generally Shepherd, *supra* note 76 (discussing the cy pres remedy).

78. *Id.* at 452.

79. *Id.* at 453.

the judicial direction of future price reductions in an effort to provide relief to future users and thus, approximately capture the injured class members on the assumption that future users are likely to roughly include most past users.⁸⁰

The Comment acknowledged that the first option, increasing the share of the class members who made claims, may provide the next best solution because it would ensure that the recipients of the funds were individuals who had suffered similar harm to that suffered by the uncompensated absent class members, and avoid reducing the deterrent effect on the defendant or unjustly enriching him.⁸¹ Yet there are significant concerns with this form of distribution.⁸² “[T]his method expressly contemplates that silent class members will not receive any compensation, even indirectly,” and the class members who made claims would be unjustly enriched at the expense of the absent class members.⁸³ Furthermore, use of this approach could create a perverse incentive among victims to bring suits where large numbers of absent class members were unlikely to make claims. It might also create an incentive for the represented class members to keep information from the absent class members.⁸⁴

Under the second option—distribution through the state⁸⁵—the court would direct the unclaimed funds to be given to the state, to be used for the benefit of the citizens generally or for a designated social purpose.⁸⁶ An example of a court giving the funds to the state for a designated purpose, what could be termed “conditional escheat,” is the decision in *West Virginia v. Chas. Pfizer & Co.*⁸⁷ In that case, the notice by publication to consumer members of the class stated that if they failed to make an individual claim in ninety days, “that [failure] will constitute an authorization to the Attorney General [or other government official] to utilize whatever money he may recover as your representative for the benefit of the citizens of your State in such manner as the Court may direct.”⁸⁸ The attorney general recommended using the funds to establish public health projects.⁸⁹ Despite the fact that the underlying action was an

80. Unlike cy pres, where funds are awarded to a charitable third party, “fluid class recovery” is used to indirectly compensate class members when direct compensation is impracticable. For a detailed analysis of fluid class recovery and its relationship to cy pres, see *infra* Part V.

81. Shepherd, *supra* note 76, at 453.

82. *Id.*

83. *Id.*

84. The concern expressed in the Comment foreshadowed the problems of faux class actions, but failed to recognize the similar issues that would arise from the use of cy pres in class actions. See *infra* Part IV.B.

85. Shepherd, *supra* note 76, at 453.

86. *Id.* at 453–54.

87. 440 F.2d 1079 (2d Cir. 1971).

88. *Id.* at 1083 (quoting district court order).

89. Shepherd, *supra* note 76, at 457.

antitrust suit involving the drug tetracycline, the suggested projects included “drug abuse programs, community health clinics, and lead poisoning and sickle cell anemia research, which the attorney regard[ed] as areas of need for which adequate funding is not politically feasible.”⁹⁰

The Comment recognized that putting the funds to a use that would more directly benefit the absent class members would provide a better analogy to a cy pres remedy.⁹¹ Nonetheless, it argued that when a close approximation of the actual class is unavailable, “there is sufficient flexibility in the cy pres doctrine to permit the state to allocate the funds to other programs designed to maximize public benefit.”⁹² The Comment also acknowledged that directing the use of funds for a specific purpose may give rise to objection because any additional benefits to the absent class members may be “quite remote,” and of no more direct benefit than general escheat to the state.⁹³ Finally, problems exist concerning oversight of the use of the funds to ensure they are used for the benefit of the class.⁹⁴

2. Development of the Modern Form of Class Action Cy Pres

Under the version of class action cy pres originally proposed in the *University of Chicago Law Review* Comment in 1972, the acceptability of a cy pres remedy was to be measured by “(1) the extent to which the injured class receives the damages, (2) the [administrative] cost of applying the remedy, and (3) the equitability of the distribution with respect to the potential of windfalls for nonclass members.”⁹⁵ Also, as originally contemplated, cy pres would be used only in large classes with unclaimed remainders.⁹⁶

Although the initial scholarly suggestion of some form of class action cy pres came in 1972, at that time no thought seems to have been given to creation of the current version of the doctrine. In its original context of trusts and estates, it should be recalled, cy pres was employed in an effort to find the “next best” means of achieving the testator’s or benefactor’s charitable purpose when enforcement of his original directive had become infeasible. In one sense or another, each of the three alternatives originally proposed in 1972 sought to find the “next best” means of compensating absent class members when it was impractical or impossible to compensate them directly. However, in 1987 two student Notes argued that remainders

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 458.

94. *Id.* at 455. The Comment recognized that distribution of the funds to the state “would appear to be more like a fine or penalty than like compensatory damages.” *Id.* However, the Comment did not find these concerns sufficiently severe to warrant the rejection of cy pres distributions to the state. *Id.* at 456.

95. *Id.* at 464.

96. *Id.*

from class actions should be donated to charitable purposes, even where such a donation was, at best, only remotely designed to benefit the injured class members.⁹⁷ Both Notes conceived of cy pres as a freestanding alternative to class action remedies in “small claim consumer class actions.”⁹⁸ Under this form of cy pres, funds would be used to create a charitable trust, and that trust would be used either to create a charitable foundation or donate to a pre-existing charitable organization related in some way (however loosely) to the subject of the class action suit.⁹⁹ The benefit of charitable trust cy pres, according to these notewriters, is that the defendant is fully disgorged of his unlawful gains, the distribution costs do not devastate the recovery fund, and the disgorged funds are used for beneficial purposes related in some way to the harm caused by the defendants.¹⁰⁰

At this later stage of its development, class action cy pres began to take on a subtly altered tone. The “next best” relief was no longer focused wholly on finding an alternative means of indirectly compensating victims who could not feasibly be compensated directly, but rather simply on seeking a beneficial use of the compensatory funds exacted from the defendant. This transformation makes all the difference in the world in determining the current practice’s legitimacy and constitutionality. As modified, cy pres improperly transforms the legal DNA of both the underlying substantive law being enforced in the class proceeding and the structural framework of the adversary process imposed by Article III of the Constitution.¹⁰¹ Before we can effectively explore the serious—and ultimately fatal—pathologies of class action cy pres, however, it is first necessary to understand the manner in which the original form of cy pres, established in the law of trusts, has been misused by federal class action courts.

3. Judicial Development of Class Action Cy Pres

In its current form as used in the federal courts, cy pres relief in class actions has involved the donation of a portion of the settlement or award fund to charitable uses which are in some loose manner connected to the substance of the case. Courts seem to feel no need to find a form of relief that will ultimately have the effect of indirectly compensating as-yet uncompensated class members.

97. Barnett, *supra* note 76, at 1600; Natalie A. DeJarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 732 (1987).

98. Barnett, *supra* note 76, at 1594.

99. *Id.* at 1605; DeJarlais, *supra* note 97, at 759.

100. Barnett, *supra* note 76, at 1600; DeJarlais, *supra* note 97, at 767.

101. U.S. CONST. art. III, § 2 (requiring cases or controversies); *see infra* Part IV.A.

The earliest judicial use of some form of cy pres in the class action context came in 1974 in the Southern District of New York's decision in *Miller v. Steinbach*.¹⁰² The suit was brought on behalf of the owners of 4,167,302 shares of Baldwin-Lima-Hamilton Corporation (BLH) stock against a company with which the shareholders' company had merged. The complaint alleged that the terms of the merger had been unfair and that the securities laws had been violated.¹⁰³ In approving a proposed class settlement, the court noted that

[i]n view of the very modest size of the settlement fund and the vast number of shares among which it would have to be divided, the parties have agreed instead . . . to pay the fund to the Trustee of the BLH Retirement Plan, *applying a variant of the cy pres doctrine at common law*.¹⁰⁴

The court reasoned that “while neither counsel nor the Court has discovered precedent for the proposal,” neither had it “been made aware of any precedent that would prohibit it.”¹⁰⁵ Concluding that “no alternative is realistically possible,” the court deemed the settlement “fair and reasonable.”¹⁰⁶

Miller provides a valuable illustration of the important dichotomy we draw between charitable cy pres relief—the category in which virtually all of the recent uses of cy pres in class actions fit—and creative efforts to find alternative or indirect means of compensating absent class members when direct compensation is infeasible. In the former category, the cy pres award of unclaimed damage funds is made to a charitable institution that has, at best, some loose connection to the subject matter of the suit. No effort is made to assure the court that by donating to that charity it will be indirectly benefiting the absent class members who had not been directly compensated. In contrast, under fluid class recovery the measure of the chosen relief is the extent to which it actually approximates through future relief those who had been injured in the past.¹⁰⁷

It is clear that courts in the cy pres cases make no such effort. In *Miller*, for example, the court made no effort to assure itself that by donating unclaimed funds to the BLH retirement fund, the settlement's award was likely to indirectly compensate members of the injured class. For the settlement to have achieved that end, the court would first have had to find that most BLH shareholders were in fact BLH employees who would benefit from the retirement fund, and correspondingly that most BLH

102. No. 66 Civ. 356, 1974 WL 350, at *2 (S.D.N.Y. Jan. 3, 1974).

103. *Id.* at *1.

104. *Id.* (emphasis added).

105. *Id.* at *2.

106. *Id.*

107. *See infra* Part V.

employees (those who would benefit from an award to the retirement fund) were BLH shareholders. While for all we know this might well have been the case, no finding to this effect was explicitly made by the court, nor did the answer to that question seem to be of any importance to the court. In this manner, *Miller* illustrates the focus of the courts that have employed the charitable award version of cy pres in the class action context: putting the defendant's funds to valuable and worthwhile use, rather than necessarily compensating the absent class members.

Another example of the charitable version of cy pres is the California state court decision, *Vasquez v. Avco Financial Services*.¹⁰⁸ There, pursuant to a settlement order the majority of the settlement funds were donated to an organization that educated consumers on credit transactions. The court reasoned that such a distribution would provide a greater benefit to the class plaintiffs than would individual distributions.¹⁰⁹ The fact remains, however, that such a "benefit" to the class represented a far more attenuated form of "compensation" than would individual distributions.

An even stronger illustration of the attenuated connection between the direct interests of the class members and the charity receiving the cy pres award is the federal district court decision in *In re Compact Disc Minimum*

108. No. NCC 11933 B (Los Angeles Super. Ct. Apr. 24, 1984).

109. *Id.* Yet another illustration is *Vecchione v. Wohlgemuth*, 80 F.R.D. 32, 46 (E.D. Pa. 1978).

[W]e are sufficiently impressed with the prospects of an agency system that we will apply the *cy pres* doctrine and order that the unclaimed Vecchione payback funds (now totalling some \$250,000) be applied to a pilot program testing the feasibility of an agency system. If the pilot project proves successful, we trust that the Commonwealth will move towards that system, even if only because it promises to be less expensive than guardianship.

In *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1254 (7th Cir. 1984), the court overturned a charitable cy pres award, directed by the district court, to establish a foundation to study antitrust law. However, the appellate court's concern appeared not to have been with the general idea of charitable cy pres but rather with the wisdom of the specific award.

[E]stablishment of the proposed Foundation[, the court said,] would be carrying coals to Newcastle. There has already been voluminous research with respect to multidistrict antitrust litigation and the substantive and procedural aspects of the antitrust laws by judges, lawyer specialists, law schools, bar associations, Congressional committees, the Department of Justice and the Federal Trade Commission, and it is a continuing project of all those concerned. In our view, establishing an unneeded Foundation for these purposes from the reserve fund would be a miscarriage of justice and an abuse of discretion.

Id. at 1254-55.

Advertised Price Antitrust Litigation.¹¹⁰ There the court in a compact disc advertised price antitrust litigation authorized a cy pres award to the National Guild of the Community School of the Arts.¹¹¹ There was no way that the designation even arguably compensated injured victims, directly or indirectly, in any recognizable way. Similarly, in a class suit concerning infant formula a cy pres award was made to the American Red Cross Disaster Relief Fund.¹¹² Along the same lines are the decisions in *In re Wells Fargo Securities Litigation*,¹¹³ where a federal district court made a cy pres award to the Stanford Law School Securities Class Action Clearinghouse,¹¹⁴ and in *Jones v. National Distillers*,¹¹⁵ where the court awarded a cy pres award from a securities fraud suit to a legal aid society because it was more related to the subject matter of the suit than would be “a dance performance or a zoo.”¹¹⁶ In none of these decisions did the charitable designation in any way constitute even a feeble attempt to indirectly compensate victims.

Although district courts usually look favorably upon the use of cy pres in class actions, appellate courts have not always been as receptive to the practice. Indeed, on occasion appellate courts have expressly recognized its potential for abuse.¹¹⁷ For example, one appellate court overturned a cy pres distribution when the district court had failed to consider whether the unclaimed funds could have instead been distributed as treble damages to class members in an antitrust case.¹¹⁸ Another appellate court did so because the large amount of the cy pres settlement was merely punitive rather than compensatory.¹¹⁹ Yet another did so because the defendants

110. No. MDL 1361, 2005 WL 1923446 (D.Me. Aug. 9, 2005).

111. *Id.* at *1.

112. *In re Infant Formula Multidistrict Litig.*, No. 4:91-CV-00878-MP, 2005 WL 2211312, at *1 (N.D. Fla. Sept. 8, 2005).

113. 991 F. Supp. 1193 (N.D. Cal. 1998).

114. *Id.* at 1198; *see also* *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) (allowing the excess of settlement consumer fund to be distributed to states in proportion to their population to be used for benefit of consumers in a case involving price fixing allegations against major drug manufacturers).

115. 56 F. Supp. 2d 355 (S.D.N.Y. 1999).

116. *Id.* at 359.

117. *See, e.g.*, *Mirfasihi v. Fleet Mortgage. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004).

Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself? The settlement that the district judge approved sold these 1.4 million claimants down the river. Only if they had no claim—more precisely no claim large enough to justify a distribution to them—did they lose nothing by the settlement, and the judge made no finding that they had no such claim.

118. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 435–36 (2d Cir. 2007).

119. *Mirfasihi*, 356 F.3d at 784 (discussing Fair Credit Reporting Act case against

would have been required to pay an amount disproportionate to the harm to class members.¹²⁰ The fact remains, however, that cy pres has played an important—indeed, arguably vital—role in assuring the widespread use of the class action device.¹²¹

4. Why Cy Pres in the Class Action Context?

With such widespread use, we may question what, exactly, are the parties and courts seeking to accomplish by borrowing for use in class actions a doctrine developed in entirely different substantive and procedural contexts. It is likely that the relevant motivation comes down to the simple fact that, in the minds of advocates of enhanced use of the class action device, absent resort to cy pres relief generally no acceptable alternative remedial framework exists. It is therefore probably accurate to surmise that in the view of class action supporters, no alternative remedy would effectively punish and deter unlawful behavior while simultaneously dedicating defendants' money to what are deemed socially beneficial purposes.

The point can best be understood by considering what would happen to unclaimed funds if cy pres relief were unavailable to a class action court. One conceivable alternative would be reversion of the unclaimed funds to the defendant. The Supreme Court indicated in *Boeing Co. v. Van Gemert*¹²² that the claim of a defendant to reversion of unclaimed awards is, as a legal matter, at least colorable.¹²³ This alternative has been attacked because it is thought to amount to “unjust enrichment” of the defendant.¹²⁴ However, this characterization appears to misperceive the underlying basis of the reversion concept. Presumably, unclaimed funds would revert to the defendant on the theory that defendant's money remains its own unless and until it has been awarded as damages to and claimed by the plaintiff. The legal inertia, in other words, is presumed to be in favor of the status quo until both of these events take place. Of course, advocates of cy pres may respond that when funds awarded as the result of litigation are unclaimed, the money is no longer the defendant's; rather, it has been judicially determined to be damages for illegal behavior. But under the nation's private rights model of adjudication,¹²⁵ damage awards are not made “in

telemarketers).

120. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (concerning RICO suit against tobacco companies for misrepresenting the harmfulness of light cigarettes).

121. *See infra* Part IV.

122. 444 U.S. 472 (1980).

123. *Id.* at 481–82. Though acknowledging the Supreme Court's recognition of the possibility of reversion to defendants, the court in *Powell v. Georgia-Pacific Corp.*, 843 F. Supp. 491, 496, 499 (W.D. Ark. 1994), rejected that alternative under the facts of that case.

124. Shepherd, *supra* note 76, at 456.

125. For a detailed discussion of the private rights adjudicatory model, see MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 90–103 (1991).

the air.” Instead, they are awarded to a specific plaintiff, who has presumably brought suit to vindicate his substantive right which the defendant has allegedly violated.¹²⁶ Until that plaintiff recovers the funds, this argument proceeds, if only due to legal inertia the money remains the property of the defendant. To be sure, it may trouble us that a defendant who has been judicially determined to have violated the law gets to retain money that rightly should have been transferred to its victims. But in light of the underlying theoretical framework of the judicial process, reversion to the defendant has at least an arguable foundation when the victim, authorized to recover by governing substantive law, has for whatever reason failed to claim his award.

The primary alternative to reversion of unclaimed funds to the defendant, absent resort to cy pres, is escheat to the state.¹²⁷ Under the theory of this approach, once the money has been awarded in the form of damages as part of a judgment, ownership of the money automatically transfers to the plaintiffs. If the money goes unclaimed, the theory goes, it is appropriately treated in the same manner as all unclaimed property is usually treated: it escheats to the state.¹²⁸ But once again, this mode of disposition understandably leaves many unsatisfied, since we cannot be assured that the award will necessarily be used by the state for socially valuable purposes related to the subject matter of the suit.

The third alternative mode of disposition of unclaimed funds, absent resort to cy pres, is an increase in the pro rata share of claiming plaintiffs. But as commentators have noted, such an approach necessarily results in an undeserved windfall for those plaintiffs, who have already been compensated for the harm they have suffered.¹²⁹

There is, of course, a fourth alternative that often seems to go unnoticed: simply denying class certification on the grounds that such a proceeding would be unmanageable. Where compensation of individual victims in a manner contemplated by the underlying substantive law through use of the class action device is infeasible, the inexorable

126. Of course, a plaintiff may have motivations for bringing suit that are grounded in the public interest. Whatever plaintiff’s underlying motivation, however, she may not bring suit unless she has suffered injury in fact caused by defendant’s actions which can be redressed by judicial action. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563, 568 (1992).

127. *See In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1258 (7th Cir. 1984) (Flaum, J., concurring in part and dissenting in part) (“Traditionally, unclaimed property escheats to the states.”). There is serious question as to whether unclaimed funds in suits brought under federal law can escheat to the United States. *Compare id.* at 1255 (majority opinion) (finding “interim” escheat to federal government is “impermanent” and therefore “raises no unconstitutional taking”; it will remain available to pay late claimants who file), *with id.* at 1256 (Flaum, J., concurring in part and dissenting in part) (noting that escheat to United States is impermissible, and as a practical matter majority is authorizing escheat to United States).

128. *See infra* Part VI.

129. *See generally* Shepherd, *supra* note 76 (discussing the reversion of funds to defendants).

conclusion must be that resort to the class action procedure is improper. Its use in such contexts would be the equivalent of insertion of a procedural square peg in a substantive round hole. Those who wish to see widespread corporate or governmental misbehavior punished, however, understandably find this alternative unsatisfactory. Nevertheless, as nothing more than a rule of procedure the class action device cannot rise above the substantive law it is designed to enforce. If existing substantive remedies are deemed inadequate as a means of enforcing the law's behavioral prohibitions, the task of altering the remedial framework is one for the authority that created the substantive law in the first place. Resort to cy pres when existing remedies cannot effectively be invoked by use of the class action device, then, improperly distorts the remedial structure through use of a nakedly procedural device.

Beyond putting defendant's funds to valuable and worthwhile use, there may also exist an additional dynamic at work in favor of the use of cy pres in the class action context. Empirical research has shown that, whether class attorneys are compensated by use of a percentage-of-the-fund method or by a lodestar method (which measures fees on a calculation of the amount of work the attorney put into the suit),¹³⁰ the actual fee, on average, generally amounts to one third of the fund—the size of which always includes the funds distributed to a designated charity through cy pres.¹³¹ If cy pres did not exist, the fund—and, of course, the size of the attorneys' fee—might well be far smaller. This is especially true when the cy pres relief is established by judicial order or class settlement *ex ante*. Thus, it is surely reasonable to speculate that one of the primary effects, if not purposes, of class action cy pres is to inflate the size of class attorneys' fees. Whether intended or not, it surely has that effect.

Plaintiff class attorneys may have even stronger motivations for use of cy pres relief. As already noted, in a number of situations individual claims of absent class members will be too small, too difficult to prove, or too expensive or difficult to distribute. Thus, in many cases it will not be all that difficult for a certifying court to determine at the outset that it is highly unlikely that resolution of the suit would result in significant transfer of damages from defendant to its victims. If the only practical alternatives are reversion to defendant or escheat to the state, a certifying court may well be unwilling to certify the class. The availability of a possible cy pres award to a worthy charity might well alter the situation sufficiently, in the

130. 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 14:5–6 (4th ed 2002).

131. *Id.* § 14:6, at 551 (“Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.”); *see also id.* (asserting that the fee is measured on the basis of the size of the common fund); *infra* Part IV.E.

court's mind, to justify certification.¹³²

III. THE PATHOLOGIES OF CLASS ACTION CY PRES

A. *The Unconstitutionality of Class Action Cy Pres*

By criticizing judicially authorized donations to worthy charities, one naturally risks subjecting oneself to the most unattractive labels of “Grinch” or “Scrooge.” Nevertheless, there is little doubt that use of cy pres in the class action context is improper as a matter of both democratic theory and constitutional law. As an intrinsic matter, cy pres suffers from three key constitutional flaws. First, the doctrine unconstitutionally transforms the judicial process from a bilateral private rights adjudicatory model into a trilateral process. Second, the practice violates separation of powers because through the wholly improper mechanism of a purely procedural device, the substantive law is effectively transformed from a compensatory remedial structure to the equivalent of a civil fine. Finally, from a litigant-oriented perspective, the very possibility of a cy pres award threatens to undermine the due process rights of both defendants and absent class plaintiffs. In addition to its own intrinsic failings, cy pres is also deserving of criticism due to the instrumental role it plays in disguising some of the serious problems of constitutional law and political theory that plague the modern class action even absent use of cy pres. By creating the illusion of compensation, cy pres effectively facilitates the litigants' ability to certify classes where all involved should know from the outset that the plaintiff class exists in theory only.

In the discussions that follow, we explore each of these serious constitutional concerns. Any one of them, standing alone, should provide a sufficient basis for the total abandonment of the use of cy pres in the class action context. When taken together, however, they underscore the serious and fatal threats posed by the use of cy pres to the nation's constitutional and procedural foundation.

B. *Trilateralization of the Bilateral Adjudicatory Process*

When courts invoke cy pres in a class action, they introduce a non-party into the litigation as a legally significant actor. In this manner, cy pres transforms what begins as an adversary bilateral dispute (in accord with constitutional dictates) into a less-than-fully-adversary trilateral process, wholly unknown to the adjudicatory structure contemplated by Article III.

132. This will especially be true in the so-called “settlement class action” situation, where the court is asked to certify on the condition that it accept a prearranged settlement agreed to by the parties. See generally Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006) (discussing constitutional difficulties resulting from the settlement class action device).

It achieves this result by ordering or authorizing an award to an uninjured private entity which had no involvement whatsoever in the legally relevant events that gave rise to the suit.¹³³ Awarding “damages” to an uninjured third party effectively transforms the court’s function into a fundamentally executive role, because no longer is the court functioning as a judicial vehicle by which legal injuries suffered by those bringing suit are remedied. Instead, the court presides over the administrative redistribution of wealth for social good. As a result, the practice violates both the constitutional separation of powers and the case-or-controversy requirement of Article III.

Under Article III of the Constitution, the role of the federal courts is confined to the resolution of live cases and controversies.¹³⁴ Supreme Court doctrine has long made clear that both the case-or-controversy requirement and liberal democratic theory demand that actions of the unaccountable judicial branch be confined to the redress of actual injuries suffered by the party bringing suit.¹³⁵ Thus, according to established Supreme Court doctrine, the constitutional dictate of justiciability requires findings of injury-in-fact, traceability, and redressability, and thus, the plaintiff must have suffered concrete injury that is traceable to the defendant’s unlawful behavior and that can be remedied by judicial action.¹³⁶ If any one of these three factors is not satisfied, the Court has made clear, adjudication violates the case-or-controversy requirement. The justification for these justiciability requirements is grounded in a proper understanding of the unaccountable judiciary’s role in a constitutional democracy. As the only unrepresentative branch of the federal government, the judiciary’s sole justification for action is performance of its function as adjudicator of live disputes and enforcer of legal rights.¹³⁷ Judicially authorized charitable donations that are neither recognized nor required by controlling substantive law lie well beyond the scope of the constitutionally ordained judicial function.

It may not at first be obvious that class action *cy pres* contravenes the constitutional and political purposes served by the case-or-controversy requirement. After all, *cy pres* relief involves neither issuance of advisory opinions nor the judicial promulgation of controlling law untied to resolution of a live dispute. Nevertheless, more careful examination reveals the manner in which *cy pres* contravenes both the letter and spirit of Article

133. The court also leaves an injured party without compensation, as discussed *infra* Part IV.C.

134. U.S. CONST. art. III, § 2.

135. For a detailed explanation of Article III’s case-or-controversy requirement, see generally Redish & Kastanek, *supra* note 132.

136. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

137. *See generally* Redish & Kastanek, *supra* note 132 (discussing the textual and normative groundings of the adversement requirement derived from Article III’s case-or-controversy requirement).

III's case-or-controversy requirement. Cy pres rests at the opposite pole from impermissible judicial legislation: While judicial creation of generally applicable law untied to resolution of a live controversy violates Article III, so, too, does judicial alteration of the legal topography of a specific situation, imposed by a court absent the resolution of a real dispute between the litigants. Thus, even where a federal court makes no statement about general legal precepts, its ordering of the transfer of money from one private actor to another private actor whose rights have in no way been violated inescapably contravenes Article III's case-or-controversy requirement.

Compounding this constitutional violation is the inherently deceptive manner in which it is achieved. What makes cy pres so deceptive is the *superficial appearance* of the resolution of a live dispute: the plaintiff class is presumably made up of those who claim to be victims and whose rights are alleged to have been violated by the defendants. The constitutional problem, however, is that requiring the defendant to donate to an uninjured charitable recipient amounts to a remedial non-sequitur. The recipient has sued no one—and with good reason, since its legal rights have presumably been violated by no one. Ordering the transfer of defendants' funds to the charitable third party thus remedies no violation of anyone's legally protected rights. The charitable third party and the defendant are in no way adverse to each other when the suit begins. Despite the superficial resemblance of the cy pres litigation to a live case or controversy, a cy pres award fails to satisfy any of the foundational requirements of Article III. The fact that the amount paid to the charitable recipient equals a portion of the harm suffered by the plaintiff class members as a result of defendants' illegal actions is irrelevant for Article III purposes. Damages are not determined in the air; unless they are imposed as a means of redressing a legally recognized injury, they do not satisfy the justiciability requirements imposed by Article III.

While this constitutional analysis appears to be indisputable in cases in which the class action court coercively orders payment of cy pres relief to a charitable recipient unrelated to the litigation, it might be argued that it is irrelevant when cy pres relief is included as part of a class action settlement that has been voluntarily agreed to by the parties. When cy pres relief is voluntarily imposed by the parties themselves, the argument proceeds, it is not properly attributable to the class action court and therefore Article III's requirements are not implicated. Pursuant to this argument, the parties may voluntarily enter into a private contractual agreement in which plaintiff agrees to drop her suit, with prejudice, in consideration for defendant's donation to the Red Cross, the Salvation Army, or any other recognized charity.

This argument may well have force in non-class action litigation: it is difficult to see how Article III would be in any way implicated by such a

settlement agreement as long as the court is in no way involved in its administration, since under these circumstances presumably the parties may voluntarily enter into virtually any agreement they wish as a means of resolving their private dispute. The resolution of a class action by means of settlement, however, represents a wholly different situation. Unlike the settlement of a non-class proceeding, settlement of a class action requires court approval, following the conduct of a fairness hearing.¹³⁸ Thus, the federal judiciary is necessarily and substantially involved in every class settlement. Moreover, no defendant would be placed in the position of having to settle a class-wide proceeding—often thereby avoiding having to “bet” its company¹³⁹—unless the federal court has, either prior to or at the time of settlement, certified the individual plaintiff’s suit as a class. Thus, a defendant may be willing to accept the idea of cy pres relief as part of a settlement only because of its awareness that such a form of relief is likely to be employed by a class court in imposing coercive relief following adjudication. It is therefore impossible to view use of cy pres in the course of class settlements as untied to the federal courts’ exercise of the judicial power.¹⁴⁰

C. Transformation of the Underlying Substantive Law

Another pathological consequence of the trilateralization of the bilateral adversary process caused by cy pres is the illegitimate transformation of the underlying substantive law from a compensatory framework into the practical equivalent of a civil fine. It must be remembered that a class action suit does not “arise under” Rule 23 of the Federal Rules of Civil Procedure. Rather, it arises under the substantive law being enforced; Rule 23 merely facilitates that enforcement procedurally. As a matter of both constitutional separation of powers and the terms of the Rules Enabling Act,¹⁴¹ a court may not employ a rule of procedure to alter the essence of the underlying substantive right being enforced. It is therefore constitutionally inappropriate for a court, under the guise of the class action procedure, to alter the underlying structure of the substantive law that the class procedure is intended to enforce.

Substantive laws necessarily contain two elements: a behavioral proscription and an enforcement mechanism.¹⁴² The proscription regulates

138. FED. R. CIV. P. 23(e).

139. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

140. On the relevance of Article III’s case-or-controversy requirement to class action settlements, see generally Redish & Kastanek, *supra* note 132 (providing textual, doctrinal, and theoretical analysis of the adverseness requirement of Article III). Because one of the authors has previously developed the framework for analyzing the adverseness requirement, this Article only reviews the elements necessary to address the pathologies of cy pres.

141. 28 U.S.C. § 2072(b) (2006) (prohibiting a rule from abridging, enlarging, or modifying a substantive right).

142. Redish, *supra* note 74, at 75.

an actor's primary behavior, while the enforcement mechanism provides either consequences for violating the proscription or some directly coercive means of enforcing that proscription. The enforcement mechanism may compensate a party injured by the actor's wrongdoing or provide for punitive remedies such as treble damages or criminal or administrative penalties.¹⁴³ It is therefore understandable that the specific remedial choices made by the law-giver will often be politically controversial. Alteration of that remedial choice, then, may not be made under the guise of a rule of procedure without seriously risking the deception of the electorate.

In addition to its serious systemic threat, use of cy pres also threatens the absent individual claimants' right to due process by judicially revoking their substantive right to compensatory relief. Lawmakers often enact laws that enforce their substantive directives by means of a compensatory remedial model, under which victims are provided a private right of action against the wrongdoer to make them whole after they have suffered a legal wrong. By seeking to enforce her private right, an individual may also incidentally further the public interest, but the right remains fundamentally the individual's.¹⁴⁴ In their pristine substantive form, these rights have been invested by the lawmaking authority (legislature, common law court, or Constitution) in the individual victim. The class action procedure established by Rule 23 allows the aggregation of these individual substantive claims for purposes of procedural convenience; it does not (and legally could not) transform the nature of the substantive law's remedial framework from a compensatory model into a civil fine. In a democracy, if such a dramatic alteration in controlling substantive law is to be made, it must be through the democratically authorized and monitored legislative process.

It is true that cy pres relief is not formally the equivalent of a civil fine. Whereas a civil fine is normally paid to the state, pursuant to cy pres the

143. *Id.* This punitive remedy may be additional civil penalties beyond compensation, or criminal sanctions.

144. *Id.* at 86.

It surely does not follow, however, that federal adjudication is incapable of advancing social, economic, or political interests that extend well beyond the personal interest of the individual litigant. It means, simply, that whatever impact federal adjudication may have on the public interest must come as an incident to the assertion and adjudication of narrower, personal interests.

Id.; see John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986) ("Probably to a unique degree, American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies.").

court transfers defendants' money to a private charitable entity not directly involved in the particular litigation. Moreover, whereas the amount of a civil fine can be determined in a variety of ways, cy pres relief normally approximates the amount of unclaimed damages suffered by the victim class. Yet in its contrast to the classic compensatory remedial model, cy pres is strikingly similar to the generic civil fine. Unlike a compensatory model, both the civil fine and cy pres coercively transfer the defendant's money not as a form of compensation for injuries suffered but as a form of punishment. The fact that one transfers it to an uninjured private third party while the other transfers it to the state in no way alters the fundamental difference separating both procedures from a remedial model requiring victim compensation. Most important is the fact that both forms of remedy differ dramatically from the victim compensation expressly dictated in the substantive law being enforced in the class proceeding. Thus, the class action device may no more legitimately transform a substantively dictated compensatory model into cy pres relief than it may transform it into a civil fine.¹⁴⁵

It could conceivably be responded that, rather than transform the remedial element of the underlying substantive law into a civil fine, cy pres is instead properly viewed as relevant solely to the traditional question of how to dispose of unclaimed property. By viewing cy pres through the lens of unclaimed property disposition, it is arguably possible to divorce the question of cy pres relief from the underlying substantive law being enforced in the class proceeding. If, on the other hand, one were to consider the question more holistically as one of how to enforce that underlying substantive law through resort to the class action device, then how a federal court treats the unclaimed property issue may well have significant legal implications extending far beyond the procedural context.

Whether the disposition of unclaimed funds is, as a general matter, to be deemed part and parcel of the "substantive" law is usually answered in the negative. Instead, courts traditionally consider the disposition of unclaimed property to a present legal issue wholly distinct from the substantive law enforced in the suit that gave rise to the unclaimed award in the first place. In *Wilson v. Southwest Airlines, Inc.*,¹⁴⁶ for example, the Court of Appeals for the Fifth Circuit treated the issue purely as a matter of the federal court's inherent equitable discretion, ignoring the possibility

145. One might argue that in a case in which the underlying substantive law authorizes punitive damages, resort to a procedure resembling a civil fine is not problematic, since the purpose of such damages is to punish, not to compensate. However, there remain fundamental differences between the two remedial forms. Punitive damages are awarded as relief ancillary to the provision of victim compensation. They are a substantively authorized windfall to those who have been injured. In contrast, a civil fine (much like cy pres relief) is wholly divorced from the victim compensation so central to the underlying law.

146. 880 F.2d 807 (5th Cir. 1989).

that Texas escheat law applied.¹⁴⁷ Like the Fifth Circuit, “other federal courts have treated the issue of the disposition of unclaimed funds in class actions as a matter of judicial administration, committed to the discretion of the district court under Rule 23 and unconstrained by state law.”¹⁴⁸ On one level, it is tempting to accept this conclusion. After all, one might reasonably expect that cy pres would usually be employed in the class action context only after all claimants have been given a reasonable opportunity to file claims into the post-judgment award or settlement fund.¹⁴⁹ At that point, one might argue, the remainder of the fund can reasonably be characterized as the unclaimed property of the remaining unknown claimants. How one disposes of such property, it could be further argued, is not an issue implicating the underlying substantive law, but rather one purely of judicial administration. More careful examination, however, reveals that to view class action cy pres as merely a matter of the substantively neutral administration of unclaimed property grossly and misleadingly oversimplifies the relevant legal dynamics. To the contrary, invocation of cy pres in the class action context alters substantially the DNA of the underlying substantive law, without any legitimate substantive authorization for making such a change.

To disingenuously conceptualize the radical non-compensatory damage disposition methods as nothing more than the trans-substantive disposal of unclaimed property is to place form over substance. The likely difficulties in distribution of relief will almost always be easily recognizable by both court and litigants at the class proceeding’s certification stage.¹⁵⁰ Thus, when the federal court chooses to certify the class, it must be presumed to be aware that a significant portion of the awarded funds cannot feasibly be distributed in a compensatory manner, as designated by the substantive law being enforced.¹⁵¹ From the outset, however, the potential availability of cy

147. *Id.* at 811.

148. *In re Lease Oil Antitrust Litig.* (No. II), MDL No. 1206, 2007 WL 4377835, at *14 (S.D. Tex. Dec. 12, 2007) (citing *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706–07 (8th Cir. 1997); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990); *Van Gemert v. Boeing Co.*, 739 F.2d 730, 737 (2d Cir. 1984).

149. This is not always the case, however. In a number of cases, cy pres has been invoked in an *ex ante* matter, before claimants have had an opportunity to file a claim. *See infra* Part IV.C.

150. Certain courts, recognizing these dangers, have refused certification. *See, e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (“Given that any residue would be distributed to the class’s benefit on the basis of cy pres principles rather than returned to defendants, defendants would still be paying the inflated total estimated amount of damages arrived at under the first step of the fluid recovery analysis.”); *see also In re Fresh Del Monte Pineapples Antitrust Litig.*, No. 1:04-md-1628 (RMB), 2008 WL 5661873, at *10 (S.D.N.Y. Feb. 20, 2008) (rejecting certification because fluid class recovery plan would not assure compensation to injured class).

151. *Cf. In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) (rejecting statistical sampling method of computing damages in asbestos class action under *Erie* doctrine because Texas, which supplied the underlying cause of action, “has made its policy choices in defining the duty

pres makes the class concept viable. It is clear, then, that class action cy pres is designed for the very purpose of enabling the class action procedure in a situation in which otherwise the substantive law would have the effect of preventing it. Therefore when the court certifies the class it must be deemed to be knowingly employing Rule 23 as a means to radically alter the compensatory remedial model invariably embodied in the underlying substantive law being enforced in the class proceeding. This is simply too big a dog for the small tail of Rule 23 to wag.

It is important to note that this concern applies far beyond the traditional issues surrounding choice of law when state law and federal adjudication overlap. The Rules Enabling Act, under which the Federal Rules are promulgated, explicitly provides that a rule may “not abridge, enlarge or modify any substantive right.” Because even when the underlying right is federally created, the enforcement mechanism is necessarily an important element of the substantive right; use of Rule 23 to authorize radical modification in the mode of penalization or enforcement is itself a violation of the Enabling Act’s restriction.

No more helpful to the argument that judicial discretion controls under Rule 23 would be a general appeal to a court’s inherent equitable discretion.¹⁵² Initially, it is wholly anachronistic to seek to justify the radically new practices of class action cy pres on the basis of an appeal to historically authorized equity practice.¹⁵³ More importantly, Rule 23 purports to vest in the class action court no special equitable authority to fashion final relief in any manner it deems appropriate, regardless of the underlying substantive law’s directives—nor could it, without blatantly violating the limits imposed by the Rules Enabling Act. The nature of the remedy for violation of substantive law is as substantive as the primary behavioral prohibition itself. As already noted, it involves issues of social, moral and economic policy that go well beyond the interests of the judiciary. Equity cannot exceed the limits of either the Rules Enabling Act or the Constitution, and for a court to rely on the support of the class action rule to justify its replacement of substantively sanctioned relief is to ignore both.

owed by manufacturers and suppliers of products to consumers”).

152. See, e.g., *In re Folding Carton Antitrust Litig.*, 557 F. Supp. 1091, 1105 (N.D. Ill. 1983) (“Faced with the more closely analogous problem of how to dispose of unclaimed portions of settlement funds, courts have the power and the responsibility to exercise equitable discretion to achieve substantial justice in the distribution of the funds.”). For an example of commentators citing the judiciary’s equitable powers as a basis for using cy pres, see 4 CONTE & NEWBERG, *supra* note 130, § 10:16 (“[I]t has been recognized that this determination falls within the general equity powers of the court and that defendants lack standing to contest this issue once they have already been found liable for the aggregate damages.”).

153. Recall that the doctrine of cy pres developed not in the class action context, but in the law of trusts. See *supra* Part II.A.

D. *Cy Pres and the Facilitation of Class Action Pathology*¹⁵⁴

Cy pres' effective transformation of class-wide compensatory damages into the equivalent of a civil fine is indicative not merely of the practice's intrinsic invalidity. It is also problematic in an instrumental sense because, when used in this manner, cy pres helps to conceal the most invidious of the modern class action's pathologies: the "faux" class action.¹⁵⁵ The term refers to suits brought as class actions where the individual damages are, on the whole, so minimal and the barriers to filing claims so high that as a practical matter the function of the suit as a means of compensating injured victims is all but completely undermined. In these suits, it is the class attorneys, who presumably have suffered no injury at the hands of the defendant, who are the ones financially rewarded for bringing the wrongdoer to justice. In effect, the faux class action transforms a compensatory class into a qui tam action, in which an uninjured party is incentivized to bring suit by receiving a portion of the damages for its successful prosecution. In this manner, the faux class action transforms the DNA of the substantive remedial model from a compensatory framework to what can be called a "bounty hunter" framework.¹⁵⁶

Cy pres facilitates this wholly improper remedial transformation by creating the illusion of compensation, thereby diluting or obscuring the starkly illegitimate nature of the bounty hunter remedial model. By forcing class defendants to pay at least a portion of the class-wide relief to a sympathetic charity having some loose connection to the subject matter of the suit, cy pres relief makes the attorneys' fees seem less the central goal of the proceeding and more the ancillary facilitator of victim compensation. But the charity was not a victim; its legal rights were not violated, nor was the suit filed for the purpose of their vindication. Thus, any payment it receives serves no compensatory purpose. In effect, by means of cy pres relief, one procedural illusion is created to disguise another: the illusion of victim compensation, designed to prevent the realization that a real class of plaintiffs seeking and expecting compensation, in reality does not exist.

Cy pres has also facilitated the other ominous class action pathology: the so-called settlement class action. Under this procedure, the parties agree to a settlement prior to seeking certification, and seek certification solely on the condition that the court approve the settlement.¹⁵⁷ Under no circumstances will the suits be litigated; the federal courts' authority is exercised over a case in which the parties are in full agreement from the

154. For an explanation of the concept of class action "pathology," see *supra* Part I.

155. For detailed analysis and explanation of the faux class action, see Redish, *supra* note 1, at 21–85.

156. *Id.* at 25–26.

157. For a detailed analysis and critique of the settlement class action, see generally Redish & Kastanek, *supra* note 132.

outset of the suit. The certification decision is made without the benefit of the adversary process. As our empirical research demonstrates,¹⁵⁸ the use of cy pres has grown substantially in recent years, and understandably so. It should not be difficult to conclude that the availability of cy pres makes the certification of a settlement class far simpler, since it assures the certifying court that defendants will be made to pay, and that that money will be put to good use.

Perhaps the strongest intuitive basis on which to support cy pres relief is the deterrent effect this form of relief is assumed to have on unlawful behavior. Absent resort to cy pres, the argument proceeds, wrongdoers would never be forced to pay for the harm they have caused in those situations in which large numbers of individual victims cannot feasibly be found or compensated. As a result, advocates of cy pres might well argue, there would exist no civil mechanism by which to deter similar unlawful behavior—either by the same or other wrongdoers—in the future. But whatever one thinks about this argument purely as a normative matter, it is clear that a Federal Rule of Civil Procedure—even a rule as important as the one authorizing class actions—is a legally inappropriate device through which to solve the problem. In a democracy, if the existing remedial model provided for in the governing substantive law has proven unsatisfactory, any alterations must come from the same government organs that promulgated the substantive law in the first place.

E. *Cy Pres and the Due Process Rights of Absent Class Members*

In addition to the serious constitutional and political problems which we have already described, use of cy pres relief in class actions also gives rise to fatal violations of procedural due process. By disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens the due process rights of those class members. In this manner, the practice unconstitutionally undermines the due process obligation of those representing absent class members to vigorously advocate on their behalf and defend their legal rights.¹⁵⁹ It brings about this constitutionally troubling result by ensuring that the size of the settlement or award fund will remain constant, regardless of the likelihood or actuality of compensating injured victims. Because as a practical matter the size of attorneys' fees will be tied, directly or indirectly, to the size of the class-wide award,¹⁶⁰ where the size of that award included the cy pres relief the class attorneys' financial interest will be wholly divorced from their efforts to compensate individual class members. This does not necessarily mean that in every case in which cy

158. See *infra* Part IV.

159. *Hansberry v. Lee*, 311 U.S. 32, 45–46 (1940); see also FED. R. CIV. P. 24(a)(2) (requiring adequacy of representation).

160. See *supra* notes 131–32 and accompanying text.

pres is awarded, class attorneys will fail to fashion effective mechanisms of class relief. But due process may be violated even in situations in which no prejudice is actually demonstrated. It is sufficient, in order to establish a violation of due process, to establish the existence of a temptation to the reasonable person to ignore her constitutionally dictated responsibilities to the litigants.¹⁶¹ There can be little doubt that by assuring class attorneys of the same pay whether absent class members receive compensation or not, use of cy pres threatens to undermine their constitutionally imposed obligations.

The most likely response to the due process attack on cy pres is that the constitutional dangers to which we point are by no means confined to the use of cy pres. Indeed, *any* measure of class attorneys' fees that does not restrict those fees to a percentage of the amount *actually claimed*, rather than the amount awarded class wide,¹⁶² would seem to give rise to the very same danger. But the fact that other methodologies—for example, escheat to the state of unclaimed funds or increase in the size of amounts paid to those class members who do file claims—give rise to the same constitutional problems in no way avoids the fatal constitutional flaw in cy pres. In any event, because, as previously noted, cy pres provides the illusion of compensation by awarding class funds to a charity connected—if only loosely—to the general subject matter of the law suit, its availability likely makes class certification a far more attractive prospect than if cy pres were unavailable. No other method of treating unclaimed class-wide funds creates this illusion. In this manner, cy pres provides a uniquely effective shield for the constitutional pathologies of the class action.

One might also respond to the due process critique that the options available to class attorneys to improve the administration of class compensation are in reality quite limited, so as a practical matter absent class members are not likely to suffer substantially due to cy pres's availability. It is difficult to know whether this will be true in the individual case, but the fact remains that class attorney incentives to find ways to assist class members will inevitably be impacted by the extent to which their own compensation is tied to the amounts actually recovered. Indeed, it is this very form of incentivization that lies at the heart of the contingent fee process. Thus, rather than make the wholly unsupported *ex ante* assumption that attorney ingenuity will be of no help in fostering class member recovery in the individual case, it makes more sense to employ a measure of class relief that encourages, rather than discourages, an attorney's creative use of such ingenuity.

161. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259–61 (2009) (discussing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

162. *See, e.g., McLaughlin v. Am. Tobacco Co.*, 522 F.3d. 215, 222 (2d Cir. 2008).

IV. EMPIRICAL ANALYSIS OF CY PRES AWARDS IN FEDERAL CLASS ACTION CASES

To further study the use and possible consequences of class action cy pres awards, we examined a set of federal class action cases with such awards. A series of searches conducted using Westlaw, LEXIS, JSTOR, and Google revealed 120 federal class action cases from 1974 through 2008 where the court either included a cy pres award as part of a judgment or approved a cy pres distribution as part of a settlement.¹⁶³ The compiled dataset of 120 cases provides a factual backdrop for some of the legal and pathology concerns discussed in earlier parts of this Article.

The dataset informs several important questions related to class action cy pres awards, including:

- What is the prevalence of class action cy pres awards from their first use in 1974 through 2008?
- To what extent are cy pres awards associated with settlement class and faux class actions?
- How often are cy pres awards granted *ex ante*, i.e., before absent class members have the opportunity to make claims?
- How large are cy pres awards in class actions?
- What impact might class action cy pres awards have on the amount of fees granted to plaintiffs' attorneys?

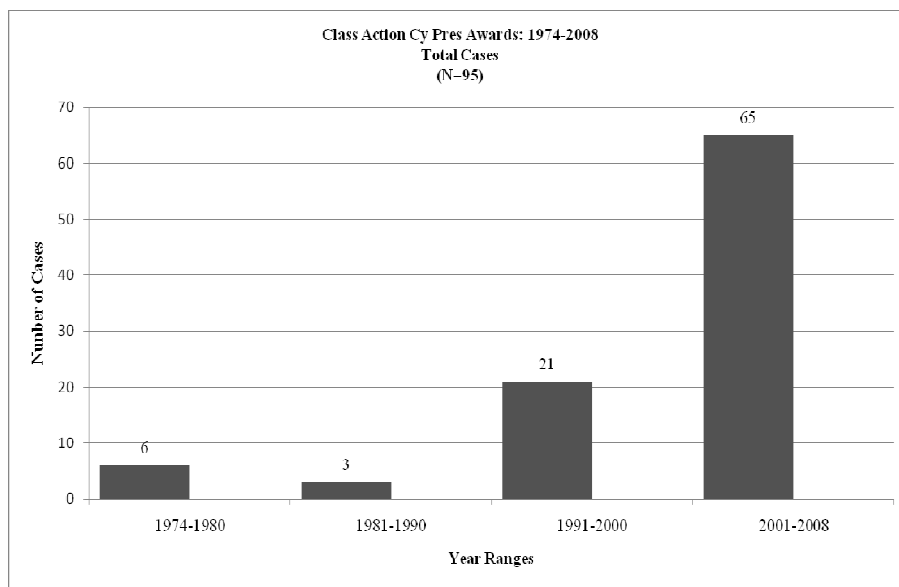
163. The dataset was developed from searches of Westlaw, LEXIS, JSTOR, and Google. Initially, in June 2008, the Westlaw ALLFEDS database was searched using the terms "class action!" and "cy pres." This search was then supplemented in November and December 2008 using the LEXIS, JSTOR, and Google search functions. The LEXIS "Federal & State Cases, Combined" database was searched for "class action" AND ("cy pres" OR "fluid class recovery" OR "fluid recovery" OR "leftover award" OR "remaining award" OR "remainder award"). The same search string was used in both JSTOR's Basic Search and in Google. Combined, these searches resulted in 657 cases. In many of these cases, the court mentioned cy pres only incidentally, or rejected a cy pres award. For purposes of this Article, only the cases where the court granted a cy pres award to a third party charity as part of a judgment on the merits or where the court approved a settlement agreement that included a cy pres distribution to a third party charity were included. The remaining 120 cases in the dataset are only in federal courts and are not duplicative. Quantitative legal research from databases such as Westlaw and LEXIS may have inherent selection biases because they do not include every case, nor are the available cases randomly selected. The same is true of JSTOR and other publicly available mentions of cy pres awards. Therefore, caution must be exercised if extrapolating results to the broader population of cy pres cases.

A. *The Prevalence of Class Action Cy Pres Awards*

In light of the serious constitutional concerns raised about use of class action cy pres, it is important to understand the trend in the growth of such awards over time. Over the last three decades, the number of class action cy pres awards in the dataset has increased, especially after 2000 (Figure 1).¹⁶⁴

From 1974 through 2000, federal courts granted or approved cy pres awards to third party charities in thirty class actions, or an average of approximately once per year. Since 2001, federal courts granted or approved cy pres awards in sixty-five class actions, or an average of roughly eight per year. Hence, the use of class action cy pres awards by federal courts has increased since the 1980s and has accelerated sharply after 2000.

Figure 1



B. *Cy Pres Awards in Settlement Class and Faux Class Actions*

As mentioned earlier, cy pres awards may be used by parties to conceal problematic types of class actions, such as settlement class actions¹⁶⁵ and

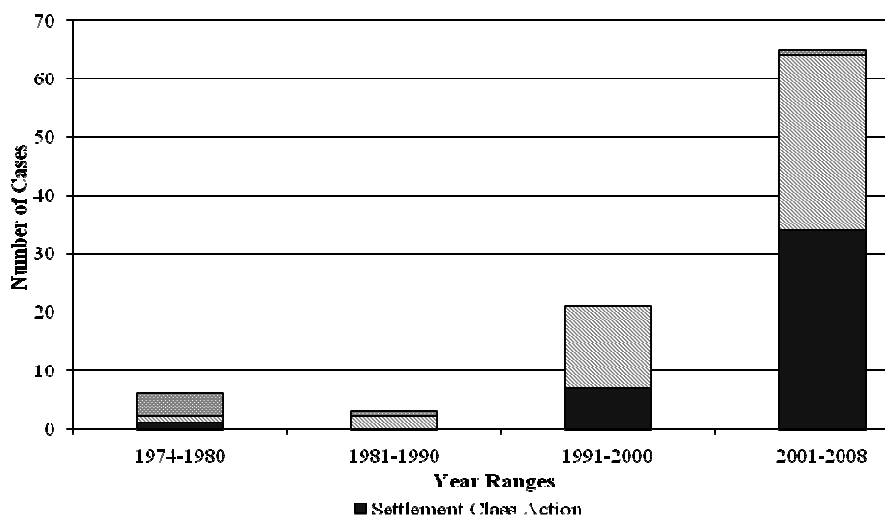
164. The following analysis is based on ninety-five cases since an explicit cy pres award date for every case was not available.

165. When a court certifies a settlement class action, it violates the Article III requirement that it only adjudicate cases or controversies. *See Redish & Kastanek, supra* note 132, at 582. When the parties submit a settlement class action to the court, the parties agree on the desired outcome, and lack the requisite adverseness. *Id.* at 563. The only benefit of filtering the settlement through the court is to foreclose the rights of absent plaintiffs.

faux class actions,¹⁶⁶ where the class action procedure is used primarily for the benefit of participants in the process other than the absent claimants.¹⁶⁷ Absent the availability of cy pres awards, it is at least possible these cases would not have proceeded past the certification stage. One important question, then, is the extent to which the observed increase in the use of cy pres awards is associated with a corresponding increase in the use of settlement class actions over time. As can be seen in Figure 2, the percent of class actions in the dataset that were certified for the purposes of settlement has increased both over time and relative to the cases that have settled post-certification or been adjudicated on the merits.¹⁶⁸

Figure 2

Class Action Cy Pres Awards: 1974 - 2008
Settlement Class Actions v. Other Class Actions with Cy Pres Awards
(N = 95)



166. Faux class actions are class action suits where the damages are too small to incentivize an individual plaintiff to pursue the available funds. For the purposes of this analysis, a faux class action was defined as one where the mean award per plaintiff is likely to be less than \$100. In cases where calculations were necessary to determine whether the case was a faux class action, the mean award per plaintiff was calculated based on the total award and the number of anticipated plaintiffs in the class.

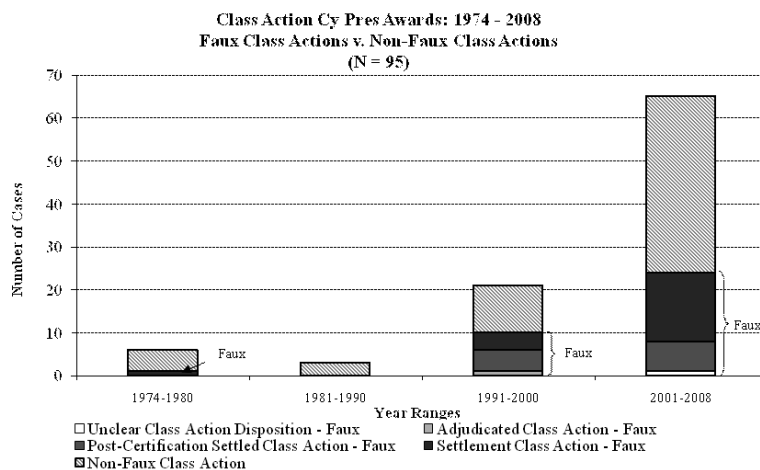
167. Ironically, the *University of Chicago Law Review* Comment originally advocated the use of cy pres in class actions in order to avoid making class actions an instrument that benefited only lawyers. Shepherd, *supra* note 76, at 449.

168. There are also six cases where it was not possible to tell from the information available whether the cy pres award was part of a case that was adjudicated on the merits, that settled post-certification, or that was a settlement class action (“Unclear Class Action Disposition” in Figure 2).

Prior to 2001, eight of the cases were settlement class actions. Over the same time period, seventeen cases were either decided by the courts on the merits or were settled post-certification and five cases did not have sufficient information to determine whether the case was adjudicated on the merits, was settled post-certification, or was a settlement class action. Thus, eight out of thirty (or 26.7%) cases were clearly settlement class actions and most of the eight cases did not appear until the end of the time period. After 2000, thirty-four cases were clearly settlement class actions, thirty cases were adjudicated or settled post-certification, and one case did not provide sufficient information to determine whether the case was adjudicated on the merits, was settled post-certification, or was a settlement class action. The percent of settlement class actions after 2000 increased to thirty-four out of sixty-five cases (52.3%). Since 2000, then, over half of the class action cy pres awards occurred in settlement class actions.

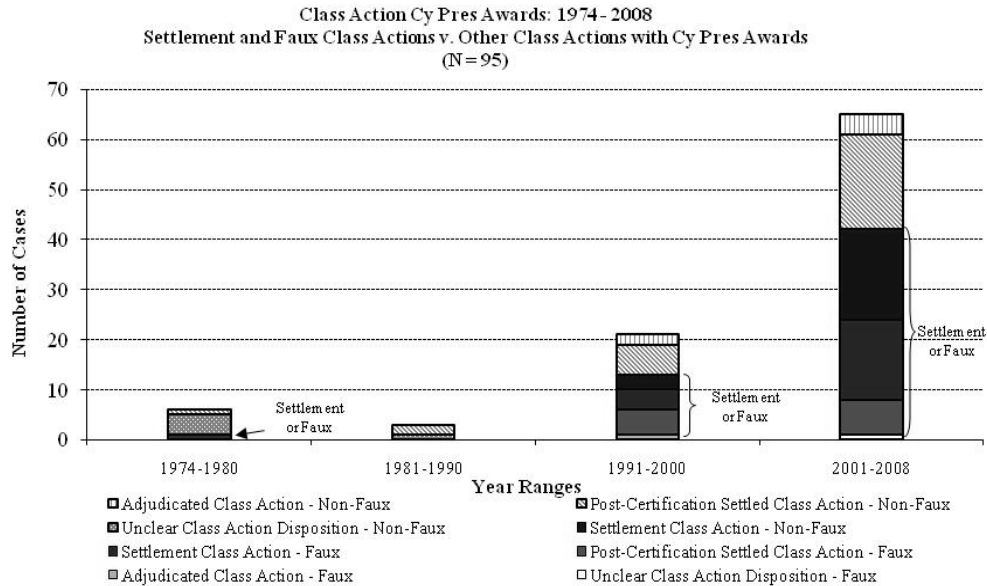
A second related question is the extent to which the increase in the use of cy pres awards is associated with an increase in faux class actions over time. Much like settlement class actions, cy pres awards also have a positive relationship with faux class actions (Figure 3).

Figure 3



Before 2001, eleven of thirty cases (or 36.7%) were faux class actions. Likewise, after 2000, twenty-four out of sixty-five cases (or 36.9%) were faux class actions. Generally, over a third of class action cy pres awards are associated with faux class actions.

Combining the results from Figures 2 and 3, it is clear that cy pres awards have a positive and increasing relationship with both settlement and faux class actions (Figure 4).

Figure 4

Prior to 2001, fourteen of thirty cases (or 46.7%) were settlement or faux class actions but after 2000, forty-two of sixty-five cases (or 64.6%) were such cases. Further, over the entire time period, twenty-one cases were both settlement *and* faux class actions. Sixteen of these cases occurred after 2000. As such, settlement class and faux class actions went from representing less than half of the class actions with cy pres awards before 2001 to about two-thirds after 2000. Thus, from 1974 to 2008 not only is there an increasing number of class actions with cy pres awards in the dataset, but the increase is associated with both settlement and faux class actions. Specifically, based on the data available, since 2000 over half of the class action cy pres awards occurred in settlement class actions, over one-third of class action cy pres awards occurred in faux class actions, and approximately two-thirds of class action cy pres awards occurred in either settlement or faux class actions.

C. Ex Ante Cy Pres Awards

In some instances, courts also name the charitable recipient of the cy pres award in anticipation of a remainder, allocating an award amount up front, rather than waiting to see what funds remain unclaimed. That courts occasionally designate cy pres awards *ex ante* before attempting to compensate absent members, illustrates the transformative nature of cy

pres awards.¹⁶⁹ Ignoring temporarily the pathologies of cy pres, at least one could consider a court to be acting “reasonably ancillary” to resolving a dispute when it makes a cy pres award out of unclaimed funds after giving absent class members notice of the fund and a chance to make a claim.¹⁷⁰ The presence of *ex ante* awards indicates that the court recognizes from the outset that overwhelmingly, plaintiffs will not receive compensation from the suit and is thus not acting in a manner that is “reasonably ancillary” to the dispute. As Figure 5 shows, federal courts awarded cy pres *ex ante*¹⁷¹ thirty times out of 120 cases (or in 25% of the cases).

Figure 5

Ex Ante Cy Pres Awards by Class Action Disposition	Number of Cases
Adjudicated Class Action	2
Post-Certification Settled Class Action	13
Settlement Class Action	14
Unclear Class Action Disposition	1
Total Ex Ante Cy Pres Awards	30

Of those thirty *ex ante* cy pres awards, two were given as part of a court-ordered award.¹⁷² Of the cases with *ex ante* cy pres awards that settled, thirteen were from post-certification settlements, fourteen were from settlement class actions, and one had an unclear disposition based on the available information.

The use of *ex ante* cy pres awards underscores the federal judiciary’s reliance on cy pres to transform the underlying substantive law’s compensatory remedial model into a wholly distinct civil fine model. By distributing the funds to charities before even providing absent class members with an opportunity to redeem their individual claims from a damage or settlement fund, the courts are making clear that the award is not really intended to compensate the plaintiffs, but solely to punish the defendant. Indeed, this has occurred in a noticeable number of cases. In a

169. *See supra* Part III.B.

170. *See* U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship, 513 U.S. 18, 21–22 (1994) (holding that a court “may make such disposition of the whole case as justice may require,” including the use of any judicial practice “reasonably ancillary to the primary, dispute-deciding function of the federal courts” (internal quotation marks omitted)).

171. “*Ex ante*,” for purposes of this analysis, is defined as a cy pres award that was designated as a part of a settlement agreement or judgment where: (1) an amount *and* at least one charity was named as a recipient of part of the fund from the outset and the charity’s receipt of the award was not contingent on there being remaining/unclaimed funds in the settlement fund, or (2) the entire award was given to at least one named charity with no attempt to compensate the absent class members.

172. Note that in the dataset of 120 cases, only thirteen were adjudicated.

quarter of cy pres class actions, the amount and recipient of the cy pres award were determined prior to giving absent class members the opportunity to make claims on the awarded class-wide fund.

Figure 6¹⁷³

	Class Action Cy Pres Awards as a Percent of Total Compensatory Damages		
	Total Compensatory Damages	Class Action Cy Pres Awards	Cy Pres as a Percent of Compensatory Damages(Paired)
Average	\$51,778,958	\$5,847,866	30.8%
Median	\$11,300,000	\$243,000	11.5%
Maximum	\$445,078,000	\$75,700,000	100.0%
Minimum	\$1,342	\$342	0.1%
St. Dev.	\$91,706,915	\$14,497,677	35.9%
Cases	47	47	47

D. The Magnitude of Class Action Cy Pres Awards

Since the data show cy pres award usage is increasing, especially in settlement class and faux class actions, the next reasonable inquiry is into the size and proportions of class action cy pres awards. Figure 6 shows the dollar amounts of class action cy pres awards as well as these awards' relationships to total compensatory damages.¹⁷⁴

In the forty-seven cases where compensatory damage, attorneys' fee, and cy pres award amounts were separately identifiable, the average cy pres award was \$5.8 million and reached as high as \$75.7 million. Further, cy pres awards averaged 30.8% of the total compensatory damages awarded and ranged from 0.1% to a 100.0%. Interestingly, there are ten cases where the cy pres award was 75.0% or more of the total compensatory damages. All ten of these cases were faux class actions with *ex ante* cy pres awards and six were also settlement class actions. As such, cy pres awards generally make up a non-trivial portion of total

173. The variable "Cy Pres as a Percent of Compensatory Damages (Paired)," was derived from a distribution that included each case's cy pres award as a percent of total compensatory damages. Thus, the percentages shown cannot be calculated from the information in Figure 6.

174. For purposes of this analysis, total compensatory damages include all cy pres awards but specifically exclude attorneys' fees and other costs.

compensatory damages awarded, and in some cases comprise the entire compensatory award.

E. *The Impact of Class Action Cy Pres Awards on Attorneys' Fees*

Faux and settlement class actions with cy pres awards are problematic if they misuse class actions for the benefit of attorneys rather than for the plaintiffs. One potential source for such abuse may be evident when considering attorneys' fees that are determined by reference to these non-trivial cy pres awards.¹⁷⁵

Generally, in class actions, attorneys' fees equal approximately one third of the total fund.¹⁷⁶ As Figure 7 shows, in the sixty-three cases¹⁷⁷ where it was possible to separately determine both the total recovery and the attorneys' fees, the attorneys' fees averaged 35.9% of the total recovery, but ranged from as little as 0.4% to as much as 98.3%. The average attorneys' fee awarded was \$14.1 million.

175. 4 CONTE & NEWBERG, *supra* note 130, § 14:6, at 546–47. Newberg explains the reasoning behind awarding compensation off the entire fund as follows:

The common fund doctrine allows a court to distribute attorney's fees from the common fund that is created for the satisfaction of class members' claims when a class action reaches settlement or judgment. The doctrine is grounded in the principles of quantum meruit and unjust enrichment, in two senses. First, the doctrine prevents unjust enrichment of absent members of the class at the expense of the attorneys. It is meant to compensate the attorneys in proportion to the benefit they have obtained for the entire class (the fund), not just the representative members with whom they have contracted.

Id.

176. *Id.* § 14:6, at 551 (“Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.”).

177. The sets of cases in Figures 6 and 7 are not identical. However, there is some overlap between the sets.

Figure 7¹⁷⁸

Attorneys' Fees as a Percent of Total Recovery in Cy Pres Class Actions			
	Total Recovery	Attorneys' Fees	Attorneys' Fees as a Percent of Total Recovery (Paired)
Average	\$100,200,592	\$14,101,946	35.9%
Median	\$7,500,000	\$1,088,787	30.0%
Maximum	\$3,200,000,000	\$464,000,000	98.3%
Minimum	\$16,400	\$10,000	0.4%
St. Dev.	\$408,803,092	\$59,191,541	26.6%
Cases	63	63	63

Although attorneys' fees as a percentage of the total recovery in cy pres class actions are similar to the percentage in class actions generally, the primary concern in cy pres class actions is the absolute amount of money awarded to the plaintiffs' attorneys.¹⁷⁹ Assuming that cy pres should not be awarded in the class action context, since it will not compensate the plaintiff classes, the absence of cy pres awards could possibly lead to a decrease in the size of the total fund awarded.¹⁸⁰ If the fund on which a percent of attorneys' fees is based decreases, then the actual amount of attorneys' fees will necessarily decrease as well. The percent, however, may remain the same in these situations. Further, if a case might not have been certified absent a cy pres award, then the plaintiffs' attorneys likely would not have received any fees for that case but for the availability of cy pres awards.

As an example, given that the average cy pres award was \$5.8 million and accounted for 30.8% of total compensatory damages and given that the average attorneys' fees as a percent of total recovery was 35.9%, such awards meaningfully increase attorneys' compensation without directly, or

178. "Total Recovery" includes all monetary amounts awarded to the plaintiffs or cy pres recipients. This includes the total fund with cy pres awards and attorneys' fees. The variable "Attorneys' Fees as a Percent of Total Recovery (Paired)" was derived from a distribution that included each case's attorneys' fees as a percent of total recovery. Thus, the percentages shown cannot be calculated from the information in Figure 7.

179. *See supra* Part II.B.4.

180. Technically this should hold for any awards that do not directly compensate the plaintiff class, not just cy pres awards.

even indirectly, benefiting the plaintiff. Additionally, of the ten cases where the cy pres amount was 75.0% or more of the total compensatory damages, all of them are potentially questionable cases. This suggests that cy pres awards could further increase attorneys' compensation by allowing additional class actions that may not have been certified otherwise to continue.

Therefore, not only does the availability of cy pres awards have the potential to increase the total available fund only as a punishment to the defendant and legitimize cases where the class might not otherwise be certified, but it can also increase the likelihood and absolute amount of attorneys' fees awarded.

F. *Conclusions*

The available data provide several key answers to the questions posed in the beginning of this Part. First, the prevalence of class action cy pres awards has increased steadily by decade since the 1980s and has accelerated noticeably after 2000. Second, since 2000, the majority of class action cy pres awards are associated with cases that were certified solely for the purposes of settlement, over one-third of class action cy pres awards are associated with faux class actions, and approximately two-thirds of class action cy pres awards are associated with either settlement or faux class actions. Third, in a quarter of cy pres class actions, the amount and recipient of the cy pres award was determined *ex ante*, or prior to giving absent class members the opportunity to make claims on the fund. Fourth, the average cy pres award was \$5.8 million and accounted on average for 30.8% of total compensatory damages. Finally, not only do cy pres awards have the potential to increase the total available fund and legitimize cases where the class might not otherwise be certified, but they can also increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefiting the plaintiff.

V. FLUID CLASS RECOVERY AND CY PRES CONTRASTED

In contrast to cy pres, the fluid class recovery concept has had a most difficult time in the courts. This is puzzling, since while both alternatives have their problems, as a conceptual matter fluid class recovery represents a far more arguably legitimate approach than does cy pres.

One commentator defined "fluid class recovery" as a "three-step process: calculation of gross rather than individual damages, individual recovery from a damage fund upon authentication of claims by class members, and distribution of the remainder of the fund to the class as a whole or to an entity that will benefit the class as a whole."¹⁸¹ On occasion,

181. Gregory A. Hartman, Comment, *Due Process and Fluid Class Recovery*, 53 OR. L. REV. 225, 227 (1974).

courts have treated cy pres and fluid class recovery as fungible concepts.¹⁸² For purposes of both separation of powers and due process critiques, however, it is necessary to draw an important distinction between the two. As the term has been most often used, cy pres refers to the designation of a portion of unclaimed damage or settlement funds to a charitable use that is in some way related to the subject of the suit. As employed here, fluid class recovery applies to an effort—either in a class settlement or as part of a class award—to approximate the injured class of consumers through the provision of relief to future consumers. The assumption is that the class of future users will likely substantially overlap with the injured class of past consumers.

A classic illustration of this form of fluid class recovery came in the California state class action, *Daar v. Yellow Cab Co.*¹⁸³ There a taxicab customer brought a class action to recover excessive charges by the defendant company for use of its taxicabs over a four-year period. The trial court approved a settlement that, instead of paying past cab users, lowered future fares for a specified period for the benefit of future riders. Since individual claims by past taxicab users would obviously have been infeasible, the only alternative to such fluid class recovery would have been to allow the defendant to escape payment for its unlawful behavior.

In the federal courts, future approximation fluid class recovery has had something of a checkered history. In the well-known case of *Eisen v. Carlisle & Jacquelin*,¹⁸⁴ the Court of Appeals for the Second Circuit overturned the district court's use of fluid class recovery in a complex and controversial antitrust suit brought by an odd-lot stock trader (i.e., transfers involving less than a hundred shares) against the major odd-lot dealers on the New York Stock Exchange. The class consisted of approximately six million traders whose damages were relatively minimal (the named plaintiff's claim was for \$70). Finding them, notifying them, and then getting them to go the trouble of filing individual claims were all highly unlikely.¹⁸⁵ Hence the district court fashioned a scheme in which the amount of a class-wide damage fund remaining after individual claims were filed was "to be used for the benefit of all odd-lot traders by reducing the odd-lot differential 'in an amount determined reasonable by the court until such time as the fund is depleted.'"¹⁸⁶ A skeptical Second Circuit stated that it was "at a loss to understand how this is to be done, but it is

182. See, e.g., *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008); *Democratic Cent. Comm. of D.C. v. Wash. Metro. Area Transit Comm'n*, 84 F.3d 451, 455 (D.C. Cir. 1996) (per curiam) ("In the context of class actions, the cy pres doctrine is referred to as 'fluid recovery.'").

183. 433 P.2d 732 (Cal. 1967).

184. 479 F.2d 1005 (2d Cir. 1973) (*Eisen III*), *vacated on other grounds*, 417 U.S. 156 (1974).

185. *Id.* at 1010.

186. *Id.* at 1011 (quoting the district court opinion).

suggested that it ‘might properly be done under SEC supervision or at least with SEC approval’—something that the court suspected was not legally authorized.¹⁸⁷ Continuing with its obvious skepticism, the Second Circuit wrote: “All the difficulties of management are supposed to disappear once the ‘fluid recovery’ procedure is adopted. The claims of the individual members of the class become of little consequence.”¹⁸⁸ The *Eisen* court categorically rejected the district court’s fluid class recovery plan, concluding that

Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure.¹⁸⁹

The court therefore held “the ‘fluid recovery’ concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.”¹⁹⁰

The Courts of Appeals for the Fourth and Ninth Circuits relied on *Eisen* to disallow fluid class recovery distribution methods in class actions.¹⁹¹ However, perhaps because the Second Circuit’s sweeping rejection of fluid class recovery was so lacking in anything even approaching persuasive supporting reasoning, courts have on occasion accepted the practice despite that court’s well-known refusal to recognize it. For example, in *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*,¹⁹² the D.C. Circuit, in dictum, noted that the future price reduction version of fluid class recovery “is ‘particularly effective for remedying overcharges on items which are repeatedly purchased by the same individuals.’”¹⁹³ The court noted that “[s]tate courts, in particular California, have been more hospitable to fluid recovery in class actions.”¹⁹⁴

Even the Second Circuit itself subsequently authorized a form of fluid class recovery. For example, in *In re “Agent Orange” Product Liability Litigation*,¹⁹⁵ although that court rejected—on the basis of *Eisen*—Judge Weinstein’s establishment of a class assistance foundation to fund projects

187. *Id.*

188. *Id.* at 1017.

189. *Id.* at 1018.

190. *Id.*

191. *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 72 n.41 (4th Cir. 1977); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 233–34 (9th Cir. 1974).

192. 84 F.3d 451 (D.C. Cir. 1996).

193. *Id.* at 455 (quoting *State v. Levi Strauss & Co.*, 715 P.2d 564, 571 (1986)).

194. *Id.* at 455 n.2; *see, e.g., State v. Levi Strauss & Co.*, 715 P.2d 564, 576 (1986).

195. 818 F.2d 179 (2d Cir. 1987).

and services that would benefit the entire class of servicemen allegedly made ill by exposure to the defendants' chemical defoliant in Vietnam, it allowed use of a portion of the settlement fund "to provide programs for the class as a whole."¹⁹⁶ *Eisen* was distinguishable, the court held, because "the class that will benefit from the district court's distribution plan is essentially equivalent to the class that claims injury from Agent Orange."¹⁹⁷ In contrast, "[i]n *Eisen*, the proposed recovery scheme would primarily have benefitted not the class of persons who claimed injury from prior odd-lot transactions but instead a class of persons who would engage in such transactions in the future."¹⁹⁸ In effect, the court was saying that the only thing wrong with the fluid class recovery scheme in *Eisen* was its failure to have the future class adequately "mirror image" the injured class. It was in no way rejecting the approach as an abstract matter. Similarly, in the recent decision in *In re Fresh Del Monte Pineapples Antitrust Litigation*,¹⁹⁹ the Southern District of New York rejected a proposed fluid class recovery scheme on the grounds that it was not clear that a future price reduction would actually benefit the injured purchaser class.²⁰⁰ Thus, despite *Eisen's* sweeping categorical rejection of the practice, it is conceivable that at least a disciplined form of future approximation fluid class recovery could today be acceptable.

This disciplined effort to reflect in the group of future beneficiaries the bulk of the class of injured victims arguably distinguishes this form of fluid class recovery from the charitable award version of cy pres. The latter unconstitutionally triangulates the bilateral adjudicatory process contemplated in Article III by insertion of a non-injured party, effectively transforms the DNA of the underlying substantive law by improper means, and threatens to undermine the due process rights of absent class members by externalizing their interests. In contrast, the former appears to represent a creative effort to compensate the class of victims which would otherwise be impossible. The problem for future approximation fluid class recovery, of course, is that the devil is in the details. It will often be difficult to say with any assurance that the two are likely to basically match up. Absent such assurance, the practice suffers from virtually all of the defects and pathologies that afflict cy pres.

VI. HOW TO TREAT UNCLAIMED FUNDS

Since we have rejected use of cy pres as a means of disposing of unclaimed class funds, we are left with the question of exactly what to do with those funds. In many cases, this question should have been answered

196. *Id.* at 184.

197. *Id.* at 185.

198. *Id.*

199. No. 1:04-md-1628 (RMB), 2008 WL 5661873 (S.D.N.Y. Feb. 20, 2008).

200. *Id.* at *6-7.

at the start of the case, rather than at its close. We conclude that the proper way to deal with a situation in which there remain significant unclaimed funds in a class action is to avoid the situation in the first place, by simply not certifying the class. A federal court asked to certify a class suit should always demand that the party (or, assuming settlement class actions continue to exist, “parties”) seeking certification establish that meaningful relief will be provided to the large majority of the class members.

Even if the federal courts, however, follow this front-loaded recommendation, cases will no doubt arise in which a portion of the award or settlement fund will remain unclaimed—albeit in far smaller amounts than under current practice. It is, perhaps, arguable that in these narrower circumstances, *cy pres* relief would be appropriate. However, we remain skeptical. *Cy pres* relief always gives rise to the danger of seductively leading all involved to believe that the purposes of the substantive law have been vindicated—when, in reality, the failure to compensate victims will always represent a failure in those situations in which the substantive law provides such relief as the sole remedy for law violation. The unclaimed funds, then, should be treated in a manner that reveals to all the failure (if only partial) of the remedial process.

With *cy pres* excluded as a possibility, two conceivable alternatives remain: first, escheat to the state; and second, retention by the defendant. The argument for escheat would proceed as follows: once the court has entered judgment, the awarded funds become the property of the plaintiff. If that plaintiff fails to collect the award, the unclaimed funds should be treated in the same manner that any unclaimed property is treated—it escheats to the state. Alternatively, it could be argued that in an adversary system premised on a notion of private rights adjudication, unless and until the plaintiff actually claims the award, it remains the property of the defendant. To take defendant’s money solely for purposes of escheat to the state effectively turns the private compensatory model (which, we assume for present purposes, constitutes the sole enforcement mechanism contained in the underlying substantive law) into the equivalent of a civil fine. Neither the Rules Enabling Act nor dictates of democratic theory permits this result. Thus, while resolution of this issue is beyond the scope of our critique of class action *cy pres*, a strong argument can be made in favor of retention of unclaimed funds by defendant. This approach would presumably have the added advantage of confining plaintiffs’ attorneys’ fees to the funds actually claimed, since it would be incoherent to award to the attorneys a percentage of funds retained by the defendant.

VII. CONCLUSION

Surprisingly, the federal courts’ growing use of *cy pres* relief in the modern class action has—up to now—somehow managed to escape the scathing scholarly critique it so richly deserves. While litigants may use *cy*

pres to conceal the more generally acknowledged concerns with class actions, cy pres exhibits numerous pathologies of its own. Cy pres performs unconstitutional alchemy by effectively transforming the underlying substantive law from a compensatory remedial model into a civil fine by means of nothing more powerful than a procedural joinder device. Cy pres also improperly transforms a bilateral dispute into a trilateral proceeding by introducing into the adjudicatory mix an uninjured third party who has no legitimate interest in the disposition of the suit. In addition, cy pres threatens to undermine the due process interests of absent class members by disincentivizing the class attorneys in their efforts to assure the class-wide compensation of victims of the defendant's unlawful behavior. Finally, cy pres fosters the pathological aspects of modern class action jurisprudence, including unconstitutional settlement classes and highly dubious "faux" class actions.

Use of cy pres in the modern class action, without principled justification, undermines the valid use of the class action process and contravenes core constitutional dictates. It must therefore be abandoned by the federal courts.