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Recalibrating Cy Pres Settlements to Restore the Equilibrium

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Recalibrating *Cy Pres* Settlements to Restore the Equilibrium

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ABSTRACT

Class action settlement funds become "non-distributable" when class members fail to claim their share of the settlement or the cost of distribution exceeds the value of individual claims. Before 1974, parties had two options for disposing of non-distributable funds: escheatment to the state or reversion to the defendant. Both options undermine unique objectives of the class action—namely, compensating small individual harms and deterring misconduct.

To balance the undermining effects of escheatment and reversion, courts incorporated the charitable trust doctrine of *cy pres* into the class action settlements context. *Cy pres* distributions direct non-distributable settlement funds to charities whose work aligns "as near as possible" with the interests of the class. The class thus receives an indirect benefit from the distribution that it would not have received through escheatment or reversion.

Federal courts have struggled to delineate requirements for *cy pres* settlements, and as a result, inconsistent approaches to the issue have emerged. This Comment examines those inconsistencies in light of the theory behind the doctrine's importation into the class action context. It argues that the inconsistent approaches to *cy pres* settlements reflect unspoken judicial preferences for one of the two class action objectives that *cy pres* preserves.

This Comment begins by examining the history and modern principles of *cy pres* settlements. Next, it explores four federal

* J.D. Candidate, The Pennsylvania State University's Dickinson Law, 2019. I would like to thank my mother for her sacrifices that have always allowed me to pursue my dreams, my father for teaching me perseverance at a young age, and my sister for being my constant. I would also like to thank John Abel for helping guide me through the whirlwind of law school and showing me the meaning of zealous advocacy. Lastly, I would like to thank my grandmother for her unconditional love and support. This Comment is dedicated to the memory of John Eric Slobom.

circuit courts' approaches to *cy pres* settlements and considers how each approach reflects the respective court's preference for one class action objective over the other. This Comment then argues that courts should recalibrate their methods of assessing *cy pres* settlements to account for the theory behind the doctrine's importation into the class action settlements context. Finally, it proposes a framework for assessing *cy pres* settlements that accounts for that theory.

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I. INTRODUCTION

In 1966, Congress amended the Federal Rules of Civil Procedure, and the modern-day money damages class action was born.[1]

1. Scott Dodson, *An Opt-In Option for Class Actions*, 115 MICH. L. REV. 171, 177 (2016) (noting that the 1966 amendments produced the modern iteration of Federal Rule of Civil Procedure 23).

Under the revised version of Rule 23,[2] a final judgment in a Rule 23(b)(3) class action[3]—commonly referred to as a "mandatory" class action[4]—binds all individuals who share an issue of law or fact in common with the class.[5] To exclude oneself from the final judgment in a mandatory class action, an individual must affirmatively opt out of the class.[6] Shortly after the 1966 amendments went into effect, parties to mandatory class actions began encountering new problems at the settlement stage as large sums of settlement funds often remained unclaimed.[7] In many instances, class members simply failed to claim their awards.[8] When awards remained unclaimed, the parties could dispose of the unclaimed funds through escheatment to the state[9] or reversion to the defendant.[10] Both options, however, undermine unique objectives of the class action—namely, compensating small individual harms and deterring misconduct.[11]

In an effort to avoid the undermining effects of escheatment and reversion, courts began to dispose of unclaimed settlement funds through the charitable trust doctrine of *cy pres*.[12] In the con-

2. The relevant portions of the 1966 version of Rule 23 are mostly still in effect today. *See* FED. R. CIV. P. 23(b)(3).

3. A Rule 23(b)(3) class action may proceed if the "court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

4. *See generally* Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177 (2003) (discussing the evolution of the mandatory class action since the 1966 amendments).

5. *See* FED. R. CIV. P. 23(c)(3)(B).

6. *Id.*

7. *See, e.g.*, West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1083–84 (2d Cir. 1971) (discussing the lack of response from consumer class members that resulted in $20 million in unclaimed settlement funds).

8. *Id.*

9. *See* Hodgson v. YB Quezada, 498 F.2d 5, 6 (9th Cir. 1974) (finding escheatment of unclaimed settlement funds to the Treasury of the United States proper); Hodgson v. Wheaton Glass Co., 446 F.2d 527, 536 (3d Cir. 1971) (holding that unclaimed settlement funds escheat to the government).

10. *See* Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The* Cy Pres *Remedy*, 39 U. CHI. L. REV. 448, 449–50 (1972) (discussing courts that have "redefine[d] the class" to deal with residual funds).

11. *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013).

12. *See, e.g.*, Miller v. Steinbach, No. 66 Civ. 356, 1974 WL 350, at *1 (S.D.N.Y. Jan. 3, 1974) (approving the application of the *cy pres* doctrine to the class action settlement context). It is generally believed that the term "*cy pres*" derives from the Norman French phrase *"cy pres comme possible*," which translates to "as near as possible." *See* EDITH L. FISCH, THE *CY PRES* DOCTRINE IN THE UNITED STATES 1 (1950).

text of class action settlements, the *cy pres* doctrine allows parties to distribute otherwise "non-distributable" settlement funds to the "next best recipient."[13] Class action settlement funds become non-distributable when class members fail to claim their shares of the settlement[14] or when the cost of distribution exceeds the value of the individual claims.[15] Courts often deem charitable organizations whose interests align with the class's interests the "next best recipient."[16]

The United States Supreme Court will review its first *cy pres* settlement case in its October 2018 term.[17] While the Court has never addressed the issue of *cy pres* settlements, Chief Justice Roberts has signaled his "fundamental concerns surrounding the use of such remedies in class action litigation."[18] The Court's decision to address the issue now is unsurprising. In recent years, *cy pres* distributions have become more prominent features of class action settlements,[19] and federal circuit courts have struggled to delineate requirements for assessing such settlements.[20] As a result, inconsistent approaches to the issue have emerged.[21]

This Comment examines those inconsistencies against the theory behind the doctrine's importation into the class action context. It argues that the courts' inconsistent approaches reflect unspoken judicial preferences for one of the two class action objectives that *cy pres* preserves.

Part II of this Comment examines the history and modern principles of *cy pres* settlements. Part III explores four federal circuit courts' approaches to *cy pres* settlements[22] and considers how each approach reflects the respective court's preference for one class ac-

13. *In re* Google Referrer Header Privacy Litig., 869 F.3d 737, 741 (9th Cir. 2017).

14. *See, e.g.*, Powell v. Georgia-Pacific Corp., 119 F.3d 703, 706–07 (8th Cir. 1997) (finding the trial court did not abuse its discretion when it approved a *cy pres* distribution of unclaimed funds after all individual claims had been satisfied).

15. *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 825 (9th Cir. 2012) (affirming the district court's approval of a *cy pres*-only settlement on the grounds that individual awards would be *de minimis*).

16. *See, e.g.*, *id.* at 822.

17. *See In re Google*, 869 F.3d 737, *cert. granted*, 86 U.S.L.W. 3552 (U.S. Apr. 30, 2018) (No. 17-961).

18. Marek v. Lane, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., statement respecting the denial of certiorari).

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

20. *See infra* Part III.A–C.

21. *See infra* Part III.A–C.

22. *See infra* Part III.A–C.

tion objective over the other.[23] Part III argues that courts should recalibrate their methods of assessing *cy pres* settlements to account for the theory behind the doctrine's importation into the class action settlements context.[24] Part III then proposes a new framework for assessing *cy pres* settlements.[25] Finally, Part IV concludes with suggestions for the future of *cy pres* settlements.

II. BACKGROUND

A. The Origins of Cy Pres*: Charitable Trusts*

The *cy pres* doctrine originated in the context of charitable trusts.[26] In that context, *cy pres* serves as a means to effectuate a donor's intent for the trust when intervening circumstances have rendered strict adherence to the donor's stated purpose impossible, unlawful, or impracticable.[27] The doctrine allows courts to redirect the corpus[28] to a charitable purpose that "reasonably approximates" the testator's original intent.[29] For instance, after the passage of the Thirteenth Amendment to the United States Constitution, a court used *cy pres* to redirect a trust supporting the abolition of slavery to support instead educational opportunities for poor African-Americans.[30]

B. The Doctrine's Importation into Class Actions

Courts incorporated the *cy pres* doctrine into the class action[31] context in response to an unforeseen consequence of the 1966 amendments to the Federal Rules of Civil Procedure.[32] The origi-

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23. *See infra* Part III.D.

24. *See infra* Part III.D.

25. *See infra* Part III.E.

26. Charitable trusts are distinct from private trusts. In the context of private trusts, the corpus—the subject property of the trust—is devoted to specific persons who are designated as beneficiaries of the trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. c (AM. LAW INST. 2012). In the context of charitable trusts, the corpus is devoted to a charitable purpose and the public is designated as the beneficiary. *See id.*

27. *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 168 n.2 (3d Cir. 2013) (discussing the origins of the *cy pres* doctrine); Shepherd, *supra* note 10, at 452.

28. *See* sources cited *supra* note 27.

29. RESTATEMENT (THIRD) OF TRUSTS § 67.

30. *See* Jackson v. Phillips, 96 Mass. 539, 596 (1867).

31. The class action is a procedural device that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group. *See* Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979).

32. *See* Shepherd, *supra* note 10, at 450–53 (suggesting that courts utilize the *cy pres* doctrine to avoid the problem of uncollected damages in class actions that resulted from the 1966 amendments).

nal version of Rule 23 provided for the so-called "spurious"[33] class action[34] in which class members made separate claims involving common "question[s] of law or fact."[35] Judgments in spurious class actions did not bind absent class members.[36] Instead, the final judgment in a spurious class action bound individuals only if they opted in to the class.[37]

The 1966 amendments replaced the spurious class action with the Rule 23(b)(3) "mandatory" class action and thus widened the permissible circumstances[38] of class certification.[39] Mandatory class actions may proceed despite absent class members.[40] Thus, under the amended version of Rule 23, the final judgment in a mandatory class action binds all persons who did not affirmatively opt out of the suit, even if they were unaware of or unwilling to participate in the suit.[41]

If the parties reach a settlement, they must provide notice to the class,[42] and the court may afford the members an opportunity to opt out of the settlement to preserve their individual claims.[43] Individuals who do not opt out of the settlement become eligible to receive a share of the damages upon the court's final approval of the settlement.[44] Due to the structure of class actions brought

33. *See* Green v. Wolf Corp., 406 F.2d 291, 297 (2d Cir. 1968) (discussing the spurious class action under the 1938 version of Rule 23).

34. *See* FED. R. CIV. P. 23(a)(3) (1937) (amended 1966).

35. *Id.*

36. *Green*, 406 F.2d at 297.

37. *Id.*

38. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011) ("[Rule 23(b)(3) of the 1966 amendments] allows class certification in a much wider set of circumstances but with greater procedural protections.").

39. A court must certify a class before a lawsuit may proceed as a class action. *See* FED. R. CIV. P. 23(c)(1)(A). To obtain certification, the claimant must satisfy each of the four prerequisites under Federal Rule of Civil Procedure 23(a) and at least one of the three requirements under Rule 23(b). Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013).

40. FED. R. CIV. P. 23(b)(3).

41. *Id.* 23(c)(3)(B) ("Whether or not favorable to the class, the judgment in a class action must . . . include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members."); *see also* J. Russell Jackson, *Class Actions and the Implications of Rule 23*, SCOTUSBLOG (Sept. 12, 2011, 2:26 PM), http://bit.ly/2xcvCKq (discussing the historical effects of the 1966 amendments to Rule 23).

42. FED. R. CIV. P. 23(e)(1).

43. *Id.* 23(e)(4).

44. *See id.* 23(e) ("The claims, issues, or defenses of a certified class may be settled . . . only with the court's approval."); Christine P. Bartholomew, *Saving Charitable Settlements*, 83 FORDHAM L. REV. 3241, 3247 (2015).

under Rule 23(b)(3), however, distribution of individual awards often becomes problematic.[45]

Rule 23(b)(3) class actions include all injured persons in the class for purposes of calculating damages, even if the court did not recognize them as plaintiffs at the start of the litigation.[46] The distribution of damages thus depends on identifying and locating class members post-settlement[47] as well as class members affirmatively claiming their shares of the award.[48] However, class members frequently fail to respond to settlement notices;[49] some class members never hear about the settlement at all.[50] As a result, large sums of settlement funds go unclaimed.[51]

A 1972 law review comment[52] by University of Chicago Law School student Stewart R. Shepherd is widely credited as the first proposal to import the *cy pres* doctrine into the class action context.[53] Prior to the doctrine's importation, judges and parties resorted to one of two options to dispose of unclaimed damages: reversion to the defendant[54] or escheatment to the state.[55]

Both judges[56] and academics[57] have criticized the practice of reverting settlement funds to the defendant. Reversion undermines

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45. *See, e.g.*, Linda S. Mullenix, *Settlements*, *in* A PRACTITIONER'S GUIDE TO CLASS ACTIONS 177, 236–37 (Mary Hogan Greer ed., 2d ed. 2017) (discussing distribution problems that result from large class actions).

46. *See id.* at 236; Rhonda Wasserman, Cy Pres *in Class Action Settlements*, 88 S. CAL. L. REV. 97, 102–05 (2014) (discussing the "underlying problem" of unclaimed or non-distributable funds).

47. Mullenix, *supra* note 45, at 236.

48. Wasserman, *supra* note 46, at 104–05.

49. *See, e.g.*, West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1083–84 (2d Cir. 1971) (discussing the lack of response from consumer class members that resulted in $20 million in unclaimed settlement funds).

50. *See, e.g.*, Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1307–08 (9th Cir. 1990) (finding it likely that many class members would not learn of the settlement due to the defendant's failure to keep records of its employees).

51. *See* WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 12:28 (5th ed. 2017) (discussing the various situations that prevent courts from distributing class action damages).

52. *See* Shepherd, *supra* note 10.

53. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) (crediting Shepherd's comment as the first proposal to use *cy pres* for disposing of excess class action settlement funds).

54. *See* Shepherd, *supra* note 10, at 449–50 (discussing courts that have "redefine[d] the class" to deal with residual funds).

55. *See* Hodgson v. YB Quezada, 498 F.2d 5, 9 (9th Cir. 1974) (finding escheatment of unclaimed settlement funds to the Treasury of the United States proper); Hodgson v. Wheaton Glass Co., 446 F.2d 527, 536 (3d Cir. 1971) (holding that unclaimed settlement funds escheat to the government).

56. *See, e.g.*, *In re Baby Prods.*, 708 F.3d at 172 ("Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement.").

the "deterrent effect of class actions by rewarding defendants for the failure of class members" to claim their shares of the settlement.[58] And while escheatment preserves the deterrent value of a suit,[59] it undermines individual compensation by distributing the settlement to the broader community.[60]

Shepherd argued that the *cy pres* doctrine would provide a balanced alternative for distributing unclaimed settlement funds.[61] Shepherd proposed directing residual settlement funds to the "'next best' class."[62] He suggested that the parties could effectuate the legislature's intent by directing settlement residue to charitable organizations whose interests align with the underlying cause of action.[63]

In 1974, the U.S. District Court for the Southern District of New York became the first federal court to approve the use of *cy pres* outside the context of charitable trusts.[64] In a decision approving a settlement in a shareholders' derivative suit, the court characterized the terms of the agreement as a "variant of the *cy pres* doctrine."[65] The court concluded that the terms were proper in light of the "modest size of the settlement fund and the vast number of shares among which it would have to be divided."[66]

C. Modern Application of Cy Pres *in Class Actions*

Since *Steinbach*, courts have applied *cy pres* outside the charitable trust context with ever-increasing frequency.[67] Today, *cy pres* is a common feature of class action settlements.[68] Most circuits

57. *See, e.g.*, Shepherd, *supra* note 10, at 450 ("[Reversion] lead[s] to unjust enrichment of the defendant and decrease[s] the deterrent effect of the judgment.").

58. *In re Baby Prods.*, 708 F.3d at 172; *see also* Hughes v. Kore of Ind. Enter., 731 F.3d 672, 676 (7th Cir. 2013) (finding that the purpose of *cy pres* in class action settlements is to prevent the unjust enrichment of the defendant).

59. *In re Baby Prods.*, 708 F.3d at 172.

60. *Id.*; Bartholomew, *supra* note 44, at 3249 ("[E]scheatment . . . risks only benefiting local governments rather than advancing the goals of the underlying claims.").

61. Shepherd, *supra* note 10, at 452.

62. *Id.*

63. *Id.*

64. Redish et al., *supra* note 19, at 632.

65. Miller v. Steinbach, No. 66 Civ. 356, 1974 WL 350, at *1 (S.D.N.Y. Jan. 3, 1974).

66. *Id.*

67. Redish et al., *supra* note 19, at 653.

68. *Id.*

have approved of at least one form of *cy pres* distribution[69] but diverge in their approaches.[70]

1. Types of Cy Pres *Distributions*

Federal courts have approved two general types of *cy pres* settlements.[71] The first type—which this Comment will refer to as "part *cy pres* settlements"—follows the distribution scheme that Shepherd's comment proposed.[72] Part *cy pres* settlements distribute residual settlement funds to a third party after all individual claims have been satisfied.[73]

The second type of *cy pres* settlement directs the entire settlement fund to a third party.[74] In this second scenario, there is no direct individual recovery.[75] Courts refer to these settlements as "*cy pres*-only settlements."[76] While courts generally agree that part *cy pres* settlements are permissible,[77] *cy pres*-only settlements tend to stir up controversy.[78]

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69. *See, e.g.*, *In re* Google Referrer Header Privacy Litig., 869 F.3d 737 (9th Cir. 2017); Hughes v. Kore of Ind. Enter., 731 F.3d 672 (7th Cir. 2013); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163 (3d Cir. 2013); *In re* Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24 (1st Cir. 2009); Airline Ticket Comm'n Antitrust Litig. Travel Network v. United Air Lines, 307 F.3d 679 (8th Cir. 2002) (remanding settlement for revised *cy pres* recipient); *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 179 (2d Cir. 1987).

70. *See* cases cited *supra* note 69.

71. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07 cmt. a (AM. LAW INST. 2010).

72. *See generally* Shepherd, *supra* note 10 (discussing the use of *cy pres* to dispose of unclaimed settlement funds).

73. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07 cmt. a.

74. *Id.*

75. *Id.*

76. *See, e.g.*, *In re* Google Referrer Header Privacy Litig., 869 F.3d 737, 741–43 (9th Cir. 2017).

77. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) ("[A] district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component . . . ."); Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011) (noting that *cy pres* distributions are permissible methods for disposing of unclaimed settlement funds); *In re* Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 35–36 (1st Cir. 2009) (approving the use of *cy pres* to dispose of residual settlement funds); *In re* Airline Ticket Comm'n Antitrust Litig., 268 F.3d 619, 625–26 (8th Cir. 2001) (finding distribution of unclaimed settlements through *cy pres* proper if the recipient closely relates to the class).

78. *See* Joshua L. Becker & Brad M. Strickland, *Increased Scrutiny for* Cy Pres *Provisions in Class Action Settlements*, LAW J. NEWSL.: PROD. LIAB. L. & STRATEGY (Oct. 2017), https://bit.ly/2O43r6F.

2. *Considerations in Assessing* Cy Pres *Distributions*

While the Federal Rules of Civil Procedure govern the circumstances under which a judge may approve a class action settlement,[79] no rule explicitly addresses settlement agreements that contain *cy pres* provisions.[80] Instead, courts generally assess the propriety of a *cy pres* settlement under the same standards that govern settlement agreements in general—those provided by Federal Rule of Civil Procedure 23(e).[81]

Federal Rule of Civil Procedure 23(e) governs judicial approval of federal class action settlements and permits approval only if the settlement is "fair, reasonable, and adequate" in its entirety.[82] To determine whether a settlement meets the Rule 23(e) benchmark, courts consider a range of factors, such as: (1) the expense and complexity of the litigation; (2) the class's reaction to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of litigation; (5) the risks of maintaining the class action through trial; (6) the ability of the defendants to withstand a greater judgment; (7) the settlement's reasonableness in light of the best possible recovery; and (8) the reasonableness of the settlement fund in light of the plaintiffs' likelihood of success on the merits.[83]

The American Law Institute has set forth model guidelines in its *Principles of the Law of Aggregate Litigation* ("*ALI Principles*") for courts to consider when assessing *cy pres* settlements.[84] Section 3.07 of the *ALI Principles* addresses two aspects of *cy pres* settlements.[85] Subsections (a) and (b) address when a *cy pres* settlement

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

80. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172–73 (3d Cir. 2013).

81. *Id.* at 173 ("Inclusion of a *cy pres* provision by itself does not render a settlement unfair, unreasonable, or inadequate.").

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

83. *See* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1998); Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975); City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974), *abrogated by* Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000).

84. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07 (AM. LAW INST. 2010).

85. *See id.*

is proper—the triggering requirement.[86] Subsection (c) addresses the type of recipient that is proper—the nexus requirement.[87]

The *ALI Principles* embody a strong preference for direct distribution to class members and deem *cy pres* settlements appropriate only when direct distribution is not "feasible."[88] Infeasibility occurs when "class members cannot be reasonably identified" or when distribution would not be "economically viable."[89] Courts that have adopted the "economic viability" test require a settlement's proponent to show that the cost of individual distribution, including the costs of locating class members, outweighs the value of individual awards.[90]

The *ALI Principles* provide that once a court deems a *cy pres* distribution proper, it must determine whether the *cy pres* recipient's interests "reasonably approximate those being pursued by the class."[91] A court may direct a *cy pres* distribution to a party whose

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86. Section 3.07(a)–(b) of the *ALI Principles* provides:

> A court may approve a settlement that proposes a *cy pres* remedy even if such a remedy could not be ordered in a contested case. The court must apply the following criteria in determining whether a *cy pres* award is appropriate:
>
> (a) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members.
>
> (b) If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

Id. § 3.07(a)–(b).

87. Section 3.07(c) of the *ALI Principles* provides:

> (c) If the court finds that individual distributions are not viable based upon the criteria set forth in subsections (a) and (b), the settlement may utilize a *cy pres* approach. The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class. If, and only if, no recipient whose interests reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class.

Id. § 3.07(c).

88. *Id.* § 3.07, cmt. a.

89. *Id.*

90. *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 817–21 (9th Cir. 2012) (finding distribution of a settlement fund of $6.5 million to a class of over 3.6 million members infeasible because individual payments would have been *de minimis*).

91. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07(c).

interests do not "reasonably approximate" the interests of the class only if it cannot identify a "reasonably approximate" party after "thorough investigation and analysis."[92] While most courts require some nexus between the interests of the class and the interests of the *cy pres* recipient,[93] others seemingly pay mere lip service to the nexus requirement.[94] Even still, other courts have suggested that the nexus requirement may be unnecessary altogether.[95] And as *cy pres* settlements become more common,[96] the inconsistent approaches to these issues will only foster more confusion. The mounting pressure of these considerations clearly necessitates a recalibration of *cy pres* settlements.

III. ANALYSIS OF THE CIRCUIT SPLIT AND A PROPOSED SOLUTION

Courts must consider two general questions when deciding whether to approve a *cy pres* settlement. First, a court must determine whether the circumstances trigger a justifiable use of *cy pres*.[97] Second, a court must assess whether the *cy pres* recipients are appropriate.[98] Taking a holistic view, courts consider both questions to determine whether the settlement is "fair, reasonable, and adequate."[99]

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92. *Id.*

93. *See, e.g.*, *In re* Airline Ticket Comm'n Antitrust Litig. Travel Network, 268 F.3d 619, 625–26 (8th Cir. 2001) (finding distribution of *cy pres* funds to a law school in an antitrust action concerning caps on ticket commission did not reasonably approximate the interests of the class).

94. *See In re* Google Referrer Header Privacy Litig., 869 F.3d 737, 746–47 (9th Cir. 2017) (approving a *cy pres* distribution to plaintiff counsel's alma mater in an internet privacy action). *But see* Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308–09 (9th Cir. 1990) (finding the interests of a humanitarian organization working in the region from which class members immigrated too remote from the interests of class members in a migrant rights action).

95. *See* Hughes v. Kore of Ind. Enter., 731 F.3d 672, 676 (7th Cir. 2013) ("When there's not even an indirect benefit to the class . . . , the '*cy pres*' remedy . . . is purely punitive.").

96. Redish et al., *supra* note 19, at 653.

97. *See In re* Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 34 (1st Cir. 2009) (discussing cases where courts have found circumstances that trigger a justifiable use of *cy pres*).

98. *See In re* BankAmerica Corp. Sec. Litig, 775 F.3d 1060, 1067 (8th Cir. 2015) (noting that a district court must find that the recipient of a *cy pres* distribution will benefit the class before it may approve a *cy pres* settlement); *In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 33 (1st Cir. 2012) (noting that the *cy pres* recipient must reasonably approximate the interests of the class).

99. FED. R. CIV. P. 23(e)(2); *see In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172–73 (3d Cir. 2013) ("[A]pproval is warranted when the court finds that the settlement, taken as a whole, is 'fair, reasonable, and adequate' from the perspective of the class." (quoting FED. R. CIV. P. 23(e)(2))).

Both types of *cy pres* settlements trigger when the settlement fund is "non-distributable."[100] For part *cy pres* settlements, a settlement fund is non-distributable when monies remain unclaimed after the individual claims process has elapsed.[101] For *cy pres*-only settlements, courts deem a settlement fund non-distributable when the cost of distribution to the class outweighs the value of the individual awards.[102]

Generally, a *cy pres* recipient is appropriate if it constitutes the "next best" recipient.[103] That determination requires courts to consider whether a "substantial nexus" between the interests of the recipient and the interests of the class exists.[104] Courts often examine the nature of the recipient's work to determine whether the class will actually benefit from the distribution.[105] Both the mission[106] and geographic scope[107] of the recipient's work factor into this inquiry. Some courts consider the objectives of the statutes underlying the plaintiffs' claims.[108] Even still, some courts have seemingly abandoned the "next best" recipient principle altogether,[109] and

100. *See, e.g.*, *In re* Google Referrer Header Privacy Litig., 869 F.3d 737, 741 (9th Cir. 2017) ("[T]he *cy pres* doctrine permits a court to distribute . . . non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries for the indirect benefit of the class.").

101. *See, e.g.*, Powell v. Georgia-Pacific Corp., 119 F.3d 703, 706–07 (8th Cir. 1997) (finding that the trial court did not abuse its discretion when it approved a *cy pres* distribution of unclaimed funds after all individual claims had been satisfied).

102. *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 825 (9th Cir. 2012) (affirming the district court's approval of a *cy pres*-only settlement on the grounds that individual awards would be *de minimis*).

103. *See, e.g.*, Nachshin v. AOL, LLC, 663 F.3d 1034, 1036 (9th Cir. 2011); Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007).

104. *See, e.g.*, *Lane*, 696 F.3d at 822 ("[A] district court should not approve a *cy pres* distribution unless it bears a substantial nexus to the interests of the class members.").

105. *See* Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1309 (9th Cir. 1990) (finding the *cy pres* distribution did not adequately target the plaintiff class).

106. *Id.* (finding distribution improper because the interests of the *cy pres* recipient, an organization devoted to providing humanitarian aid, did not align with the interest of a class made up of farm laborers).

107. *See, e.g.*, Houck v. Folding Carton Admin. Comm., 881 F.2d 494, 502 (7th Cir. 1989) (remanding for the district court to consider to some degree a "broader nationwide use of its *cy pres* discretion" because the case involved nationwide harm).

108. *See Nachshin*, 663 F.3d at 1036 ("*Cy pres* distributions must account for . . . the objectives of the underlying statutes . . . ."); *In re* Airline Ticket Comm'n Antitrust Litig. Travel Network, 307 F.3d 679, 683 (8th Cir. 2002) (explaining that a proper *cy pres* recipient should relate to the statutory injury).

109. *See, e.g.*, *In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1396–99 (N.D. Ga. 2001) (distributing $1.85 million from a price-fixing class action settlement relating to merchandise sold at professional stock car races to a children's hospital); Superior Beverage Co., Inc. v. Owens-Illinois, Inc., 827 F. Supp.

others have opined that the recipient's identity is irrelevant so long as the settlement functions as a deterrent.[110]

A court's particular stance toward the theory behind the doctrine's importation into the class action context influences its approach to both questions—that is, whether the circumstances trigger the use of *cy pres* and whether the *cy pres* recipients are appropriate.[111] The *cy pres* doctrine emerged within the class action settlements context to strike a balance between two competing objectives: compensation and deterrence.[112]

Compensating small individual harms is a primary objective of the class action, particularly where the cost of individual litigation would outweigh the value of recovery.[113] Escheatment undermines the compensation objective because the benefit of the settlement distributes to persons whom the defendant has not harmed.[114]

Class actions also serve a deterrence objective.[115] While government agencies properly deter misconduct consistent with the law,[116] the Supreme Court has acknowledged that the class action device provides a mechanism by which private parties can seek remedies for injuries that have gone unaddressed by the govern-

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477, 480 (N.D. Ill. 1993) (awarding $2 million from an antitrust class action settlement to an art museum, the American Jewish Congress, a public television station, and the ACLU).

110. *See* Hughes v. Kore of Ind. Enter., 731 F.3d 672, 676 (7th Cir. 2013).

111. *Compare In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 174 (3d Cir. 2013) (emphasizing the importance of assessing the "degree of direct benefit provided to the class" when deciding whether to approve a *cy pres* settlement), *with Hughes*, 731 F.3d at 677–78 (suggesting a preference for *cy pres* due to its ability to preserve the deterrent objective of class actions).

112. *In re Baby Prods.*, 708 F.3d at 172; *see generally* Shepherd, *supra* note 10 (arguing that incorporating the *cy pres* doctrine into the context of class action settlements would offset the undermining effects of escheatment and reversion).

113. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (finding that "[e]conomic realities" sometimes demand that an individual's claim be asserted through the class action device to compensate individuals for minor injuries).

114. *In re Baby Prods.*, 708 F.3d at 172.

115. *See, e.g.*, *Hughes*, 731 F.3d at 677 ("A class action, like litigation in general, has a deterrent as well as a compensatory objective."); Blackie v. Barrack, 524 F.2d 891, 903 (9th Cir. 1975) ("The availability of the class action to redress such frauds has been consistently upheld . . . in large part because of the substantial role that the deterrent effect of class actions plays in accomplishing the objectives of the securities laws.") (citations omitted).

116. *See, e.g.*, William B. Rubenstein, *On What a Private Attorney General Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2139 (2004) ("[P]rivate attorneys represent individual clients with private interests while public attorneys represent the citizenry at large pursuing their public interest.").

ment regulatory system.[117] Reversion undermines deterrence by allowing defendants to "walk[ ] away from the litigation scot-free."[118]

While the *cy pres* doctrine theoretically preserves both objectives,[119] courts approach *cy pres* settlements with unspoken preference for one objective to the other's detriment.[120] An examination of divergent judicial rationales reveals the nature of this unspoken favoritism.[121]

A. Courts that Favor the Compensation Objective

1. The Third Circuit's "Degree of Direct Benefit" Test

The Third Circuit considered the propriety of *cy pres* settlements for the first time in 2013.[122] In *In re Baby Products Antitrust Litigation*,[123] the court reviewed a trial court's approval of a part *cy pres* settlement arising from a price-fixing lawsuit.[124] The settlement agreement required the defendants to deposit $35.5 million into a settlement fund for distribution through an individual claims process and mandated the disposal of unclaimed funds through *cy pres*.[125] The agreement allowed both parties to recommend up to two potential *cy pres* recipients, but it gave the court the power to choose the unclaimed funds' destination.[126]

The agreement entitled individual claimants to different levels of compensation based on the documentation they submitted.[127] The trial court estimated that the class would receive approximately $8.1 million of the settlement fund through individual distribu-

117. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.").

118. *Hughes*, 731 F.3d at 676.

119. *In re Baby Prods.*, 708 F.3d at 172 ("*Cy pres* distributions . . . preserve the deterrent effect, but . . . more closely tailor the distribution to the interests of class members, including those absent members who have not received individual distributions.").

120. *Compare In re Baby Prods.*, 708 F.3d at 174 (emphasizing the importance of assessing the "degree of direct benefit provided to the class" when deciding whether to approve a *cy pres* settlement), *with Hughes*, 731 F.3d at 677–78 (suggesting a preference for *cy pres* due to its ability to preserve the deterrent objective of class actions).

121. *Infra* Part III.D.

122. *See In re Baby Prods.*, 708 F.3d at 171.

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

124. *Id.* at 170.

125. *Id.*

126. *Id.*

127. *Id.* at 170–71.

tions.[128] However, on review, the Third Circuit found that the class would actually receive roughly $3 million because the majority of claimants were only eligible for the lowest level of compensation—a fact that the trial court was unaware of when it approved the settlement.[129]

The Third Circuit held that part *cy pres* settlements are permissible disposal methods for unclaimed settlement funds so long as the approving court directs the distribution to a third party that will use the award for "a purpose related to the class injury."[130] However, the court reversed the district court's decision, finding that the district court based its approval of the settlement on insufficient facts regarding the true amount of funds being distributed directly to the class.[131] The court further highlighted its preference for direct distributions[132] and emphasized that any settlement must be fair, reasonable, and adequate from the perspective of the class as a whole.[133]

The court also seized the opportunity to add an additional inquiry to the analysis it had previously established for approving class action settlements: the "degree of direct benefit" that the settlement provides to the class.[134] That additional inquiry, together with the court's mandate that *cy pres* distributions "be used for a purpose related to the class injury,"[135] arguably reflects the court's preference for preserving the compensation objective.[136]

The degree-of-direct-benefit test has impeded the use of *cy pres* within the Third Circuit.[137] For example, in *Johnson v. Famous Dave's of America, Inc.*,[138] a district court denied a *cy pres*-only settlement even after several attempts to distribute the settlement

128. *Id.* at 171.

129. *Id.*

130. *Id.* at 172.

131. *Id.* at 175.

132. *Id.* at 173.

133. *In re Baby Prods.*, 708 F.3d at 174.

134. *Id.* The court found several factors relevant to this inquiry, including "the number of individual awards compared to both the number of claims and the estimated number of class members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards." *Id.*

135. *Id.* at 172.

136. *See infra* Part III.D.

137. *See* Johnson v. Famous Dave's of Am., Inc., No. 12-344, 2013 WL 12149707, at *2 (E.D. Pa. Mar. 7, 2013) (denying approval of a *cy pres*-only settlement based on the Third Circuit's degree-of-direct-benefit test).

138. Johnson v. Famous Dave's of Am., Inc., No. 12-344, 2013 WL 12149707 (E.D. Pa. Mar. 7, 2013).

funds directly to the class failed.[139] The district court acknowledged that the proposed *cy pres* distribution resulted from the class's failure to submit any valid claims.[140] However, it nevertheless deemed the settlement invalid in light of the *Baby Products* decision because none of the funds would go to the "direct benefit to the class."[141]

More recently, a district court in the Third Circuit ostensibly sidestepped the degree-of-direct-benefit test altogether.[142] In *In re Google Inc. Cookie Placement Consumer Privacy Litigation*,[143] the United States District Court for the District of Delaware approved a $5.5 million *cy pres*-only settlement in an electronic privacy suit involving millions of potential class members.[144] In its opinion, the court did not mention the degree to which the class would benefit from the settlement.[145] Instead, the court deemed a factual distinction from *Baby Products* sufficient to render the decision inapplicable.[146] Rather than following the circuit's governing test, the court adopted an analysis commonly employed in other circuits;[147] it examined whether the *cy pres* distributions bore a "direct and substantial nexus to the interests of absent class members."[148]

2. *The Eighth Circuit's Strict Adherence to the "Next Best Recipient" Principle*

The Eighth Circuit has expressed skepticism toward the legitimacy of applying the *cy pres* doctrine to class action settlements.[149] Such skepticism has materialized in decisions that severely limit the use of *cy pres* settlements.[150] In *In re BankAmerica Corporation*

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139. *Id.* at *2.

140. *Id.* ("[T]he Court is sympathetic to concerns about . . . the difficulty of identifying the class members . . . .").

141. *Id.*

142. *See In re* Google Inc. Cookie Placement Consumer Privacy Litig., No. 12–MD–2358 (SLR), 2017 WL 446121, at *4–5 (D. Del. Feb. 2, 2017) (approving a *cy pres*-only settlement because the distributions bore a direct and substantial nexus to the interests of the class).

143. *In re* Google Inc. Cookie Placement Consumer Privacy Litig., No. 12–MD–2358 (SLR), 2017 WL 446121 (D. Del. Feb. 2, 2017).

144. *Id.* at *1, *4.

145. *See id.* at *1–5.

146. *Id.* at *4.

147. *See, e.g.*, Nachshin v. AOL, LLC, 663 F.3d 1034, 1036 (9th Cir. 2011).

148. *In re Google Inc.*, 2017 WL 446121, at *4.

149. *See In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1065 (8th Cir. 2015) (noting the potential for abuses that arise from applying a trust law doctrine to the context of class action settlement).

150. *See id.* at 1063–67.

Security Litigation,[151] the Eighth Circuit reversed a district court's approval of a part *cy pres* settlement which the parties proposed after two failed attempts to distribute the funds to the class.[152]

The lawsuit arose from alleged securities fraud claims, and the lower court initially resolved the case by approving a $490 million settlement.[153] Approximately $6.9 million remained in the settlement fund after the initial distribution in December 2004.[154] After a second court-ordered distribution in April 2009, approximately $2.4 million remained unclaimed.[155] After the second attempt to distribute the funds failed, the district court ordered the remainder of the funds to be disposed of via *cy pres*[156] and designated a Missouri legal services organization whose work included representing victims of fraud as the recipient.[157] The district court found that the organization was a satisfactory recipient because it served individuals in the geographic location where the majority of the victims resided and because the recipients would use the distribution to assist future victims of fraud.[158]

The Eighth Circuit found that the circumstances did not trigger an acceptable use of *cy pres*[159] and that the *cy pres* recipient was inappropriate.[160] Regarding the triggering requirement, the court found that *cy pres* settlements are permissible only when further individual distributions are not feasible.[161] The court explained that the feasibility inquiry "*must* be based *primarily* on whether 'the amounts involved are too small to make individual distributions economically viable.'"[162] The court seemingly implied that the parties must make additional distributions to individuals whose claims had already been fully satisfied before they may consider a *cy pres* distribution.[163]

Regarding the nexus requirement, the court suggested that the Missouri legal services organization was not an acceptable recipient

151. *In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060 (8th Cir. 2015).
152. *Id.* at 1062, 1067.
153. *Id.* at 1062.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 1069 (dissenting opinion).
158. *In re* Bank of Am. Corp. Sec. Litig., No. 4:99–MD–1264 (CEJ), 2013 WL 3212514, at *4–5 (E.D. Mo. June 24, 2013).
159. *See In re BankAmerica Corp.*, 775 F.3d at 1064–66.
160. *Id.* at 1067.
161. *Id.* at 1064.
162. *Id.* at 1065 (second emphasis added) (quoting PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07(c) (AM. LAW INST. 2010)).
163. *See id.* ("[A] *cy pres* distribution is not authorized by declaring . . . that 'all class members submitting claims have been satisfied in full.'").

because other organizations more "closely approximate[ ] the interests of the class."[164] The court noted that a *cy pres* recipient must serve "a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated."[165] Although the organization's work focused on a geographic region where many of the class members lived[166] and assisted fraud victims,[167] the Eighth Circuit nevertheless directed the district court to select a recipient "more closely tailored to the interests of the class and the purposes of the underlying litigation."[168]

B. Preserving Deterrence: The Seventh Circuit's "Purely Punitive" Approach

The Seventh Circuit views *cy pres* remedies as "purely punitive."[169] In *Hughes v. Kore of Indiana Enterprise, Inc.*,[170] the court reversed a district court's decision to decertify a class based, in part, on a finding that the class members could recover more substantial damage awards through individual lawsuits.[171] The original class action lawsuit alleged that the defendants, two companies that owned ATMs, violated the Electronic Funds Transfer Act[172] when they failed to post certain notices on their ATMs.[173] The statute entitles a plaintiff in an individual action to either actual damages[174] or statutory damages "not less than $100 nor greater than $1,000."[175] The statute entitles the class in a class action to "such amount as the court may allow," but the amount may "not be more than the lesser of $500,000 or 1 per centum of the net worth of the defendant."[176] The parties had stipulated to limit damages to $10,000—one percent of the defendants' net worth—and that more

164. *Id.* at 1067.

165. *Id.* (quoting *In re* Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 682 (8th Cir. 2002)).

166. *In re* Bank of Am. Corp. Sec. Litig., No. 4:99–MD–1264 (CEJ), 2013 WL 3212514, at *4 (E.D. Mo. June 24, 2013).

167. *See id.* at *5.

168. *In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1067 (8th Cir. 2015).

169. Hughes v. Kore of Ind. Enter., 731 F.3d 672, 676 (7th Cir. 2013); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004).

170. Hughes v. Kore of Ind. Enter., 731 F.3d 672 (7th Cir. 2013).

171. *Id.* at 675, 678.

172. 15 U.S.C. §§ 1693–1693r (2018) (establishing rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems).

173. Hughes v. Kore. of Ind. Enter., No. 1:11-cv-1329-JMS-MJD, 2013 WL 3467320, at *1 (S.D. Ind. July 10, 2013).

174. 15 U.S.C. § 1693m(a)(1).

175. *Id.* § 1693m(a)(2)(A).

176. *Id.* § 1693m(a)(2)(B).

than 2,800 transactions occurred in the relevant timeframe.[177] The district court noted that if the number of transactions that occurred resulted in 2,800 class members, individual recovery would amount to approximately $3.57.[178] Because the minimum recovery in an individual action would have been substantially higher under the circumstances, the lower court found the case unfit for class action treatment.[179]

On review, the Seventh Circuit noted the unlikelihood of individual lawsuits in such a case given the relatively small recovery available.[180] The Seventh Circuit also acknowledged that the individual awards expected to emerge from the class action were likely too small to incentivize class members to submit claims.[181] However, the court also observed that the class action provides the ideal mechanism for asserting small individual claims.[182] The court explained that class actions serve both compensatory and deterrent objectives.[183] It suggested that the damages sought in the case would likely "have a deterrent effect on future violations of the Electronic Funds Transfer Act by [the defendants] and others."[184]

The court then suggested that *cy pres* might provide the "best solution" to the settlement distribution issues.[185] In that instance, the court explained, application of *cy pres* was especially appropriate because it would preserve the deterrent value of the lawsuit, and because individual distribution would provide "no meaningful relief."[186] Importantly, the court stated that "prevent[ing] the defendant from walking away from the litigation scot-free" justifies the application of the *cy pres* doctrine in the class action context.[187] In the Seventh Circuit's view, *cy pres* distributions need not provide any indirect benefit to the class when the value of individual recovery is minimal because the settlement serves a "purely punitive" function.[188]

177. Hughes v. Kore of Ind. Enter., 731 F.3d 672, 674 (7th Cir. 2013).
178. *Hughes*, 2013 WL 3467320, at *7.
179. *Id.* at *8.
180. *Hughes*, 731 F.3d at 675.
181. *Id.*
182. *Id.* at 677.
183. *Id.*
184. *Id.* at 678.
185. *Id.* at 675.
186. *Id.*
187. *Id.* at 676.
188. *Id.*

C. *Linking* Cy Pres *to the Litigation: The Ninth Circuit's Approach*

The Ninth Circuit's approach to *cy pres* settlements emphasizes neither compensatory nor deterrent objectives, but instead focuses on the settlement's compatibility with the underlying litigation.[189] Under the Ninth Circuit's approach, *cy pres* provides a permissible means for disposing of "unclaimed or non-distributable" settlement funds.[190] The court deems settlement funds "non-distributable" when "the proof of individual claims would be burdensome or distribution of damages costly."[191] For example, the court has found settlement funds "non-distributable" when the value of individual awards would be *de minimis*.[192]

While the court requires *cy pres* distributions to constitute the "next best distribution,"[193] its interpretation of the "next best" principle is not as strict as some of its sister courts.[194] In the Ninth Circuit's view, a *cy pres* recipient may qualify as the "next best distribution" if it "bears a substantial nexus to the interests of the class members."[195] The court considers two factors when assessing the nexus requirement: the objectives of the statutes on which the plaintiffs base their claims and the interests of the silent class members.[196]

First, the court examines the objectives of the statutes on which the plaintiffs base their claims.[197] For example, in *In re Google Referrer Header Privacy Litigation*,[198] the court found that organizations dedicated to Internet privacy were permissible *cy pres* recipients because the plaintiffs' claims arose out of alleged online privacy violations.[199] By contrast, the court in *Nachshin v. AOL,*

189. *See* Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011) ("[*C*]*y pres* distribution[s] must be guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members.").

190. Lane v. Facebook, Inc., 696 F.3d 811, 819 (9th Cir. 2011).

191. *Id.*

192. *See In re* Google Referrer Header Privacy Litig., 869 F.3d 737, 741–42 (9th Cir. 2017).

193. Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990).

194. *Compare id.*, *with In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1067 (8th Cir. 2015).

195. *Lane*, 696 F.3d at 821.

196. *See In re Google*, 869 F.3d at 743 ("[W]e require *cy pres* awards to meet a 'nexus' requirement by being tethered to the objectives of the underlying statute and the interests of the silent class members.").

197. *Id.*

198. *In re* Google Referrer Header Privacy Litig., 869 F.3d 737 (9th Cir. 2017).

199. *Id.* at 743–44.

LLC,[200] a case involving electronic communications privacy claims, found *cy pres* distributions to a legal aid organization, the Boys and Girls Club, and the Federal Judicial Center Foundation were improper because none of the recipients' work aligned with "the objectives of the underlying statutes on which [the plaintiffs based] their claims."[201]

Second, the court considers the interests of the silent class members.[202] The court determines whether the recipient's work serves common interests of the class as a whole.[203] It also examines the geographic scope of the recipient's work to ensure that the benefits derived from the settlement distribute across the class.[204]

D. Assessing the Current State of Cy Pres *Among the Circuits*

A thorough assessment of *cy pres* settlements should first take into account the theory behind the *cy pres* doctrine's application to the class action context.[205] Courts imported the *cy pres* doctrine into class action settlements to preserve two unique objectives of the class action: compensation and deterrence.[206] Previously, alternative methods of disposing leftover settlement funds undermined both objectives.[207] The *cy pres* doctrine provided a mechanism to dispose of non-distributable settlement funds while preserving an indirect benefit to injured parties[208] and disincentivizing misconduct.[209]

Over time, however, the various approaches courts have taken to assess *cy pres* settlements have disturbed the balance that *cy pres* established.[210] Rather than using the *cy pres* doctrine to preserve the compensatory and deterrence objectives, courts tend to elevate the preservation of one objective over the other.[211] The Third Circuit's degree-of-direct-benefit test ensures that injured parties re-

200. Nachshin v. AOL, LLC, 663 F.3d 1034 (9th Cir. 2011).

201. *Id.* at 1040.

202. *See* Lane v. Facebook, Inc., 696 F.3d 811, 821 (9th Cir. 2011).

203. *See Nachshin*, 663 F.3d at 1040.

204. *Id.*

205. *See* Shepherd, *supra* note 10, at 452 (proposing the use *cy pres* in class action settlements to balance the negative effects of other settlement distribution options).

206. *See id.*

207. *Id.*

208. *In re* Google Referrer Header Privacy Litig., 869 F.3d 741 (9th Cir. 2017).

209. Hughes v. Kore of Ind. Enter., 731 F.3d 672, 675–78 (7th Cir. 2013).

210. *Supra* Part III.A–C.

211. *Supra* Part III.A–C.

ceive compensation for their injuries.[212] But the test fails to account for situations where a recipient whose interests align with the class injury does not exist.[213] Nor does it leave room for situations where the class receives only minimal monetary benefits,[214] such as settlements that produce *de minimis* individual awards.

Similarly, the Eighth Circuit's strict adherence to the "next best recipient" principle preserves the compensation objective by requiring the parties to identify recipients that will provide the greatest benefit to the class.[215] Unfortunately, by demanding a near-perfect match, the court fails to account for situations in which a near-perfect match does not exist.[216] The rigidity of the court's requirements diminishes deterrence, making it more likely that defendants will "walk[ ] away from the litigation scot-free."[217]

In contrast, the Seventh Circuit's "purely punitive" approach preserves the deterrence objective by facilitating class action suits with relatively insignificant individual recoveries.[218] But this approach risks opportunities for abuse that cause harm to the class.[219] Plaintiffs' attorneys might more willingly settle for lower damages if they can collect their fees sooner. The "purely punitive" approach provides those attorneys the mechanism needed to carry out such a dubious strategy and circumvent a searching inquiry into the fairness of the settlement to the class as a whole.[220]

Cy pres settlements clearly require judicial recalibration. Perhaps a variant of the Ninth Circuit's approach—anchored by the class action objectives of compensation and deterrence—might restore the equilibrium.

E. Balancing the Objectives: A Proposed Solution

1. The Triggering Requirement

Although *cy pres* settlements constitute a unique type of class action settlement, approval is nevertheless contingent on a court's

212. *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013).
213. *Id.*
214. *See* Lane v. Facebook, Inc., 696 F.3d 811, 825 (9th Cir. 2012) (deeming the indirect benefit of a *cy pres*-only distribution appropriate because direct distribution to the class would be too burdensome).
215. *See In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1063–67 (8th Cir. 2015).
216. *See id.*
217. Hughes v. Kore of Ind. Enter., 731 F.3d 672, 676 (7th Cir. 2013).
218. *Id.* at 677.
219. *See* Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784–85 (7th Cir. 2004).
220. *Id.* at 785.

finding that the settlement is "fair, reasonable, and adequate."[221] Additionally, each class member has a constitutionally recognized property interest in the claims that the settlement resolves.[222] In light of these principles, courts should only approve *cy pres* distributions when direct distribution to the class is infeasible.[223]

For part *cy pres* settlements, courts should deem direct distribution infeasible when settlement funds remain unclaimed after the individual claims process deadline.[224] Pro rata distributions to class members who have received their entire share of the settlement may be preferable.[225] However, the parties' decision not to distribute the funds pro rata should not bar approval unless the statutes upon which the plaintiffs based their claims serve strict compensatory objectives.[226] Choosing *cy pres* distribution over pro rata distribution would not undermine the compensatory objective because *cy pres* distribution spreads the benefit of the settlement across the class rather than concentrating it with a few identifiable members.[227] However, should the parties choose *cy pres* distribution, the recipient should align closely with the interests of the class to ensure that the class derives an actual indirect benefit from the distribution.[228] In the context of *cy pres*-only settlements, courts should deem direct distribution infeasible if either: (1) individual awards are *de minimis* and the cost of distribution exceeds the award or (2) identifying class members is exceedingly difficult.[229]

2. The Nexus Requirement

Similar to the Ninth Circuit's approach, assessment of proposed *cy pres* recipients should begin with an examination of the substantive statute upon which the plaintiffs base their claims.[230] However, rather than focusing on the injury the statute seeks to address, courts should focus on the broader purpose of the statute—specifically, whether the legislature intended the statute to

221. FED. R. CIV. P. 23(e)(2); *see also In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172–73 (3d Cir. 2013) (discussing how *cy pres* settlements are subject to Rule 23(e)(2)).

222. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807–08 (1985).

223. *See* Lane v. Facebook, Inc., 696 F.3d 811, 821 (9th Cir. 2011).

224. *See id.* at 819.

225. *See* Powell v. Georgia-Pacific Corp. 119 F.3d 703, 706–07 (8th Cir. 1997).

226. *See In re* Holocaust Victim Assets Litig. Pink Triangle Coal., 424 F.3d 158, 168 (2d Cir. 2005).

227. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013).

228. *See* Nachshin v. AOL, LLC, 663 F.3d 1034, 1040 (9th Cir. 2011).

229. *See* Lane v. Facebook, Inc., 696 F.3d 811, 821 (9th Cir. 2011).

230. *See Nachshin*, 663 F.3d at 1039.

compensate injured parties or deter misconduct.[231] Courts make similar assessments in other areas of class actions.[232] For example, courts have considered whether Congress intended a substantive statute to serve compensatory or deterrent objectives to assess whether a case is suitable for class action treatment.[233]

If a court finds that Congress intended the underlying statute to serve primarily compensatory objectives, the parties should designate a recipient that aligns with the common interests of the class.[234] This determination should account for both the injury involved and the geographic scope of the class.[235] However, courts should not demand a perfect fit.[236] Divesting a defendant of ill-gotten gains may be a benefit in itself.[237] But in cases where no potential recipient that remotely aligns with the interests of the class exists,[238] parties should consider soliciting input from identifiable class members.[239] Some scholars have suggested the use of voting and crowd-sourcing technology.[240] And courts have looked favorably upon the practice of soliciting direct input from the class during the selection process.[241]

Where the underlying statute serves a deterrence objective, the "next best recipient" should be anyone but the defendant.[242] For claims based on statutes intended to deter misconduct, the common interest of the class is to divest the defendant of ill-gotten gains.[243] And the class nevertheless benefits from both having its injuries vindicated and ensuring general deterrence against similarly situ-

231. *See* Hughes v. Kore of Ind. Enter., 731 F.3d 672, 677 (7th Cir. 2013) ("A class action, like litigation in general, has a deterrent as well as a compensatory objective.").

232. *See* Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.3d 1301, 1306–07 (9th Cir. 1990) (examining the underlying purpose of a statute to determine whether treatment of the case as a class action was preferred over individual litigation).

233. *Id.*

234. *See Lane*, 696 F.3d at 821.

235. *Id.*

236. *See In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1067 (8th Cir. 2015).

237. *See* Hughes v. Kore of Ind. Enter., 731 F.3d 672, 677 (7th Cir. 2013).

238. The parties should reach this conclusion only after a good faith effort.

239. *See In re BankAmerica*, 775 F.3d at 1066.

240. *See* Chris J. Chasin, Comment, *Modernizing Class Action* Cy Pres *Through Democratic Inputs: A Return to* Cy Pres Comme Possible, 163 U. PA. L. REV. 1463, 1488–90 (2015).

241. *See In re BankAmerica*, 775 F.3d at 1066.

242. *See Hughes*, 731 F.3d at 675–78.

243. *See id.* at 677.

ated actors.[244] The parties would benefit from soliciting class input here as well, as it would provide the class an opportunity to determine how to carry out the deterrence function.[245]

IV. CONCLUSION

This Comment draws attention to the inconsistent ways in which federal courts approach *cy pres* settlements. In so doing, it illuminates how those inconsistencies derive from, and run counter to, the rationale behind the *cy pres* doctrine's importation into the class action context. A close examination of how federal courts assess *cy pres* settlements reveals unspoken judicial favoritism of the competing class action objectives that *cy pres* settlements aim to preserve.[246] Courts must recalibrate their analytical frameworks to ensure that the benefits of *cy pres* settlements remain viable.

Cy pres settlements offer a functional method for disposing of otherwise non-distributable settlement funds.[247] A comparison of the available disposal methods shows that a properly executed *cy pres* settlement is more consistent with the underlying objectives of the class action than its counterparts.[248] But if *cy pres* settlements are to remain superior, courts must consider the rationale behind the *cy pres* doctrine's importation into the class action context.[249] Incorporating that rationale into their assessments of *cy pres* settlements might restore the equilibrium.

244. *See* Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* 195–202 (Vand. U. L. Sch., Working Paper No. 17-40, 2017), http://bit.ly/2Qz4q09.

245. *See In re BankAmerica*, 775 F.3d at 1066; Chasin, *supra* note 240, at 1488–90.

246. *See supra* Part III.A–D.

247. *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) (explaining the three options for disposing of non-distributable settlement funds).

248. *Id.* ("Among [the three disposal] options, *cy pres* distributions have benefits over the alternative choices.").

249. *See supra* Part III.E.