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March 16, 2015

Committee on Rules of Practice and Procedure  
Thurgood Marshall Building  
Administrative Office of the United States Courts  
One Columbus Circle NE  
Washington DC 20544

**Re: Potential Amendments to Federal Rule of Civil Procedure 23**

To the Members of the Advisory Committee on Civil Rules and the Rule 23 Subcommittee:

The American Antitrust Institute (“AAI”) is an independent non-profit education, research, and advocacy organization focused on improvement of the antitrust enterprise.<sup>1</sup> We write here specifically to address potential amendments concerning cy pres awards. AAI has a particular interest and expertise on the issue, having received several cy pres awards in the context of settled antitrust class actions and having had extensive discussions with class action attorneys and a variety of state antitrust officials about best (and less than best) practices regarding cy pres. Our article in *Antitrust Magazine* provides analysis of the law and practice, leading to a series of suggestions for best practices.<sup>2</sup> More recently we authored a chapter on cy pres in *The Private Enforcement of Antitrust Law in the United States*.<sup>3</sup>

**Generally supportive of ALI 3.07**

Cy pres is a valuable remedy in the settlement of antitrust class actions. It is far superior to returning unclaimed funds to defendants, which would constitute an entirely unjustified windfall, or turning the funds over to the state, which bears no necessary relationship to the victims of an antitrust violation. In general, we approve of the approach taken by the American Law Institute in section 3.07 of the *Principles of the Law of Aggregate Litigation*. The ALI recognizes a legitimate and valuable role for cy pres, sets priorities in favor of distribution to the extent feasible to members of

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<sup>1</sup> See [www.antitrustinstitute.org](http://www.antitrustinstitute.org).

<sup>2</sup> Albert A. Foer, *Enhancing Competition Through the Cy Pres Remedy*, 24 ANTITRUST 86 (Spring 2010).

<sup>3</sup> Albert A. Foer, *Cy pres as a remedy in private antitrust litigation*, in, PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE UNITED STATES, A HANDBOOK 349-64 (Albert A. Foer and Randy M. Stutz eds., 2012).

the class, and subjects any cy pres distribution to the rule of nexus, providing helpful citations and illustrations.<sup>4</sup>

### **The Fallacy of Automatically Assigning Subsequent Distributions to the Same Claimants**

We do have one basic qualm about the ALI strategy in that it rests on the concept that after claimants have been paid in accordance with the settlement terms, remaining funds should then be distributed (again and perhaps even yet again) to the same claimants on the theory that they have probably not received 100% of their damages. This is fallacious in theory and can be unjust in practice.

When a case is not litigated to a result, no one knows what, if any, damages might have been proven for the class as a whole or for any individual member. The pool of money and perhaps other valuable benefits (for example, changes in conduct) agreed to by the parties in a settlement cannot be taken to reflect actual individual damages; on the contrary, a settlement represents nothing more than a compromise between two or more sets of rival assumptions about the likelihood and extent of prevailing in a trial.<sup>5</sup> Thus, there is no principled basis for distributing to any member of the class any more than a proportionate share worked out in accordance with the settlement.

The situation is even more complicated because there can be many reasons why a member of the class (that is, anyone who has not made the effort to opt out) may not apply for or otherwise qualify for payment. In many cases, the process may seem too cumbersome or too time consuming to be worth the likely recovery. (Bear in mind that in most of these cases, end-use consumers are the members of the settlement class and their overcharges are frequently based on purchases of low-ticket items.) In other cases, the required evidence to substantiate a claim (e.g. receipts for small purchases) may not be available. There is no principled reason to promote the interests of successful claimants, who have already received what they are entitled to by the terms of the settlement, above

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<sup>4</sup> AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION Section 3.07 (2010): “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.
- (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.”

<sup>5</sup> For example, the plaintiffs may believe that the potential damages are \$100 million and the likelihood of success is 90%. The defendants may believe that potential damages are \$50 million and the likelihood of success is 50%. If the parties split the difference and settle at \$57.5 million, one could not say one way or another whether a full pro rata distribution has fully compensated a class member or not.

those of other class members, who can be benefitted at least indirectly by appropriate cy pres distributions.

An iron-clad rule that remaining money after a first distribution must automatically go to the successful claimants does not seem to be justified, although there may be situations where the court can determine that this direct interest outweighs the less direct interests of the entire class or portions of the class that could not be located. And, of course, the cost of further individualized distributions must be taken into account.

### **Appropriate Cy Pres Recipients**

As case law and commentary amply require, an appropriate cy pres recipient will have some relation to the members of the class or to the purpose of the litigation, with a geographic mission that relates to the class.

There can be no detailed rules to eliminate a judgment factor as to whether a particular cy pres recipient is justifiable in a particular circumstance, as each situation is likely to be unique. Courts now have sufficient guidance to assure that a settlement, including cy pres, furthers the interests of the class.

It is important to recognize that the interests of the class may be found in the betterment of enforcement of the law under which the litigation was initiated. This is consistent with the ALI's commentaries.<sup>6</sup> And it is consistent with grants that have been made to the American Antitrust Institute in antitrust class actions.

Many of the complaints that have been raised about cy pres involve a failure to assure a nexus between the class and the use of the cy pres funds. We believe that the nexus rule is now better understood and is only in need, at most, of restating.

### **Conflicts**

Another voiced complaint is that there have been conflict-of-interest situations, where, for example, the judge approves or even actively directs the money to a charity of which he or she is an active supporter and which is unrelated to the case. These risks can be addressed by transparency requirements, to the extent they are not resolved by following the rule of nexus. We do not believe that a conflict exists if an attorney who participates in the selection process is merely affiliated with an otherwise appropriate recipient, provided that the attorney receives no material benefit and that arguable conflicts have been made known to the court.

A related issue is whether plaintiffs' attorneys' fee award should exclude consideration of the valuation of cy pres relief gained or the time spent in arranging such an award. Provided the relief follows the rule of nexus, we believe that attorneys' compensation should reflect the work involved

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<sup>6</sup> E.g., in the ALI's Illustration 2, the NAACP Legal Defense Fund was not a party to the class action, but the case involved enforcement of the civil rights statutes, the special cause of the fund. The commentary rightly concludes that the NAACP Legal Defense Fund would be an "appropriate" recipient.

in, and the benefits of, cy pres relief. Practically speaking, removal of cy pres from consideration in calculating a reasonable fee would deny the value of the lawyer's work and would thereby reduce the incentive for taking on the risks and expenses of a class action, where it is most often not known far in advance whether cy pres will be part of the remedy. Restricting attorneys' compensation in this manner will further reduce the chances of future antitrust victims receiving compensation and will thus undermine the deterrence objective of the antitrust laws.

### **AAI's Proposed Language for a New Rule 23 (e)(3)**

We recommend that the following amendment to Rule 23:

- (3) A class action settlement may provide for a cy pres distribution for all or part of the class fund in appropriate circumstances, including: (a) where direct payments to members of the class are not economically or administratively feasible or (b) where funds remain after an initial distribution has been made to qualified claimants and a further distribution may be economically and administratively feasible, but the benefits and fairness of a further distribution to the same claimants are outweighed by the benefits and fairness to the entire class or a portion thereof of a proposed cy pres distribution.

In determining the propriety of a cy pres distribution, the court:

(a) must consider:

1. whether the mission of the proposed cy pres recipient(s) is consistent with the purpose of the litigation and the underlying legal claims, such that the indirect interests of the class, taken as a whole, are likely to be benefitted;
2. whether the location or geographic service area of the proposed cy pres recipient(s) is consistent with that of the class, or the portion of the class that cannot be located;
3. whether the funds, once distributed to the cy pres recipient(s), will be free of any control by the parties and subject to a reasonable process for accounting; and

(b) may consider any other matter pertinent to ensuring that the cy pres distribution is appropriate.

We would be pleased to discuss this proposal with the Committee and appreciate your consideration.

Sincerely,

Diana L. Moss

Handwritten signature of Diana L. Moss in black ink.

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