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PROMOTION OF ANTITRUST AND THE PUBLIC INTEREST  
THROUGH USE OF CY PRES DISTRIBUTION

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This memorandum has been prepared for attorneys in antitrust class actions who may find themselves in the position of advising the court on the distribution of excess funds. We provide legal and tactical information on *cy pres* distribution with the hope that some funds will be directed to public interest organizations such as the American Antitrust Institute that can help the court carry out the purposes that originally motivated the litigation from which the *cy pres* fund arises.<sup>2</sup>

1. Introduction

Where a litigated or settled aggregate class recovery cannot feasibly be distributed to individual class members or where a balance of a class recovery remains after payment of claims to individual class members, courts and counsel are required to formulate alternative distributions of these remaining funds.<sup>3</sup> These alternative distributions may

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<sup>2</sup> The AAI does not engage in the practice of law. Those who utilize this analysis are encouraged to consult an attorney familiar with the jurisdiction in question.

<sup>3</sup> Rule 23 of the Federal Rules of Civil Procedure provides that the judgment in a class action binds all class members who have not requested exclusion from the suit. This provision reflects the assumption that silence does not signify opposition to the maintenance of the suit, and “has created a problem in large class actions for damages where class members remain silent even after a judgment or settlement in their favor

include reversion to the defendants, escheat to the governmental body, and various forms of indirect distributions as well as a combination of these approaches.

Another method of distribution that may help promote the public interest in a class action antitrust case is *cy pres*.<sup>4</sup> The *cy pres* doctrine permits these residual funds to be distributed for the indirect prospective benefit of class members.<sup>5</sup> The doctrine originated in the common law with reference to the fair disposition of charitable trusts that would otherwise fail,<sup>6</sup> and today, California appears to be the only state that has a statute unequivocally authorizing *cy pres* distribution.<sup>7</sup>

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has been reached and do not attempt to collect their shares of the recovery.” Stewart R. Shepherd, “Damage Distribution in Class Actions: The *Cy Pres* Remedy,” 39 *U. Chi. L. Rev.* at 448 (1972).

<sup>4</sup> *Cy pres* distribution may be used not only in antitrust class actions, but also class actions of other law fields, such as mass tort cases, environmental cases, and civil rights cases. However, in all situations, as set out in detail below, the objectives of the underlying statute or litigation and interest of class members should lead the courts to seek the “next best use” of the residual funds.

<sup>5</sup> Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 10.17. (3<sup>rd</sup> Ed. 1992). The courts have the general equity powers to determine how to distribute the funds and defendants do not have standing to contest this issue once they have been found liable for the aggregate damages. *Id.* § 10.16. “Neither the class members nor the settling defendants have any legal right to unclaimed or excess funds.” “Where no legal claim to settlement benefits exists, a court can exercise its equitable powers to distribute the remaining funds.” *In re: Motorsports Merchandise Antitrust Litigation*, 160 F. Supp. 2d 1392 (N.D. Ga. 2001) (citing *Powell v. Georgia-Pacific Corp.*, 843 F. Supp. 491 (W.D. Ark. 1994)).

<sup>6</sup> Newberg & Conte, *supra* note 5, § 10.17. “The *cy pres* doctrine is a judicial saving device applicable to charities which enables the court, when it is impossible, impractical or illegal to effectuate the precise intention of the donor, to direct the application of the property to a charitable purpose as near as possible to the precise objective of the donor, provided that the intention of the donor was general and not specific.” Edith L. Fisch, Doris Jonas Freed, Esther R. Schachter, *Charities and Charitable Foundations* 413-414 (Lond Publications 1974).

<sup>7</sup> California Code of Civil Procedure section 384 (a) provides: “[I]t is the intent of the Legislature in enacting this section to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Californians.” Section 384 (b) provides that “the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue, plus interest on that sum at the legal rate of interest from the date of entry of the initial judgment, to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent.”

## 2. The Scope of the Cy Pres Doctrine

### A. *Manageability of Class Action*

As a matter of practice, there is no issue of the distribution of residual funds until after the defendant's liability to the class is found and aggregate damages for the class are awarded. In other words, a *cy pres* distribution does not affect any management problems associated with threshold class proof of liability and amount of damages.<sup>8</sup> In the case of *Six Mexican Workers v. Arizona Citrus Growers*,<sup>9</sup> the court stated that "the existence of a large unclaimed damage fund does not necessarily make a class action 'unmanageable'"<sup>10</sup> and that the district court properly adopted a *cy pres* procedure "only for the limited purpose of distributing unclaimed damages," not to avoid individual proof of damages.<sup>11</sup>

### B. *Cy Pres Distribution and Price Reduction or Market Distribution*

There are two approaches to make a proper disposition of residual funds: an aggregate *cy pres* distribution; and a price reduction or market distribution. The *cy pres* doctrine permits unclaimed or residual class action funds to be put to their next best use for the aggregate, indirect, prospective benefit of class members (aggregate *cy pres* distribution). It has been affirmed that the courts have broad discretion to determine how to direct the funds to their next best use and to identify qualified recipients,<sup>12</sup> and the funds are usually paid to a third party or agency to use for designated purposes.

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<sup>8</sup> Newberg & Conte, *supra* note 5, §§ 10.17, 10.21.

<sup>9</sup> 904 F.2d 1301 (9<sup>th</sup> Cir. 1990).

<sup>10</sup> *Id.* at 1306.

<sup>11</sup> *Id.* at 1308. In *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 at 1018 (2<sup>nd</sup> Cir. 1973), the court held that the "fluid recovery" procedure could not be used as a solution of the manageability problems of class actions.

<sup>12</sup> See Kevin M. Forde, "What Can a Court Do with Leftover Class Action Funds? Almost Anything!," The Judge's Journal, 19 (summer 1996).

Undistributed class funds may also be used for the prospective benefit of individual class members and others similarly situated who engage in future transactions of the type involved in the class litigation (price reduction or market distribution), and, in that event, the funds remain either in the possession of defendant or in an escrow account.<sup>13</sup> It should be noted, however, that the latter approach has been rejected by some courts<sup>14</sup> and commentators for reasons that the defendant may gain a competitive benefit from the reduced price and the injured class members are required to make further purchases of the litigated product in order to receive their recoveries.<sup>15</sup> Particularly in antitrust cases, the economic ramifications and the effect on competition of price reduction in the relevant markets should carefully be examined.

### C. *The Cy Pres Fund*

*Cy pres* funds result in situations where either individual recovery to class members is impossible or impractical,<sup>16</sup> or where class members are not identifiable,<sup>17</sup>

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<sup>13</sup> Newberg & Conte, *supra* note 5, §§ 10.17-10.18. “Price reduction distribution is basically a device whereby a lump sum damage judgment or unclaimed balance is distributed not to the class members directly, but in a way that will give most or all of them an indirect benefit, usually by making the product or service that was the subject of the suit less expensive in the future.” For example, in *Colson v. Hilton Hotels Corp.*, 59 FRD 324 (N.D. Ill. 1972), “an antitrust suit charging unlawful hotel charges on incoming phone calls, the settlement required the unclaimed balance of the common fund to be credited for the benefit of future guests at the rate of 50 cents per occupied room per stay.” *Id.*

<sup>14</sup> See *State of California v. Levi Strauss & Co.*, 715 P.2d 564, at 572 (Cal. 1986). The court stated that “[T]his method is not appropriate in nonmonopoly markets like the jeans market since it compels consumers to collect their refunds by making further purchases of the defendant’s products, to the detriment of the defendant’s competitors.”

<sup>15</sup> Forde, *supra* note 12, at 19. See also Shepherd, *supra* note 3, at 461-465.

<sup>16</sup> See *Jones v. National Distillers*, 56 F. Supp. 2d 355, 358 (S.D.N.Y.) (stating that with “17,198 class members, the postage and administrative costs of distributing \$18,400.80 to all qualified claimants would be prohibitive and the amount per recipient would be negligible.”). See also Brad Seligman & Jocelyn Larkin, *Fluid Recovery and Cy Pres: A Funding Source for Legal Services (Federal Version)*, at <http://www.impacthund.org/CyPres2000FED.html>

<sup>17</sup> See *Six Mexican Workers*, *supra* note 9, at 1306, 1307. In this case, defendant’s failure to record and retain the addresses of its workers as required by the statute caused numerous unlocatable class members and the court denied the defendant’s claim that the number of unlocated class members made the class action unmanageable and that the *cy pres* award could not be used to rectify the problem.

cannot be found, or fail to timely file claims for recovery, and only after courts have considered and rejected other options, such as reversion to the defendants, escheat, or options that do not create a residual fund, such as price reduction or market distribution.<sup>18</sup> However, this does not mean that the distribution of funds should be restricted by escheat laws or other state abandoned property statutes.<sup>19</sup> In *In re: Folding Carton Antitrust Litigation*,<sup>20</sup> the Seventh Circuit at first held that “establishing an unneeded Foundation [a tax-exempt Foundation for research on complex antitrust litigation] for these purposes from the reserve fund would be a miscarriage of justice and an abuse of discretion.” “Instead [the court directs] that the remainder of the reserve fund escheat to the United States.” The parties then agreed that the fund would be distributed between class members and law schools, and the district court approved this settlement. Subsequently, the Seventh Circuit again voided the grants to the law schools for the reason that the earlier decision which prohibits the distribution of funds for antitrust purposes still “remains and shall not be circumvented by the parties or the district court” but stated that “it may be appropriate for the district court on remand to consider to some degree a broader nationwide use of its cy pres discretion.”<sup>21</sup>

At the early stage of this case, the court also discussed the legal status of the reserved fund.<sup>22</sup> The court first ruled that the defendants had relinquished any claim to any portion of the settlement fund because they irrevocably transferred the fund, and denied the defendants’ claims requesting distribution of the reserve fund to them. The court also determined that the claiming plaintiffs (former class members) whose claims

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<sup>18</sup> Armando M. Menocal, “Proposed Guidelines for Cy Pres Distribution,” *The Judge’s Journal* 22 (winter 1998).

<sup>19</sup> Forde, *supra* note 12, at 20. In *Van Gemert v. Boeing Co.*, 739 F.2d 730 at 735 (2<sup>nd</sup> Cir. 1984), the court held that the federal statute providing for the deposit of unclaimed funds in pending or adjudicated cases with the Treasurer of the U.S. did “not limit the discretion of the unclaimed portion of a class action judgment fund.”

<sup>20</sup> 744 F.2d 1252, at 1255 (7<sup>th</sup> Cir. 1984).

<sup>21</sup> 881 F.2d 494 at 502 (7<sup>th</sup> Cir. 1989). The Seventh Circuit, in this second opinion, did not exclude the law schools from “being the beneficiaries of some new appropriate *cy pres* use.” *Id.*

<sup>22</sup> 557 F. Supp. 1091 (N.D. Ill. 1983).

against the fund have been fully satisfied by receiving more than their anticipated share of the fund had no legal right against the fund, but non-claiming former class members who had failed to timely file claims against the fund had an equitable claim to the reserve fund.<sup>23</sup> Finally, the distribution of the unclaimed fund to the National Association for Public Interest Law (NAPIL) for fellowship program unrelated to antitrust law was approved by the court.<sup>24</sup>

#### D. *Recipients of the Fund*

Where settlement funds remain after distribution to class members, courts may permit charitable donations to organizations geared toward “combating harms similar to those that injured the class members.”<sup>25</sup> Courts may also distribute, under the *cy pres* doctrine, residual funds to public organizations which have no direct or indirect relationship to subject matter of the litigation<sup>26</sup> after the careful considerations necessary to tailor an award to the original purposes of the class action and its settlement.<sup>27</sup> In *Superior Beverage Co. v. Owens-Illinois*,<sup>28</sup> distributions of funds to charitable organizations not directly related to the plaintiffs’ original claims were approved. The

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<sup>23</sup> *Id.* at 1107.

<sup>24</sup> 1991 U.S. Dist. LEXIS 2553, 1991 WL 32867 (N.D. Ill. 1991).

<sup>25</sup> *In re: Motorsports Merchandise Antitrust Litigation*, supra note 5, at 1394. (citing *Jones*, supra note 16, at 358).

<sup>26</sup> Linda Zazove, “The Cy Pres Doctrine and Legal Service for the Poor: Using Undistributed Class Action Funds to Improve Access to Justice,” ABA National Institute on Class Actions (2001).

<sup>27</sup> *See In re: Airline Ticket Commission Antitrust Litigation*, 307 F.3d 679 (8<sup>th</sup> Cir. 2002). The case involved the claim that major airlines colluded in placing caps on commissions paid to travel agents. The court stated that “the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated” and that “[A] *cy pres* distribution to these agencies [travel agencies in Puerto Rico and the U.S. Virgin Islands, not member of the class] would relate directly to the antitrust injury alleged in this lawsuit and settled by the parties.” The court ruled that “unclaimed funds should first be distributed on a proportional basis to the travel agencies in Puerto Rico and the U.S. Virgin Islands which were subject to the caps” and left the details of the distribution to the district court’s discretion.

<sup>28</sup> 827 F. Supp. 477 (N.D. Ill. 1993). In this case, the court invited applications for *cy pres* grants by various ways including publishing a notice in the Wall Street Journal. After holding a hearing with all applicants, the court distributed the fund to non-profit legal groups, law schools and an art museum.

court discussed the history of the doctrine<sup>29</sup> and stated that it appeared “to have become more flexible” in recent years.<sup>30</sup> The court then held that although the use of funds for purposes closely related to their origin was the best *cy pres* application, the doctrine of *cy pres* and the courts’ broad equitable powers permitted the use of funds for other public interest purposes by educational, charitable, and other public service organizations.<sup>31</sup> Although many courts have approved the distribution of unclaimed funds to public, legal organizations, law schools, and even to an art museum as the next best use,<sup>32</sup> in the light of the origin and purpose of the *cy pres* doctrine, the remaining funds must first be distributed in the ways to enhance competition for the claimed industries as a recovery in antitrust class actions.<sup>33</sup>

### 3. Criticisms of *Cy Pres* Distribution

Plaintiffs may face objections to the proposed *cy pres* distribution on the ground that it would be a windfall to nonmembers of the class and members whose claims have already been paid, and that unclaimed funds should be returned to defendants to avoid unfairness.<sup>34</sup> Moreover, in *In re: Motorsports Merchandise Antitrust Litigation*, the defendants argued that “because the settlement documents do not address the issue of

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<sup>29</sup> *Id.* at 478. For example, the court stated that “where the testator’s dominant intent was that a separate building be built, using the funds to construct an addition to an existing building would not be allowable under *cy pres*, at least not where construction of a separate building was not actually impossible, citing *Connecticut College v. United States*, 107 U.S. App. D.C. 245, 276 F.2d 491 (D.C. Cir. 1960).

<sup>30</sup> *Superior Beverage*, *supra* note 28, at 478.

<sup>31</sup> *Id.* at 479.

<sup>32</sup> For a detailed list of cases that ordered *cy pres* distributions and the recipients, *see* Forde, *supra* note 12, at 21-23.

<sup>33</sup> *See, e.g., Superior Beverage*, *supra* note 28 (stating that the “use of funds for purposes closely related to their origin is still the best *cy pres* application.”); *In re: Airline Ticket Commission Antitrust Litigation*, *supra* note 27 (stating that “the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interest of class members, and the interest of those similarly situated.”).

<sup>34</sup> *See* Newberg & Conte, *supra* note 5, § 10.20.

distribution of excess settlement funds, the plaintiffs have served their intended purpose, and the court should use its equitable powers to return the surplus.”<sup>35</sup>

First, as to the issue of windfall, it is true that the *cy pres* distribution produces a windfall where the funds are repeatedly paid to class members who have already been fully compensated.<sup>36</sup> However, to the extent “that *cy pres* distribution actually benefits a sufficient number of injured class members, the monies paid to third parties are an incidental but necessary cost that must be accepted in order to confer the benefits in a feasible way to a large proportion of the injured class members.”<sup>37</sup> Second, returning the excess funds to the defendants would result in “giving a windfall to the wrongdoers,”<sup>38</sup> or result in awarding the defendants the benefit of their own wrongdoing.<sup>39</sup> The reversion would defeat the deterrence function of the underlying substantive cause of action.<sup>40</sup> Moreover, some cases have specifically ruled that defendants have no right against the unclaimed portion of the funds.<sup>41</sup> Finally, concerning the settlement documents argument, the court in *In re: Motorsports Merchandise Antitrust Litigation* stated that although a rule 23 class could not be certified using a fluid recovery or *cy pres* theory, excess funds could be distributed in such a manner once a settlement between the parties has been reached.<sup>42</sup>

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<sup>35</sup> *In re: Motorsports Merchandise Antitrust Litigation*, *supra* note 5, at 1394.

<sup>36</sup> See Forde, *supra* note 12, at 20 (citing *In re: Folding Carton Antitrust Litigation*, 881 F.2d 494, at 503 (7<sup>th</sup> Cir. 1989), *Van Gemert v. Boeing Co.*, 739 F.2d 730, at 736 (2<sup>nd</sup> Cir. 1984) and *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, at 811-812 (5<sup>th</sup> Cir. 1989)).

<sup>37</sup> Newberg & Conte, *supra* note 5, § 10.22.

<sup>38</sup> *Id.*

<sup>39</sup> *Friar v. Vanguard Holding Corp.*, 509 N.Y.S. 2d 374, at 376 (1986).

<sup>40</sup> Newberg & Conte, *supra* note 5, § 10.24.

<sup>41</sup> For example, *In re: Folding Carton Antitrust Litigation*, *supra* note 22, at 1101 (N.D. Ill. 1983).

<sup>42</sup> *In re: Motorsports Merchandise Antitrust Litigation*, *supra* note 5, at 1395.



#### 4. Procedural Issues

Although a *cy pres* distribution can be used in both adjudicated and settled cases, courts seem to be more comfortable to apply it in cases involving settlements.<sup>43</sup> For example, the court in *In re: Motorsports Merchandise Antitrust Litigation* mentioned that courts were “typically reluctant to authorize *cy pres* distributions in a litigated class action context,” but “when done in connection with a class action settlement, ‘these distributions have obtained a stamp of approval.’”<sup>44</sup> Therefore, the parties should anticipate the possibility of unclaimed or residual funds and provide the court with proposed language for provision for distribution of excess funds in the settlement agreement.<sup>45</sup> While the exact amount of the undistributed funds is usually not fixed at the time of settlement, it is possible to specify the method of distribution of the remaining funds.<sup>46</sup> Since the *cy pres* doctrine allows the courts to redirect the unclaimed funds to their “next best use”<sup>47</sup> or for a purpose “as near as possible” to the objectives of the lawsuit and the interests of class members or those similarly situated,<sup>48</sup> the application of the settlement should include “information about the purposes and goals of the proposed grantee, and an explanation of how a grant would further the interests of the class.”<sup>49</sup>

As the frequency of *cy pres* distribution has increased, problems relating to the fairness of distributions, such as the possible close relationship between plaintiff’s attorney and recipients, as well as the accountability and evaluation of proposals, are presented.<sup>50</sup> In most of the cases, a list of recommended recipients was offered by

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<sup>43</sup> See Newberg & Conte, *supra* note 5, §§ 10.17. 11.20.

<sup>44</sup> *In re: Motorsports Merchandise Antitrust Litigation*, *supra* note 5, at 1395 (citing Newberg & Conte, *supra* note 5, § 11.20.).

<sup>45</sup> Zazove, *supra* note 26.

<sup>46</sup> *Id.*

<sup>47</sup> See Menocal, *supra* note 18, at 22.

<sup>48</sup> *In re: Airline Ticket Commission Antitrust Litigation*, *supra* note 27, at 682.

<sup>49</sup> Seligman & Larkin, *supra* note 16.

<sup>50</sup> See Menocal, *supra* note 18, at 23.

plaintiff's counsel in a stipulated or unopposed order and the court generally accepted them.<sup>51</sup> Plaintiffs should carefully avoid any conflict of interest with the class in this selection of recipients. Alternatively, plaintiffs may also establish a procedure for selecting the beneficiaries instead of specifying the particular *cy pres* distribution recipients in the settlement.<sup>52</sup> In any event, fair and clear selection procedures should be established in order to fulfill the best interests of absent class members and to minimize disputes over the settlement.<sup>53</sup>

As a tactical matter, whether plaintiff's counsel should name specific recipients in a proposal as opposed to outlining generic qualifications, such as "public interest organization dedicated to enhance competition," is apparently not discussed in the literature. On one hand, courts have a broad discretion to determine how to distribute the residual funds and judges' view on the interest of class members or the adequate use of the funds may differ widely.<sup>54</sup> For example, in *In re: Motorsports Merchandise Antitrust Litigation*, antitrust action alleging defendants' conspiracy for price fixing, the court approved a *cy pres* distribution to charities not related to antitrust issues, including The Make-A-Wish Foundation and The American Red Cross. The court order explains that "[W]ith a donation of \$250,000, the Make-a-Wish Foundation estimates that it can fulfill the wishes of 44 children with life threatening illness in the year 2002" and that "[A] distribution to the Atlanta chapter of the American Red Cross will help further these important services [support given in the wake of natural disasters, health and safety programs, etc.]."<sup>55</sup> In *Superior Beverage Co. v. Owens-Illinois*, the court distributed the remaining funds to the Loyola University of Chicago College of Law stating that

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<sup>51</sup> *Id.* at 23.

<sup>52</sup> Seligman & Larkin, *supra* note 16.

<sup>53</sup> *Id.*

<sup>54</sup> See Forde, *supra* note 12, at 21. The author cites the *In re: Folding Carton Antitrust Litigation*, stating that "[T]he second Folding Carton opinion of the Seventh Circuit Court of Appeals appears to stand for the proposition that in an antitrust class action the *cy pres* doctrine allows for practically any charitable, educational, or legally-related purpose – except the creation of an antitrust foundation barred by its earlier opinion."

<sup>55</sup> *In re: Motorsports Merchandise Antitrust Litigation*, *supra* note 5, at 1396

“[U]sing antitrust case funds to study, from the perspective of consumers, the relationship between and the practices of various segments of the economy with initial focus on the health care field is clearly a cy pres utilization of funds remaining from an allegedly illegal price-fixing antitrust case.”<sup>56</sup> The court also approved the grant to the San Jose Museum of Art because “the Museum’s desire to acquire glass works of art is an appropriate public purpose” and “a ‘seed money’ grant from glass container antitrust funds is not inappropriate.”<sup>57</sup> On the other hand, it is pointed out that courts “often lack the familiarity and resources to identify alternative uses of the funds and potentially qualified recipients.”<sup>58</sup>

The initiative typically rests with Plaintiff’s counsel, who will need to keep foremost in mind the objective of ensuring the best interest of the class members, as this will be the primary legal argument to be made in favor of a proposal. Relevant considerations will include the anticipated attitudes of the judge and defense counsel. In some situations, it may be the better tactic to propose only that excess funds be distributed to public interest organizations that will promote effective competition in the industry where the antitrust problem occurred; in others, it may be enough to recommend named organizations, based on their general mission<sup>59</sup>; in others, one might propose

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<sup>56</sup> *Superior Beverage*, *supra* note 28, at 483.

<sup>57</sup> *Id.* at 485.

<sup>58</sup> *Menocal*, *supra* note 18, at 23.

<sup>59</sup> The American Antitrust Institute was recommended by a plaintiff’s attorney in *Law v. National Collegiate Athletic Association*, No. 94-2053 KHV (D. Kansas), a case relating to the NCAA’s alleged fixing of coach’s salaries, in the following context, quoting the Plaintiffs’ Motion and Memorandum in Support of Motion for Cy Pres Distribution of Settlement Fund:

“\$50,000 to Coaches vs. Cancer, a non-profit, tax-exempt organization, sponsored by the American Cancer Society and the National Association of Basketball Coaches, which raises money for American Cancer Society research, advocacy, education and patient services programs. Materials describing the Coaches vs. Cancer program are attached hereto as Exhibit A.

\$50,000 to the Betty F. Jaynes Internship Program, sponsored by the Women’s Basketball Coaches Association, which provides opportunities to gain professional and personal experience in the world of women’s sports. Materials describing the Betty F. Jaynes Internship Program are attached hereto as Exhibit B.

\$25,000 to the Boys and Girls Clubs of America, which sponsors multiple programs designed to

specifically named organizations along with specific projects that will carry out the intent of the litigation on behalf of the class<sup>60</sup>; and in still others, it might be most prudent to propose the appointment of a trustee to solicit specific proposals from a limited number of named organizations.<sup>61</sup> In general, the more vague the proposal, the more latitude the judge will have to transfer excess funds to his or her own pet charities. On the other hand, the more specific the proposal, the greater the likelihood it will trigger a negative response from defense counsel, particularly if the proposal is likely to enhance competition.

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teach young people the skills they need to succeed in life, including character and leadership, education and career, and sports, fitness and recreation programs. Materials relating to the Boys and Girls Clubs are attached hereto as Exhibit C.

\$50,000 to the Boy Scouts of America, which provides educational programs for boys and young adults to build character, to train in the responsibilities of participating citizenship, and to develop personal fitness. Materials relating to the Boy Scouts are attached hereto as Exhibit D.

\$50,000 to the Girl Scouts of America, which sponsors programs for girls designed to increase skill building and responsibility, and to promote the development of strong leadership and decision-making skills, including math, science and technology, environmental education and health, fitness and sports. Materials relating to the Girl Scouts are attached hereto as Exhibit E.

\$50,000 to the American Antitrust Institute, an independent, non-profit, tax-exempt, education, research and advocacy organization based in Washington, D.C. that is devoted to increasing competition and assuring that it is fair. Materials describing the work of the AAI are attached hereto as Exhibit F.

The remainder to one or more of the above charities, or to any other charity approved by the Court.”

The AAI received \$50,000.

<sup>60</sup> In *In re Motorsports Merchandise Antitrust Litigation*, *supra* note 5, Judge Thomas W. Thrash wrote to the American Antitrust Institute that one of the parties had suggested a distribution of some of the funds to the AAI in an amount potentially as large as \$250,000. He requested a written proposal of our intended use of the funds, which arose from a class action against vendors who allegedly fixed prices of souvenirs sold at NASCAR races. The case was settled prior to class certification. We proposed in detail a two-year project to benefit the class of automobile racing spectators as well as other consumers by studying how meaningful remedies can be provided to indirect purchasers who are injured by antitrust violations. We were not selected.

<sup>61</sup> In the Vitamin Anti-Trust Class Action Lawsuit in California, the court approved a settlement of the lawsuit which provides for distribution of the consumer class funds to improve the health and nutrition of California consumers, and to improve the enforcement of antitrust laws in California. A consumer advocate was selected to be Fund Administrator. Based on recommendation by a plaintiff’s attorney in the litigation, the Fund Administrator solicited a proposal from the AAI and others. We proposed to perform both an empirical and theoretical analysis of Power Buying and Competition in California. Recipients have not yet been selected.