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Abstract

CY PRES AS AN ANTITRUST REMEDY

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This paper discusses the *cy pres* doctrine and more specifically the courts' authority to use cy pres remedies in antitrust lawsuits. The doctrine allows undistributed or unclaimed residue of a settlement or class action damages to be used to provide indirect, prospective benefit of a class of consumers.

This paper argues that in antitrust cases the cy pres doctrine may be used as a remedy to restore competition within a specific market or to maintain competition more generally.

However, a cy pres distribution is legitimate only if it is linked, directly or indirectly, to the underlying purposes of the statue that was violated. While some fluid recoveries proposed to courts have adequately reflected this nexus between the scope of the lawsuit and the cy pres distribution, in other cases the nexus was completely absent. Such cases are particularly dangerous because they give the courts unfettered discretion to hand out money to any cause the judge or the lawyers personally favor.

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. Consistent with this, the cy pres doctrine can be utilized to assist the goals of antitrust.

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CY PRES AS AN ANTITRUST REMEDY

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In class action litigation involving the antitrust laws, it is often impossible or impracticable to compensate all victims. In such cases courts sometimes employ "cy pres" or "fluid recovery" to put the damage funds to "the next best use," such as awarding funds to public interest organizations or rolling back the price of the defendants' product.

This paper provides a brief overview of three non-pecuniary types of class action settlements, focusing on the cy pres doctrine. The paper will then argue that in antitrust cases the cy pres doctrine should be utilized as a remedy for the purpose of improving competitive conditions.

I. NON-PECUNIARY ASPECTS OF CLASS ACTION SETTLEMENTS

While cy pres may be part of an adjudicated remedy, it is more generally found in settlement agreements.[2] Typically, as part of a class action settlement, the class agrees to release the defendant from any and all liability with regard to the alleged claim and in exchange obtains the

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[2] According to Areeda, Hovenkamp and Blair,

> "[I]ts potential application is limited to cases where the total damages can be calculated without consideration of individual claims. Of course, this may be true in cases in which good data are available on the volume of sales that the defendant(s) made, although not on the identity of the purchasers. Further, the legality of such schemes has been questioned because it requires the defendant, in effect, to pay damages to people who have not established their injury and who may not even have been members of the class. Critics argue that class action procedures cannot displace the apparent requirement of Clayton Act § 4 that a plaintiff prove injury to its particular business or property. Thus it is one thing for a defendant to agree to settle a case by paying a certain amount into a general fund; it is quite another for a court to order payment to anyone who has not satisfied the Clayton § 4 requirements for proof of damages."

See P.E. Areeda, H.Hovenkamp, R.D. Blair, ANTITRUST LAW. AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, Aspen Law & Business. (2000)

payment of all court and administration expenses and attorneys' fees – considered as non-pecuniary components – as well as an immediate cash component.[3]

Indeed a non-pecuniary settlement has been defined as "settlement of a class action lawsuit in which the defendant, in exchange for a release of legal claims, provides consideration other than an immediate cash payment to defined members of the class."[4]

In the context of consumer antitrust class actions, when a distribution of the damages awarded to all the class members is impractical, inappropriate or impossible, or where there are unclaimed funds from an immediate direct distribution or market distribution, the courts have considered at least several options. We shall allude to three of these options: (1) reverter funds; (2) coupon distribution; and (3) cy pres distribution.

Reverter Fund Settlements

In reverter fund settlements, the defendant contributes cash to an escrow account to be paid out to class members who apply for funds pursuant to a pre-set claims process, with any unclaimed funds reverting to the defendant at the end of the set period.[5]

Courts and commentators have used a variety of labels to describe this sort of fund, where actual payout depends on the class members stepping forward to claim their share, and where any remaining money in the fund is returned to the defendant. In Boeing v. Van Gemert,[6] the U.S. Supreme Court described the settlement as creating a common fund where the defendant retained

[3] *See* G. P. Miller, L.S. Singer, *Nonpecuniary Class Action Settlements*, 60-AUT Law & Contemp. Probs. (1997). In certain circumstances, such as the defendant's financial distress, the court might award the attorneys a fee that comes directly from the settlement in kind, rather than a cash fee. *See, e.g.*, Seidman v. American Mobile Systems, 965 F. Supp. 612 (E.D. Pa. 1997).

[4] *Id.*

[5] *See, e.g.*, Boeing v. Van Gemert, 444 U.S. 472, 100 S. Ct. 745 (1980).

[6] 444 U.S. 472 (1980).

a "latent claim against unclaimed money in the judgment fund."[7] In In re Copley Pharmaceutical, Inc.,[8] the settlement agreement provided for "remittitur" to the defendant.[9] Other commentators have called this type of settlement a "claims-made distribution."[10] Herbert Newberg terms such settlements as containing a "recapture clause" allowing the defendant to recapture the unclaimed portion of the fund.[11] Most recently, in a statement accompanying the Court's denial of a petition for writ of certiorari, Justice Sandra Day O'Connor called this settlement a "reversionary fund."[12]

Despite the different terminology, the meaning is the same: the defendant places the designated funds into an escrow account, which is monitored by an agent; in order for class members to receive a distribution, they must apply to the escrow agent (or claims administrator) and at the end of the designated payment period, if any funds remain in the escrow account such funds revert to the defendant.[13]

It must be noted that the actual value of a reverter fund settlement to the class – and consequently the costs to the defendant – is dependent upon the number of class members who apply to receive the funds from the account; thus, although the potential total value of the settlement is known *ex ante*, it is very difficult to predict how effective a reverter fund will be in awarding damages to the offended parties. [14]

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[7] *Id.* at 482.

[8] 1 F. Supp. 2d 1407 (D. Wyo. 1998).

[9] *Id.* at 1408, 1412.

[10] *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 199 (2000); National Association of Consumer Advocates, Standards and Guidelines for Litigating and Settling Consumer Class Actions, 176 F.R.D. 375, 398 (1997). *See also* Robert P. Sugarman, *Settlement Terms, Approval and Enforcement*, 583 PLI/Lit 519 (April, 1998). It must be noted, however, that some class action settlements are described as “claims-made”, without any reversion of funds to defendants. For example settlement funds that are not claimed might be redistributed among the claimants who do submit claims or might be allocated to the next best use that would provide indirect benefit to the class (“cy pres” distribution). *See* Section III, *infra.*

[11] *See* Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS 12.11, at 12-31 (3d ed. 1992).

[12] *See* Int'l Precious Metals Corp. v. Waters, 530 U.S. 1223, 1223 (2000).

[13] *See* Miller & Singer, *supra* note 3.

[14] *Id.*

However, it must also be recognized that when an immediate cash payment to the class members is not feasible, a reverter fund may be a very efficient way to protect the settlement funds against the defendant's management or more simply against the claims of defendant's creditors, at least for a limited period of time and up to the limits of the fund.[15]

Unlike in product liability litigation, where damages can be computed (or estimated in cases of potential future harm) based on actual harm, reverter funds historically have not played a significant role in the antitrust context, because actual damages are often speculative.

Coupon Settlements

Coupon settlements are settlements in which class members do not receive an immediate cash payment, but rather the right "to obtain a discount on future purchases of the defendant's or possibly someone else's products or services." [16]

From the defendant's perspective, there are several benefits to a discount taking the form of a coupon settlement: (a) defendant obtains a release from legal claims; (b) consumers have an increased incentive to continue a business relationship that may have been impaired by the underlying cause of the litigation or the litigation itself; and (c) there are likely economic advantages in the difference between compensating at firm's cost rather than at retail, as well as the likelihood that fewer consumers will utilize the coupons than would have claimed cash.[17]

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[15] *Id.*

[16] *Id.*

[17] It might also be that no coupon is distributed, but class members nevertheless are entitled to some sort of favorable treatment on future purchases. These settlements are analogous to settlements involving actual coupons because the class member obtains relief only by continuing to do business with the defendant.

It should be noted, however, that some courts[18] and commentators have rejected this approach as an antitrust remedy both because the defendant may gain a competitive benefit from the reduced price (if it does not raise price to make up for the coupon's costs) and because the injured class members are required to make further purchases of the litigated product in order to recover their damages.[19] In other words, the only way for class members to actually benefit from the settlement is to buy products from the defendant – at a discounted price this time – and this may very well turn out to be a competitive disadvantage for all other sellers in the relevant market (unless all sellers are in fact sued in the class action).[20] Particularly in antitrust cases, the economic ramifications and the effect on competition of coupon distribution and price reduction in the relevant markets should carefully be examined. In some circumstances, it will be preferable to require the defendant to honor coupons for purchases made from its competitors. Sometimes, as in the California Microsoft settlement,[21] coupons can also be used to purchase at discount the goods of other participants in the market.

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[18] *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 non-monopoly 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."

[19] *See* Forde, *What Can a Court Do with Leftover Class Action Funds? Almost Anything*" The Judge's Journal, 19 (1996). *See also* S. R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. at 448 (1972).

[20] *See* H.B. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS, § 10:17 (4th ed.). *See also* A. Mitchell Polinsky and Daniel L. L. Rubinfeld, "A Damage-Revelation Rationale for Coupon Remedies" (March 1, 2005). *Berkeley Program in Law & Economics, Working Paper Series.* Paper 174.
http://repositories.cdlib.org/blewp/art174

See also In re Microsoft Corp. Antitrust Litigation, 185 F.Supp.2d 519 (D.Md.,2002.). The proposed settlement would have established a charitable foundation funded by Microsoft with at least $400 million, for the purpose of providing computer technology to impoverished schools. The court held that the distribution of computers and software by the foundation would favor Microsoft products, and would therefore have a detrimental effect on Microsoft's competitors: "The agreement raises legitimate questions since it appears to provide a means for flooding a part of the kindergarten through high school market, in which Microsoft has not traditionally been the strongest player (particularly in relation to Apple), with Microsoft software and refurbished PCs." 185 F.Supp.2d 519, 528.
See also "Microsoft Class Actions Settlement Unfair and Should Be Rejected, AAI Writes to MDL Court", 11/27/01, available at http://www.antitrustinstitute.org/recent/154.cfm

[21]*See* Settlement Agreement, In re Microsoft Cases, J.C.C.P No.. 4106 (Cal. Super. Ct. June 16, 2003), available at http:// www.microsoftcalsettlement.com/PDF/SettlementAgreement.pdf
The settlement provides up to $1.1 billion of vouchers that people and businesses can use toward the purchase of desktop, laptop or tablet computers, printers, scanners, monitors, keyboards and generally available software made by any manufacturer. The settlement applies to consumers and businesses that acquired Microsoft Windows, MS-DOS, Office, Word, Excel, Works Suite or Home Essentials between February 18, 1995 and December 15, 2001 for use in California.

However, an additional disadvantage of discount remedies is that "because future price reduction is basically a method for compensating class members, its value is lessened when consumers are not likely to make repeat purchases"[22] whether from the defendant or from other sellers in the market.

To summarize, if a coupon-type distribution is utilized in an antitrust case, it seems elementary that the court should not approve a remedy that will affect the marketplace in a way that may provide a competitive advantage to a firm that was charged with anticompetitive conduct.

We turn now to the doctrine of cy pres. First we set forth the doctrine. Next, we discuss the test of an appropriate nexus to the case, in the context of an antitrust remedy both in private litigation and in parens patriae litigation. Finally, we suggest how cy pres can be used creatively to help achieve the underlying purposes of the statute whose violation is being remedied.

II. THE CY PRES DOCTRINE IN PRIVATE CLASS ACTIONS

The cy pres doctrine (also known as the fluid recovery rule) originated as a rule in the law of trust and estates that allows the Court to provide for the next-best use of gifts or fair disposition of charitable trusts or wills that would otherwise fail. When literal construction of the original purpose of the trust or bequest is impracticable or illegal, courts apply the cy pres rule of

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Another, very particular form of coupon distribution was used in In Re Starlink Corn Products Liability Litigation, No. 03 C 4385 (N.D. Ill.). There, a $100mm settlement was reached in which class settlement funds were distributed not by cash or check but as stored funds on prepaid debit cards. Class members in the case were corn farmers, allegedly damaged by improper distribution of genetically engineered corn seed. The settlement gave the class members three options: they could (1) get 10% discount off the total purchase prices of Tractor Supply Company; (2) use the card as an ordinary debit card anywhere in the world Visa-branded cards are accepted; or (3) get cash back from US post offices. *See* www.nonstarlinkfarmerssettlement.com. A proposal for a similar distribution is currently pending before the District Court in In re Relafen Antitrust Litigation, No. 01-CV-12239-WGY (D.Mass.).

[22] *See* Newberg & Conte, *supra* note 20.

construction to determine the interpretation of instruments as nearly as possible in conformity with the original intention of the testator. .[23]

By analogy, courts now apply the cy pres doctrine in class actions, including antitrust class actions, where direct distribution of the damages awarded to all the class members is not feasible. The cy pres doctrine holds that, when distribution is impracticable, inappropriate or impossible, funds can be distributed "in the next best fashion in order to benefit the intended class as closely as possible and to avoid retention of ill-gotten gains by defendants".[24]

In other words, 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, a process known as aggregate cy pres distribution. In such an event, one or more third parties or agencies are placed in charge of administering the funds and ensuring that they are used for designated purposes.[25]

This distribution does imply any greater liability for the defendants nor does it alter their substantive rights, as it only concerns the distribution of the damages already assessed to class members who for one reason or another have not claimed their share.[26]

Two specific fluid recovery procedures are "earmarked escheat" and consumer trust funds. The latter aim at financing existing consumer protection organizations or creating a new organization:[27] such institutions will be required to use the funds for the benefit of class members,

[23] *See* B.A. Vauter, *The Next Best Thing, settlements could benefit low-income consumers by deposits in the State Bar of Michigan Access to Justice Development Fund* , 80-JUL Mich. B.J.68.

[24] *Id.*

[25] *See* Newberg & Conte *supra* note 20.

[26] *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307, (9thCir. (Ariz.) May 18, 1990).

[27] To some extent, the court (or perhaps a trustee appointed by the court) acts like a charitable foundation.

consumers or those similarly situated, for instance by supporting lawsuits, lobbying, or other projects related to consumer protection and education. [28]

In governmental escheat the residue is directly deposited into a government agency's general fund, again "for use on projects that benefit non-collecting class members and promote the purposes of the underlying cause of action".[29]

In In re Folding Carton Antitrust Litigation,[30] the court discussed the legal status of a reserved fund.[31] 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 against the fund had been fully satisfied, through receipt of more than their anticipated share of the fund, had no legal right against the remainder of the fund. However the court did allow non-claiming former class members, who had failed to timely file claims against the fund, to file equitable claims against the reserve fund.[32] It is true that

[28] *See* S.Karas, *The Role of Fluid Recovery in Consumer Protection Litigation: Kraus v. Trinity Management Services*, 90 Calif. L. Rev. 959 (2002).

[29] *See* State of California v. Levi Strauss & Co., 715 P.2d 564, 572 (Cal. 1986).: "a [..] form of fluid distribution is "earmarked escheat." Under this approach, the uncollected funds are disbursed to a responsible governmental organization for use on projects that benefit non-collecting class members and promote the purposes of the underlying cause of action.[..] Earmarked escheat provides indirect compensation to silent class members. The recipient governmental body may use class funds to ameliorate the effects of past harm and to reduce the risk of future harm. Administrative costs are minimized by utilizing already extant governmental bodies to administer the fund." 715 P.2d 564, 572 (Cal. 1986)
However the same court stated that "[A]nother alternative is general escheat: payment of the recovery to the general fund of a governmental body. Of all the fluid recovery devices, general escheat provides the least focused compensation to the class. The benefits of the recovery are spread among all taxpayers, and there is no attempt to ensure that the spillover is used to effectuate the purposes of the substantive law.[...] The only advantage of general escheat is ease of administration. Hence, it is usually regarded as a last resort for use where a more precise remedy cannot be found […]" 715 P.2d 564, 572 (Cal. 1986). *See also* S.Karas, *supra* note 28.

[30] 557 F. Supp. 1091 (N.D. Ill. 1983), aff'd, 774 F.2d 1252 (7th Cir. 1984), cert. dismissed, 471 U.S. 1113 (1985).

[31] 557 F. Supp. 1091 (N.D. Ill. 1983).

[32] *Id*. at 1107. "[t]he equitable claim on these settlement funds of the non-claiming class members is substantial. They furnished equal consideration for the settlement in this litigation in that their purchases formed part of the base of the various settlements. Moreover, they too are bound by the final judgment. Even though the settlement fund was established for their benefit and, in effect, paid for in part with consideration furnished by them, the nonclaiming class plaintiffs have to date received no direct or indirect benefit from the settlement fund.[..] What is more, the reserve fund itself was established for the express purpose of benefiting those class members who might appear and file late

a fluid recovery fund only exists while some direct victims of the illegal conduct remain uncompensated. Although refusing to award the remainder of the funds awarded as damages to the already compensated direct victims "may seem in some sense unjust, doing so is consistent with the modern trend of pragmatism in mass litigation."[33]

The need for efficiency leads courts to consider the unified and stable interests of the class rather than looking at the individual plaintiff's claim. Courts have also sometimes recognized "the need to balance benefits with costs by permitting fluid recovery in mass suits where individual notice is impractical."[34]

In Levi Strauss, the California Supreme Court in fact proposed a balancing test, which takes into account different and somehow conflicting aspects of fluid recovery such as "the amount of compensation provided to direct victims, the proportion of class members sharing in the recovery, the size and effect of the spillover to non-class members, and the costs of administration."[35]

Susan Beth Farmer suggests that direct restitution to consumers should be preferred in cases in which fraud is not a real threat.[36] Prof. Farmer writes:

> "The equitable option of a cy pres distribution to a charitable organization may be a more efficient and effective way to indirectly benefit consumers and check fraud in other situations. Courts are advised to employ the following four-factor test in reviewing distribution plans: (1) whether the class of consumers is large and difficult

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claims. The conclusion seems unavoidable that those class members who have not come forward to receive their intended benefit have an equitable claim to the reserve fund. It is beyond question that these class members' claims are equitably superior both to those of the settling defendants on account of whose wrongdoing the settlement fund was created and to those of the class members who have already received substantially more than their anticipated share of the fund".

[33] *See* Karas *supra* note 28. *See generally* Jack B. Weinstein, Individual Justice in Mass Tort Litigation (1995).

[34] *See* Karas *supra* note 28.

[35] *Id*. *See* Levi Strauss *supra* note 18.

[36] *See* S.B. Farmer, *More Lessons From the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought By State Attorneys General*, 68 Fordham L. Rev. 361 (1999) at 404.

> to identify because, for example, neither consumers nor producers maintain records of purchasers; (2) whether the product is relatively inexpensive and frequently purchased; (3) whether a creative alternative is viable to return value directly to consumers without promoting fraudulent claims or benefiting the defendant; and (4) whether the costs of any effort at direct restitution exceed the likely benefit."[37]

Two extreme positions on fluid recovery are sometimes advanced: on the one extreme that it is per se unconstitutional or that courts should always use it to surmount problems in the process of a class action. The Seventh Circuit,in Simer v. Rios correctly warned not to adopt either extreme:

> "Rather, we believe that a careful case-by-case analysis of use of the fluid recovery mechanism is the better approach. In this approach we focus on the various substantive policies that use of a fluid recovery would serve in the particular case. The general inquiry is whether the use of such a mechanism is consistent with the policy or policies reflected by the statute violated. This matter can be more particularized into an assessment of to what extent the statute embodies policies of deterrence, disgorgement, and compensation."[38]

Although Federal Rule of Civil Procedure 23 (governing class actions) does not address the issues of remedies or a court's remedial power, today, nearly all jurisdictions apply the cy pres doctrine in a broad variety of cases.[39] Whether a cy pres distribution is possible depends in part upon the legislative authority under which a class action is brought.[40]

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[37] *Id.*

[38] *See* Simer v. Rios, 661 F.2d 655 (7th Cir. 1981), cert. denied, 456 U.S. 917 (1982) (holding that courts must consider whether ordering fluid recovery would serve "various substantive policies," with one factor being whether the underlying statute has a compensatory purpose); Nat'l Ass'n of Consumer Advocates, Standards and Guidelines for Litigating and Settling Consumer Class Actions, October 8, 1997. *See generally* Karas *supra* note 28.

[39] *See* Farmer, *supra* note 36 at 393. *Cf.* Eisen v. Carlisle & Jacquelin 479 F.2d 1005 (2d Cir. 1973), vacated on other grounds, 417 U.S. 156 (1974); The *Eisen* (41 F.R.D. 147 (S.D.N.Y. 1966)) litigation was brought on behalf of purchasers and sellers of odd-lot shares of stock on the New York Stock Exchange. The suit alleged a conspiracy to monopolize odd-lot trading to fix the odd-lot price differential in violation of the Sherman Act. The district court dismissed the action and, on appeal, the Second Circuit reversed and remanded. (Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968)) On remand, the district court determined that the suit was manageable, that if liability were established an aggregate damage fund could be assessed, and that excess funds could be distributed by reducing

For example, in West Virginia v. Chas. Pfizer & Co.,[41] brought under the Sherman and Clayton Acts, the federal district court acknowledged that the cy pres doctrine was applicable and that the court "should exercise its equitable control over these funds for the benefit of all consumers." [42] Similarly, the federal district court in Bebchick v. Public Utilities Commission[43] (patent infringement case) fashioned a cy pres remedy because it was a "judgment appropriate to carry out the opinion."[44] In class actions brought under Fed. R. Civ. P. 23, a court order approving a class action settlement is reversed only upon a showing of an abuse of discretion.[45]

It must also be remembered that the main rationale of Rule 23 is to provide compensation for the individual harms of those who were not able or chose not to participate in a class action .To some extent “unnamed members of the class in a class action lawsuit often have characteristics

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profits on future odd-lot transactions until the illegal profits were disgorged. (Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971))On appeal, the court held price reduction to be improper and, in dictum, found it to be a violation of due process. Eisen v. Carlisle & Jacquelin 479 F.2d at 1018. For a more extensive analysis, *see* N. A. Dejarlais, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 Hastings L.J. 729 (1987). *See also* Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, at 447 & n.120 (1973).

[40] *See* Kraus v. Trinity Mgmt. Servs., 999 P.2d 718, 732 (Cal. 2000). In Kraus, the California Supreme Court held that fluid recovery is not available in representative actions brought under the state's expansive Unfair Competition Law (UCL). However Kraus has been heavily criticized, both because the California Supreme Court itself traditionally has recognized the propriety of fluid recovery in class actions (and several state appellate courts have done so in the context of UCL actions) and because the Kraus court seems to have based its holding on too narrow a view of the UCL, assuming indirect evidence of legislative intent. *See* Karas, *supra* note 28.

[41] 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971). *See also* N. A. Dejarlais, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 Hastings L.J. 729 (1987).

[42] *Id.* at 728 (quoting with approval "the Alabama Plan" for distribution of funds, proposed by plaintiffs and adopted by defendants). *See* . Dejarlais, *supra* note 39.

[43] 8 F.2d 187 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963).

[44] *Id.* at 203.

[45] *See* In re Airline Ticket Comm'n 2001, 268 F.3d at 625 ("We review a district court's cy pres distribution for an abuse of discretion.") (citing Powell v. Georgia-Pacific Corporation 119 F.3d at 706 (8th Cir. 1997),; *See also* In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) (finding and discussing abuse of discretion in a class action case).

similar to those of legal aid clients-- they are unrepresented and unable to assert their rights." [46] Indeed class action damages collected for unrepresented class members are sometimes awarded to organizations whose basic mission is to protect a similar class of persons.[47]

The authority for federal courts to fashion equitable remedies may also lie within Federal Rule of Civil Procedure 54(c)(equitable remedies).[48] In In Re Folding Carton Antitrust Litigation,[49] the federal district court stated that "it is well recognized that the administration of class actions . . . will present novel and unanticipated administrative difficulties. We are admonished to respond with flexibility and imagination. That admonition reflects in part the equitable origin of the class action device, a setting characterized by innovation consistent with settled principles."

III. CY PRES IN PARENS PATRIAE ACTIONS

Closely paralleling private class actions are parens patriae actions pursuant to Section 4C of the Clayton act.[50] Parens patriae actions allow state Attorneys General to bring antitrust actions on behalf of the natural-person citizens of the state. Substantive antitrust principles were not altered by the allowance of parens patriae actions.[51] Before the HSR amendments, in actions based on the federal antitrust laws, the states could only seek to obtain injunctive relief or to recover for actual

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[46] *See* 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).

[47] *Id.*

[48] *See* Dejarlais *supra* note 39 (citing Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, at 447 & n.120 (1973)): "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." FED. R. CIV. P. 54(c).

[49] 557 F. Supp. 1091 (N.D. Ill. 1983), aff'd, 774 F.2d 1252 (7th Cir. 1984), cert. dismissed, 471 U.S. 1113 (1985).

[50] 15 U.S.C.A. § 15c(b) (2) and (3). *See* HSRA, Pub. L. No. 94-435, sec. 301, 4C, 90 Stat. 1383, 1394 (codified at 15 U.S.C. 15c (1994)).

[51] *See id.* H.R. Rep. No. 94-499, at 9 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2578; S*ee also* Kansas v. Utilicorp United, Inc., 497 U.S. 199, 219 (1990) ("[Section] 4C did not establish any new substantive liability. Instead, "it simply created a new procedural device - parens patriae actions by States on behalf of their citizens - to enforce existing rights of recovery under 4 [of the Clayton Act].'" (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 734 n.14 (1977)). *See generally* Farmer, *supra* note 36.

injury to the businesses or property of their state's natural-person citizens. Following the HSR amendments, states have the authority to directly pursue antitrust damages for consumers.[52]

Much as in private litigation, courts adjudicating parens patriae antitrust litigation must determine how to distribute damages, whether determined through a trial or settlement. Under HSRA, courts have vast discretion to approve the distribution of damages in parens patriae actions. However, in doing so, courts must be guided by the underlying justifications for the HSRA: facilitation of antitrust litigation to benefit consumers; disgorgement of ill-gotten gains; and deterrence.[53]

In this regard, Professor Farmer noticed that "[e]xpansive application of cy pres distributions in parens patriae antitrust actions brought on behalf of a state-wide or national group of consumers can serve the laudable legislative goal of opening courts to consumers in antitrust cases. Moreover, use of a cy pres remedy for the entire corpus of a settlement or damages fund may serve, in effect, as a civil penalty that is likely a stronger deterrent than injunctive relief alone and is obtained under a civil burden of proof of a preponderance of the evidence. Criminal remedies, which are not available to state officials to enforce federal law, offer greater deterrence, but with a correspondingly higher burden of proof."[54]

Unlike class actions governed by Rule 23, the Attorney General bringing the parens patriae actions need not have suffered the antitrust injury due to the defendant's conduct. However, Attorneys General bears some resemblance to other class representatives in that in most states they are elected officials, thus they theoretically are subject to the control of the very consumer-voters whom they represent in parens patriae actions.[55] Moreover, the state Attorneys General are in a

[52] *See* 15 U.S.C. 15c; S*ee also id.* 15 (allowing private actions by injured persons, including foreign states); *id.* 15a (allowing treble damages actions by the United States for injury to its business or property). For a discussion of the state of the law at the time of the HSRA's passage, *see generally* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), and California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir. 1973). *See generally* Farmer, *supra* note 36

[53] *See generally* Farmer, *supra* note 36.

[54] *Id*.

[55] *Id.*

good position to seek a remedy that will serve the overall public policy goals of their state, and not merely the benefit of a particular victim. This can be especially important where competition within the state has itself been damaged by an action that has also brought direct harm to specific businesses or consumers.

IV. NEXUS: THE IMPORTANCE OF RESTRAINT

Allowing courts to formulate broad cy pres distribution of damages has several significant benefits. First, deterrence is served because the unclaimed funds do not return to the defendant. Second, the defendant is not unjustly enriched if all potential plaintiffs do not assert a claim. Third, because the funds will be used to help promote competition or dissuade the kinds of actions that constituted a violation of the antitrust laws, or will benefit the society in general, the plaintiffs who did not assert a claim are indirectly benefited, along with the marketplace in general, [56]

Courts must remain mindful that the cy pres distributions should be made in a manner "as near as possible" to an immediate direct distribution.[57] In the caselaw, it appears that while some cy pres distributions proposed to courts (and in some cases approved) have adequately reflected this nexus between the injured class and the cy pres distribution;[58] in other cases the nexus is remote[59] or completely absent.[60]

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[56] *See* K.M Forde, *supra* note 19.

[57] In re Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 682 (8th Cir. 2002) (stating that "unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit").

[58] *See, e.g.*, Mkt. St. Ry. Co. v. R.R. Comm'n, 171 P.2d 875, 881 (Cal. 1946) (stating that "inasmuch as the people of the city paid the excess fares they are the natural beneficiaries thereof").

[59] *See* J, G. Casurella & J. R. Bevis, *Class Action Law in Georgia: Emerging Trends In Litigation, Certification, and Settlement*, 49 Mercer L. Rev. 39, 67 n.158 (1997) (discussing a case involving predatory lending, where the court approved cy pres funds for a legal aid society that provides legal assistance to low income homeowners who are victims of predatory lending). *See generally* R.E. Draba, *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near As Possible"*, 16 Loy. Consumer L. Rev. 121 (2004).

[60] *See, e.g.*, Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990) ("Even where cy pres is considered, it will be rejected when the proposed distribution fails to provide the 'next best' distribution."); In re Matzo, 156 F.R.D. at 607 ("Thus, plaintiffs' rationale for approval of a settlement pursuant to which the class members themselves receive nothing is simply inadequate.").

Most courts correctly operate on the proposition that a nexus cannot be absent.[61]

However, a direct nexus between the injured consumers and the cy pres recipients is neither always feasible nor required. In Superior Beverage Co. v. Owens-Ill., Inc., [62] the District Court observed that

> "[I]n recent years, the [cy pres] doctrine appears to have become more flexible, Funds remaining in antitrust cases have been awarded to law schools to support programs having little or no relationship to antitrust law, competition or the operation of our economy. […]
> [W]hile use of funds for purposes closely related to their origin is still the best cy pres application, the doctrine of cy pres and courts' broad equitable powers now permit use of funds for other public interest purposes by educational, charitable, and other public service organizations, both for current programs or, where appropriate, to constitute an endowment and source of future income for long-range programs to be used in conjunction with other funds raised contemporaneously. Having served on the boards

[61] *E.g.* State v. Dairylea Coop., 1985 WL 1825, at *1 (S.D.N.Y. June 26, 1985) (ordering the entire $6.1 million settlement in an alleged price fixing scheme among milk wholesalers, serving an eleven county market, be distributed among schools in the same eleven-county area to fund nutrition-related purposes or programs); Market Street Railway Company v. Railroad Commission, 171 P.2d 875, 881 (Cal. 1946) (court ordering the streetcar company to use unclaimed funds to improve transportation facilities that injured consumers used).
Although involving employment discrimination rather than antitrust , Powell v. Georgia-Pacific Corporation 119 F.3d 703 (8th Cir. 1997) is another interesting case. A class of African-American workers alleged the Georgia-Pacific Corporation had violated their rights. After the class members were compensated, nearly $ 1 million in settlement funds remained. Rather than distribute the remaining funds to class members, the district court ordered the parties to design a scholarship program to be administered by the Georgia-Pacific Foundation. Under the program, scholarships were to be awarded over ten years to 112 African-American high school students in the three counties in Arkansas and three parishes in Louisiana where most of the class members lived, with the remaining proceeds going to the United Negro College Fund. Not only did the scholarship program carry out the plaintiffs' desire to have scholarships benefit their younger relatives, it addressed the subject matter of the lawsuit -- the employment opportunities available to African-Americans living near Georgia-Pacific's facilities in Crossett, Arkansas.

In Nelson v. Greater Gadsden Housing Authority 802 F.2d 405, 409 (11th Cir. 1986), which involved utility allowances, the court approved use of unclaimed funds to improve the energy efficiency of the apartment units, where members of the injured class lived.

See generally Draba, *supra* note 59.

[62] 827 F. Supp. 477 (N.D. Ill. 1993).

> of a number of charitable and educational organizations, the court is cognizant of the advantages of having endowment income as well as current contributions with which to finance operations."[63]

When courts distribute funds that are to support various public interest programs (e.g. public health programs), the nexus between those directly harmed and the distribution of damages sometimes seems quite remote, although perhaps not altogether absent. For example, in West Virginia v. Chas. Pfizer & Company, the court ordered that a portion of the $37 million in damages from an antibiotic antitrust class action settlement be used to create public health programs not necessarily related to antibiotics.[64] These public health programs provided injured and uninjured consumers some benefit related to their injuries only in the general sense that both the injury and the cy pres distribution both involved health care. To conform more fully to the cy pres doctrine, the court could have ordered that the public health programs be related to the particular type of health problems for which the antibiotics in the case were typically used.

Some courts in parens patriae cases have also ordered the entire damage award to be used for some public interest purposes, even though the consumers on whose behalf the case was brought did not recover their actual damages.[65]

Rather than using the funds to educate consumers, some cy pres distributions have also been ordered to be used by state Attorneys General to fund antitrust enforcement.[66] This use, while not

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[63] *Id*.

[64] *See* West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 728 (S.D.N.Y. 1970) ("Others may seek court approval to use the balance of their consumer fund for a public health purpose."); Superior Beverage Co. v. Owens-Ill., Inc., 827 F. Supp. 477, 479 (N.D. Ill. 1993) (stating that the "remaining funds" in Chas. Pfizer "were divided among the states to be used for public health programs that would benefit the unfound class members and the general public..."). *See generally* Draba, *supra* note 59.

[65] *See* New York v. Dairlylea Coop., No. 81 Civ. 1891 (RO), 1985 WL 1825, at *2 (S.D.N.Y. Jun. 26, 1985); the settlement funds were distributed "in the Court's discretion to the schools, public, private and parochial, located wholly or partly within the eleven-county area covered by the complaint, to be used solely for nutrition-related purposes or programs that would not otherwise be funded."
See also New York v. Keds Corp., No. 93 Civ. 6708 (CSH), 1994 WL 97201, at *3 (S.D.N.Y. Mar. 21, 1994); *See generally* Farmer, *supra* note 36.

[66] *See* Farmer, *supra* note 36.

addressing the consumers or the industry specifically affected by the defendant's conduct, seeks to promote compliance with the antitrust laws. Such a distribution certainly promotes the statute being enforced, but may create the possibility of a conflict of interest for the Attorneys General, whose office may appear to gain at the expense of the uncompensated victims.

Finally, at the other end of the spectrum, is the unique decision in Motorsports Merchandise Antitrust Litigation,[67] which appears to have gone unacceptably beyond Superior Beverage and its statement that the cy pres doctrine is nowadays "more flexible."

In that 2001 case involving the price fixing of NASCAR souvenirs, the court approved the distribution of excess settlement funds to ten different charities.

In its cy pres order, the Court identified and described each charity chosen to receive funds, defined the use that the charity would make of the settlement funds and assessed its impact on the community. Any funds remaining after all of the distributions were made and all costs paid were to be given to two legal-aid organizations.[68] The Court stated that it "attempted to identify charitable organizations that may at least indirectly benefit the members of the class of NASCAR racing fans."[69]

In reality, while the class and geographic scope of the lawsuit was nationwide, settlement funds were distributed mainly to local organizations: the Motorsports Court approved the distribution of $250,000 each to The Make-a-Wish Foundation, The American Red Cross, Race Against Drugs, Children's Healthcare of Atlanta, The Atlanta Legal Aid Society, The Georgia Legal Services

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[67] *See* In re: Motorsports Merchandise Antitrust Litigation, 160 F. Supp. 2d 1392 (N.D. Ga. 2001). The Court solicited proposals from charitable organizations proposed by the parties. The American Antitrust Institute was invited by the judge, at the request of one of the parties, to submit a proposal. 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 for an award.

[68] *See* In re: Motorsports Merchandise Antitrust Litigation, 160 F. Supp. 2d 1392 (N.D. Ga. 2001). *See also* 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).

[69] *See* Motorsports, *supra* note 67.

Program, Kids' Chance, Duke Children's Hospital and Health Center, and The Lawyers Foundation of Georgia. The Court also ordered $100,000 of the settlement proceeds distributed to the Susan G. Komen Breast Cancer Foundation.

Motorsports appears to be an anomaly, as there has not been another case involving such a wide range of distributions that seem to be wholly unrelated to the actual injury sustained by the class. Thus, an appropriate question is, what limits, if any, should there be on distributions of funds in antitrust cases to charitable or public interest organizations?

In re Airline Ticket Commission Antitrust Litigation,[70] the Eighth Circuit found that the trial court had abused its discretion with respect to a cy pres distribution.[71] The first abuse occurred when the trial court "merely adopted liaison class counsel's proposed list of mostly local recipients, which had no relationship to the class action suit."[72] Basically, the Eighth Circuit found that there was no nexus between the injured class and organizations receiving unclaimed funds through a cy pres distribution.[73]

A second abuse was the trial court' s failure on remand to comply with the Eighth Circuit's opinion from the first appeal when it ordered the distribution of unclaimed funds.

> "The last time this case was before us, we drew upon Powell to emphasize the importance of tailoring a *cy pres* distribution to the nature of the underlying lawsuit. In reversing the district court's initial distribution of funds to local charities, we suggested that the court failed to consider the full geographic scope of the case. Thus, we quoted from the Seventh Circuit's decision in Houck v. Folding Carton Admin. Comm., 881

[70] The cy pres distribution of the trial court was appealed twice and reversed twice. *See* In re Airline Ticket Comm'n Antitrust Litig., 268 F.3d 619 (8th Cir. 2001) [hereinafter Airline Ticket Comm'n 2001] and In re Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679 (8th Cir. 2002) [hereinafter Airline Ticket Comm'n 2002]. The district court initially ordered a cy pres distribution to several Minnesota law schools and charitable institutions. (Airline Ticket Comm'n 2001)

[71] Airline Ticket Comm'n 2002, 307 F.3d at 680 ("When the case was remanded, the district court ordered the funds distributed to the National Association for Public Interest Law (NAPIL). Today we reverse that decision as well.").

[72] In re Airline Ticket Comm'n 2001, 268 F.3d at 626.

[73] *See* Airline Ticket Comm'n 2002 at 680.

> F.2d 494, 502 (7th Cir. 1989), which remanded for the district court to "consider to some degree a broader nationwide use of its *cy pres* discretion" because the case involved a nationwide harm"[74]

The best cy pres distribution would be one in which the connection between the indirect cy pres benefit and the injured consumer would be clear.[75] But this clear nexus is not always possible under the circumstances of the case.[76] When a court essentially abandons the nexus aspect of the cy pres doctrine as in Motorsports, "the use of the cy pres doctrine runs the risk of being a vehicle to punish defendants in the name of social policy, without conferring any particular benefit upon any particular wronged person."[77]

The problem with a Motorsports-type of distribution is that it gives the court unfettered discretion to hand out the money to any charitable cause that the judge or the lawyers personally favor. Neither the class, nor those similarly situated, nor the interests at stake in the underlying litigation will benefit. The judge is often a person of political background who may run for office or be appointed for life, and who has ties to a variety of interests, including those of family and friends. Class actions already have a bad name and have recently been narrowed by federal legislation.[78] Support for the institution of antitrust itself can be undermined if the public comes to see antitrust consumer class actions as vehicles not only for large attorney fees and small direct benefits, but for gifts to judges' and lawyers' favorite charities.

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[74] *Id* at 683. On the other hand, Cavalier v. Mobil Oil Corp., La. App. 2004-1543, 898 So. 2d 584, 2005, recently faced the opposite problem – that of confining the cy pres distribution to a narrower geographical area, and indeed reached the opposite conclusion: "[T]he trial Court [..] erred in allocating funds to an organization outside the geographical boundaries of these class action settlements. As such, we reverse that part of the trial court judgment, which allocated 20% of the proceeds to the Lighthouse Project of the Volunteers of America."

[75] *See* California v. Levi Strauss & Co. (holding that it is the overlap between the injured class of persons and the class to be benefited "that provides the principal criterion for assessing the compensatory effectiveness of a distribution plan."). *See* Draba, *supra* note 59.

[76] *See* Jones v. Nat'l Distillers, 56 F. Supp. 2d 355, 358 (S.D.N.Y. 1999) ("there is no obvious use for the money that provides particular benefit to class members"). *See* Draba, *supra* note 59.

[77] *See* Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1312 (9th Cir. 1990) (Fernandez, J., concurring).

[78] *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

V. CY PRES AS A TOOL FOR RESTORING COMPETITION

In situations where the nexus is not direct and immediate, it should be necessary to link the distribution to the underlying purposes of the statute that was violated.[79] In the case of antitrust, the allegations usually relate to anticompetitive conduct that has deprived the public of the benefit of freely functioning markets. Thus, a cy pres distribution would have a suitable nexus if it was directed at the restoration of competition within the market or with the maintenance of competition more generally.

A. Restoration of competition within the same geographic market

In State of Utah v. Stericycle and BFI Waste Systems of North America, the State of Utah entered into a settlement agreement with a medical waste disposal company that had entered into an asset swap with another medical waste disposal company, the result being that one company was left standing in Utah and the other allocated exclusive rights to an adjacent state, instead of having two rivals face each other in each state.[80] The settlement included creation of a fund that Utah could use to expand competition in the medical waste industry. [81]

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[79] *See* Simer v. Rios, *supra* note 38.

[80] *See* Complaint for Injunctive Relief, The State of Utah v. Stericycle and BFI Waste Systems of North America, Inc., (D. Utah, Case No. 2:03CV 0049-DB), filed Jan. 13, 2003. The State of Utah sued Stericycle and BFI in the United States District Court for the District of Utah for entering into "illegal agreements to allocate customers, divide market territories, agree and conspire not to compete, and attempt to monopolize the markets for collection and disposal of medical waste" in the inter-mountain states of Utah, Colorado, and Arizona. Consent decrees were entered against each company within days of the filing of the complaint. Both negotiated judgments sought to facilitate future competition in the industry, but with BFI having exited the medical waste disposal business in 1999 with no plans to re-enter, this was problematic.

[81] It must be noted that this was not truly a cy pres settlement, in that the funds in question were not left over from a distribution, but were an integral part of the settlement. "In addition to the investigative expenses and attorneys fees specified in section IV, BFI will contribute the amount of $100,000 to a non-profit entity designated by the Attorney General for use in funding analyses of ways to increase competition for the collection, transportation, or disposal of medical waste and to fund new entry or expansion by entities engaged in the collection, transportation, or disposal of medical waste generated by entities in Utah. This amount will be paid by BFI within thirty (30) days of the Utah Attorney General notifying BFI of the entity or entities to receive the funds." Final Judgment by Consent.

The State of Utah was faced with a problem. The defendant competitor had already stopped doing business in the State, and could not be persuaded to re-enter. In order to try to relieve a near-monopolistic situation, Utah intended to use the defendant's funds to induce new entry, designating the funds for a new entrant to construct a local autoclave or incinerator for the treatment of medical wastes.[82] It turned out that this specific plan did not work, because the city would not grant permission for the facility, even though the new entrant had arranged to purchase the land, although the money was nonetheless used to directly facilitate a more competitive market.[83] The Utah solution represents a creative way, adaptable in a cy pres case, in which the defendants' money can be used to help restore competition within the geographic and product market that was allegedly injured.[84] Although the money in a circumstance of this nature does not

[82] A corollary to the State's requirement that BFI contribute $100,000 to the inducement of new competitors was eliminating barriers to entry for new entrants. Thus, it required that Stericycle permit customers to leave Stericycle, despite the existence of long term contracts. In addition, Stericycle waived the "exclusivity" requirement in their customer contracts.

[83] Information about the State's intention and what occurred was provided to the authors by Wayne Klein, Assistant Attorney General of Utah. E-mail from Wayne Klein to Albert Foer, dated June 1, 2005.

It is Klein's understanding that the location in which the new entrant would operate was already zoned for industrial use, which prohibited hazardous waste but did not prohibit treatment of medical waste (infectious waste). Nevertheless, the city refused an operating permit for either the autoclave or, alternatively, a transfer station. The entrant already had ordered a new autoclave and ended up installing it at its site near Boise, Idaho, purchasing additional trucks to transport the medical waste from Utah to Boise. He still plans to create a processing facility in Utah, but in a different location.

In the end, the remaining money was granted to three competitors:

A) Medical Disposal Services, an existing competitor, received $10,000 to secure its ability to continue delivering waste to Stericycle's incinerator for treatment. MDS used the $10,000 towards the purchase of a new truck to be used in servicing customers.

B) Realty Ready,a new entrant to the market, received $5,000 to secure its ability to deliver waste to the Stericycle facility for incineration. The $5,000 was used for startup costs including containers, labels, bags, licenses, advertising, truck signage, and office set-up.

C) Larson-Miller, the largest new entrant, received $55,000, to offset certain expenses of entry (for which it had spent $480,000). It now services seven hospitals in Northern Utah and has the contract for the American Red Cross Blood Services in Utah.

[84] This represents an application to antitrust of a practice that is well-established in other types of litigation. For example, in the tobacco settlements, the States set aside a large portion of the money for anti-smoking advertising. Part of the settlement money in the cases against Firestone and Bridgestone for defective tires was used to fund an advertising campaign to the public so everyone would understand the importance of proper tire inflation.

go to individual consumers, a clear nexus exists between the purposes of the statute, the class of injured consumers, and the intended use of the funds generated by the settlement.

B. Maintaining competition within the same product market

Another segment of the settlement funds was granted by Utah to the American Antitrust Institute for the purpose of constructing a "tool kit" that would assist law enforcement officials (not only in Utah, but in all states and in the federal agencies as well) to understand the legal and economic theories relating to competition in the medical waste disposal industry, thereby helping enforcers spot the types of situations in which antitrust intervention might be appropriate, providing them with the legal and economic arguments that they would be able to utilize in preparing a case, and gathering in one reference document information relating to other cases (e.g., complaints, discovery requests, declarations by economists) that could substantially reduce the costs for the next antitrust intervention.[85] By reducing the transaction costs for antitrust intervention in the future and making the industry aware that the "tool kit" exists, this type of project can help maintain competition in an industry that had proven itself prone to anticompetitive behavior. Although the money does not go directly to individual consumers, there is a clear nexus between the purposes of the statute (to protect competition), the type of injury (reduction of competition in the medical waste disposal industry), and the intended use of the funds generated by the settlement.

C. Public education relating to the statute

In In re Vitamin Cases a California court reviewed a proposed cy pres settlement of $38 million related to a vitamin price fixing scheme.[86] The vitamins involved in the scheme were used as supplements, included in food products, and even added to pet foods. It was quite possible that almost any adult citizen of California could have been a class member of the litigation. Due to the

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[85] A redacted version of the confidential report is available at http://www.antitrustinstitute.org/recent2/451.pdf.

[86] *See* In re Vitamin Cases, 132 Cal. Rptr. 2d 425, 428 (Cal. Ct. App. 2003); *See* Draba, *supra* note 59.

sheer size of this class, the amount of any individual damages would have been so small that the transaction costs associated with the processing and payment of individual consumers made that remedy untenable. The court instead upheld the distribution of all $38 million to charitable, governmental, and nonprofit organizations for the purpose of promoting the health and nutrition of the consumer class members or otherwise furthering "the purposes underlying the lawsuit."[87] The settlement also established a system for cy pres distribution, which included employment of a funds administrator who operated like a foundation, accepting highly detailed applications that were reviewed by the staff and presented to a committee to make recommendations to the court. The administrator was also charged with monitoring grantees for compliance with the grant documents.

The American Antitrust Institute was a recipient of approximately $500,000 to conduct a two-year antitrust education project in California. The project consists of two related phases. In the first phase, a video film will be made for television, demonstrating the value of the antitrust laws for consumers and businesses. The film will be re-edited for classroom use and become part of a package of classroom materials, teacher materials, and web-based additional resources, for introduction into California high school curricula. Although money does not go directly to individual consumers, there is a clear nexus between the statute that was violated and the intended use of the funds generated by the settlement, i.e. that the law is more likely to be followed if more members of the public are familiar with its existence and rationale.

We are hardly unbiased, but we believe that the California court which approved the AAI's antitrust education project demonstrated a sound grasp of the propriety of using cy pres funds to support enforcement of the antitrust laws. This contrasts with an earlier episode in the Seventh Circuit.

In In re: Folding Carton Antitrust Litigation,[88] the Seventh Circuit at first held that "establishing an unneeded Foundation [a tax-exempt Foundation for research on complex antitrust

[87] *Id. See also* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 453 n.243 (2003).

[88] 744 F.2d 1252, at 1255 (7th Cir. 1984).

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."[89]

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 district court.[90] On August 13, 1990 the court appointed a committee for the reserve fund's administration. Under judicial direction, the committee investigated the mechanics of setting up a national public interest fellowship program (NPIFP). "The Committee concluded that the reserve fund should not be used to simply fund public interest fellowships for a finite period of time, but instead the fund should be used as "seed money" to establish a permanent national fellowship program to which foundations, corporations, law firms and individuals could contribute." [91] The court adopted the committee and NAPIL's proposal to set up a permanent source of funding for NPIFP because using the reserve fund to establish the NPIFP was appropriate under the cy pres doctrine.[92]

It seems to us that the Seventh Circuit, in its second decision, was correct that there was too little nexus between a cartel case and distributing the funds generally to local law schools, assuming that law schools were not a significant part of the injured class of consumers. The rationale would seem to be on the very high level of generalization that the case involved a

[89] 881 F.2d 494 at 502 (7th 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*.

[90] 1991 U.S. Dist. LEXIS 2553, 1991 WL 32867 (N.D. Ill. 1991).

[91] *Id.*

[92] *Id.*

violation of law, so a relevant remedy would involve teaching or learning about law. However, this is too general and could justify too wide a range of distributions.

It remains unclear what the nexus was between the statutory violations and a fellowship program for public interest lawyers that is unrelated to antitrust law. A grant to a foundation for research on complex antitrust litigation could be structured in a way that has a fairly clear nexus to the public interest in the statute that was violated and could reasonably lead to fewer violations or better administration of the antitrust law. In defense of the outcome, it appears that the court was concerned that this was not a needed function (perhaps being duplicative of research already being conducted in law schools), and on that ground it would have been justified in denying the funding.

VI. SOME CONCLUDING THOUGHTS ON PROCESS

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 grant recipients, as well as the accountability and evaluation of proposals, are presented.[93] In most of the cases, a list of recommended recipients was offered by plaintiff's counsel in a stipulated or unopposed order and the court generally accepted them.[94] Plaintiffs should carefully avoid any conflict of interest with the class in this selection of recipients and courts should play an active role in overseeing the grant process. In fact, it is pointed out that "courts often lack the familiarity and resources to identify alternative uses of the funds and potentially qualified recipients."[95] Plaintiffs may be helpful by proposing a procedure for selecting the beneficiaries instead of specifying the particular cy pres distribution recipients in the settlement.[96] In any event, fair and

[93] *See* A. M. Menocal, *Proposed Guidelines for Cy Pres Distribution*, The Judge's Journal 22 (1998).

[94] *Id*. at 23.

[95] *See* Menocal, *supra* note 93.

[96] *See* B. Seligman & J. Larkin, *Fluid Recovery and Cy Pres: A Funding Source for Legal Services (Federal Version)*, at http://www.impacthund.org/CyPres2000FED.html.

clear selection procedures should be established in order to fulfill the best interests of absent class members and to minimize disputes over the settlement.[97]

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. A remedy that is intended to help restore competition might be controversial, and of course cannot be adopted as part of a settlement if the defense refuses to go along.

In some situations, therefore, it may be the better tactic for plaintiffs 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; in others, one might propose specifically named organizations along with specific projects that will carry out the intent of the litigation on behalf of the class 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 or even by public notice. In general, the more vague the proposal, the more latitude the judge will have to transfer excess funds to his or her own –or the lawyers'-- 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 in the specific industry where the defendant was accused of abusive conduct. The plaintiff must be prepared to argue that the enhancement of competition should be viewed as an essential part of the remedy.

In a private class action case, where plaintiff attorneys are under scrutiny for sometimes appearing to obtain better results for themselves than for the class they represent, the inclusion of public-oriented antitrust remedies may enhance the reputation of the bar while making the huge effort normally entailed by a class action more socially worthwhile and professionally rewarding.

[97] *Id*.

In a parens patriae case, it should be an inherent part of the state's strategy in an antitrust case to create a remedy that enhances competition, with cy pres an option for achieving that end.