

**aa****i**  
The American  
Antitrust Institute

AAI Working Paper #07-11

**ABSTRACT**

Title: Enhancing Competition Through the Cy Pres Remedy: Suggested Best Practices

Author: Albert A. Foer, President, American Antitrust Institute

This paper reviews the law that relates to the cy pres doctrine which provides the ability of courts to approve settlements in antitrust class actions, whereby the defendants' funds are distributed to organizations having a nexus to the case, rather than to successful claimants within the class. The paper advocates use of the cy pres remedy as a method of enhancing competition. Wary of potential criticisms of cy pres, the paper suggests a series of best practices for regularizing a process that may be characterized as largely ad hoc.

Date: November 29, 2007

Keywords: Procedures, Remedies

Author Contact: [bfoer@antitrustinstitute.org](mailto:bfoer@antitrustinstitute.org)

AAI Working Papers are works in progress that will eventually be revised and published elsewhere. They do not necessarily represent the position of the AAI.

Nov. 29, 2007 copyright American Antitrust Institute

ENHANCING COMPETITION THROUGH THE CY PRES REMEDY:  
SUGGESTED BEST PRACTICES

Albert A. Foer<sup>1</sup>

A “sidebar” column in the November 26, 2007, New York Times called attention to the fact that courts with increasing frequency are handing out large sums of money to charities and other public interest institutions. An eminent law professor was “shocked to learn about it” and called it “an invitation to wild corruption of the judicial process.”<sup>2</sup>

The normal remedies in a private antitrust case are a combination of injunctions and treble damages which are paid out to the victim(s) of the illegal anticompetitive activity. In class action litigation involving the antitrust laws, however, it is often impossible or impracticable to compensate all victims. In such cases courts sometimes employ the doctrine of “cy pres” to put the unclaimed damage funds to “the next best use,” which may include awarding funds to public interest organizations for purposes related in some way to the case. It is increasingly, and-- I will argue-- appropriately, being recognized that the cy pres doctrine can be utilized as part of a remedy for the purpose of carrying out the objectives of the antitrust laws by enhancing competition. At the same time, cy pres opens up possibilities of corruption, waste, and/or public criticism. In this paper, I will provide background on class action settlements and the law of cy pres before turning to suggestions for a “best practices” agenda that can utilize the cy pres doctrine as part of a competition-enhancing remedy.

I. CLASS ACTION SETTLEMENTS

---

<sup>1</sup> Albert A. Foer is President of the American Antitrust Institute, [www.antitrustinstitute.org](http://www.antitrustinstitute.org). The author has drawn on research by Hiromitsu Miyakawa and Roberto Amore, performed when they were Research Fellows at the AAI and has quoted heavily without attribution from AAI Working Paper 05-10, Albert Foer and Roberto Amore, “Cy Pres as an Antitrust Remedy,” <http://www.antitrustinstitute.org/Archives/454.ashx>. The author has also benefited from comments by a variety of private and state antitrust attorneys. The AAI is not a disinterested observer, having received some significant cy pres distributions that are noted in this paper.

<sup>2</sup> Adam Liptak, “Doling Out Other People’s Money,” New York Times, Nov. 26, 2007, at A12.

While cy pres grants may be part of an adjudicated remedy, they more generally occur within the context of settlement agreements. 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 payment of all court and administration expenses and attorneys' fees – considered as non-pecuniary components – as well as a cash component.<sup>3</sup> In the context of consumer antitrust class actions,<sup>4</sup> 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 several options, three of which are: (1) reverter funds; (2) coupon distribution; and (3) cy pres distribution. The first two often have serious drawbacks for antitrust cases.

---

<sup>3</sup> See G. P. Miller, L.S. Singer, *Nonpecuniary Class Action Settlements*, 60-AUT Law & Contemp. Probs. (1997).

<sup>4</sup> Generally, we are talking about indirect purchaser actions, which are only viable in states that have passed “Illinois Brick Repealer” statutes or otherwise interpret their laws as providing standing to indirect purchasers. See Albert A. Foer, “An Indirect Question: The Problems Surrounding Indirect Purchaser Litigation in the U.S.,” *Competition Law Insight*, Sept. 25, 2007, available at [http://www.antitrustinstitute.org/archives/files/An%20indirect%20question\\_092620071149.pdf](http://www.antitrustinstitute.org/archives/files/An%20indirect%20question_092620071149.pdf). In direct purchaser class actions, the defendants usually have the contact information for all of their customers, to whom appropriate checks can be delivered. It is far more difficult to identify and locate qualified indirect purchasers.

In reverter fund settlements,<sup>5</sup> 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. This type of remedy is most likely to be applied where the amount of damages that will be claimed is reasonably predictable, as in many product liability class actions, where damages can be computed or future damages can be estimated, based on actual harm. In antitrust class actions, actual damages are often more speculative and consequently reverter funds historically have not played a significant role in the antitrust context.

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.”<sup>6</sup> The coupon settlement has several benefits for a defendant: (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) economic advantages in the difference between compensating at the firm’s cost rather than at retail, as well as the likelihood that fewer consumers will utilize the coupons than would have claimed cash.

---

<sup>5</sup> Courts and commentators have used a variety of labels to describe this sort of fund, e.g., a “latent claim against unclaimed money in the judgment fund,” *Boeing v. Van Gemert*, 444 U.S. 472, 482, 100 S. Ct. 745 (1980); “remitter” to defendant, *In re Copley Pharmaceutical, Inc.*, 1 F. Supp. 2d 1407, 1412 (D. Wyo. 1998); a “claims-made distribution,” 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). Justice Sandra Day O’Connor called the reverter kind of settlement a “reversionary fund.” See *Int’l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1223 (2000). Herbert Newberg describes such settlements as containing a “recapture clause” allowing the defendant to recapture the unclaimed portion of the fund. See Herbert B. Newberg & Alba Conte, *NEWBERG ON CLASS ACTIONS* 12.11, at 12-31 (3d ed. 1992)

<sup>6</sup> See Miller & Singer, *supra* note 2.

Because of the advantages for the defendant, some courts<sup>7</sup> and commentators<sup>8</sup> (not to mention plaintiffs) have rejected the coupon approach as an antitrust remedy. On the one hand, the defendant (like Briar Rabbit begging not to be thrown into the briar patch) may gain a competitive benefit by using the discount to take sales away from innocent competitors; and, on the other, the injured class members, in order to recover damages, are required to make further purchases of the litigated product.<sup>9</sup> 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, as in the California Microsoft settlement,<sup>10</sup> it will be preferable to require

---

<sup>7</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 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.”

<sup>8</sup> 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).

<sup>9</sup> 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>. The briar patch analogy would not be applicable if all the sellers in the relevant market are sued and subjected to the same remedy.

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/Archives/154.ashx>.

<sup>10</sup>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.

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

the defendant to honor coupons for purchases made from its competitors.<sup>11</sup> It seems elementary that the court should not approve a coupon remedy that will affect the marketplace in a way that may provide a competitive advantage to a firm that was charged with anticompetitive conduct.

## II. THE CY PRES DOCTRINE IN ANTITRUST CLASS ACTION LITIGATION

With reverter settlements not being used with frequency in antitrust class action settlements because of the difficulty in estimating damages and coupon remedies frequently having serious drawbacks for competition and for consumers, the cy pres remedy has evolved into a workable device that often fits well into an antitrust class action settlement. The cy pres doctrine<sup>12</sup> originated as a rule in the law of trusts and estates, allowing the Court to provide for the next-best use of gifts or fair disposition of charitable trusts or wills that would otherwise fail.<sup>13</sup> 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, permitting funds to 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.”<sup>14</sup>

---

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](http://www.nonstarlinkfarmerssettlement.com).

<sup>11</sup> 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” whether from the defendant or from other sellers. *See* Newberg & Conte, *supra* note 7 .

<sup>12</sup> The cy pres doctrine is sometimes known as the fluid recovery rule.

<sup>13</sup>When literal construction of the original purpose of the trust or bequest is impracticable or illegal, courts apply the cy pres rule of construction to determine the interpretation of instruments as nearly as possible in conformity with the original intention of the testator. *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.

<sup>14</sup> *Id.*

In other words, the cy pres doctrine—which is nothing new-- 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.<sup>15</sup>

Cy pres remedies fall into two general categories: “earmarked escheat” and consumer trust funds. Earmarked escheat involves a governmental plaintiff. 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”.<sup>16</sup> The consumer trust fund approach aims at financing existing consumer protection organizations or creating a new organization:<sup>17</sup> such institutions will be required to use the funds for the benefit of class members, consumers

---

<sup>15</sup> See Newberg & Conte *supra* note 20. This distribution does not 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. Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1307, (9thCir. (Ariz.) May 18, 1990). This case also holds that a cy pres remedy may not be used in a contested class action to avoid manageability problems. Many cases, on the other hand, uphold the use of cy pres in settlements. See American Law Institute (“ALI”), Principles of the Law of Aggregate Litigation, Council Draft No. 1, Nov. 2007, § 3.07 Cy Pres Settlements.

<sup>16</sup> 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, *The Role of Fluid Recovery in Consumer Protection Litigation: Kraus v. Trinity Management Services*, 90 Calif. L. Rev. 959 (2002).

<sup>17</sup> To some extent, the court (or perhaps a trustee appointed by the court) acts like a charitable foundation.

or those similarly situated, for instance by supporting lawsuits, lobbying, or other projects related to consumer protection and education.<sup>18</sup>

A fundamental question that has arisen in a few cy pres distributions is whether it is, in the first place, proper to dole out damage funds to anyone other than a member of the plaintiff class who has filed a qualified claim. This question should be answered in the affirmative, under the right conditions. In In re Folding Carton Antitrust Litigation, the court discussed the legal status of a reserved fund.<sup>19</sup> The court first ruled that the defendants had relinquished any claim to any portion of the settlement fund because they had irrevocably transferred the fund, and therefore denied the defendants' request that distribution of the reserve fund be 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.<sup>20</sup> It is true that 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."<sup>21</sup>

---

<sup>18</sup> See S. Karas, *note 16 supra*.

<sup>19</sup> 557 F. Supp. 1091 (N.D. Ill. 1983), *aff'd*, 774 F.2d 1252 (7th Cir. 1984), *cert. dismissed*, 471 U.S. 1113 (1985).

<sup>20</sup> *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 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".

<sup>21</sup> See Karas *supra* note 16. See generally Jack B. Weinstein, *Individual Justice in Mass Tort Litigation*



Pragmatism has indeed characterized much of cy pres jurisprudence. In Levi Strauss, the California Supreme Court, for example, 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.”<sup>22</sup>

Susan Beth Farmer suggests that direct restitution to consumers should be preferred in cases in which fraudulent claim-making is not a real threat. 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 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.”<sup>23</sup>

---

(1995). A draft statement of the American Law Institute takes the position that if funds remain after claims have been fulfilled and further distribution is economically viable, the first objective should be to distribute such funds to the claimants, on the theory that the funds belong to the class and that it is not going to create a windfall for these claimants because it is unlikely that any claimant received more than 100% of his or her damages. ALI, note 15 *supra*. On the other hand, it can be argued that the class of those injured by an antitrust violation is usually much larger than the individuals who become aware of a class action remedy and have the energy and information to take advantage of it. If the members of this more extended class could benefit from the cy pres distribution, isn't it a bit legalistic—rather than equitable-- to insist that the funds go only to the successful claimants? The ALI draft does say that when distribution to individuals is not feasible, the cy pres option is preferable to other options such as reversion to the defendants or escheat to the state. *Id.*

<sup>22</sup> *Id.* See Levi Strauss *supra* note 16.

<sup>23</sup> 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.

Two extreme positions on fluid recovery are sometimes advanced: on the one extreme, that it is per se unconstitutional or, on the other, that courts should always use cy pres 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.”<sup>24</sup>

Although Federal Rule of Civil Procedure 23, governing class actions, does not address the issues of remedies or a court's remedial power,<sup>25</sup> today, nearly all jurisdictions apply the cy pres doctrine in a broad variety of cases.<sup>26</sup> Whether a cy pres distribution is

---

<sup>24</sup> 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); also see 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 16.

<sup>25</sup> The authority for federal courts to fashion equitable remedies may also lie within Federal Rule of Civil Procedure 54(c)(equitable remedies). 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) (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).

<sup>26</sup> See Farmer, supra note 23 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 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,

possible depends in part upon the legislative authority under which a class action is brought.<sup>27</sup> As one example, in West Virginia v. Chas. Pfizer & Co.,<sup>28</sup> 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."<sup>29</sup> 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.<sup>30</sup>

Closely paralleling private class actions are *parens patriae* actions pursuant to Section 4C of the Clayton act,<sup>31</sup> in which state Attorneys General bring antitrust actions for damages on behalf of the natural-person citizens of the state.<sup>32</sup> Much as in private

---

note 25 supra. See also Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, note 25 supra.

<sup>27</sup> 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 16.

<sup>28</sup> 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, note 25 supra.

<sup>29</sup> 314 F. Supp. 710, 728 (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, note 25 supra.

<sup>30</sup> 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).

<sup>31</sup> 15 U.S.C.A. § 15c(b) (2) and (3). See HSR, Pub. L. No. 94-435, sec. 301, 4C, 90 Stat. 1383, 1394 (codified at 15 U.S.C. 15c (1994)).

<sup>32</sup> Substantive antitrust principles were not altered by the allowance of *parens patriae* actions. 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 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. See *id.* H.R. Rep. No. 94-499, at 9 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2578; See 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 21 .

litigation, courts adjudicating *parens patriae* antitrust litigation must determine how to distribute damages, whether determined through a trial or settlement. As in private cases, 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 *parens patriae* legislation: facilitation of antitrust litigation to benefit consumers; disgorgement of ill-gotten gains; and deterrence.<sup>33</sup>

The state Attorneys General are in a 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.

While the discretion of a court in shaping or approving a *cy pres* remedy is great, there are nevertheless certain constraints, which we turn to in the next section.

### III. NEXUS: THE IMPORTANCE OF RESTRAINT

The purpose of a remedy in an antitrust case is three-fold: to protect or restore competition in the market, to deter anticompetitive behavior, and to compensate victims of illegal conduct. All of these goals are applicable in the remedy phase of a class action adjudication or settlement. When an aggregate amount of damages is established, the primary objective is to distribute the damages to those who were directly damaged, i.e. the members of the class who come forward with *bona fide* claims. Sometimes there is money left over in the form of unclaimed funds. Occasionally, there may be administrative reasons that outweigh making payments to individual plaintiffs, e.g., in the case of an extremely large class where the fund is not large enough to justify the transaction costs of distribution. In either event, allowing courts to formulate broad *cy*

---

<sup>33</sup> See generally Farmer, *supra* note 23.

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.<sup>34</sup>

The essence of the cy pres doctrine, however, is that distributions should be made in a manner “as near as possible” to an immediate direct distribution.<sup>35</sup> In the case law, it appears that while some cy pres distributions proposed to courts have adequately reflected this nexus between the injured class and the cy pres distribution;<sup>36</sup> in other cases the nexus is remote<sup>37</sup> or completely absent.<sup>38</sup> Most courts correctly operate on the proposition that a nexus cannot be absent.<sup>39</sup> But what constitutes an adequate nexus?

---

<sup>34</sup> See K.M Forde, *supra* note 8.

<sup>35</sup> 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").

<sup>36</sup> 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").

<sup>37</sup> 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).

<sup>38</sup> 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.").

<sup>39</sup> 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

A direct nexus between the injured consumers and the cy pres recipients is neither always feasible nor required. As the trial court observed in Superior Beverage Co. v. Owens-Ill., Inc.,

[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.<sup>40</sup>

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 rather 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-related antitrust class action settlement be

---

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 37.

<sup>40</sup> 827 F. Supp. 477 (N.D. Ill. 1993).

used to create public health programs not necessarily related to antibiotics.<sup>41</sup> These public health programs provided both damaged and undamaged consumers some benefit related to the antitrust injuries only in the general sense that both the injury and the cy pres distribution involved health care. To provide a more direct nexus to the case at hand, 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. It has generally been sufficient, however, for the proposed use of cy pres funds to be related to the industry in which the antitrust violation occurred, without requiring a relationship to the particular product.

Some courts in *parens patriae* cases have ordered the entire damage award to be used for public interest purposes, such as education with respect to the industry in which liability was established,<sup>42</sup> even though the consumers on whose behalf the case was brought did not recover their actual damages. In other instances, some cy pres distributions have been ordered to be used by state Attorneys General to fund antitrust enforcement.<sup>43</sup> This use, while not addressing the consumers or the industry specifically affected by the defendant's conduct, seeks to promote compliance with the antitrust laws.

On July 10, 2007, Judge Kollar-Kotelly of the U.S. District Court for the District of Columbia issued one of the most interesting opinions discussing an antitrust cy pres distribution.<sup>44</sup> Class Plaintiff sought distribution of the undistributed settlement funds,

---

<sup>41</sup> 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...").

<sup>42</sup> See *New York v. Dairylea 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 23.

<sup>43</sup> See *Farmer*, *supra* note 23.

<sup>44</sup> *Diamond Chemical Co., Inc. v. Akzo Nobel Chemicals BV*, Civ. Action No. 01-2881 (CKK)

which amounted to more than \$5 million, to George Washington University Law School, for the purpose of establishing an endowment for a new Center for Competition Law. Defendant chemical companies opposed this, on three grounds: (1) the distribution does not correspond with the geographical scope of the case; (2) it is disconnected from the subject matter of the case, which the defendants described as the chemical industry; and (3) the Center is not necessary because there are substantial public and private resources already devoted to antitrust research and enforcement. In approving the distribution, the Court noted that the award would be closely related to the underlying action (price-fixing by an international cartel) and would benefit members of the injured class because the new Center would focus on problems of globalization and private antitrust enforcement. Moreover, the Court was convinced by the Plaintiff's detailed and concrete plans that the Center had been carefully thought through and had a good chance for succeeding. Even the fact that some of the Center's work would involve foreign jurisdictions was found to support the proposal, because the Center could deter foreign cartels from actions that would harm U.S. consumers. The nexus to the underlying law suit was satisfied because the law suit involved an international cartel to fix prices. It was not necessary that the funds be used with respect to the chemical industry.

Finally, the Court turned to the question of whether a center to promote antitrust enforcement was necessary. Defendants relied on the Folding Carton Litigation of the early 1980's,<sup>45</sup> in which a court had rejected a cy pres distribution that would have supported research and study relating to antitrust litigation and law. Judge Kollar-Kotelly distinguished this by saying that in the early '80s, there had been voluminous antitrust research into domestic antitrust, whereas today there are many issues involving global antitrust that merit further study.<sup>46</sup>

---

<sup>45</sup> In re Folding Carton Antitrust Litig., 744 F.2d 1252,1254 (7<sup>th</sup> Cir. 1984), Houck v. Folding Carton Admin. Comm., 881 F.2d 494, 496-97 (7<sup>th</sup> Cir. 1989). Defendants also relied on Schwartz v. Dallas Cowboys Football Club, Ltd., 362 F.Supp. 2d 574, 577 (E.D. Pa. 2005), in which the court rejected a cy pres distribution to a legal clinic at the University of Pennsylvania Law School because it was not necessary to promote the cause of U.S. antitrust enforcement. Judge Kollar-Kotelly distinguished this because the current proposal did not involve funding a typical law school clinic that engages in the representation of clients.

<sup>46</sup> Diamond Chemical at page 9 of slip opinion.



The nexus in Diamond Chemical was the relationship between the law violation – an international price-fixing cartel—and the expenditure of cy pres funds, i.e., an educational and advocacy center that would focus at least to some extent on international antitrust enforcement. A relevant consideration was whether such an expenditure was necessary. The message to a public interest organization like the American Antitrust Institute seems to be that a class action cy pres settlement may be approved, even over the defendants’ objection, in an antitrust case where the proposed expenditure, backed up in some detail, is to tailor pro-enforcement activity to the type of violation that occurred, without regard to the industry involved.

But such justification for a pro-enforcement grant may not be needed, particularly if there is no objection from defendants. Consider the unique decision in Motorsports Merchandise Antitrust Litigation,<sup>47</sup> which appears to have gone unacceptably beyond Superior Beverage and its statement that the cy pres doctrine is nowadays “more flexible.”

In the 2001 Motorsports 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.<sup>48</sup> The Court stated that

---

<sup>47</sup> 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.

<sup>48</sup> 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).

it “attempted to identify charitable organizations that may at least indirectly benefit the members of the class of NASCAR racing fans.”<sup>49</sup>

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 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 or to the underlying statute. 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,<sup>50</sup> the Eighth Circuit found that the trial court had abused its discretion with respect to a cy pres distribution.<sup>51</sup> 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.”<sup>52</sup> Basically,

---

<sup>49</sup> See Motorsports, *supra* note 67.

<sup>50</sup> 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)

<sup>51</sup> 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.”).

<sup>52</sup> In re Airline Ticket Comm’n 2001, 268 F.3d at 626.

the Eighth Circuit found that there was no nexus between the injured class and organizations receiving unclaimed funds through a cy pres distribution.<sup>53</sup>

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. Said the Court,

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 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.<sup>54</sup>

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.<sup>55</sup> But such a clear nexus is not always possible under the circumstances of the case.<sup>56</sup> 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."<sup>57</sup>

---

<sup>53</sup> See *Airline Ticket Comm'n* 2002 at 680.

<sup>54</sup> *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."

<sup>55</sup> 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 37 .

<sup>56</sup> 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").

<sup>57</sup> See *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1312 (9th Cir. 1990) (Fernandez, J.,

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. The attorneys, too, have their personal and professional interests that may not correspond with the needs of the case. Class actions already have a bad name and have recently been narrowed by federal legislation.<sup>58</sup> 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.

#### IV. CY PRES AS A COMPETITION-ENHANCING REMEDY

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.<sup>59</sup> 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 through grants to competitors.

---

concurring).

<sup>58</sup> See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

<sup>59</sup> See *Simer v. Rios*, *supra* note .

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 participated in 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.<sup>60</sup> The settlement included creation of a fund that Utah could use to expand competition in the medical waste industry.<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup> The Utah solution represents a creative

---

<sup>60</sup> 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.

<sup>61</sup> 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.

<sup>62</sup> 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.

<sup>63</sup> Information about the State's intention and what occurred was provided to the author by Wayne Klein, Assistant Attorney General of Utah. E-mail from Wayne Klein to Albert Foer, dated June 1, 2005.

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.<sup>64</sup> Although the money in a circumstance of this nature does not go directly 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. Restoration of competition would benefit the consumers who had been injured.

As this Utah experience demonstrates, however, the potential complexities that may arise in an "industrial policy" intervention. When the effort to promote new entry failed, the State made grants directly to three small competitors already in the market, to strengthen their abilities to compete.<sup>65</sup> Both strategies -- incentivizing entry and strengthening existing competitors through direct grants of cy pres funds— may require substantial continuing involvement by the court or its representative, and run a risk of providing a governmental competitive advantage to a subset of the market. On the other hand, in certain situations, these risks may be worth undertaking in order to restore competition to a market that was undermined by antitrust violations.

---

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.

<sup>64</sup> 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.

<sup>65</sup> According to Klein, note 63 supra, 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.

## 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 law enforcement costs for the next antitrust intervention.<sup>66</sup> 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 that was violated.

In In re Vitamin Cases a California court reviewed a proposed cy pres settlement of \$38 million related to a vitamin price fixing scheme.<sup>67</sup> 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 sheer size of this class, the amount of any

---

<sup>66</sup> A redacted version of the confidential report is available at <http://www.antitrustinstitute.org/Archives/451.ashx>. The full report was provided to all States and to the FTC and DoJ Antitrust Division.

<sup>67</sup> See *In re Vitamin Cases*, 132 Cal. Rptr. 2d 425, 428 (Cal. Ct. App. 2003); See *Draba*, *supra* note 37.

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.”<sup>68</sup> 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 a 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 was produced for television, demonstrating the value of the antitrust laws for consumers and businesses. The film, “Fair Fight in the Marketplace,” was re-edited for classroom use and made part of a package of classroom materials, teacher materials, and web-based additional resources, for introduction into California high school curricula.<sup>69</sup> 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

---

<sup>68</sup> *Id.* See also Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 453 n.243 (2003).

<sup>69</sup> The educational website is [www.fairfightfilm.org](http://www.fairfightfilm.org). The video was produced under the supervision of the AAI by Filmmakers Collaborative. It has received two national awards for documentaries and has been aired on public television stations first in California and then around the country. The video, with its segments each introduced by a California prosecutor, may be viewed on the website. The curriculum materials that are available on the website were produced under the supervision of the AAI by Street Law, an organization experienced in the development of law-related materials for schools. Street Law also conducted training of teachers in California, to encourage the introduction of the materials into the classroom.



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,<sup>70</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, instead, 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>71</sup>

Finally, the distribution of the unclaimed fund to the National Association for Public Interest Law (NAPIL) for a fellowship program unrelated to antitrust law was approved by the district court.<sup>72</sup> 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.”<sup>73</sup> The court adopted the committee and NAPIL’s proposal to set up a permanent source of funding for

---

<sup>70</sup> 744 F.2d 1252, at 1255 (7<sup>th</sup> Cir. 1984).

<sup>71</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>72</sup> 1991 U.S. Dist. LEXIS 2553, 1991 WL 32867 (N.D. Ill. 1991).

<sup>73</sup> *Id.*

NPIFP because using the reserve fund to establish the NPIFP was appropriate under the cy pres doctrine.<sup>74</sup>

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 too high a level of generalization: that the case involved a 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. As the later Diamond Chemical distribution demonstrates,<sup>75</sup> a grant to a foundation or center 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 Seventh Circuit was concerned that general antitrust research 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. In Diamond Chemical, the Court required a showing by the intended recipient that there is a need for the type of antitrust research and activism being proposed.

## VI. SOME THOUGHTS ON BEST PRACTICES

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.<sup>76</sup> In most of the cases, a list of recommended recipients was offered by

---

<sup>74</sup> *Id.*

<sup>75</sup> Diamond Chemical, note 44 *supra*.

<sup>76</sup> See A. M. Menocal, *Proposed Guidelines for Cy Pres Distribution*, *The Judge's Journal* 22 (1998).

plaintiff's lead counsel in a stipulated or unopposed order and the court generally accepted them.<sup>77</sup> On occasion, a court has requested proposed recipients to either make written submissions elaborating on how they would utilize the funds or to appear before the court to make a presentation.<sup>78</sup> 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. Because "courts often lack the familiarity and resources to identify alternative uses of the funds and potentially qualified recipients,"<sup>79</sup> plaintiffs may be helpful by proposing a procedure for selecting the beneficiaries instead of specifying the particular cy pres distribution recipients in the settlement.<sup>80</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>81</sup>

The initiative typically rests with plaintiff's lead 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, to a lesser extent, defense counsel. A remedy that is intended to help restore or promote competition might

---

<sup>77</sup> *Id.* at 23. The American Antitrust Institute was recently the surprised recipient of a cy pres grant of nearly \$1.7 million, which it has used to create an endowment fund. The AAI did not make an application for this grant and the grant contained no conditions. *Wade v. Bayer AG et al*, order the Shelby County Circuit Court, Tennessee, December 7, 2006. The grant is being used to create an endowment.

<sup>78</sup> In *House v. GlaxoSmithKlein*, Docket No. 2:02cv442 (order filed March 30, 2006) in the Eastern District of the United States District Court for Virginia (Norfolk Division), Judge Morgan invited the nominees for awards to come to Norfolk and present their justifications for cy pres distributions. Plaintiffs' lawyers in the case had agreed on five nominees, including the AAI, but had also agreed not to promote particular candidates or award amounts. The AAI was ultimately awarded ten percent of the left-over funds, with the remainder being split equally among two hospitals, a medical schools, and a childrens rights organizations. The underlying case involved price fixing of a drug frequently prescribed to children and the Court opined that antitrust was further removed from the injured class than was health care for children. This is the only example we know of in which the plaintiff's nominees were called to the court to explain how they would spend funds. The AAI has been invited in other cases to provide the court with background on its makeup and activities and in some cases to provide a written proposal for how it would expend funds.

<sup>79</sup> See Menocal, *supra* note 76.

<sup>80</sup> 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>.

<sup>81</sup> *Id.*

be controversial, and of course cannot be adopted as part of a settlement if the defense refuses to go along, unless the Court (as in Diamond Chemical) approves.

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.

In a *parens patriae* antitrust case, it should be an inherent part of the state's strategy to create a remedy that provides restitution or damages for injured consumers and enhances competition, with *cy pres* an option for achieving that end, if direct relief isn't possible.

With these thoughts as background, I am offering the following as proposed best practices for courts, plaintiffs' lawyers and state enforcement officials:

1. The first priority in an antitrust class action remedy is to assure that as many members of the injured class as possible are aware of their opportunity to file a claim and that the claims process is as simple and fair as possible, consistent with the need to deter fraud and achieve transactional efficiency.

2. Where funds are not distributed directly to the injured consumers, there must be a nexus between the nature of the claim and the uses to which the cy pres funds will be put. The responsibility is on plaintiffs' class counsel (including *parens patriae* counsel, if applicable) to come forward with a plan for distribution. It is the responsibility of the court to assure that plans are equitable, administrable, and satisfy the requirements of the cy pres doctrine.

3. The benefit to the class may be direct or indirect and may be related to the industry in which the antitrust violation occurred, the type of harm that occurred, or to the restoration or enhancement of competition.

4. All things being equal, proposals for direct benefit to the class are to be preferred to proposals for indirect benefit and proposals that relate to the geographic scope of the harm are preferred to proposals that relate to only a segment of the geographic market in which the harm occurred.

5. Proposals should be rejected which entail possible anti-competitive effects, such as giving a marketplace advantage to a defendant.

6. If the class is so large compared to the size of the fund that the transaction costs render a distribution of cash infeasible, then a cy pres alternative should be designed as the essential part of the settlement or adjudicated order.

7. Where the fund is sufficiently large, the court should establish a foundation-like process not only for awarding and distributing the money, but also for overseeing the expenditures by cy pres recipients. In this case, a percentage of the fund should be set aside for administration and the order should set forth general objectives of the distribution, which could include different percentages targeted at different objectives. The administrator should have some experience in analyzing, evaluating, and supervising grant proposals.

8. Where the fund is not considered sufficiently large to encompass a foundation-like process, the plaintiffs should present multiple candidates for awards and describe how the candidates were selected (e.g., explaining why there is no conflict or bias on the recommenders' part). The candidates should provide the court with their background, their proposal for how an award would be utilized, a justification for the award in terms of benefit to the class, and a commitment to provide one or more reports to the court in the future on how the money was in fact expended.

9. Types of cy pres remedy appropriate in an antitrust case could include education, research, and/or advocacy with respect to the improvement of antitrust enforcement or compliance in the industry where the violation occurred. In *parens patriae* cases, if relief focused on consumers is not feasible, the remedy could include carefully constructed grants to encourage entry or otherwise improve the state of competition within the industry.

10. States should adopt guidelines for cy pres situations in which they have a role, so that ad hoc policies and procedures can be minimized and Attorneys General are not given *carte blanche* to spend cy pres money.

There may be ways in which the transaction costs associated with cy pres might be reduced through cooperative action. An example would be to establish a single foundation-like organization into which all cy pres funds would be funneled. This would be too extreme if it removed from the court decisions as to who will receive funds and for

what purposes. However, such an organization, funded through a percentage of cy pres moneys, could investigate applicants for the courts and administer the funds, including monitoring expenditures for the courts.