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Enhancing Competition Through The Cy Pres Remedy: Suggested Best Practices

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THE NORMAL REMEDIES IN A private antitrust case are a combination of injunctions and treble damages that are paid out to the victim(s) of the anticompetitive activity. When an aggregate amount of damages is established, the primary objective is to distribute the damages to those who were injured. In antitrust class action litigation, however, it is often impossible or impracticable to compensate all victims. Administrative concerns may work against payments to individual plaintiffs, as in the case of an extremely large class where the fund is not sufficient to justify the transaction costs of distribution to individual claimants. Consequently, in some cases, there is money left over in the form of unclaimed funds.

In such cases, courts sometimes employ the doctrine of "cy pres" to put the unclaimed funds to "the next best use," which may include awarding funds to public interest organizations or charities for purposes related to the case. There is increasing interest in utilizing the cy pres doctrine as part of the remedy because of its potential to enhance competition.[1] At the same time, cy pres opens up possibilities of corruption, waste, and public criticism.[2] In this article, I provide background on the law of cy pres and suggest "best practices" for its invocation.

The Cy Pres Doctrine in Antitrust Class Action Litigation

The cy pres remedy has evolved into a workable device that often fits well into an antitrust class action settlement. The cy pres doctrine originated as a rule in the law of trusts and estates, allowing courts to provide for the next-best use of gifts or fair disposition of charitable trusts or wills that would otherwise fail.[3] By analogy, courts began to apply the cy pres doctrine in class actions in the 1970s, after the 1966 amendments to Federal Rule of Civil Procedure 23 expanded the class action procedure.[4] The process known as aggregate cy pres distribution permits unclaimed or residual class action funds to be put to their next best use for the aggregate, indirect, prospective benefit of class members. Examples described later in this article include the *Diamond Chemical* case and the California Vitamins Cartel litigation.[5]

Although Rule 23 does not directly address remedies,[6] today, nearly all jurisdictions apply the cy pres doctrine in a broad variety of cases.[7] In class actions brought under Rule 23, a court's order approving a class action settlement—including one that involves a cy pres award—is reversed only upon a showing of an abuse of discretion.[8]

Class actions may be brought as suits by private plaintiffs or as parens patriae actions pursuant to Section 4C of the Clayton Act,[9] under which state attorneys general may bring antitrust actions for damages on behalf of the natural-person citizens of the state. Much as in private litigation, courts adjudicating parens patriae antitrust litigation must determine how to distribute damages, whether ascertained through a trial or settlement. As in private cases, courts have vast discretion to approve the distribution of damages in parens patriae actions.

The Importance of a Nexus Between the Case and the Remedy

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.[10] Allowing courts to formulate broad cy pres distribution of damages has several significant benefits. First, deterrence is served because, an amount of damages having been determined, 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 promote competition or dissuade the kinds of actions that constituted an antitrust violation, or will benefit society in general, class members who did not assert a claim are indirectly benefited.

The essence of the cy pres doctrine, however, is that distributions should be made "for a purpose as near as possible to the legitimate objectives underlying the lawsuit."[11] While some cy pres distributions have adequately reflected this nexus between the injured class and the cy pres distribution;[12] the nexus has been remote[13] or completely absent[14] in other cases. Most courts correctly operate on the proposition that a nexus cannot be absent. But what constitutes an adequate nexus?

It is not necessary for the nexus between the injured consumers and the cy pres recipients to be direct in order to be adequate. When courts distribute funds to support public interest programs (e.g., public health promotion), the nexus between those directly harmed and the distribution of dam-

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ages may be indirect, although not altogether absent.[15] For example, it has generally been sufficient 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 involved in the case.

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,[16] even though the consumers on whose behalf the case was brought did not recover their actual damages. In other instances, cy pres distributions have been ordered to be used by state attorneys general to fund antitrust enforcement.[17] 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.

Judge Kollar-Kotelly's 2007 *Diamond Chemical* opinion provides one of the most interesting discussions of an antitrust cy pres award.[18] Class plaintiff sought distribution of the undistributed settlement funds, 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. In approving the distribution over the objection of the defendant chemical companies, 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. In other words, in this price-fixing case, a cy pres grant aimed at improving competition through education and advocacy meets the test of nexus. Moreover, the court was convinced by the plaintiff's detailed plans that the Center had been carefully thought through and had a good chance of success. 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 suit was satisfied because the suit involved an international cartel to fix prices. It was not necessary that the funds be used with respect to the chemical industry.

The message to a public interest organization seems clear enough: a class action cy pres settlement may be approved, even over the defendants' objection, where the proposed expenditure will support pro-enforcement activity aimed at the type of violation that occurred, even without connection to the specific industry involved.

By way of contrast, consider the unique decision in *Motorsports Merchandise Antitrust Litigation*,[19] involving price fixing of NASCAR souvenirs. The court approved distribution of excess settlement funds to ten charities. In its cy pres order, the court described each charity chosen to receive funds, defined the use that the charity would make of the funds, and assessed its impact on the community. Any funds remaining after all distributions were made and all costs paid were to be given to two legal aid organizations.[20] 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."[21] In reality, while the class and geographic scope of the lawsuit was nationwide, funds were distributed mainly to local organizations having relatively little to do with either class members or the issues of the case.[22]

So, what limits, if any, should there be on distributions of funds to charitable or public interest organizations in antitrust cases? Everyone agrees that the best cy pres distribution would be one in which the connection between the indirect cy pres benefit and the injured consumer is clear. But such a clear nexus is not always possible under the circumstances of the case.[23] Support for the class action mechanism, not to mention for the institution of antitrust itself, can be undermined if the public comes to see the outcome of class litigation as having too little connection to the underlying cause of action.

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. In the cases brought under the antitrust laws, the allegations will concern anticompetitive conduct that has deprived the public of freely functioning markets. Most often, the violation will involve horizontal collusion and the class will consist of purchasers who overpaid as a consequence. Thus, a cy pres distribution would have a suitable nexus if it were directed at (1) compensating the class; and/or (2) restoring competition within the particular market where the violation occurred; and/or (3) maintaining competition more generally.

In the *California Vitamin Cases*, a California court reviewed a proposed cy pres settlement of $38 million related to a vitamin price-fixing scheme.[24] The vitamins involved in the scheme were used as supplements, included in food products, and even added to pet foods. Almost any adult citizen of California could have been a class member. Due to the sheer size of this class, the amount of any individual damages would have been so small that transaction costs associated with the processing and payment of individual consumers rendered 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."[25] The settlement also established a system for cy pres distribution, which included employment of a funds administrator who operated much like a foundation, generating highly detailed applications that were reviewed by a staff and presented to a committee that would 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 undertake a two-year antitrust education project focused largely on California. In the first phase, a TV

video was produced, demonstrating the value of the antitrust laws for consumers and businesses. The video then was re-edited for classroom use and made part of a package of classroom materials and Web-based additional resources for introduction into California high school curricula.[26] Although money did not go directly to individual consumers, one can read into the approval of this use of cy pres funding that there was a clear nexus between the antitrust statute that was violated and the intended use of the funds, i.e., that the law is more likely to be followed if more members of the public are familiar with it.[27]

As the *Diamond Chemical* distribution demonstrates,[28] a grant to a foundation or center for research on complex antitrust litigation could be structured with a clear nexus to the public interest in enforcing the applicable statute and could reasonably lead to fewer violations or better administration of the antitrust laws. Put differently, education, research, and advocacy involving the enhancement of the antitrust enterprise can be appropriate "next best" uses of a class action remedial fund in an antitrust case.

The ALI Principles of the Law of Aggregate Litigation

The cy pres remedy today is coming under closer public and legal scrutiny than at any previous time.[29] The American Law Institute (ALI) on November 18, 2008, issued Council Draft No. 2 of the Principles of the Law of Aggregate Litigation. Section 3.07, previously approved by the membership, deals with cy pres settlements. It provides that a court may approve a settlement that proposes a cy pres settlement subject to three criteria:

(a) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members.

(b) If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

(c) If the court finds that individual distributions are not viable based upon the criteria set forth in subsections (a) and (b), the settlement may utilize a cy pres approach only if the parties can identify a recipient involving the same subject matter as the lawsuit that reasonably approximates the interests being pursued by the class.[30]

Subsection (a) is a traditional and unobjectionable restatement of the law. Subsection (b), however, could in some situations substantially reduce the funds available for cy pres distribution, and requires further discussion, some of which is provided by the ALI's commentary:

> This Section rejects the position urged by a few commentators that a cy pres remedy is preferable to further distributions to class members. Those commentators reason that further direct distributions would constitute a "windfall" to those class members. However, few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery for those class members. In any event, this Section takes the view that in most circumstances distributions to class members better approximate the goals of the substantive laws than distributions to third parties that were not directly injured by the defendant's conduct.[31]

There is neither an empirical nor a theoretical basis for the ALI's statement that few settlements award 100 percent of a class member's loss in an antitrust case. It is certainly true that settlements never obtain treble damages to which a plaintiff would be entitled in a trial victory, but we can only hypothesize as to what the outcome of the trial would have been and how much actual damages would have been established as the basis for trebling. In other words, the precise damages to which an individual class member is entitled in a settled case is a fiction. A settlement represents a compromise between two estimates for the damages that might in a future trial be determined for a class whose size and makeup are rarely foreseeable on a precise basis, taking into account conflicting discounts for predicted trial outcomes and collection risk. Although we can doubt that actual damages (as opposed to negotiated damages) are often obtained, there is no reason to conclude that a class member is entitled to recover actual damages in a settled case. Rather, what the court finds to be a "fair and reasonable and adequate" basis for damages after a Rule 23 hearing must be taken as a reasonable approximation for what should be distributed to individual qualified claimants within the overall context of the litigation.

A supplemental distribution to the same claimants who have already received what the court found adequate is unlikely to make these claimants "whole" since "whole" cannot be determined in this context with anything approaching precision. Moreover, distributing excess funds to those who filed valid claims ignores both the remaining class members who for one reason or another did not file qualified claims and the overall purpose of the case, which is to provide a remedy not only to those who were directly injured but also to those who were indirectly injured or who would likely be injured in the future but for the efforts of the litigants.

The ALI's commentary to Subsection (c), which finally authorizes cy pres, properly rejects the option of returning the remaining funds to the defendant, as this would reward the wrongdoer.[32] It also rejects escheat to the state because this would benefit all citizens equally, even those who were not harmed by the defendant's alleged conduct.[33] The commentary continues:

> A cy pres award to a recipient that closely approximates the class is preferable to either of these options. Nonetheless, if no close approximation to the class can be identified, then a

> cy pres award is not justified. Moreover, even if such a nexus can be shown, a cy pres remedy should not be ordered if the court or any party has a significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits.[34]

The ALI's concern about conflicts of interest is well-grounded. The more difficult question is whether the ALI would sanction cy pres distributions to third parties whose mission is to enhance the purposes of the law under which the litigation was conducted.

The ALI commentary explains circumstances in which a cy pres payment to the NAACP Legal Defense Fund would be appropriate. In the example, the Legal Defense Fund was not a party, but the case involved enforcement of the civil rights statutes, the special cause of the fund. A parallel understanding of antitrust would hold it appropriate to award cy pres funds to a non-profit organization for the enhancement of the purposes of the antitrust laws.

Recommended 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 plaintiffs' attorney and grant recipients, as well as the accountability and evaluation of proposals, are presented. In most of the cases, a list of recommended recipients was offered by plaintiffs' lead counsel in a stipulated or unopposed order and the court generally accepted them. On occasion, a court has requested proposed recipients to elaborate on how they would utilize the funds or to appear before the court to make a presentation. Plaintiffs' attorneys may be helpful by proposing a procedure for selecting the beneficiaries instead of specifying the particular cy pres distribution recipients in the settlement. In any event, fair and clear selection procedures should be established to serve the best interests of absent class members and minimize disputes over the settlement.

The following are proposed best practices for courts, plaintiffs' lawyers, defense counsel, and state enforcement officials:[35]

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. If there are funds remaining after qualified claims have been met or 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 an essential part of the settlement or adjudicated order.
3. 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. Class counsel (or parens patriae counsel, if applicable) must come forward with a plan for distribution, and other counsel should evaluate the proposal and inform the court of any objections or proposed revisions. After notice to the class and an opportunity for objections, the court can then hold a hearing to determine if the remedy is equitable, administrable, and consistent with the requirements of the cy pres doctrine.
4. 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 the restoration or enhancement of competition.
5. All things 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 only to a segment of the geographic market in which the harm occurred.
6. Proposals entailing possible anticompetitive effects, such as providing a marketplace advantage to a defendant, should be rejected.
7. Where the fund is sufficiently large, the court should establish a grant-making 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 specify general objectives of the distribution, which could include different percentages targeted at different objectives. The administrator should have experience in analyzing, evaluating, and supervising grant proposals and their implementation.
8. Where the fund is not sufficiently large to encompass a formal grant-making process, the plaintiffs should present multiple candidates for awards and describe how the candidates were selected (e.g., transparently explaining any 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 expended.
9. Types of cy pres remedies appropriate in an antitrust case could include education, research, and/or advocacy

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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 consumer payments 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 cy pres guidelines and ad hoc policies and procedures should be minimized.

There may be ways in which the transaction costs associated with cy pres could be reduced through cooperative action. An example would be to establish a national administrative entity which, at the court's discretion, would help administer cy pres funds. Although the forum court should determine who will receive funds, the amounts, and for what purposes, such a central administrator, funded through a percentage of cy pres moneys, could investigate applicants as an agent for the court and administer the funds, including monitoring expenditures, thereby providing economy of scale and a level of expertise and oversight that rarely occurs in today's cy pres distributions.

Conclusion

The doctrine of cy pres has a proper role to play in the context of antitrust class actions, but there is a danger of abuse that has been recognized in the media and must be addressed by the bar and the judiciary. A variety of "best practices" can help avoid the pitfalls while assuring that cy pres is part of a remedy for competitive problems that brought the class into the courtroom. ■

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[1] By "competition" the author refers not only to the possibility of usages of cy pres funds that may directly enhance the competitive process within a particular market that was the subject of an antitrust violation, or that may, more generally, indirectly benefit the class by contributing to enhancement of the competitive process through such projects as education of consumers, training of judges, or the support of enforcement activities related to the underlying antitrust violation in the case.

[2] Cy pres has its critics. *See* Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES, Nov. 26, 2007, at A12; Ted Frank, *Cy Pres Settlements*, http://www.aei.org/publications/filter.all,pubID.27789/pub_detail.asp; Amanda Bronstad, *Cy Pres Awards Under Scrutiny*, 2008 NATIONAL J. ONLINE, Aug. 11, 2008, http://www.nlj.com; Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative & Empirical Analysis*, http://www.law.northwestern.edu/Searle center/issues/index.cfm?ID=70. These articles, probably overstating the problems inherent in current cy pres situations, constitute one reason why it is now appropriate to adopt "best practices" in this area.

[3] The cy pres doctrine is sometimes known as the fluid recovery rule, although fluid recovery more precisely applies to an effort to approximate the injured class of consumers through the provision of relief to future consumers, e.g. by discounting the price in future sales.

[4] *See* S.R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972).

[5] *See infra* text at notes 18 and 24.

[6] A federal court may approve a proposed settlement of a class action only after a hearing and on a finding that it is "fair, reasonable, and adequate." FED. R. CIV. P. (as amended to Dec. 1, 2007), Rule 23(e)(2). The authority for federal courts to fashion equitable remedies may also lie within FED. R. CIV. P. 54(c) (equitable remedies). *See* Natalie 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, 447 & n.120 (1973)) ("every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded such relief in its pleadings." FED. R. CIV. P. 54(c)).

[7] *See, e.g.*, Susan 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, 404 (1999).

[8] *See In re* Airline Ticket Comm'n 2001, 268 F.3d 619, 625 (8th Cir. 2001) ("We review a district court's cy pres distribution for an abuse of discretion.") (citing Powell v. Georgia-Pac. Corp. 119 F.3d 703, 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).

[9] 15 U.S.C. § 15c(b)(2) & (3). *See* Hart Scott Rodino Antitrust Improvements Act, Pub. L. No. 94-435, sec. 301, 4C, 90 Stat. 1383, 1394 (codified at 15 U.S.C. 15c (1994)).

[10] *See* United States v. Microsoft Corp., 253 F.3d 34, 103 (D.C. Cir. 2001) (citing cases).

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

[12] *See, e.g.*, Mkt. St. Ry. Co. v. R.R. Comm'n, 28 Cal. 2d 363, 371, 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").

[13] *See* Jeffrey G. Casurella & John 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).

[14] *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 Food Prods. Litig., 156 F.R.D. 600, 607 (D.N.J. 1994) ("Thus, plaintiffs' rationale for approval of a settlement pursuant to which the class members themselves receive nothing is simply inadequate.").

[15] *See* West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 728 (S.D.N.Y. 1970); Superior Beverage Co. v. Owens-Illinois, Inc., 827 F. Supp. 477, 479 (N.D. Ill. 1993) (public health programs to benefit both damaged and undamaged consumers were granted cy pres funds).

[16] *See* New York v. Dairlylea Coop., No. 81 Civ. 1891 (RO), 1985 WL 1825, at *2 (S.D.N.Y. Jun. 26, 1985); *see also* New York ex rel. Koppell v. Keds Corp., No. 93 Civ. 6708 (CSH), 1994 WL 97201, at *3 (S.D.N.Y. Mar. 21, 1994).

[17] *See* Farmer, *supra* note 7.

[18] Diamond Chem. Co. v. Akzo Nobel Chems. B.V., No. 01-2118 (July 10, 2007); Press Release, George Washington University, Leading the Way in Competition Law: Law School Receives $5.1 Million for New Center (July 11, 2007), *available at* http://www.gwu.edu/~magazine/archive/2007_law_fall/docs/dept_philanthropy.html.

[19] *See In re* Motorsports Merch. Antitrust Litig., 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. AAI 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.

[20] *Id.*; *see generally* Robert E. Draba, *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near as Possible,"* 16 LOY. CONSUMER L. REV. 121 (2004); *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).

[21] *See Motorsports*, 160 F. Supp. 2d 1392.

[22] 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.

[23] *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 a particular benefit to class members").

[24] *In re* Vitamin Cases, 107 Cal. App. 4th 820, 824 (Cal. Ct. App. 2003).

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

[26] The educational Web site is www.fairfightfilm.org. The video was produced under the supervision of the AAI by Filmmakers Collaborative. It 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, was fully viewable on the Web site for several years and is now distributed via catalog to educators. The curriculum materials that are available on the Web site 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.

[27] Compare this to the *Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1254 (7th Cir. 1984), which eventually ended up in the creation of a committee for the reserve fund's administration and the subsequent establishment of the National Public Interest Fellowship Program. Houck v. Folding Carton Admin. Comm., 881 F.2d 494, 502 (7th Cir. 1989). The Seventh Circuit, in this second opinion, did not exclude law schools from "being the beneficiaries of some new appropriate *cy pres* use." *Id.*; *see also In re* Folding Carton Antitrust Litig., No. MDL 250, 1991 U.S. Dist. LEXIS 2553 (N.D. Ill. Mar. 6, 1991).

[28] Diamond Chem. Co. v. Akzo Nobel Chems. BV, Civ. Action No. 01-2881 (CKK).

[29] A number of states have adopted rules relating to how courts may exercise their discretion in cy pres distributions. For example, Massachusetts' Rule 23 was amended, effective January 1, 2009, to provide: "[I]n matters where the claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, or to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts." *See* Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 TENN. B.J. 12 (2009).

[30] American Law Institute, *Principles of the Law of Aggregate Litigation*, Council Draft No. 2, Section 3.07, at 225 (Nov. 18, 2008).

[31] *Id.* at 227.

[32] *Id.*

[33] *Id.* A cy pres remedy that enhances the competitive process in an antitrust case would presumably benefit the public at large as well as members of the class, because of the statutory determination that antitrust serves the public interest. There is no reason to think the ALI would rule out such a grant on the basis that its benefits extend beyond the class.

[34] *Id.* at 228.

[35] These recommendations were discussed extensively in two joint meetings with class action plaintiffs' attorneys and state assistant attorneys general for antitrust and reflect an apparent consensus of those present. See Summary of Second Meeting on Private/State Antitrust Enforcement (Dec. 18, 2007), *available at* http://www.antitrustinstitute.org/Archives/states2.ashx.