Bloomberg BNA

Class Action Litigation Report®

SETTLEMENTS

APPELLATE REVIEW

While *cy pres* settlements are not always appropriate and are often misused, sometimes they are an invaluable tool for parties to use to resolve otherwise intractable disputes, say attorneys David L. Balser, Zachary A. McEntyre, and Skyler G. McDonald in this BNA Insight. The authors analyze recent decisions by the First, Fifth, and Ninth Circuits ''cataloguing the risks that *cy pres* settlements pose,'' and suggest that for companies seeking to resolve class actions through *cy pres* settlements, these rulings provide a roadmap for obtaining approval of their settlements.

Are *Cy Pres* Class Settlements Really 'Faux Settlements'? Analyzing Recent Criticism of *Cy Pres* Funds in Class Settlements

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On June 1, 2012, the House Subcommittee on the Constitution convened to hear three distinguished lawyers analyze the state of class action litigation seven years after Congress passed and President George W. Bush signed the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005). Although the discussion was wide-ranging, two of the three panelists devoted significant attention to a topic some observers—including lawyers who spend much of their time litigating class actions—might consider relatively obscure: the advancing trend of class action settlements incorporating *cy pres* funds.[1] The panelists' views on this trend, to put them succinctly, were not favorable. In fact, one of the panelists—perhaps the country's leading scholar in this area, Professor Martin H. Redish of Northwestern University School of Law—expressly endorsed con-

[1] Testimony of Professor Martin H. Redish, Subcommittee on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, June 1, 2012 (''Redish Testimony''); Testimony of John H. Beisner, Subcommittee on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, June 1, 2012 (''Beisner Testimony'').

 ISSN 1529-0115

gressional action to ban the use of *cy pres* funds in class settlements altogether.[2]

While this subcommittee hearing represented a potential high-water mark for critics of *cy pres* class settlements, it was not the first time the critics have made their voices heard. Over the last several years, a number of interest groups—led by the U.S. Chamber of Commerce and the Center for Class Action Fairness—have sounded the alarm about the increasing use of *cy pres* funds in class settlements.[3] Only recently, three federal appellate courts—the Courts of Appeals for the First, Fifth, and Ninth Circuits—amplified those concerns in four separate opinions, three times rejecting class settlements incorporating *cy pres* funds and once approving such a settlement but also expressing concerns about the use of *cy pres* funds in class settlements.[4]

The refrain from the interest-group critics and the courts is similar: *cy pres* settlements do not compensate class members; they are used as a means to justify attorneys' fees for the plaintiffs' lawyers; they invite judges to abuse their authority by enriching nonprofits with which they have personal ties at the expense of the allegedly injured class members; and they permit plaintiffs' lawyers and defendants to collude to ensure that the plaintiffs' lawyers get paid, while permitting the defendants to limit their liability by not paying the purportedly injured class members. In short, the critics contend that *cy pres* settlements pervert the adversary system and subvert the Constitution.

These concerns are valid and deserve serious consideration by both Congress and the courts. But the picture of *cy pres* settlements the critics have painted may not be complete. While *cy pres* settlements are not always appropriate and are too often misused, sometimes they are an invaluable tool for parties to use to resolve otherwise intractable disputes. As a result, companies that find themselves frequent class action targets (as well as interest groups advocating on their behalf) may want to pause before wholeheartedly endorsing a ban on *cy pres* settlements.

Brief History of *Cy Pres* Settlements in Class Actions

The *cy pres* doctrine is an ancient concept, originating in Roman law.[5] The term derives from the Norman French expression ''*cy prescomme possible*,'' or ''as near as possible.''[6] Traditionally, courts have used the *cy pres* doctrine to save testamentary gifts or trusts that would otherwise fail because carrying out the bequest would be difficult or no longer possible, such as if a specific charitable purpose were to become obsolete or illegal.[7] Forty-eight states and the District of Columbia have codified *cy pres* as a means of modifying charitable trusts.[8]

The use of *cy pres* funds in the context of class action settlements, in contrast, is a relatively new concept. The first federal court to approve a class action settlement incorporating a *cy pres* fund did so in 1974.[9] In the ensuing decades, courts have applied *cy pres* principles in class action settlements haphazardly. Early on, some courts set limits on the applicability of the *cy pres* doctrine in the class action context. For example, in *Six Mexican Workers v. Arizona Citrus Growers*, the Ninth Circuit Court of Appeals cautioned that class action settlements can utilize the *cy pres* doctrine only when doing so ''serve[s] the goals of the statute and protect[s] the interests of the silent class members.''[10] Although the court held that under the right circumstances unclaimed class action settlement funds may be distributed using a *cy pres* fund, it rejected the *cy pres* fund proposed in that case because the ''proposal benefit[ted] a group far too remote from the plaintiff class,'' and ''there [was] no reasonable certainty that any member [would] be benefited.''[11] As a result, the Court set aside the proposed *cy pres* fund and remanded the case for reconsideration.[12]

Other courts, however, have used the *cy pres* doctrine freely, approving settlements that provided for *cy pres* gifts that made no readily discernible effort to compensate class members. In a class action regarding infant formula, for example, a court in the Northern District of Florida approved a *cy pres* award to the American Red Cross Disaster Relief Fund.[13] Similarly, a court in the Southern District of New York awarded *cy pres* funds in a securities fraud class action to a legal aid society, reasoning that the legal aid society was more related to the subject matter of the suit than ''a dance performance or a zoo.''[14] Other examples abound.[15]

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[2] Redish Testimony at 9-10.

[3] The other panelist who addressed *cy pres* settlements at length during his testimony before the Subcommittee on the Constitution, John H. Beisner, a senior partner at Skadden, Arps, Meagher & Flom LLP, testified on behalf of the U.S. Chamber of Commerce's Institute for Legal Reform.

[4] *Dennis v. Kellogg Co.*, Nos. 11-55764, 11-55706, 2012 BL 225692 (9th Cir. Sept. 4, 2012); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21 (1st Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011). *But see Nelson v. Mead Johnson & Co.*, No. 11-15956, 2012 BL 1830862012, at *5 (11th Cir. July 20, 2012) (affirming approval of class settlement incorporating *cy pres* fund and overruling objector's argument that fund was improper because class members did not receive full relief).

[5] *Turner v. Murphy Oil USA, Inc.*, Civ. A. No. 05-4206, 2009 BL 294193, at *2 (E.D. La. May 27, 2009). A number of scholars and lawyers have written extensively about the *cy pres* doctrine and its use in the class action context. Rather than rehashing the work others have done so completely, we merely summarize the history for context.

[6] *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 33 (1st Cir. 2009).

[7] *Id.*; *see also In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002). For example, if a testator designated funds for a school for orphans in Chicago, but no such school existed, then a court may give the funds to a school for orphans in nearby Cicero in an effort to find a charity that is closest to the testator's intent. Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010)).

[8] Redish, *supra* note 10, at 628.

[9] *See Miller v. Steinbach,* No. 66 Civ. 356 (S.D.N.Y. Jan. 3, 1974) (approving the parties' settlement agreement and noting that it was applying a ''variant'' of the *cy pres* doctrine).

[10] 904 F.2d 1301, 1312 (9th Cir. 1990).

[11] *Id.* at 1308.

[12] *Id.* at 1308, 1312.

[13] *In re Infant Formula Multidistrict Litig.,* No. 4:91-CV-00878-MP, 2005 BL 28537, at *1 (N.D. Fla. Sept. 8, 2005).

[14] *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999).

   ISSN 1529-0115

Recent Criticism of *Cy Pres* Funds in Class Settlements

While some courts have long expressed skepticism about the use of *cy pres* funds in class settlements, the last year saw three separate appellate courts—the First Circuit, the Fifth Circuit, and the Ninth Circuit—issue four notable decisions cataloguing the risks that *cy pres* settlements pose. We discuss each of these decisions in turn.

Klier v. Elf Atochem

In September 2011, the Fifth Circuit held that a district court abused its discretion by approving a class settlement that included a *cy pres* distribution of unused funds to charities instead of class members.[16] In *Klier v. Elf Atochem*, the plaintiffs alleged that they were exposed to arsenic and other toxic chemicals emitted by an agrochemicals plant that the defendant owned in Bryan, Texas.[17] The parties eventually reached a settlement, under which the defendant would pay $41.4 million to three subclasses of individuals.[18] Over half of the total settlement amount, $23.34 million, was allocated to members of Subclass A, which included persons who lived or work near the plant during a specified period and suffered from one or several specified health maladies. The remaining funds were allocated to Subclass B, which included persons who had not manifested any health problems, but who had been exposed to the toxins, and Subclass C, which included persons who owned property located near the plant and experienced diminution in property value as a result.[19] The settlement agreement did not contain any provision for distributing unclaimed funds via *cy pres*.

Approximately $830,000 of the funds earmarked for a medical monitoring program for the members of Subclass B went unused.[20] Because the parties agreed that distributing the funds to the members of Subclass B was not economically feasible, the district court requested that the parties propose alternative uses for the funds.[21] Class counsel failed to respond to the court's request, but the defendant proposed that the court distribute the funds *cy pres* to five local charities, the city of Bryan, and the Bryan school district.[22]

One member of Subclass A—Ralph Klier—opposed the defendant's proposed *cy pres* distribution. Mr. Klier argued that the leftover funds earmarked for members of Subclass B but not claimed by them instead be distributed to members of Subclass A, *i.e.*, class members who had suffered from serious health problems resulting from exposure to toxins emitted by the defendant's plant. Alternatively, Mr. Klier argued that the defendant's proposed *cy pres* beneficiaries were improper because they lacked a sufficient nexus to class members' injuries or the principles that the class action sought to vindicate. If the court declined to distribute the leftover funds to members of Subclass A, Mr. Klier proposed that the court distribute the money to fund arsenic-pollution research at Texas A&M.[23] The court, however, ignored Mr. Klier's first proposal that the remaining funds be distributed to members of Subclass A, and rejected Mr. Klier's alternative proposal that the funds be distributed to Texas A&M on the basis that such a use would not benefit the Bryan community. Instead, the court directed that the $830,000 unclaimed by members of Subclass B be distributed in four equal shares to three of the charities the defendant recommended, and fourth charity, a local history and genealogy library, which the court identified itself.[24]

Mr. Klier appealed the district court's decision, contending that the district court abused its discretion in ordering the *cy pres* distribution instead of directing that the defendant pay the leftover funds to members of Subclass A, and the Fifth Circuit agreed.[25] Relying on ''basic principles,''[26] the Fifth Circuit held that the district court abused its discretion by ordering the *cy pres* distribution because the settlement agreement between the parties contained no provision allowing for *cy pres* distribution.[27] Absent such a provision, the court reasoned, a *cy pres* distribution is only permissible ''if it is not possible to put [settlement] funds to their very best use: benefitting the class members directly.''[28] While the members of Subclass B relinquished their rights to $830,000 remaining in settlement funds, the other class members—namely, the members of Subclass A—did not. Consequently, the Fifth Circuit concluded that ''there [was] no occasion for charitable gifts, and *cy pres* must remain offstage.''[29]

The Fifth Circuit's opinion is notable for its insistence on adhering to the terms of the parties' settlement agreement, even though the parties themselves consented (either expressly or implicitly) to deviating from those terms, and for making clear that the overriding objective of any class settlement is, first and foremost, to compensate the class members. But perhaps more notable is Chief Judge Edith Jones's concurring opinion, in which she challenged the validity of *cy pres* settlements altogether.

Adopting Professor Redish's rationale, Chief Judge Jones opined that *cy pres* distributions ''arguably violate the Rules Enabling Act by using a wholly procedural device—the class action mechanism as prescribed in Rule 23—to transform substantive law 'from a compensatory remedial structure to the equivalent of a civil fine.' ''[30] Moreover, Chief Judge Jones concluded that *cy pres* distributions in class settlements ''likely violate Article III's standing requirements'' because they ''may confer standing'' on an ''outsider uninvolved in the

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[15] *See, e.g.*, *In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193 (N.D. Cal. 1998) (making a *cy pres* award to the Stanford Law School Securities Class Action Clearinghouse); *In re Compact Disc Minimum Advertised Price Antitrust Litig.,* No. MDL 1361 (D. Me. Aug. 9, 2005) (authorizing a *cy pres* award to the National Guild of the Community School of the Arts, an institution that did not in any recognizable way compensate the injured victims).

[16] *Klier*, 658 F.3d at 480.

[17] *Id.* at 471.

[18] *Id.* at 472.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 473.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 471-72.

[26] *Id.* at 474.

[27] *Id.* at 477-79.

[28] *Id.* at 475.

[29] *Id.* at 479.

[30] *Id.* at 481 (Jones, C.J., *concurring*) (quoting Redish, *supra* note 10, at 623).

original litigation . . . to intervene in the subsequent proceedings should the distribution somehow go awry.''[31]

Chief Judge Jones acknowledged that these issues had not (and still have not) been fully litigated. But in light of her serious concerns about the legality and even constitutionality of *cy pres* distributions in class settlements, she suggested that the ''preferable alternative'' when there are funds left over from a class settlement is to return those funds to the defendant.[32] To do otherwise, Chief Judge Jones reasoned, would ''result in charging the defendant an amount greater than the harm it bargained to settle,'' which is incompatible with ''[o]ur adversarial system.''[33]

Nachshin v. AOL

Less than two months after the Fifth Circuit decided *Klier*, the Ninth Circuit issued its opinion in *Nachshin v. AOL, LLC*. As in *Klier*, the issue in *Nachshin* was whether a district court abused its discretion by approving a class settlement that required the defendant, AOL, to make contributions to several charities in lieu of any compensation to the class members.[34] Like the Fifth Circuit in *Klier*, the Ninth Circuit agreed with the objectors to the proposed settlement.[35] The Ninth Circuit's reasoning, however, differed significantly from the Fifth Circuit's.

In *Nachshin*, several AOL members sued AOL for allegedly inserting footers containing promotional messages into emails they sent. Following mediation, the parties agreed to a classwide settlement under which AOL would change its allegedly improper practices and contribute $25,000 each to three charities: (i) the Legal Aid Foundation of Los Angeles, (ii) the Federal Judicial Center Foundation, and (iii) the Boys and Girls Club of America (split between the Los Angeles and Santa Monica chapters). AOL would also donate $35,000 to charities selected by the named plaintiffs: the New Roads School of Santa Monica, Oklahoma Indian Legal Services, and the Friars Foundation.[36]

AOL would not, however, pay any money to the alleged class members, who numbered more than 66 million. AOL's maximum liability, if the class were certified, and a judgment was entered against it at trial, was $2 million, which was the amount of advertising revenue AOL derived from inserting the promotional messages into the emails. As a result, each class member would have been entitled to receive approximately three cents. Accordingly, the parties concluded that any distribution to the class members was cost-prohibitive.[37]

After the district court preliminarily approved the settlement, two class members objected, and over four thousand attempted to opt out (although approximately one thousand failed to follow the procedures for effectively opting out). The district court nevertheless approved the settlement, and one of the objectors appealed the decision to the Ninth Circuit, arguing (among other things) that the *cy pres* beneficiaries bore an inadequate relationship to the issue in the case (*i.e.*, AOL's allegedly wrongful insertion of promotional messages into emails).[38]

The Ninth Circuit agreed. Citing its decision in *Six Mexican Workers*, the court stated that any *cy pres* distribution ''must be guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members.''[39] According to the Ninth Circuit, these criteria help to alleviate the ''many nascent dangers'' that the *cy pres* doctrine, ''unbridled by a driving nexus between the plaintiff class and the *cy pres* beneficiaries,'' poses to the ''fairness of the distribution process.''[40] If a *cy pres* settlement does not conform to these guidelines, the court reasoned, ''the selection process [of *cy pres* beneficiaries] may answer to the whims and self interests of the parties, their counsel, or the court.''[41] And ''the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.''[42]

According to the Ninth Circuit, the proposed settlement in *Nachshin* satisfied neither criterion. It did not address the objectives of the underlying statutes (which related to AOL's allegedly improper conduct with respect to the provision of commercial e-mail services) because ''none of the *cy pres* donations . . . have anything to do with the objectives of the underlying statutes on which Plaintiffs base[d] their claims.''[43] Likewise, the proposed settlement did not promote the interests of the ''silent class members'' because it did not ''account for the broad geographic distribution of the class.''[44] While the settlement class included ''more than 66 million AOL subscribers throughout the United States,'' approximately two-thirds of the *cy pres* distributions would be to Los Angeles-area charities. And the court found no reason to believe that even the Los Angeles-area class members would benefit from distributions to the Boys and Girls Clubs of Los Angeles and Santa Monica or the Los Angeles Legal Aid.[45]

Because the settlement failed to meet the criteria the Ninth Circuit had established in *Six Mexican Workers*, the court determined that the court abused its discretion in approving it. In reaching that conclusion, the court also rebuffed the parties' arguments that courts ''must defer to the parties' freely-negotiated settlement,'' and that ''the size and geographic diversity of the plaintiff class make it 'impossible' to select an adequate charity'' to receive the *cy pres* funds.[46] The court rejected the first argument because a *cy pres* distribution must satisfy the requirements set forth in *Six Mexican Workers* regardless of whether the parties or the court fashions the *cy pres* award.[47] In other words, the parties may not disregard the principles guiding *cy pres* awards in class settlements merely by agreeing do to so.

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[31] *Id.*
[32] *Id.* at 482 (citing *Wilson v. Sw. Airlines, Inc.*, 880 F.2d 807 (5th Cir. 1989)).
[33] *Id.*
[34] 663 F.3d at 1037.
[35] *Id.* at 1036.
[36] *Id.* at 1037.
[37] *Id.*
[38] *Id.* at 1040.
[39] *Id.* at 1039 (citing 904 F.2d at 1307).
[40] *Id.* at 1038 (citing *S.E.C. v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 414-17 (S.D.N.Y. 2009); Redish, *supra* note 10.
[41] *Id.* at 1039.
[42] *Id.*
[43] *Id.* at 1040.
[44] *Id.* at 1039, 1040.
[45] *Id.* at 1040.
[46] *Id.* at 1040, 1041.
[47] *Id.* at 1040.

   ISSN 1529-0115

The court found the parties' second argument no more persuasive, reasoning that ''[t]he parties should not have trouble selecting beneficiaries from any number of non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance.''[48] In the unlikely event the parties could not identify such a charity, the Ninth Circuit recommended that the district court ''consider escheating the funds to the United States Treasury.''[49]

In re Lupron

In April 2012, the First Circuit issued another decision, *In re Lupron*,[50] expressing skepticism about *cy pres* settlements. Unlike the Fifth and Ninth Circuits in *Klier* and *Nachshin*, the First Circuit did not reject outright a *cy pres* settlement approved by a district court. Instead, after thoroughly discussing the pitfalls associated with *cy pres* settlements and determining that the facts in *Lupron* did not implicate those risks, the court held that the district court had not abused its discretion in approving the settlement.[51]

In holding that the *cy pres* settlement was appropriate, the First Circuit distinguished the *Klier* and *Nachshin* decisions on their facts. The court expressly distinguished *Lupron* from *Klier* by noting that the settlement agreement in *Lupron*, unlike the settlement agreement in *Klier*, expressly contemplated *cy pres* distribution of leftover settlement funds unclaimed by the class members.[52] Similarly, the court implicitly distinguished *Lupron* from *Nachshin* by concluding that the *cy pres* beneficiary in *Lupron*—a prostate cancer research and treatment facility—was appropriate because the wrong that the plaintiffs sought to vindicate in the class action was overcharging cancer patients for the drug Lupron.[53]

The court also dispensed with the view Chief Judge Jones espoused in *Klier* that *cy pres* settlements are *per se* improper and that any leftover settlement funds should be returned to the defendant.[54] Relying on the American Law Institute's Principles of the Law of Aggregate Litigation (the ''ALI Principles''), the court concluded that ''returning unclaimed funds to the defendant 'would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable.' ''[55]

Although it approved the *cy pres* distribution in *Lupron*, the First Circuit did not endorse the use of *cy pres* funds in class settlements without caution or reservation. To the contrary, the court expressed its ''concerns that district courts are given discretion by parties to decide on the distribution of *cy pres* funds.''[56] Again relying on the ALI Principles, the First Circuit admonished that whenever possible, the parties—*not* the courts—should propose the recipients of *cy pres* funds.[57] Only after the parties identify proposed *cy pres* beneficiaries should the court involve itself in the process, and then only to ''test'' the parties' proposal to determine whether the beneficiary is appropriate.[58] In reaching that conclusion, the court invoked the Ninth Circuit's concern that the appearance of impropriety can arise when a court inserts itself into a settlement to distribute funds to a charity of its choice.[59] At bottom, the First Circuit echoed the opinion voiced both by its sister circuits in *Nachshin* and *Klier,* and commentators, such as Professor Redish: ''[T]he adversary process is better suited to the parties making the decisions and leaving less to the discretion of the judges.''[60]

Approximately three months after the First Circuit issued its decision, on July 23, 2012, the objectors filed a petition for certiorari in the United States Supreme Court. In the petition, the objectors posed three questions: (i) May courts use *cy pres* funds to distribute leftover class action settlement funds; (ii) If so, may courts use *cy pres* in that manner when class members have not recovered their full measure of damages; and (iii) May class counsel properly decline to select *cy pres* beneficiaries in lieu of allowing the court to do so? The petition thus presents the Supreme Court with the opportunity to address directly the threshold question of whether the *cy pres* doctrine may properly be applied in a class settlement.

Dennis v. Kellogg

In September 2012, the Ninth Circuit struck again, in *Dennis v. Kellogg Co.*, once again reversing an order approving a class settlement incorporating a *cy pres* distribution.[61] The plaintiffs in *Dennis* alleged that Kellogg had made false representations about the nutritional value of its cereal products, which violated California's Unfair Competition Law (the ''UCL'') and Consumer Legal Remedies Act (the ''CLRA'').[62] After several months of negotiations, the parties agreed to settle the case on a classwide basis. Kellogg would establish a settlement fund worth $5.5 million to pay, on a claims-made basis, $5 per box of cereal, up to three boxes, to each person in California who had purchased one of the products at issue. Kellogg would donate any leftover money from the settlement fund to ''charities chosen by the parties and approved by the Court. . . .''[63] Kellogg also would donate an additional $5 million-worth of food to unspecified charities dedicated to feeding the indigent.[64]

Two class members objected to the *cy pres* component of the settlement for two reasons: (i) the objective of the *cy pres* distribution (*i.e.*, feeding the indigent) bore no relationship to the central issue in the lawsuit (*i.e.*, Kellogg's allegedly misleading marketing of its products); and (ii) the *cy pres* fund benefited the parties and counsel (by increasing the purported value of the settlement, thus justifying the attorneys' fees paid to class counsel), but not the class members, because the

[48] *Id.* at 1041.
[49] *Id.*
[50] 677 F.3d 21.
[51] *Id.* at 31-37.
[52] *Id.* at 35 n.11.
[53] *Id.* at 23, 34-35, 35 n.9.
[54] *Id.* at 32.
[55] *Id.* at 32-33 (quoting Am. Law Inst., Principles of Law of Aggregate Litigation § 3.07 cmt. b (2010)).
[56] *Id.* at 38.
[57] *Id.* (citing ALI Principles § 3.07(c)).
[58] *Id.*
[59] *Id.* (citing *Nachshin*, 663 F.3d at 1039).
[60] *Id.*
[61] 2012 BL 225692, at *7-8.
[62] *Id.* at *2-3.
[63] *Id.* at *3.
[64] *Id.*

charities receiving the *cy pres* distributions were not identified. Unmoved by these objections, the district court approved the settlement.[65]

The Ninth Circuit, on the other hand, found the objections persuasive. After reviewing the principles it articulated in *Six Mexican Workers* and *Nachshin*, the court held that the *cy pres* fund in *Dennis* did not pass muster.[66] As a threshold matter, the court held that the proposed *cy pres* distribution was ''divorced from the concerns embodied in consumer protection laws such as the UCL and the CLRA,'' because the ''noble goal'' of providing food to the indigent ''has 'little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved.' ''[67] To the contrary, the court reasoned, ''appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising.''[68]

Moreover, because the parties did not identify the *cy pres* recipients in the settlement agreement, the court had an insufficient record on which to evaluate their suitability.[69] Merely providing that the district court would ultimately approve the recipients provided the Ninth Circuit no solace, in light of its observation in *Nachshin* that *cy pres* settlements often entice courts and parties to serve their own interests rather than the class members' interests.[70] Along the same lines, the court criticized the settlement because its description of the amount that Kellogg would contribute to the *cy pres* recipients was impermissibly vague and led the court to question whether the attorneys' fees were disproportionately large compared to the value of the *cy pres* award.[71]

In essence, the court concluded that the parties could not salvage their *cy pres* settlement by ''punting down the line.'' [72]

Would Banning *Cy Pres* Settlements Throw Baby Out With Bath Water?

The concerns about *cy pres* class settlements that the First, Fifth, and Ninth Circuits expressed in these opinions, reiterated and expanded on by the distinguished panelists who testified on the subject on June 1, 2012, are undoubtedly valid. Too often, courts have exceeded their constitutional and legal mandate by insinuating themselves far too deeply into the negotiation and administration of class settlements, including by decreeing that defendants would make *cy pres* distributions when the defendants had never agreed to such payments in the terms of the settlement agreement, and by taking it upon themselves to select the causes that would benefit from the *cy pres* contributions, which may or may not bear any reasonable relationship to the injuries purportedly suffered by the members of the settlement class. Hopefully, the *Klier*, *Nachshin*, and *Lupron* decisions represent a growing trend among federal appellate courts to rein in that brand of judicial overstepping.

But some commentators—including Professor Redish and Mr. Beisner—and some judges—such as Chief Judge Jones—appear ready to go further, and to seek either judicial or congressional action to ban *cy pres* settlements altogether. Indeed, that is precisely the threshold question that the objectors in *Lupron* presented to the Supreme Court in their July 23 petition for certiorari. And while Professor Redish and others have articulated persuasive arguments regarding the constitutional grounds for such action, which surely deserve further consideration, such a step would have far-reaching practical implications that could adversely affect defendants' ability to settle otherwise intractable class litigation.

Although the *cy pres* device is sometimes arguably misused to justify higher attorneys' fees for plaintiffs' lawyers than recovery for the class might suggest is appropriate, *cy pres* settlements are not always thus misused. Sometimes, parties employ *cy pres* settlements to resolve class actions in which plaintiffs allege that defendants engaged in misconduct on a wide scale, which resulted in only *de minimis* damages to individual class members but significant damages in the aggregate. In many cases, the class members in those cases are difficult, if not impossible, to identify. And even if the defendants could identify the class members, compensating them individually would be unreasonably expensive in proportion to the amount of compensation each class member would receive.

One such case is *Nachshin*, discussed earlier, in which AOL allegedly engaged in misconduct that affected over 66 million class members, but which resulted in only pennies' worth of alleged damage to each class member. While the Ninth Circuit rejected the *cy pres* settlement in that case, it did so only because the parties and the court failed to select appropriate *cy pres* beneficiaries—not because *cy pres* relief was necessarily improper. To the contrary, the Ninth Circuit clearly acknowledged that *cy pres* relief *would* be appropriate, if the relief were directed to appropriate charities.

The use of a *cy pres* fund in *Nachshin* benefitted both AOL and the class members. It permitted AOL to resolve, on a cost-effective basis, a case that would have been expensive to defend, without incurring the unreasonable administrative costs associated with sending tens of millions of class members checks for a few cents each. And, it benefitted the class members by requiring AOL to change its allegedly improper practices and pay a penalty for engaging in those practices. If the parties did not have the option to settle the case using a *cy pres* fund, the case would likely have been aggressively litigated for years, at great expense to the parties and with a concomitant burden on the judicial system, and with no meaningful monetary relief available for the individual class members.

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[65] *Id.* at *4.
[66] *Id.* at *5-8.
[67] *Id.* at *7 (quoting *Nachshin*, 663 F.3d at 1039).
[68] *Id.*
[69] *Id.* at *8.
[70] *Id.* (citing 663 F.3d at 1039).
[71] *Id.* at *8-9.
[72] *Id.* Interestingly, both of the objectors' concerns in *Dennis*, which the Ninth Circuit shared, also were implicated in *Nelson v. Mead Johnson & Co.*, 2012 BL 183086. In *Nelson*, the parties agreed that if the class members' claims totaled less than $8 million in the aggregate, the defendant (a manufacturer of baby formula) would pay the difference by donating an equivalent amount of its ''product'' (defined as ''one or more . . . infant formulas and toddler food products'') to ''appropriate charities to be agreed upon by Class Counsel and Defendant, and approved by the Court . . . . '' *Id.* at *2. Unlike the Ninth Circuit in *Dennis*, however, the Eleventh Circuit held that the *cy pres* fund was appropriate and affirmed approval of the settlement. *Id.* at *5.

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Conclusion

Barring prompt congressional action or the Supreme Court's granting the certiorari petition in *Lupron*, the debate over *cy pres* class settlements likely will continue. For companies seeking to resolve class actions through *cy pres* settlements, the recent decisions by the First, Fifth, and Ninth Circuits provide a roadmap for obtaining approval of their settlements. The message the circuit courts are sending and that district courts should heed is that courts should respect the limits on their authority and the parties' negotiated settlements, while simultaneously taking a hard look at *cy pres* beneficiaries to ensure that they accomplish their objective: since compensating class members may be impossible, have the parties done the ''next best thing'' in their selection of a *cy pres* beneficiary?

As the courts continue to review and analyze *cy pres* settlements, and as the debate regarding the propriety of *cy pres* settlements continues, we suggest that corporations facing class actions, and interest groups advocating on corporations' behalf, take a measured approach to curtailing the potential for abuse while preserving *cy pres* as a class action settlement tool.