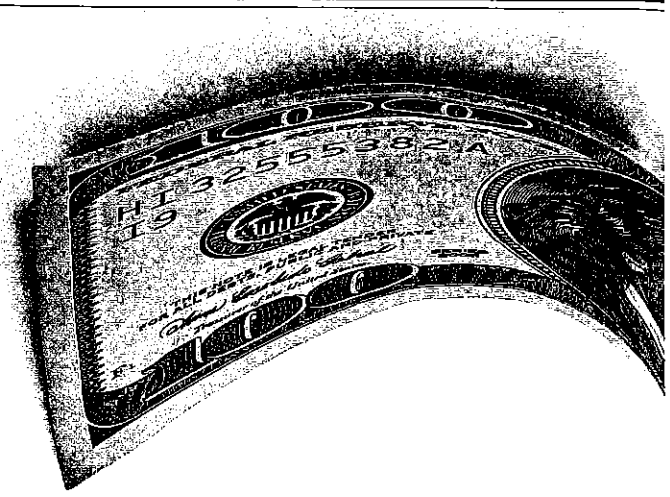
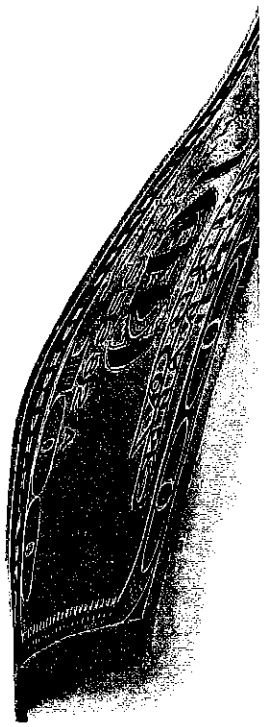
The Question Facing Class Action Defense Counsel

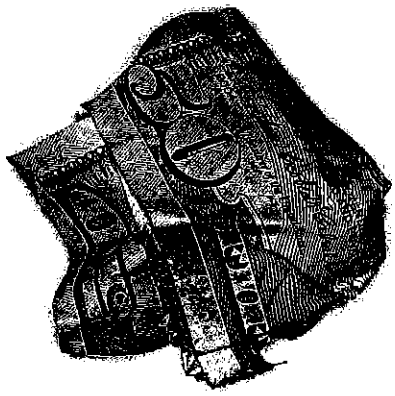
By Joshua L. Gayl



To *Cy Pres* or Not to *Cy Pres*?



We should act to preserve defendants' resources rather than permitting plaintiffs' lawyers to drain our clients in the name of charity.



■ Joshua L. Gayl is a member of the Litigation Department at Fox Rothschild LLP in Warrington, Pennsylvania. Mr. Gayl has experience in a wide range of complex civil and commercial litigation, including the representation of insurers and manufacturers in class action defense.

Whether 'tis nobler to distribute unclaimed class action settlement funds to charities under the *cy pres* doctrine is a question that defense lawyers increasingly face when settling class actions. Giving money to charities sounds noble,

and criticizing anyone for doing so seems akin to Hamlet's literary brethren Ebenezer Scrooge's "bah, humbug" or the Sheriff of Nottingham's arrests of Robin Hood for stealing from the rich and giving to the poor. Frequently, however, in the class action context, completely distributing a class recovery to all the class members who may be entitled to share in the benefits is infeasible, whether because the class members are difficult to locate, the amounts of their claims are de minimis, or the paperwork that they must complete is too burdensome to justify making the effort to respond. Under these circumstances, which occur frequently, defense lawyers owe a duty to their clients to question why settling defendants should pay unclaimed funds from class action settlements to third-party charities that were not injured by any alleged wrongdoing.

Plaintiffs' counsel often misuse the *cy pres* doctrine to generate large attorneys' fees and positive publicity, bastardizing the purpose of the doctrine and violating one basic tenet of class action litigation: rules of civil procedure cannot work as substantive law to provide a class with more rights than its members would have had if they had filed individual lawsuits.

Although commentators and the courts have offered mixed views of distributing unclaimed settlement funds to charities under the *cy pres* doctrine, distributing unused class action settlement funds under the *cy pres* doctrine is becoming an unacceptable practice designed to do justice and police corporate evildoers. Martin H. Redish, *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 623 (2010). Defense counsel, however, should take comfort in and guidance from the recent United States Court of Appeals for the Fifth Circuit decision in which the court struck down the trial court's distribution of unclaimed settlement funds to charities under the *cy pres* doctrine and held that settling defendants have a more equitable right to unclaimed funds than a charity when the property-interest-defining settlement agreement doesn't include a contrary directive. *Klier v. Elf Atochem North America, Inc.*, No. 10-20305, 2011 WL 4436528, at *5 (5th Cir. Sept. 26, 2011). In a concurring opinion, Chief Judge Edith H. Jones blasted applying the *cy pres* doctrine to unclaimed class action settlement funds: "It is time for courts to rethink the justifications of the practice." 2011 WL 4436528, at *8 (relying heavily on the analysis in Redish, *supra*, critical of the practice.).

The History of *Cy Pres*

The term "cy pres" derives from the Norman French expression "cy pres comme possible," which means, "as near as possible." Redish, *supra*, at 624; John H. Beisner, Cy Pres: *A Not So Charitable Contribution to Class Action Practice*, 3 (U.S. Chamber Institute for Legal Reform Oct. 2010). The precursor to modern *cy pres* doctrine originated in sixth century Rome in the context of charitable trusts. When an entity designated to receive trust funds no longer existed, or when it became infeasible or contravened public policy to fund it, to prevent a trust from failing, the remaining funds were transferred to the next best use that would satisfy as nearly as possible the testator's intent. Redish, *supra*, at 625; William B. Rubenstein, *et al.*, *Cy pres, fluid recovery, escheat, and deterrent distributions of unallocated class recovery funds*, 3 Newberg on Class Actions §10:16 (4th ed.); Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 Chi. L. Rev. 448, 452 (1972); E. Fisch, *The Cy Pres Doctrine in the United States* 128 (1950). In England, *cy pres* developed historically between individuals and the church: dying individuals often left charitable bequests, communicated to and administered by the church, and when a testator left an estate without specifying how he

wanted it used, the church would arrange for its use, in theory, for the good of the testator's soul. Redish, *supra*, at 625; Beisner, *supra*, at 3. As recognized by Chief Judge Jones of the Fifth Circuit, the *cy pres* doctrine originally was a means to dispose of unclaimed property in charitable trusts; it was not envisioned as a means to provide unclaimed funds from a legal dispute to third parties. *Klier*, 2011 WL 4436528, at *8 (citing Redish, *supra*, at 621); Beisner, *supra*, at 5.

By overseeing the distribution of wealth for social good without authority or without controlling substantive law, a court strays from its constitutionally defined role of redressing actual injuries suffered by a suing party.

Before 1966, class action settlements infrequently involved unclaimed settlement funds. But that changed with the 1966 amendments to Federal Rule of Civil Procedure 23, which "revolutionized" class action practice by adopting automatic inclusion in rather than exclusion from a non-mandatory class of the absent class members who did not necessarily opt out of a class. Redish, *supra*, at 630–31; Beisner, *supra*, at 7. In 1972, a student comment published in the University of Chicago Law Review suggested that courts independently "apply their own version of cy pres" to distribute unclaimed settlement funds as nearly as possible to Congress's or the state legislature's intent in providing a legal remedy for a cause of action. Redish, *supra*, at 631 (citing and quoting Shepherd, *supra*). The comment suggested that courts consider three options for unclaimed settlement funds: "(1) distribution to those class members who come forward to collect their damages, (2) distribution through the state in its capacity as parens patriae or by escheat, and (3) distribution through the market." *Id.* The comment acknowledged that the first option precluded "silent" class members from recovering anything and rewarded responding class members with windfalls creating incentive to fashion class actions composed of large numbers of class members who would not respond. *Id.* at 632. The comment further cautioned that if a court distributed unclaimed class action funds to a charity for a specific purpose that only would very remotely benefit silent class members, the distribution might elicit objections. *Id.*

Despite the comment's warning, the first court to invoke the *cy pres* doctrine to disperse unclaimed settlement funds failed to ensure that the distribution benefited the uncompensated class members. *Id.* at 635. In *Miller v. Steinbach*, which involved the fairness of a merger of a corporation with more than four million shares of stock, the proposed settlement agreement included a *cy pres* provision resulting in a distribution to the trustee of the corporation's employee retirement plan. No. 66 Civ. 356, 1974 WL 350, at *2 (S.D.N.Y. Jan. 3, 1974). The court approved the agreement even though it had not found precedent for applying the *cy pres* doctrine to a class action settlement agreement, and in the process, the court failed to determine whether the corporation employed any of the class members or if they participated in the corporation's employee retirement plan. Redish, *supra*, at 635; Beisner, *supra*, at 8.

Also, in 1987, two student notes argued that courts should order donating unclaimed settlement funds to charity even when a charity only remotely benefited the settlement class members because a *cy pres* distribution served the purpose of fully disgorging a defendant of its unlawful gains. Redish, *supra*, at 633–34 (citing Kerry Barnett, *Note, Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 Yale L.J. 1591 (1987); Natalie A. DeJarlais, *Note, The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 Hastings L.J. 729 (1987)). The *cy pres* doctrine thus strayed from its intent, changing from a doctrine meant to find alternative means of directing unclaimed property to uncompensated class members to a means to seek a beneficial use for compensatory funds exacted from a defendant. Redish, *supra*, at 634.

The history of the *cy pres* doctrine suggests that commentators, parties, and courts have forcefully transformed it in class actions into an entirely different and new substantive and procedural device, one that appropriated allegedly wrongdoing defendants' funds. And yet, according to *cy pres* doctrine proponents, defendants should sleep well at night because the money goes to charity. Bah, humbug!

The Constitution, Rules of Civil Procedure, and Substantive Law Do Not Support *Cy Pres*

Applying the *cy pres* doctrine to class actions violates at least three constitutional principles: (1) the case and controversy requirement of Article III, (2) the separation of powers, and (3) due process. *Klier*, 2011 WL 4436528, at *9 (citing Redish, *supra*, at 623). *See also* Beisner, *supra*, at 17 (noting that *cy pres* also violates *Erie* principles when federal courts are sitting in diversity and applying state substantive law that has not approved *cy pres*). In applying *cy pres* in a class action, a court orders the transfer of money from a defendant to an uninjured third party that was never before included in the adjudicatory process contemplated by Article III. Redish, *supra*, at 621. Further, by overseeing the distribution of wealth for social good without authority or without controlling substantive law, a court strays from its constitutionally defined role of redressing actual injuries suffered by a suing party. *Id.* at 641–42; Beisner, *supra*, at 17. Although the funds transferred to a charity represent a portion of the harm suffered by class members, an award of damages under Article III requires the recipient to have suffered a violation of his or her legally protected rights. Redish, *supra*, at 642; Beisner, *supra*, at 18. Certainly when a defendant contests a class action as inappropriate, a court should not use a *cy pres* distribution to bypass class certification requirements. *Principles of the Law of Aggregate Litigation* §3.07 (A.L.I. Council, entitled "Cy Pres Settlements"), Reporters' Notes (citing *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231–233 (2d Cir. 2008); *Six (6) Mexi-*

can Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990)). Even when a defendant agrees to *cy pres* provisions in a settlement agreement, courts should not rubber-stamp approval of the settlement agreement. Redish, *supra*, at 643–44 (citing *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). *See also Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003) ("In this case, there is no evidence that proof of individual claims would be burdensome or that distribution of damages would be costly. Moreover, the *cy pres* award circumvents individualized proof requirements and alters the substantive rights at issue in this case. Thus, the use of the *cy pres* award was inappropriate.")

Applying the *cy pres* doctrine to overcome an infeasible recovery plan's shortcomings also transforms substantive law in violation of the Rules Enabling Act by forcing a defendant to pay the equivalent of a civil fine under a procedural rule—Federal Rule of Civil Procedure 23—a fine that the substantive law does not impose. Redish, *supra*, at 644; Beisner, *supra*, at 15; William B. Rubenstein, *et al.*, Rubenstein, *Criticisms of cy pres class recovery distributions*, 3 Newberg on Class Actions §10:20 (4th ed.). Class actions arise under substantive law. Federal Rule of Civil Procedure 23, and state rules based on that rule, merely establishes procedure to aggregate similar claims of multiple, injured parties that the courts would find too inefficient to adjudicate separately and that would cost too much for plaintiffs to file individually. Redish, *supra*, at 644–45. Under the Rules Enabling Act, 28 U.S.C. §2072(b), which provides that a rule of procedure cannot "abridge, enlarge or modify any substantive right," Federal Rule of Civil Procedure 23 does not permit courts to alter the essence of substantive rights defined by the legislature, which would violate the constitutional separation of powers. *Id.* at 645; Beisner, *supra*, at 15. Substantive law does not require class action defendants to pay third parties that they have not injured. Trial courts sometimes improperly apply the *cy pres* doctrine to certify unmanageable classes that the substantive law would not permit. Redish, *supra*, at 647–48. Thus, when the substantive law would otherwise prevent class certification, the Rules Enabling Act prohibits courts from invoking the *cy pres* doctrine to sustain a class action. *Id.* at 648. And, as stated by Judge Richard Posner, *cy pres* as applied in class actions is a misnomer because it becomes purely punitive, transforming class actions into something other than procedures designed both to redress the harm suffered by injured plaintiffs who would otherwise have great difficulty attaining remedies and to promote judicial

efficiency. *Mirfahisi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

Cy pres also facilitates "faux" class actions in which individual damages are so de minimis and the costs of providing notice and payment to class members are so comparably expensive that the likelihood that class members would seek recovery, or even would receive compensation, be-

For the most part, *cy pres* frustrates legislatively defined remedial compensation structures designed to redress injuries.

comes virtually nil. Redish, *supra*, at 649. In a faux class action, injured victims do not receive compensation, but the victims' lawyers and the representative plaintiffs are rewarded qui tam action-style creating the illusion of compensation to the injured class. *Id.*; Beisner, *supra*, at 13; *Securities & Exchange Comm'n v. Bear, Stearns & Co., Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009). Commentators have criticized these faux class actions, such as one resulting in a $9.5 million settlement in *Lane v. Facebook*, No. C 08-3845 RS, 2010 WL 3071995 (N.D. Cal. May 27, 2010), in which the plaintiffs' lawyers stood to gain as much as 30 percent of the settlement, actual Facebook users recovered nothing, and a foundation focused on promoting privacy rights received the remaining unclaimed funds, and another, *Diamond Chemical Co. Inc. v. Akzo Nobel Chemicals B.V.*, 516 F. Supp. 2d 212 (D.D.C. 2007), in which the alma mater of one plaintiffs' lawyer, the George Washington University Law School, received a $5.1 million distribution from settlement funds from an alleged international cartel that conspired to fix the prices for the sale of specialty chemicals. Nathan Kopfel, *Proposed Facebook Settlement Comes Under Fire*, Wall St. J., Mar. 2, 2010; Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1019–20; Amanda Bronstad, *Cy Pres Awards Under Scrutiny*, The National Law Journal, Aug. 11, 2008; Ashley Roberts, Law School Gets $5.1 Million to Fund New Center, GW Hatchet, Dec. 3, 2007; Adam Liptak, *Doling Out Other People's Money*, N.Y. Times, Nov. 26, 2007. In *Diamond Chemical* the judge failed to indicate how the award benefited the prospective class members rather than every potential buyer of any good subject to antitrust law. Yospe, *supra*, at 1020. Thus, although agreeing to a *cy pres* provision may benefit a defendant in the short run, *cy pres* hurts defendants in the long run by creating confusion in the courts and offering incentive to plaintiffs' lawyers to file weak cases with expectation of profit. Theodore H. Frank, Cy Pres Settlements, Class Action Watch, March 2008. Meanwhile, *cy pres* makes plaintiffs' attorneys' fees appear more palatable even though a charity receiving a distribution through *cy pres* "was not a victim," and a lawsuit filed under that circumstance did not intend to vindicate a violation of the charity's legal rights. Redish, *supra*, at 649; Yospe, *supra*, at 1032.

The "social costs" of cy pres, two of which include frustrating the purpose of class actions and creating potentially inappropriate relationships between plaintiffs' attorneys and charities, and sometimes even between judges and charities, discussed more below, demonstrate the destructiveness that both *cy pres* and faux class actions can produce beyond the fact that the plaintiffs' counsel rather than injured victims make money. Beisner, *supra*, at 18; Frank, *supra*. While some courts are comforted to certify a class when a distribution goes to a charity, other courts have rightly refused to certify them or reversed certification decisions on appeal as unmanageable. Redish, *supra*, at 639; Yospe, *supra*, at 1033–35 (citing *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 261–265 (S.D.N.Y. 1971); William B. Rubenstein, *et al.*, *Criticisms of cy pres class recovery distributions—manageability of class actions as affected by cy pres availability*, 3 Newberg on Class Actions §10:21 (4th ed.). *Cy pres* is an inappropriate device that alters the remedial structure of substantive law that can shield the impropriety of filing lawsuits when the allegedly injured victims have little to no chance of recovery.

Further, keeping in mind that Federal Rule of Civil Procedures 23 and many state equivalents include rather than exclude absent class members, courts that turn to *cy pres* revoke individual class members' due process rights to compensatory relief. Redish, *supra*, at 650. Ordinarily under Federal Rule of Civil Procedure 23 class members' inaction bars their right to recover compensation if they had opted in, affirmatively or otherwise. The same is true if an individual files a lawsuit and receives a judgment but then fails to execute the judgment. Beisner, *supra*, at 17. *Cy pres* transforms the substantive law's remedy of compensation to injured parties into the equivalent of a civil fine, a form of punishment, while eliminating the allegedly injured class members' rights to recover compensation directly, most likely without their knowledge. Although some states have *cy pres* laws dealing with residual class action settlement funds, they vary greatly on "whether the *cy pres* statutes are mandatory, the default, or merely suggested." Emily C. Baker & Lynsey M. Barron, Cy Pres... *Say What? State Laws Governing Dispersement of Residual Class-Action Funds*, Practice Perspectives: Product Liability & Tort Liability, 32, 34 (Jones Day Publications Spring 2011), available at http://www.jonesday.com/newsknowledge/Publications.aspx (then follow "Practice Perspectives: Product Liability & Tort Litigation") (last visited Oct. 6, 2011). So for the most part, *cy pres* frustrates legislatively defined remedial compensation structures designed to redress injuries.

Ethical Considerations Make *Cy Pres* Bad Doctrine for Class Actions

Cy pres not only can encourage plaintiffs' attorneys to file lawsuits when ensuring that individual plaintiffs can actually recover anything is only remotely feasible, but it also can discourage them from tracking down absent class members. And, as already mentioned, those class members probably won't know when the *cy pres* doctrine has abrogated their substantive rights so that a charity receives compensation ostensibly sought for them. *Cy pres* often guarantees the floor of attorneys' fees, divorcing plaintiffs' lawyers' financial interest from their ethical responsibility to advocate for compensation of individual class members. Redish, *supra*, at 650; Beisner, *supra*, at 18. Even if plaintiffs' lawyers

fulfill their ethical obligations when they don't have financial incentive to do so, the temptation to ignore those responsibilities still violates due process. Redish, *supra*, at 651. And without restraints, plaintiffs' lawyers may direct *cy pres* distributions toward charities that satisfy their own financial or personal interests or the interests of named plaintiffs. Beisner, *supra*, at 11–12 (citing *Fairchild v. AOL, LLC*, No. CV 09-03568 CAS (PLAx) (C.D. Cal. 2009) (designating a charity employing the named plaintiff to receive a *cy pres* award); *Diamond Chemical*, 516 F. Supp. 2d 212 (D.D.C. 2007) (distributing a *cy pres* award to the George Washington University School of Law, alma mater of the plaintiffs' lead counsel)).

Courts charged with approving settlement agreements with *cy pres* provisions can also confront ethical dilemmas. Beisner, *supra*, at 13–14. Sometimes lobbyists for charities solicit judges to make the charities for which they work the beneficiaries of *cy pres* awards, or sometimes plaintiffs' lawyers propose that charities with which judges have affiliation receive *cy pres* awards. Nathan Koppel, *Proposed Facebook Settlement Comes Under Fire*, Wall St. J., Mar. 2, 2010; Yospe, *supra*, at 1035–36, 1048–53; Liptak, *supra*. "Federal judges are not generally equipped to be charitable foundations." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006). In *Klier* Judge Jones of the Fifth Circuit noted that opportunities to abuse *cy pres* have been well documented. 2011 WL 4436528, at *8 (citing *Bear Stearns*, 626 F. Supp. 2d at 415 ("While courts and the parties may act with the best intentions, the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety."). Although the American Law Institute recommends dispensing *cy pres* awards only when it is not feasible to distribute awards directly to class members, and only if a charity receiving a *cy pres* award resembles in either composition or purpose the class members or their interests, many courts have misapplied the *cy pres* doctrine entirely by permitting distributions whether or not the charities receiving them have any relationship to the specific law, subject matter of the litigation, or the uncompensated class members. *Principles of the Law of Aggregate Litigation* §3.07; Beisner, *supra*, at 19; Yospe, *supra*, at 1026; *In re Linerboard Antitrust Litigation*, 2008-2 Trade Cas. (CCH) ¶76331, 2008 WL 4542669, at *3 (E.D. Pa. 2008). The status of current *cy pres* jurisprudence has been aptly summarized by Chief Judge Jones of the U.S. Court of Appeals for the Fifth Circuit: "Whatever the superficial appeal of cy pres in the class action context may have been, the reality of the practice has undermined it." *Klier*, 2011 WL 4436528, at *8. She elaborated, writing that "district courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations." *Id.* at 9.

Because the Constitution, the Federal Rules of Civil Procedure, state rules based on those rules, substantive law, and the canons of ethics do not support applying the *cy pres* doctrine to class action settlement agreements, *cy pres* proponents should not receive the same folkloric benefit as Robin Hood stealing from the rich and giving to the poor. Instead, we should denounce applying the *cy pres* doctrine to class action settlements as walking a very thin ethical line because, in most cases, it steals from corporations, awards funds to uninjured parties, confiscates injured parties' due process rights, lines the pockets of plaintiffs' lawyers, and places courts in precarious positions.

Alternatives to *Cy Pres* in Class Action Settlement Agreements

The United States Supreme Court has yet to state its preference among the variety of approaches for distributing unclaimed settlement funds. Rubenstein, *Express authorization for cy pres or noncompensatory deterrent distributions of unclaimed class recovery funds*, 3 Newberg on Class Actions §10:25 (4th ed.). Although the Supreme Court has not stated a preference, in addition to distributing residual class action settlement funds to charities under the *cy pres* doctrine, other courts have considered distributing funds to responding class members pro rata, escheating funds to a government body, and reverting funds to a defendant. *In re Linerboard Antitrust Litigation*, 2008 WL 4542669, at *3; William B. Rubenstein, *et al.*, *Cy pres, fluid recovery, escheat, and deterrent distributions of unallocated class recovery funds—Cy pres distributions of class damages*, 3 Newberg on Class Actions §10:17 (4th ed.). One particular variation of *cy pres* is fluid recovery. With fluid recovery, either a defendant agrees or a court orders a defendant to reduce prices or to offer discounts for goods or services prospectively after as many class members as possible have received awards directly until the class fund has been exhausted, which also, in theory, indirectly benefits class members in the future. William B. Rubenstein, *et al.*, *Cy pres and fluid class recovery distributions for indirect class benefit*, 3 Newberg on Class Actions §11:20 (4th ed.). However, fluid recovery shares many of the same constitutional problems as *cy pres* because class members do not receive compensation for the alleged harm that they suffered, but for prospective use of a product or service, as do individuals who don't belong to the class, resulting in a windfall for class members who have already been compensated and individuals who don't belong to the class alike. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973).

Reversion allows a defendant to keep costs low for consumers in the future rather than raising prices to replenish resources or stay in business because the defendant had to forfeit funds to a charity.

Some scholars favor pro rata distribution among responding class members, particularly when class members likely will have future dealings with a defendant. William B. Rubenstein, *et al.*, *Criticisms of cy pres class recovery distributions—Cy pres distributions as creating a windfall*, 3 Newberg on Class Actions §10:22 (4th ed.). Again, as with fluid recovery, the pro rata

Cy Pres, continued on page 83

Cy Pres, from page 21

approach can result in a windfall to class members who have already received compensation and would have received less if they had pursued their claims individually, and commentators have criticized the pro rata approach for that reason. William B. Rubenstein, *et al.*, *Criticisms of cy pres class recovery distributions*, 3 Newberg on Class Actions §10:20 (4th ed.) (citing *Eisen*, 479 F.2d 1005); Yospe, *supra*, at 1045 (citing *Powell v. Georgia-Pacific Corp.*, 843 F.Supp. 491, 496 (W.D. Ark. 1994), *aff'd*, 119 F.3d 703 (8th Cir. 1997); *In re Folding Carton Antitrust Litig.*, 557 F.Supp. 1091, 1107 (N.D. Ill. 1983); Shepherd, *supra*).

Another misguided option that courts have considered is escheat to the state, purportedly to serve the deterrent function of class actions favored by *cy pres* proponents, and particularly in cases in which additional class members possibly may file claims after filing deadlines. Yospe, *supra*, at 1047. However, the state may not necessarily use funds obtained by escheat for purposes reasonably related to the subject matter of a lawsuit, or for compensating the silent class members. Redish, *supra*, at 639. Moreover, when settling parties and a court know that a significant portion of settlement funds will remain unclaimed, allowing those funds to escheat to the state becomes tantamount to fining the defendant. Redish, *supra*, at 665.

Defense counsel should hold more steadfastly to reversion to defendants. As stated by Judge Chief Judge Jones of the Fifth Circuit in *Klier*:

> In the ordinary case, to the extent that something must be done with unclaimed funds, the superior approach is to return leftover settlement funds to the defendant. This corrects the parties' mutual mistake as to the amount required to satisfy class members' claims. Other uses of the funds—a pro rata distribution to other class members, an escheat to the government, a bonus to class counsel, and a *cy pres* distribution—all result in charging the defendant an amount greater than the harm it bargained to settle. Our adversarial system should not effectuate transfers of funds from defendants beyond what they owe *to the parties* in judgments or settlements.

2011 WL 4436528, at *10 (emphasis in original). In addition to the Fifth Circuit in *Klier*, many other courts have held that leftover settlement funds ordinarily should revert to the defendant. *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir. 1989) (holding that *cy pres* is inappropriate when the defendant has equitable claim to unclaimed funds); *Van Gemert v. Boeing Co.*, 533 F.2d 812 (2d Cir. 1977); *In re Motor-*

sports Merchandise Antitrust Litig., 160 F. Supp. 2d 1392 (N.D. Ga. 2001); *Friedman v. Lansdale Parking Authority*, No. Civ. A. 92-7257, 1995 WL 141467 (E.D. Pa. 1995); *Kennedy v. Nicastro*, 546 F. Supp. 267 (N.D. Ill. 1982). Proponents of *cy pres* argue that reversion allows defendants to get off scot-free. Yospe, *supra*, at 1042–44. However, reverting unclaimed class settlement funds to a defendant is particularly appropriate in a litigated case in which the applicable statute does not have a strongly enunciated deterrence rationale. *Id.* at 1044. A settlement would very appropriately revert residual class settlement funds to a defendant when the allegedly wrongdoing defendant has not admitted to, let alone committed, wrongdoing. Bronstad, *supra*. And reversion of class action settlement funds to a defendant most closely aligns with what would have occurred if an individual sued the defendant but, for whatever reason, failed to claim his or her award. Redish, *supra*, at 639, 665. Moreover, reversion allows a defendant to keep costs low for consumers in the future rather than raising prices to replenish resources or stay in business because the defendant had to forfeit funds to a charity.

If a plaintiffs' counsel insists on distributing funds to charity, let it come out of his or her pocket. This happened in two recent settlements in the Ohio Court of Common Pleas for Lake County. In *McFadden v. The Progressive Corporation, et al.*, Case No. 09CV002886, and *Jepson v. Cincinnati Financial Corporation, et al.*, Case No. 09CV002887, the plaintiffs' counsel, the same attorney in each case, insisted on including charitable distribution provisions in the settlement agreements. Although the attorneys' fees were improperly based on the total potential settlement fund, the defendants were not required to pay class distributions into the fund until class members had submitted claims, and the plaintiffs' attorney agreed for the first time that the mandated charitable distribution in each case should come out of his attorneys' fees. Notably, the plaintiffs' counsel in *McFadden* and *Jepson* was a proponent of *cy pres* legislation that died after its sponsor in the Ohio House of Representatives lost his bid for reelection in November 2010.

Conclusion

A defense counsel does not have an obligation to alter the remedies of substantive law. In fact, a defense counsel has the opposite obligation: to uphold the remedies of substantive law. A defense attorney should fight class certification when a plaintiffs' attorney cannot establish that, by a large majority, the class members will receive meaningful remedies through a class action. Redish, *supra*, at 665. The task of altering substantive remedies belongs with the legislative branch of government, not with litigating parties or with the courts with limited power to interpret substantive law. Redish, *supra*, at 640. Ohio, Illinois, Massachusetts, North Dakota, North Carolina, and Washington, among others, have adopted laws establishing procedures for courts to follow in distributing unclaimed settlement funds. Yospe, *supra*, at 1059–63; Bronstad, *supra*; Roberts, *supra*; Liptak, *supra*; Baker & Barren, *supra*. Though the Massachusetts statute does not completely eliminate the problems with *cy pres*, it does at least require a nexus between the distribution's recipient and the subject matter of the underlying lawsuit. While these statutes have critical weaknesses of their own, better that charities and plaintiffs' lawyers lobby the legislature than the courts.

The question again is, to *cy pres* or not to *cy pres*? The answer for defense counsel is that we should act to preserve defendants' resources rather than permitting plaintiffs' lawyers to drain defendants in the name of charity. FD

Think Globally, from page 78

of whom clearly fell within the limits of the Alien Tort Statute.

To date, the D.C., Second, Seventh, and Eleventh Circuits directly have addressed whether aliens may sue corporations as well as individuals under the Alien Tort Statute. The D.C., Seventh, and Eleventh Circuits answered yes. The Second Circuit answered no. As a result, a difference exists among the circuit courts, foretelling likely review by the Supreme Court whether federal courts have subject matter jurisdiction to decide lawsuits against corporations and business entities under the Alien Tort Statute.

Authors' note: on October 17, 2011, as this article was prepared for printing, the Supreme Court granted a writ of certiorari in *Kiobel*. FD

Idiosyncratic, from page 63

- The chain of custody of the product, such as storage and handling of the product, and whether product remains so that you can have it tested.

Conclusion

As discussed, the "idiosyncratic plaintiff" can appear in a wide range of cases involving adverse reactions linked to alleged exposures, contacts, ingestions, or applied products. You can apply the reasoning, rationale, and guidance of the cases cited in this article equally in toxic tort cases, pharmaceutical and medical device cases, cosmetic and personal care product cases, and even food-related cases. Such cases are often expensive to develop and to try, however, in the early stages of litigation you can develop the necessary evidentiary base to pursue a dispositive motion, which, in turn, could promote earlier settlement resolution, if you take the appropriate steps immediately when you receive a case.

An initial pleading, even with a nominal amount of information, will likely offer enough to identify an "idiosyncratic plaintiff." The guidelines presented here, adapted to the nuances of a particular case, provide a framework for an early investigation, evaluation, and discovery plan that would span 90 to 120 days. If pursued diligently and hand-in-hand with your client and experts, you can more often than not well position a dispositive motion or take other offense-oriented approaches to a case to achieve your client's desired resolution in a fast and cost-efficient manner. This will simultaneously allow you to evaluate the strengths and weaknesses of your case effectively, as well as the likelihood of success of a dispositive motion, *Daubert* motions, or trial. FD