University of Miami Business Law Review

Volume 28
Issue 1 *Winter 2019*

Article 4

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Jorge Galavis*

Nearly Just

Frank v. Gaos is a case that weighed the merits of cy pres,
a pesky complex doctrine left applied to my dismay.
When in class action settlements, there are remaining funds,
Defendants seem to benefit from what the Plaintiffs won.

Worse still the doctrine is applied in cases such as this;
when direct payments to a class are deemed de minimus.
Counsel decided class members were fine with what they got,
Then phoned their favorite charities to divvy the whole pot.

Once courts agree that's close enough to benefit the class,
They seem to turn a blind eye to what's really come to pass:
Although there are alternatives, which objectors have implored,
The cash goes to a charity (Defendant's on the Board).

I hope to use this note to criticize the cy pres doctrine.
I'll lay out some alternatives to find a better option.
Quand cherchent justice il n'y a chose plus horrible
Que dire que on vas arriver cy pres comme possible.

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I. INTRODUCTION

Have you ever been a member of a class action claim? If you are a consumer in the United States then the answer is probably yes, whether you knew about the lawsuit or not. For example, you may have been a member in the price-fixing class action against Fresh Milk. The class involved in that lawsuit, which settled for $52 million, was everyone who bought dairy products in 15 states and the District of Colombia at any point between 2003 and January of 2017.[1]

Even if youre lactose intolerant, there are plenty of other classes of which you may have been a part. It seems reasonable to guess that anyone reading this has studied some amount of Civil Procedure, and therefore has some familiarity with *Asahi*, the landmark case in which a California court was allowed jurisdiction over a Japanese company based on the presence of their goods in the "stream of commerce."[2] You may have also realized that *Asahi* is coincidentally also a brand of beer. If you happen to have purchased an Asahi beer some time between April 5, 2013 and December 20, 2018, then you have until May 3, 2019 to claim

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[1] The 15 states were Arizona, California, Kansas, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, Oregon, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin. *See* Carlin v. DairyAmerica, Inc., 328 F.R.D 393 (9th Cir. 2018).

[2] *See* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987).

your share of their recent class action settlement related to truth in advertising.[3]

In each of these examples, many class members ultimately failed to claim their shares of settlements or judgments rendered in their favor. Most of these lawsuits feature class members that never even become aware of their rights regarding claims.[4] This has created a dynamic where "[i]n virtually every class action, there remains a reserve fund after all claims and expenses have been paid."[5] That remaining fund often amounts to millions of dollars. Seeking a solution for all of this leftover money in class action cases, Federal Courts did what they do best: they complicated things with French.[6] For this particular problem set, Federal Courts have been applying a doctrine called *cy pres comme possible* (*cy pres* for short), which is a Norman French concept that had already

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[3] *Asahi* took advantage of its Japanese name, allowing its products seem imported rather than domestic despite the fact that they were brewed and bottled in California. *See* Shalikar v. Asahi Beer U.S.A, Inc., No. LA CV17-02713 JAK, 2017 WL 9362139 (C.D. Cal. Oct. 16, 2017); Marc Sorini, *Ruling in the Asahi Beer Class Action*, LEXOLOGY (Nov. 13, 2017), https://www.lexology.com/library/detail.aspx?g=fd21f9d2-f6e2-4a03-9358-e238c3c2f136.

[4] "Recent class action settlements have exceeded $10 billion. More than half of those entitled to receive payment never even file a claim – because they are unaware of the lawsuit, or don't know how to proceed." National Unclaimed Property Associates, *Class Action Lawsuit Settlement Search*, UNCLAIMED, https://unclaimed.com/class-action-lawsuit-settlement-search/.

[5] *In re* Folding Carton Antitrust Litigation, 557 F. Supp. 1091, 1104 (N.D. Ill. 1983), aff'd, 744 F.2d 1252 (7th Cir. 1984), cert. dismissed, 471 U.S. 1113 (1985).

[6] Britt Hanson, *A (Mostly) Succinct History of English Legal Language*, Ariz. Att'y, July/August 2012, at 29-30.

> For a *lawsuit*, we need a *court*, which means we need a *courthouse*, a *judge* and a *government* that pays for these--let's say it's a *county*. We'd get nowhere without a *plaintiff* and a *defendant*, collectively known as the *parties*. [. . .]
>
> Rules of *procedure* ensure that the *lawsuit* proceeds in an orderly fashion. Eventually there will be *motions*, *briefs* and other *pleadings*. *Lawyers* (and *attorneys*!) will present *arguments* at *hearings*, which will be attended by a *bailiff*, *clerk* and *court reporter*. The *judge* will issue an *opinion*.
>
> [. . .] To err is human, so we better provide for an *appeal*. In the end, we hope *justice* is done.
>
> So, what are the origins of all these words of a lawsuit?
>
> As mentioned, law is from Old Norse. Bench, witness, oath, the house in courthouse, and the swear in answer derive from Old English. Only two of these words—testify and clerk—are from Latin. This leaves the vast majority of words. Where did these come from? French!

become prevalent in trust law.[7] The doctrine translates to "as near as possible," and has been used to achieve the objectives of a charitable trust in situations where its original goals are otherwise impossible.[8] In the context of trusts, *cy pres* has even been used to allow courts to rectify oversights in sloppy trust drafting to ensure that the objectives of the testator are met.[9]

Successful applications of *cy pres* doctrine in trust law seem to have tempted federal courts to import this concept to class actions, and use it to justify distribution of funds to charities that are deemed to accomplish the goals of the litigation.[10] Proponents of applying *cy pres* doctrine in class action lawsuits argue that this is an adequate, and even commendable, solution to the massive stores of undistributed money remaining from these types of lawsuits.[11] They argue that charities are well-equipped to accomplish the goals of particular lawsuits, and that class members receive sufficient benefits from monies being sent to organizations that were uninvolved in the litigation.[12]

Class actions have a good deal in common with trusts conceptually, so there is some logic in applying a bespoke trust doctrine to class actions.[13] However, "a trust model of the class action suggests that *cy pres* awards to a private third party like a charity may, in many circumstances, be inappropriate in the class action context because of the harmful effects they may have on deterrence and compensation."[14] Although proponents of the doctrine have lauded *cy pres* as the saving grace of modern class actions, these distributions ultimately seem to run afoul of several requirements outlined in Federal Rule of Civil Procedure 23—the rule that governs class action procedure.[15]

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7 *See e.g.* Kolb v. City of Storm Lake, 736 N.W. 2d 546, 546-50 (Iowa 2007); Am. Jur. 2d, Charities §§ 157 et seq.

8 *Id*.

9 *See e.g.* Gallaudet University v. National Soc. of the Daughters of the American Revolution, 699 A.2d 531, 533-35 (Md. App. 1997) (in which the court allowed extrinsic evidence of testator intent to divert a divestment to a charity using the *cy pres* doctrine).

10 *See e.g.* Natalie DeJarlais, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L. J. 729, 729-50 (1987); *The Cy Pres Solution to the Damage Distribution Problems of Mass Class Actions*, 9 GA. L. REV. 893, 915 (1975).

11 *Id.*

12 *Id.*

13 *See generally* Sergio J. Campos*, The Class Action As Trust*, 91 WASH. L. REV. 1461 (2016).

14 *Id.* at 1521-1522.

15 Fed. R. Civ. P. 23.

In the first section of this note, I will address the concerns that Rule 23 raises over *cy pres* distributions and discuss whether the doctrine is compatible with the fundamental goals of class action lawsuits. I will also present several empirical findings about *cy pres* distributions in class actions to show trends among applications of this doctrine. Next, I will discuss the two instances in which the issue of class action *cy pres* has been considered, and subsequently left undecided, by the Supreme Court of the United States. Then, I will evaluate the rules that govern the actual recipients of *cy pres* distributions, charities, to better understand the end results of these distributions. Finally, before offering my conclusions, I will present alternative uses for undistributed funds in class actions to challenge whether *cy pres* really means "as near as possible."

II. THE PROBLEM OF *CY PRES* IN MODERN CLASS ACTIONS

Cy pres distributions have been successful in trust law because the goals of a charitable trust are often ascertainable.[16] Identifying the concrete goals of a particular class action, or class actions as a whole, is often a bit more complex. Some of the major goals that scholars tend to identify for class actions include compensation for harmed individuals and deterrent effects on wrongdoing defendants.[17] *Cy pres* distributions fail with respect to each of those goals. Rule 23 provides the mechanism for bringing class action claims, including requirements dictating the manner in which attorneys and judges must behave in those cases.[18] Those requirements also go awry with many class action *cy pres* distributions.

When funds from a class action are distributed using a *cy pres* scheme, none of those funds provide direct benefits to the plaintiff class members. In *cy pres*-only distributions, unnamed class members get no direct compensation whatsoever from the resolution of their claims. Proponents of *cy pres* in class actions argue that this only happens in two instances: when funds go unclaimed,[19] or when direct payment to class

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16 *See e.g.* A. W. Scott & W. F. Fratcher, *The Law of Trusts* § 399 (4th ed. 1987) (describing the historic rise of *cy pres* applications in redistributing funds from charitable trusts in the United States).

17 *See e.g.* Deborah R. Hensler, *Happy 50th Anniversary, Rule 23! Shouldn't We Know You Better After All This Time?*, 156 PENN. L. REV. 1599, 1611-15 (Jun. 2017); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1872-88 (2002).

18 *See e.g.* Fed. R. Civ. P. 23. (a)(4), (e)(2), (g)(2), (g)(4).

19 *See* Dejarlais, *supra* note 11, at 730.

members would be *de minimus* after administrative costs of distribution.[20]

In the former instance, there usually is some compensation for class members. It does not, however, provide any good reason for the redistribution of remaining funds to *cy pres* recipients. Advocates of *cy pres* distributions in this category argue that these remaining funds are of little concern because many are small percentages of the total awards or settlements.[21] These arguments brush by the fact that a low-percentage distribution from a large fund can still be a hefty sum of money.[22] The recipients of these distributions were not involved in the underlying class action, and they have no accountability to compensate or benefit the actual class members.[23]

The latter instance includes cases where *cy pres* distributions are incorporated into settlements and judgements irrespective of whether the funds may go unclaimed. In this category, *cy pres* distributions are taken from a designated amount of the funds paid by the defendant, which can be the entire award after fees and costs.[24] Relative to the first, this category is a more unabashed way to distribute lawsuit funds to uninvolved parties, and critics of class action *cy pres* should feel more concerned with this type of application. Unfortunately, this is the faster-growing method for *cy pres* distributions in class actions.[25] When it comes to the goal of compensating harmed class members, sending class action funds to uninvolved *cy pres* recipients goes no further than having those funds escheat to the state.[26] Indeed, gathering the funds into a pile and setting them ablaze would compensate class members to the same degree as a *cy pres* distribution to a third party.

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20 *Id.* at 732-38.

21 *See e.g.* Brief of Professor William B. Rubenstein as *Amicus Curiae*, p. 6-8; 11; 79, *see* Frank v. Gaos, 139 S. Ct. 1041 (2019) (urging the Supreme Court to approve a total *cy pres* distribution because such distributions are "exceedingly rare," while ignoring the majority of class action *cy pres* awards, which account for less than 75% of the total funds from their respective lawsuits).

22 West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 722-23, 734 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971) (where a $32 million *cy pres* distribution was taken out of a $100 million settlement—or *only* 32% of the total settlement).

23 *See infra* Part III.

24 *See e.g.* Frank v. Gaos, 139 S. Ct. 1041, 1043-48 (2019).

25 *See infra* Part II (a).

26 Like *cy pres* recipients, the state was likely uninvolved in the underlying class action. However, escheating the funds to the state could actually have a beneficial effect on the class members who live there. *See infra* Part IV (c).

Turning to deterrence, *cy pres* distributions have also undermined this critical goal of class action lawsuits. This happens because the defendants in these cases can have relationships with the organizations that ultimately receive *cy pres* distributions from settlements or judgements entered against them. The *cy pres* recipients could be huge sources of revenue for the defendants,[27] and conceivably return the funds to the wrongdoers through added business. The *cy pres* recipients could even have board members selected by the defendants.[28] When defendants can get returns from adverse class actions, they enjoy reduced financial strain from the lawsuits. This in turn prevents defendants from fully feeling the deterrent effects that these class actions should be promulgating.

Rule 23 outlines duties for attorneys who seek to achieve these goals in any given class action.[29] This is particularly true in cases resolved by settlements because unnamed class members have fewer opportunities to challenge decisions that their lawyers and class representatives have made on their behalf.[30] If the unnamed plaintiffs' individual claims are considered, especially in massive class action lawsuits, then it is difficult to see how class council could agree with schemes that do not provide any benefit to those class members at all.

The rationale that class counsel follows, when going along with these schemes, becomes a bit easier to understand when considering the incentives of the involved attorneys themselves. Class counsel often stands to realize personal gain through *cy pres* distributions, which they would not have gotten had the monetary award been directly distributed to class members.[31] *Cy pres* schemes have little to no impact on the amounts that attorneys receive in fees and costs for representing a class, despite the fact that those fees are often supposed to be directly proportional to class compensation.[32]

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27 *See infra* note 59.

28 *See e.g.* Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012) (where Facebook was allowed to choose one of three board members for the recipient *cy pres* foundation).

29 *See* Fed. R. Civ. P. R. 23 (g).

30 *Id*. at (e)(2).

31 For example, some *cy pres* distributions can be likened to glorified alumni fundraisers, with awards going to universities that class counsel had attended. *See infra* note 59.

32 *See e.g.* In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Lit., 851 F.Supp. 2d 1040, 1069-1080 (S.D. Tex. 2012) (holding that funds distributed in a class action *cy pres* award should not be considered as compensation to class members for the purposes of determining counsel compensation); *but see* Lane v. Facebook, Inc., *supra* note 31 (where a *cy pres*-only award was used to justify proportional class compensation).

In the case of class action settlements, judges presiding over these cases also have added duties concerning approving or rejecting proposals. As with the rule for the attorneys, these requirements are intended to protect unnamed class members from being strung along by attorneys with a pecuniary interest. In the case of judges, this end is achieved by instructing the judge to consider individual class member interests, rather than the interests of the class as a whole, when deciding questions of law in class action cases.[33] Regarding settlements, Rule 23 also requires these judges presiding to hold hearings to establish whether class action settlements are fair, reasonable, and adequate.[34] These determinations must be made after considering the adequacy of class representation, whether the settlement was negotiated at arms-length, and the adequacy of the relief provided to the class members.[35]

A. Cy Pres by the Numbers

Cy pres distributions are a growing feature of class action judgements and settlements. Meanwhile, very little scholarly work has been written to criticize the increasing use of this distribution scheme. One of these works, which provided in-depth empirical analysis about recent *cy pres* class action distributions, described many of its findings as the "pathologies" of the doctrine.[36] In that article, the authors provided many comprehensive data points that highlighted financial effects of *cy pres* distributions, and the types of class actions that most featured applications of the doctrine.[37] The following section seeks to update many of the empirical findings in that article, and provide additional observations for those data points. There are several "Pathologies" described in the article that were omitted in the interest of brevity.[38] Although omitted, those figures provide additional insight to the side effects of *cy pres* distributions. Indeed, updates to the omitted data could very well be the subject of future works criticizing this doctrine in class actions.

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33 *See* Fed. R. Civ. P. R. 23 at (b)(3)(A).
34 *Id.* at (e)(2).
35 *Id.*
36 Redish, Julian, & Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L.REV. 617, 653–56 (2010).
37 *Id.*
38 *Id.*

i. Pathologies Findings

The authors and research assistants behind *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis* put together a comprehensive analysis of 120 class action cases that featured *cy pres* distributions, which took place between 1974 and 2008.[39] To that end, the authors offered the following summaries of their findings:

> First, the prevalence of class action *cy pres* awards has increased steadily by decade since the 1980s and has accelerated noticeably after 2000. Second, since 2000, the majority of class action *cy pres* awards are associated with cases that were certified solely for the purposes of settlement, over one-third of class action *cy pres* awards are associated with faux class actions, and approximately two-thirds of class action *cy pres* awards are associated with either settlement or faux class actions. Third, in a quarter of *cy pres* class actions, the amount and recipient of the *cy pres* award was determined ex ante, or prior to giving absent class members the opportunity to make claims on the fund. Fourth, the average *cy pres* award was $5.8 million and accounted on average for 30.8% of total compensatory damages. Finally, not only do *cy pres* awards have the potential to increase the total available fund and legitimize cases where the class might not otherwise be certified, but they can also increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefiting the plaintiff.[40]

The authors based their findings on a series of searches that were performed using Westlaw, Lexis Nexis, and Google.[41] The following graphs were used to present data in support of their first, second, and fourth conclusions:

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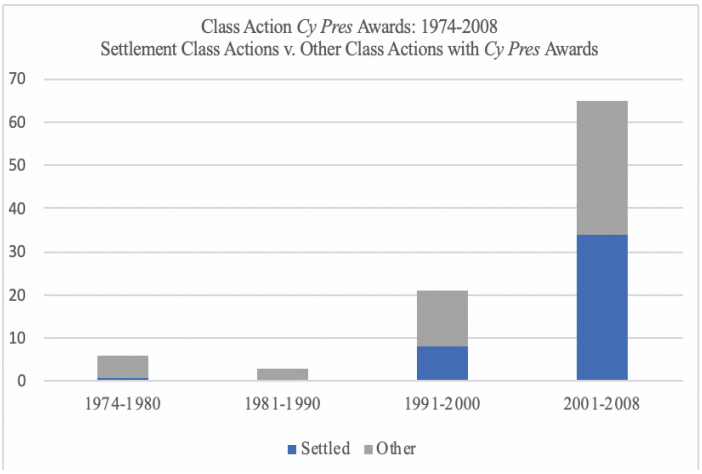
39 *Id.* at 659-61.
40 Redish, Julian, & Zyontz, *supra* note 39, at 661.
41 *Id.*



[42]

As shown by the chart, the popularity of *cy pres* awards in class actions climbed at a staggering rate between 1990 and 2008. The number of *cy pres* awards that came from settlements, instead of judgements, also grew during that time. The authors also noted that the doctrine was not adequately challenged, or even criticized, during this time.

Class Action *Cy Pres* Awards as a Percent of Total Compensatory Damages (N=47 Cases)[45]			
	Total Compensatory Damages	Class Action *Cy Pres* Awards	*Cy Pres* as a Percent of compensatory damages (Paired)
Average	$51,778,958	$5,847,866	30.8%
Median	$11,300,000	$243,000	11.5%
Maximum	$445,078,000	$75,700,000	100.0%
Minimum	$1,342	$342	0.1%
Standard Deviation	$91,706,915	$14,497,677	35.9%

This table was produced with a smaller sample of the overall search. Specifically, the authors used a group of 47 cases that had available award breakdowns. Several observations can be taken from this table. First, although the average *cy pres* award was 30.8%, the average amount distributed in *cy pres* was still nearly 6 million dollars. Furthermore, the

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[42] *Id.* (Although the content of the graph is the same, the style has been adjusted to conform with other data illustrations in this note.)

standard deviation of almost 15 million dollars indicates a wild range in amounts among those measured. That figure suggests that half of the *cy pres* awards measured fell between $342 and $20,345,543[43], with the remaining half being even higher *cy pres* awards. The authors further analyzed these awards by showing them as percentages of total compensatory damages for each case. In doing so, they highlighted the existence of cases in which all compensatory damages were being distributed through some sort of *cy pres* scheme.

Ultimately, this empirical analysis and critique of *cy pres* awards in class actions finally prompted the Supreme Court to pay attention to this trend in modern class actions.[44]

ii. Updates to *Cy Pres*

Cy Pres Relief and the Pathologies of the Modern Class Action concluded with the sentiment that class action *cy pres* "must therefore be abandoned by the federal courts."[45] Nearly a decade later, the doctrine is still alive and well in modern class action lawsuits. Indeed, with a few exceptions, the use of these distribution schemes has actually continued to rise among federal courts. In order to fully capture this trend, this section lays out several updates to the data presented above and includes a few additional points regarding the use of this doctrine. The data presented in the chart below was compiled using Westlaw, Lexis Nexis, and Bloomberg Law. The original list was generated using Westlaw Litigation Analytics, where a search for '*cy pres*' within class action cases revealed a comprehensive list of over 500 results. From that list, cases where *cy pres* distributions were only mentioned or otherwise denied were excluded. Pending cases were also excluded.

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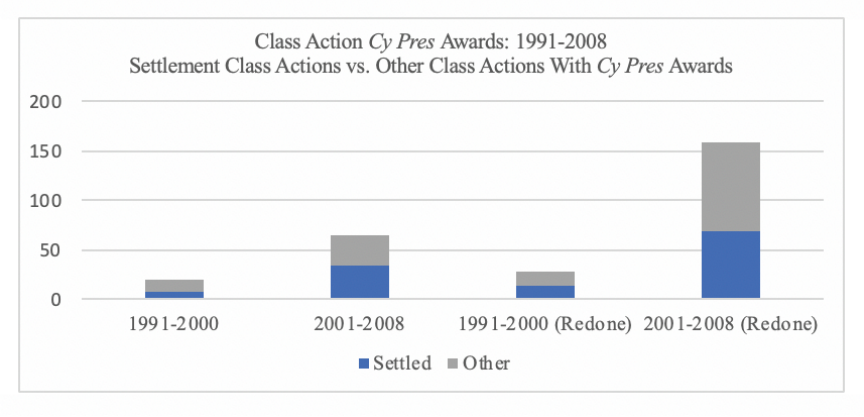
[43] Taking a standard deviation on either side of the average, considering the minimum *cy pres* award was $342.

[44] *See infra* Part II (b).

[45] Redish, Julian, & Zyontz, *supra* note 32.



This graph compares the recompiled data with the findings in *Cy Pres Relief and the Pathologies of the Modern Class Action*.[46] The recent searches produced a similar amount of cases for the time period between 1991 and 2001. For the period between 2001 and 2008, however, the recently acquired data shows a significantly larger group of cases involving *cy pres* awards. This discrepancy could be explained by considering differences in the ways in which the data was initially gathered; however, the large proportion of unreported cases in the redone data could indicate that there are simply more slip opinions available online now than there were in 2008—and the rise of *cy pres* awards in class actions grew at an even faster rate than was previously thought. In either case, there was a clear rise in *cy pres* awards and settlements that accelerated at the turn of the millennium.

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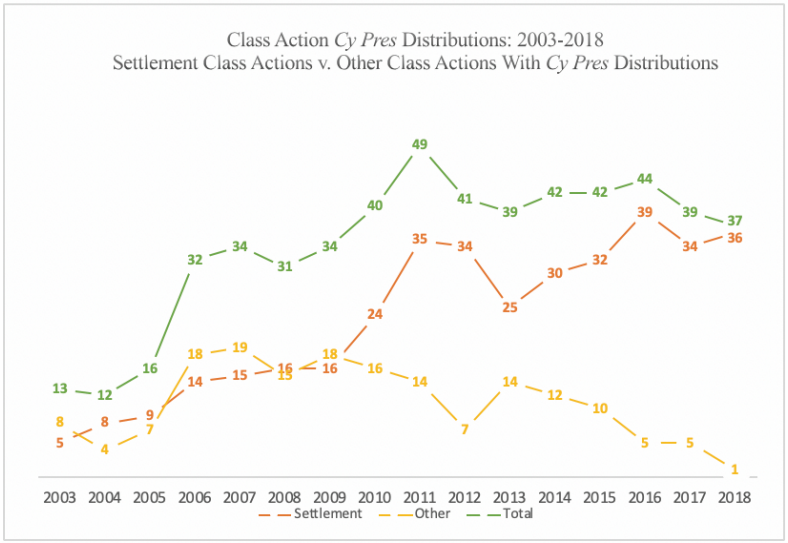
46 *Id.*



This graph tracks the growth of *cy pres* distributions in class actions from 2003 to 2018. The data is presented as a line graph as opposed to a bar graph to better show the yearly trajectory of *cy pres* awards—especially those coming from class action settlements. This graph shows that *cy pres* distributions have continued to gain popularity in class action cases. It further shows that these distributions are happening in settlements more often than before; with 36 of the 37 class action *cy pres* awards coming from settlements in 2018. There have been a few notable drops in class action *cy pres* popularity, which seem to line up with instances where the Supreme Court of the United States has considered the issue.[47] However, despite granting certiorari over one of these cases, the Court has failed to provide any adequate guidance for *cy pres* applicability in class action cases.[48] So, unless the issue is addressed in the near future, federal courts will likely continue to apply the doctrine in future class action cases.

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47 *See infra* Part II (b).
48 *Id.*

Class Action *Cy Pres* Awards as a Percent of Total Compensatory Damages (N=50 Cases)					
	Total Amount in Award or Settlement	*Cy Pres* Distribution		Compensation to Unnamed Class Members	
Average	$407,507,500	$40,820,778	11%	$303,334,510	74%
Median	$7,000,000	$1,130,000	24%	11.5%	27%
Maximum	$7,250,000,000	$753,000,000	71%	$5,700,000,000	94%
Minimum	$100,000	$814	0.1%	$0	0%
Standard Deviation	$1,161,276,686	$167,675,840	27%	$1,271,079,397	35%

Like the table included in *Cy Pres Relief and the Pathologies of the Modern Class Action*, this table was compiled with a smaller subset of cases from the initial search. Specifically, this table represents data from a sample of 50 cases that took place between 2011 and 2019 and had award breakdowns available. This data, however, does not measure *cy pres* distributions relative to total compensatory damages. Instead, it measures *cy pres* distributions against the total award or settlement amounts from the underlying class action lawsuits. As a comparison, the amount of compensation that went to unnamed class members was also presented against the total amounts in the same lawsuits.

The data contained in this table shows that *cy pres* awards took an average of 11% from the total distributions in their respective sampled cases. The average dollar amount for these awards, however, was over $40 million. This shows that even low-percentage *cy pres* awards often amounted to large sums of money. The standard deviations of $167.6 million further show that the figures in the sampled cases had a wide range—with 50% of *cy pres* awards sampled falling between $814 and $207.6 million. Additionally, the standard deviation of 27% indicates that half of the sampled cases involved *cy pres* awards that were between 0.1% and 38% of the total distributions, with the remaining cases including even higher *cy pres* awards. Ultimately, the updated empirical data shows that class action *cy pres* awards continue to represent millions of dollars in distributions, and Federal Courts show no indication of abandoning the doctrine.

B. Class Action Cy Pres in the Supreme Court

i. Frank v. Gaos

Frank v. Gaos[49] is the case that serves as the *raison d'être* for this note, and, at one time, it also seemed to be the Supreme Court's chance to finally address the pathologies of class action *cy pres* distributions. Instead, the Court used a longtime favorite in its playbook for punting challenging decisions—it remanded the case on the question of Article 3 standing.[50] *Frank v. Gaos* began with a class action lawsuit against Google for their violation of consumer privacy laws—the *In re Google Referrer Header Privacy Litigation*.[51] Specifically, the tech giant was accused of leaking consumer search terms by including those terms in "referrer headers," which were subsequently disclosed to third parties.[52] Because of the sheer number of individuals that use Google for web searching, the class was estimated to include up to 129 million searchers.[53] The case was settled for $8.5 million.[54] From this settlement, the three class counsel received roughly $2.125 million, while the named class representatives go $5,000 each.[55] Of the remaining $6 million in the settlement, the unnamed plaintiffs got nothing.[56] Instead, that entire amount was devoted to a *cy pres* distribution scheme, which distributed the funds to a suspect group of charities.[57]

One of the charities that received more of the settlement fund than any of the plaintiffs was the American Association of Retired Persons (AARP). The AARP has often promoted the defendant's products,[58] and consistently listed the defendant as one of its top five highest-paid independent contractors in its yearly filings.[59] Several of the other

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49 Frank v. Gaos, 139 S.Ct. 1041, 1043-48 (2019).

50 *Id.* at 1046

51 *In re* Google Referrer Header Privacy Litigation, 87 F. Supp. 3d 1122, 1126 (N.D. Cal. 2015) *aff'd*, 869 F.3d 737 (9th Cir. 2017), *vacated*, Frank v. Gaos, 139 S. Ct. 1041 (2019).

52 *Id*. at 1126-27.

53 *In re* Google Referrer Header Privacy Litigation, 869 F. 3d at 742.

54 *Id.* at 740.

55 *Id*. at 741.

56 *Id*. at 741.

57 *Id.* at 742.

58 *See e.g.* Gary M. Kaye, *Google—It Ain't Just Search*, AARP (June 11, 2013), https://www.aarp.org/home-family/personal-technology/info-06-2013/google-gmail-news-weather-maps.html (promoting the use of Google services and products, including its search engine).

59 *See* AARP, Return of Organization Exempt from Income Tax (Form 990) (2016) (indicating that AARP paid Google over $21 million in 2016).

charities that benefitted from the scheme were the law schools that class counsel had attended.[60] This prompted the judge in the underlying litigation to refer to the *cy pres* award as a glorified alumni fundraiser.[61]

Ultimately, upon hearing the challenges to the *cy pres*-only settlement that had been approved, the Supreme Court granted certiorari. And, although it appeared that the Supreme Court would finally address the permissibility of class action *cy pres* awards [62], the Court completely bypassed this important issue and remanded the case based on standing. Only Justice Thomas dissented, and explained that "[w]hatever role *cy pres* may permissibly play in disposing of unclaimed or distributable class funds, *cy pres* payments are not a form of relief to the absent class members and should not be treated as such (including when calculating attorney's fees). And the settlement agreement here provided no other form of meaningful relief to the class. This *cy pres*-only arrangement failed several requirements of Rule 23."[63]

In his dissent, Justice Thomas further explained that he would have decided the case on the merits, and that "because the class members here received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims, [he] would hold that the class action should not have been certified, and the settlement should not have been approved."[64]

Justice Thomas' views taken together with Chief Justice Roberts' concerns[65] over class action *cy pres* would seem to indicate that it is only a matter of time before an appropriate case comes to the Supreme Court that will allow it to address these distributions in class actions. Although that case should have been *Frank v. Gaos*, and it is easy to see how similar issues may prevent the Supreme Court from addressing class action *cy pres* in future cases, there is still hope that the Court will someday put an end to these unjustified redistributions of class funds.

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60 *See In re* Google Referrer Header Privacy Litigation, 869 F.3d at 748 (Wallace, J., concurring in part) (explaining that the distributions to class counsels' alma maters accounted for 47% of the overall settlement distribution); *see also* Brief for Petitioners, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No. 17-961), 2018 WL 3374998 at *32.

61 *Id.*

62 *See* Debra Cassens Weiss, *Supreme Court to Consider Cy Pres Awards that Give no Money to Class-Action Plaintiffs*, ABA JOURNAL (Apr. 30, 2018, 11:26 AM), http://www.abajournal.com/news/article/supreme_court_to_consider_cy_pres_awards_that_give_no_money_to_class_action.

63 Frank v. Gaos, 139 S. Ct. at 1047 (Thomas, J. Dissenting) (internal citations omitted).

64 *Id.* at 1048.

65 *See* Marek v. Lane, 571 U.S. 1003, 1003 (2013).

ii. *Marek v. Lane*

The first time that class action *cy pres* distributions were discussed by the Supreme Court was in 2013, as it considered granting certiorari in the case of *Marek v. Lane*.[66] The facts underlying *Marek v. Lane* include one of the more egregious examples of class action *cy pres* distributions. In the underlying lawsuit that prompted *Marek v. Lane*, Facebook settled a class action relating to consumer privacy.[67] This multimillion dollar settlement did not include any compensation for unnamed class members.[68] Instead, a majority of the settlement was diverted to a *cy pres* award, which was used to form a Private Foundation called the Digital Trust Foundation. The Digital Trust Foundation had three board members, and Facebook was allowed to hand-pick one of those board members.

Cy pres distributions are often argued to be favorable over direct distributions because they are claimed to reduce administrative costs of issuing remedies. The Digital Trust Foundation shows that this argument is flawed because the *cy pres* recipient in that case spent hundreds of thousands of dollars on administrative costs and was still sitting on a large amount of the award years after the resolution of the case, according to the Foundations' publicly filed tax forms. Although the Court did not ultimately grant certiorari in this case, *Marek v. Lane* corresponded with one of the few periods during which the use of class action *cy pres* awards actually fell out of favor.[69] This is likely because Chief Justice Roberts was quite critical about these distributions when he issued a statement following the Court's denial of certiorari:

> Marek's challenge is focused on the particular features of the specific *cy pres* settlement at issue. Granting review of this case might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be

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66 571 U.S. 1003, 1003 (2013).

67 Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012) (explaining that the action commenced after Facebook started using a program called Beacon to publicize users' private information).

68 *Id.* at 817.

69 The comparable decline that occurred while *Frank v. Gaos* was being decided suggests that the aforementioned decreases in the use of *cy pres* class awards likely resulted from unease among federal courts; it is quite probable that they purposely elected to wait to hear what the Supreme Court of the United States had to say about class action *cy pres* awards. *See infra* Part II (A)(ii).

> considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on. This Court has not previously addressed any of these issues. *Cy pres* remedies, however, are a growing feature of class action settlements. *See* Redish, Julian, & Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L.Rev. 617, 653–656 (2010). In a suitable case, this Court may need to clarify the limits on the use of such remedies.[70]

In issuing this statement, Chief Justice Roberts predicted that the Court will someday hear a case that will allow it to address the problems inherent in *cy pres* distributions in class actions. He also cited the only scholarly work that had adequately criticized the doctrine at the time, which has been summarized and updated in this article. Although the Court missed another opportunity to tackle this issue in *Frank v. Gaos*, it is still likely to come up in the near future given that the problem is still prevalent among Federal Courts.

III. *CY PRES BUT NO CIGAR: WHO REALLY BENEFITS FROM THE APPLICATION OF THIS DOCTRINE*

Critics of *cy pres* application in class actions have placed a heavy focus on the parties and judges involved in those suits. Their critiques are justified, and many are referenced in the earlier section of this note, but they do not pay enough attention to the ultimate recipients of these *cy pres* distributions: charities. This section will explore some of the major rules that govern charities in the United States, and argue that these rules do nothing towards achieving philanthropy, let alone the goals of *cy pres* in modern class actions.

Charities in the United States are widely regarded as benevolent organizations that do good for their beneficiaries and the public at large. At best, this view is naïve. Although terms like "charity" and "philanthropy" have become interchangeable, the laws governing these

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[70] *Marek*, 571 U.S. at 1003.

organizations do not define the term "philanthropy."[71] Instead, they describe different types of nonprofit organizations, and define their activities as charitable based on the absence of disqualifying elements instead of affirmative duties to do good or provide any measurable benefits to society.

A. The Organization and Operation Tests

Many of the fundamental requirements for public charities in the United States come from the "Organizational and Operational" tests laid out in the tax code and regulations.[72] The organizational test is satisfied with the inclusion of "magic words" in the company's articles of organization, which "(A) (a) Limit the purposes of such organization to one or more exempt purposes; and (b) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes."[73] These exempt purposes are wrapped up in a laundry list written into 501 (c)(3) by congress and expanded upon by the IRS in the treasury regulations.[74]

A public charity's exempt purpose can be extremely broad: articles of organization that say "this organization is formed for educational purposes within the meaning of section 501(c)(3) of the Code" would be sufficiently specific to satisfy the organizational test. [75] The exempt purpose can even be detached from any actual philanthropic activity because "articles stating that [an] organization is created solely to receive contributions and pay them over to organizations which are described in section 501(c)(3) and exempt from taxation under section 501(a)) are sufficient"[76] for the organizational test. Conversely, the presence of a

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[71] Ray D. Madoff, *When is Philanthropy?: How the Tax Code's Answer to This Question Has Given Rise to the Growth of Donor-Advised-Funds and Why It's a Problem, in Philanthropy in Democratic Societies* (Reich, Cordelli, & Bernholz 2016).

[72] *See generally* I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(a)(1) (2017); Treas. Reg. § 1.501(c)(3)-1(c) (2017).

[73] Treas. Reg. § 1.501(c)(3)-1(a)(1) (2017).

[74] *Id.* (This laundry list consists of various organizational purposes, including "charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals.")

[75] Treas. Reg. § 1.501(c)(3)-1(a)(1) (2017).

[76] *Id.*

nonexempt purpose in an organization's articles, if substantial[77], outright prevents the organization from qualifying as a public charity "regardless of the number or importance of truly exempt purposes" that it carries on.[78] This enables organizations to qualify as Public Charities under 501(c)(3) without conducting any actual philanthropic activities whatsoever. Meanwhile, organizations that do nothing but conduct philanthropic activities can fail to qualify as 501(c)(3) because their articles enable activities outside of the congressionally-approved categories of charity, however desirable or publicly beneficial those activities may be.

An organization called Key Worldwide Foundation serves as a recent example of the latter type of organization. As a 501(c)(3), the exempt purpose for Key Worldwide Foundation was "to provide education that would normally be unattainable to underprivileged students, [to make it] not only attainable but realistic."[79] That purpose, which was "accomplished" through bribery and fraud, satisfied the organizational test and allowed the company to operate as a 501(c)(3) unscrutinized for over 5 years.[80] The organization would likely have remained a 501(c)(3) if its fraud had not been discovered in the course of a loosely related securities investigation.[81] Indeed, this sham charity was

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[77] There is some debate over what makes a nonexempt purpose in an organization's articles *substantial*, thereby justifying removal of 501(c)(3) status. A thorough analysis of the question could be a note in and of itself. *See e.g.* American Institute for Economic Research v. U.S., 302 F.2d 934, cert. denied 372 U.S. 976, 976 (1962) (stripping an otherwise compliant educational organization of its 501(c)(3) status because it charged subscription fees for two periodical publications); *but see* Presbyterian and Reformed Publishing Co. v. Commissioner, 743 F.2d 148 (3d Cir. 1984) (allowing a religious organization to keep its 501(c)(3) status while engaging in the business of buying and selling books for profit).

[78] *See* Better Bus. Bureau v. United States, 326 U.S. 279, 283 (1945); Redlands Surgical Servs. v. Commissioner, 113 T.C. 47, 71–72, 1999 WL 513862 (1999); Nationalist Movement v. Commissioner, 102 T.C. 558, 576, 1994 WL 118959 (1994) (*quoting* Church in Boston v. Commissioner, 71 T.C. 102, 107, 1978 WL 3388 (1978)), aff'd. 37 F.3d 216 (5th Cir.1994); American Campaign Academy v. Commissioner, 92 T.C. 1053, 1065, 1989 WL 49678 (1989).

[79] Alanna Richer, *Parents Involved in College Admissions Scandal Could Face Tax Charges, Experts Say*, TIME (April 2, 2019), http://time.com/5562642/parents-college-admissions-scandal-additional-charges/.

[80] *Id.*

[81] Milton Valencia & Shelley Murphy, *Here's how Boston Investigators Uncovered What's Being Called the Biggest College Bribery Scam in History*, BOSTON GLOBE (March 13, 2019), https://www2.bostonglobe.com/metro/2019/03/13/investigation-one-scheme-lead-prosecutors-another/KBBjYqsgKeb8HQUs3yUkKP/story.html. ("It started, improbably, with a securities fraud investigation out of Boston, a so-called pump-and-dump stock scam that extended overseas.").

discovered largely by chance because the IRS looked no further than the magic words in the organization articles when granting 501(c)(3) status.

The main counterpart to the organization test in the law governing nonprofits is the operational test. The operational test is satisfied if the organization is "operated exclusively"[82] for its exempt purpose, although the word exclusively is somewhat misleading because it does not mean "solely" or "without exception." Instead, the meaning behind the word "exclusively" in the 501(c)(3) organization test has been heavily litigated and regulated since its drafting.[83] Over time, this test has largely been whittled down to regulate certain categories of activity, rather than to ensure that charities are operated to do good. According to the operations test, charities should not participate in lobbying (*insubstantial* lobbying is allowed),[84] provide improper private benefit (*some personal benefit* is allowed),[85] inure benefit to insiders (*competitive compensation* is allowed),[86] or conduct political activities (*educational policy work* is allowed).[87]

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[82] Not to be confused with the prohibition against substantial nonexempt purposes in 501(c)(3) organization articles. *See* Treas. Reg. § 1.501(c)(3)-1(c) (2017); *see also supra* note 81 and accompanying text.

[83] Again, a thorough exploration of this issue could be a full article in and of itself. But, for the purposes of this note, a few illustrative examples will do. *See infra* notes 84-87.

[84] Nayantara Mehta, *Nonprofits and Lobbying: Yes, They Can!*, AMERICAN BAR ASSOCIATION (Sept. 19, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2009/03/04_mehta/.

> Unfortunately, the IRS has not provided guidance on what is an appropriate "insubstantial" amount of lobbying and has not defined what exactly it considers to be lobbying under this test. Most tax practitioners believe that if a public charity's lobbying activity is less than 5 percent of its overall activities, it would be an insubstantial amount of lobbying.

[85] This rule has been used to challenge nonprofits that have individuals or small groups named as beneficiaries. However, there are exceptions for certain "needy" groups. Incidental private benefit to individuals is also allowed. *See* Frances Hill & Douglas Mancino, *Operating for a Public Benefit: The Private Benefit Doctrines*, Taxation of Exempt Organizations (2014).

[86] Nonprofit employees are often paid rates that are competitive with for-profit companies, and very generous—to encourage highly qualified individuals to work for employees. *Id.*

[87] *See e.g.* National Council of Nonprofits, *Political Campaign Activities – Risks to Tax-Exempt Status*, NCP, *available at* https://www.councilofnonprofits.org/tools-resources/political-campaign-activities-risks-tax-exempt-status (last visited May 4, 2019) (providing a resource for nonprofits to act politically without losing their exempt status).

B. Bar on Commerciality

Another avenue that is used to regulate charities is commerciality. Although participation in commercial activity does not indicate whether an organization is acting philanthropically, engagement in this type of activity can be sufficient to strip an organization of its status as a public charity. This removal of 501(c)(3) status happens even if the commercial activity is desirable or beneficial to the organization's charitable purpose.[88] This is because the rule against commerciality, like most rules governing charities, is designed to curtail abuses of the nonprofit business model rather than encouraging or enabling real philanthropy. Indeed, allowing more commercial activity among charities could actually be beneficial to further philanthropic goals in appropriate situations. This largely indiscriminate bar on commerciality could actually prevent a charity from helping more people or accomplishing the goals of a class action lawsuit in a *cy pres* distribution scheme.

C. Accountability to Donors, and Cy Pres Schemes

One common misconception about charities is that they are accountable to their donors or beneficiaries. Instead, charities are generally empowered to act contrary to the wishes of their donors—even if those donors only contributed for specific reasons that were later ignored. Red Cross serves as one example of this lack of accountability. Soon after the tragic events of September 11th, 2001, the Red Cross sent out calls for donations to provide relief to the people who had been impacted. Those calls were well-received, and donors gave an estimated $2.7 billion to charities for relief related to the tragedy.[89] The money sent to Red Cross for this reason, however, was largely diverted to be spent on other Red Cross projects, or squirreled away for years, benefitting no one.[90] Additionally, the Red Cross was not required to refund the donations when that information came to light because donations are deemed to belong to charities in their full discretion once they pass into the charities' possession. Although the Red Cross did ultimately offer to refund donations in that instance, this seemed to be a mere a public

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88 *See e.g.* Airlie Foundation v. Commissioner, 283 F. Supp. 2d 58 (D.D.C., 2003) (stripping a foundation of its nonprofit status because it occasionally managed a conference center as part of its operations).

89 Robert Katz, *A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief*, 36 IND. L. REV. 251, 253-58 (2003).

90 Davie Mikkelson, *September 11 Monies, Are all the Monies Collected to Assist the Victims of the September 11 tragedy reaching their intended recipients?,* SNOPES (Mar. 8, 2008), https://www.snopes.com/fact-check/charity-case/.

relations move–the Red Cross has continued to make calls for targeted donations, only to spend those donations elsewhere or not at all.[91]

D. Under-Enforcement by the IRS and Challenges in Enforcement

Although the laws governing nonprofits already do little to ensure that these organizations provide public benefit, they are also underenforced. This is because the IRS has insufficient resources to properly oversee this massive group of organizations, and there is little public pressure to ratchet up enforcement of existing rules. For example, the organizational test, which is not very challenging to satisfy, was not met by many organizations that, nevertheless, were allowed to keep their status as charities:

> Too frequently—between 26 and 42 percent of the time—the requirements for IRC (Section) 501(c)(3) status were not met and the IRS approval was erroneous. For example, as we reported in the 2017 Annual Report to Congress, one organization's articles of incorporation stated that its purpose was simply "establishment and operation of a farmer's market." In 2017, the IRS revoked the exempt status of at least two organizations that described themselves as farmers' markets, and in 2017 and 2018 denied IRC (Section) 501(c)(3) status to at least two others. Those organizations, by providing a profitable outlet for local farmers and vendors, were primarily serving the private interests of those who came to the market to sell their products, as opposed to furthering an exempt purpose.[92]

So, to the extent that rules governing charities are actually beneficial, they still fall short of regulating the actions of charities.

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[91] *See e.g. Laura Sullivan, In Search of the Red Cross' $500 Million in Haiti Relief,* NPR (Jun. 3, 2015), https://www.npr.org/2015/06/03/411524156/in-search-of-the-red-cross-500-million-in-haiti-relief.

[92] Taxpayer Advocate, *Form 1023-EZ Now Elicits Additional Information, But It's Not Clear That IRS Reviewers Are Considering It*, NATIONAL TAXPAYER ADVOCATE (Oct. 24, 2018), https://taxpayeradvocate.irs.gov/news/nta-blog-form-1023-ez-now-elicits-additional-information-but-it-s-not-clear-that-irs-reviewers-are-considering-it.

IV. COME A LITTLE BIT CLOSER: ALTERNATIVE SOLUTIONS TO *CY PRES* PROBLEMS

A. The "Lottery" Approach

A possible alternative to *cy pres* distributions in class actions is a lottery approach. With this mechanism, unnamed class members would be given an opportunity to participate in a randomized drawing wherein a small number of them would be chosen to receive large distributions from the award or settlement. Insofar as lottery tickets themselves have value, this scheme would provide direct compensation to the unnamed class members.[93] Admittedly, this style of distribution has never been attempted with class action funds, and a lottery approach in this context has been described as strange and even unsettling by some judges, who instead chose to apply equally strange *cy pres* distributions. When the concept of a lottery distribution was discussed in the Supreme Court, however, Justice Kavanaugh compared the approach to *cy pres* distributions and noted that neither approach seemed inherently stranger than the other for distributing class action funds.[94]

B. Fluid Recovery

One alternative method of relief to class action *cy pres* distributions that has actually been used by federal courts is fluid recovery. Although many courts have confused the two doctrines and referred to them as interchangeable, fluid recovery schemes generally provide much more meaningful benefit to the class members involved in the underlying lawsuits. This is because fluid recovery schemes are often clever ways for wrongdoing defendants to offer compensation to class members through their own future operations. Despite hesitation by some federal courts to apply this type of distribution, fluid recovery has been used by courts in every federal circuit, [95] particularly in class action settlement cases.[96]

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[93] *See e.g.* EconMatters, *How Much is a Lottery Ticket Worth*, TALKMARKETS (Apr. 15, 2018), https://talkmarkets.com/content/stocks--equities/how-much-is-a-lottery-ticket-worth?post=172824; Walt Hickey, *How to Calculate Your Expected Winnings On A Powerball Ticket*, BUSINESS INSIDER (Nov. 27, 2012), https://www.businessinsider.com/the-expected-value-of-playing-powerball-is-128-2012-11.

[94] Oral Argument Transcript, Frank v. Gaos, No. 17-961 (U.S. Sup. Ct. Oct. 31, 2018).

[95] *Id.* citing Antibiotic Antitrust Actions, 333 F. Supp 278; *Democratic Cent. Comm*., 84 F.3d 451; *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th

One recent example of a successful fluid recovery scheme, which was employed to prevent the award of a sizeable class action judgment, was Apple's $29 iPhone battery replacement program. In 2017, reporters revealed that the company was intentionally slowing down older iPhone models because of issues related to those phones' batteries.[97] Consumers were enraged and did not hesitate to bring several class actions against Apple,[98] which prompted the media giant to implement the battery program in January of 2018.[99] Apple offered replacement batteries at reduced cost to people who owned older iPhone models.[100] The program, which ended on December 31, 2018, was immensely popular. Indeed, Apple insiders reported that the company replaced 11 million phone batteries during the year-long offering. Any consumers who were harmed by Apple's decision, to slow phones with older batteries, could have remedied their issues through the program. Although there are likely individuals who derived undue benefit from the program without suffering from the negative effects complained of initially,[101] the program likely provided direct benefit to millions of prospective class members.

There have been some effects on Apple in the aftermath of its battery replacement program that will likely affect the company's ongoing

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Cir.1990); *Nelson*, 802 F.2d 405; *American Int'l Pictures v. Price Enter*., 636 F.2d 933 (4th Cir.1980); *L.C.L. Theatres v. Columbia Pictures*, 421 F.Supp. 1090 (N.D.Tex.1976).

96 ("[F]luid recovery has been accepted in some contexts by nearly all federal circuits that have considered it. It is most commonly employed by federal courts for damage distribution in settled cases"). *Schwab v. Philip Morris USA, Inc.*, 2005 WL 3032556 at *7 (E.D. N.Y.) citing *Beecher*, 575 F.2d 1010; *Pfizer & Co*., 314 F.Supp. 710; *Jones v. National Distillers*, 56 F.Supp.2d 355 (S.D.N.Y.1999); *Agent Orange*, 611 F.Supp. 1396; *In re Mexico Money Transfer Litig*., 267 F.3d 743 (7th Cir.2001); *Powell v. Georgia–Pacific Corp.*, 119 F.3d 703 (8th Cir.1997); *In re Motorsports Merch. Antitrust Litig*., 160 F.Supp.2d 1392 (N.D.Ga.2001); *Colson v. Hilton Hotels Co*., 59 F.R.D. 324 (N.D.Ill.1972).

97 Fionna Agomuoh, *Batterygate: How Apple Secretly Slowed Down Older iPhones and why it's such a Big Deal*, BUSINESS INSIDER (Dec. 21, 2017), https://www.businessinsider.com/apple-batterygate-how-older-iphones-slowed-down-and-why-its-a-big-deal-2017-12.

98 *See In re Apple Inc. Device Performance Litigation*, 347 F. Supp. 3d 434, 440-450 (N.D. Cal. Oct. 1, 2018).

99 Dave Smith, *If you own an iPhone 6 of Later that isn't Holding its Charge, now is the Time to get your Battery Replaced*, BUSINESS INSIDER (Dec. 30, 2018), https://www.businessinsider.com/apple-iphone-battery-replacement-program-december-2018-9.

100 *Id.*

101 For example, anyone who purchased one of the affected phone models to take advantage of the program after it was announced.

practices. First, the program was more popular than the company had foreseen. This forced Apple to sell more batteries than it had anticipated at a reduced price, or below market rate, which in turn reduced the profits that they would have otherwise received from their ordinary battery replacements that are much more expensive.[102] The availability of cheap battery replacements also reduced the demand for Apple's new iPhone models, since consumers were inclined to keep their older iPhones for longer than usual after receiving new batteries.[103] This caused Apple's stock price to fall dramatically,[104] and prompted securities lawsuits against the company.[105] Ultimately, this financial nightmare will likely have a significant deterrent effect on Apple, discouraging any similar programs in the future.

C. Helicopter Drop

One additional alternative to class action *cy pres* distributions that is far more likely to accomplish the goals of class action lawsuits is a mechanism known as a "helicopter drop."[106] A literal helicopter drop would entail loading class action funds in the form of cash onto a plane or helicopter, and releasing those funds over highly-populated areas. Unlike *cy pres* distributions, a helicopter drop could feasibly provide some direct benefit to unnamed class members.[107] A figurative helicopter

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[102] *See* Smith *supra,* note dd. (The ordinary price for battery replacements was $79).

[103] Dave Smith, *Apple is Partially Blaming Weak iPhone Sales on Customers Taking Advantage of the $30 Battery-Replacement Offer*, BUSINESS INSIDER (Jan. 2, 2019), https://www.businessinsider.com/apple-blames-weak-iphone-sales-partly-on-battery-replacement-offer-2019-1.

[104] Evan Niu, *Here's How Much Apple's Battery-Replacement Program Hurt Sales*, MOTLEY FOOL (Jan. 15, 2019), https://www.fool.com/investing/2019/01/15/heres-how-much-apples-battery-replacement-program.aspx (Apple CEO reportedly attributed $7.2 billion in missed revenue, and the corresponding stock dip, to the popularity of the battery replacement program).

[105] Kif Leswing, *Apple is Squirreling Away Money to Pay for Lawsuits Related to its iPhone 'batterygate' Throttling Scandal*, BUSINESS INSIDER (Feb. 4, 2019), https://www.businessinsider.com/iphone-batterygate-lawsuits-cause-apple-to-set-aside-money-2019-2.

[106] Neil Irwin, *Helicopter Money: Why Some Economists Are Talking About Dropping Money From the Sky*, N.Y. TIMES (July 28, 2016), https://www.nytimes.com/2016/07/29/upshot/helicopter-money-why-some-economists-are-talking-about-dropping-money-from-the-sky.html?_r=0.

[107] A heat-map of affected areas could even be calculated, to ensure that the money is dropped over as many unnamed class members as possible. *See* Neil Irwin, *Helicopter Money: Why Some Economists Are Talking About Dropping Money From the Sky*, N.Y. TIMES (July 28, 2016), https://www.nytimes.com/2016/07/29/upshot/helicopter-money-why-some-economists-are-talking-about-dropping-money-from-the-sky.html?_r=0; •

drop – the kind actually contemplated under the doctrine–could work in the following way:

First, unclaimed or undistributed funds that would have gone to a *cy pres* fund would instead escheat to the state under 28 U.S.C. Sec. 2041, 2042. This statute says that "all moneys paid into any court of the United States . . . in any case pending of adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States, in the name and to the credit of such court" , and that such money "so deposited for at least five years unclaimed by the person entitled thereto [shall be] deposited in the Treasury in the name and to the credit of the United States."[108] Next, the Tax Code would be amended to provide a variable refundable tax credit for anyone who was an unnamed member of a class in a class action, as determined by a yearly list published by the IRS to be used by tax preparers. In doing so, the administration costs and enforcement mechanism for fraud would be shared with an agency that specializes in making individual determinations over the entire tax base of the United States. This would allow unnamed class members a better chance at accessing the compensation that was diverted away from them.

V. CONCLUSION

Class action *cy pres* awards are often gross miscarriages of justice, yet they have become incredibly popular means for redistributing class action funds. This popularity has risen despite the requirements of Rule 23 and the lack of compatibility of this doctrine with the fundamental goals of class action lawsuits. Hopefully, the Supreme Court is able to take a case to address the lack of compatibility and finally curtail the use of class action *cy pres*. When the Court does take such a case, it should have in its arsenal all the alternatives to *cy pres* distributions that come closer to justice than "as near as possible."

Willem Buiter, *The Simple Analytics of Helicopter Money: Why It Works—Always*, ECONOMICS: THE OPEN-ACCESS, OPEN0ASSESSMENT E-JOURNAL, Vol. 8 (2014), available at http://dx.doi.org/10.5018/economicsejournal.ja.2014-28.

[108] 28 U.S.C. Sec. 2041, 204.