

2004

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Robert E. Draba

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Recommended Citation

Robert E. Draba *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near as Possible"*, 16 Loy. Consumer L. Rev. 121 (2004).
Available at: <http://lawcommons.luc.edu/lclr/vol16/iss2/3>

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STUDENT ARTICLES

Motorsports Merchandise: A Cy Pres Distribution Not Quite “As Near As Possible”

By Robert E. Draba*

I. Introduction

The National Association for Stock Car Auto Racing (“NASCAR”) is a \$2 billion industry and purportedly the fastest growing spectator sport in America.¹ Forty million people consider themselves avid NASCAR fans.² In the past decade track attendance at NASCAR events has doubled,³ and recently, 160,000 people gathered in a small town in eastern Tennessee to watch a NASCAR race.⁴ NASCAR has been called a “juggernaut that now rivals the [National Football League] in popular appeal.”⁵

* J.D. candidate, May 2005, Loyola University Chicago School of Law; B.S. Education from Indiana University, 1968; M.S.T from The University of Chicago, 1972; Ph.D. from The University of Chicago, 1978; M.B.A. from The University of Chicago, 1988. The author would like to thank the senior and staff editors of the Loyola Consumer Law Review for their help and support.

¹ Michael A. Cokley, *In the Fast Lane to Big Bucks: The Growth of NASCAR*, 8 SPORTS LAW. J. 67, 67-69 (2001); *but see* Jesse Eisinger, *Ahead of the Tape*, WALL ST. J., Aug. 22, 2003, at C1 (asking whether the popularity of NASCAR will continue to grow, because attendance at NASCAR events has been “sluggish” in 2003), *available at* 2003 WL-WSJ 3977640.

² Sam Walker, *On Sports: Can Nascar Take Manhattan?*, WALL ST. J., Mar. 8, 2002, at W6, *available at* 2002 WL-WSJ 3388029.

³ *Id.*

⁴ Dave Kansas, *Nascar, Engine of Change, Finds Itself Changing, Too*, WALL ST. J., Aug. 27, 2003, at D12, *available at* 2003 WL-WSJ 3978109.

⁵ *Id.*

Last year, NASCAR television ratings increased 38%⁶ and with the exception of the National Football League (“NFL”), NASCAR events attract a viewing audience larger than any other sport.⁷ Consequently, sales of NASCAR-licensed merchandise have also soared. From 1990 to 1999, gross sales have increased from a mere \$80 million to a figure estimated to exceed \$1 billion.⁸

Behind the scenes, however, vendors of NASCAR souvenirs and merchandise were recently defendants in a consumer antitrust class action that was brought on behalf of consumers who purchased souvenirs and merchandise from these vendors.⁹ Plaintiffs alleged that licensed vendors¹⁰ had been fixing merchandise prices at NASCAR Winston Cup races since January 1, 1991.¹¹

Rather than litigate the matter, the parties reached a settlement agreement.¹² The vendors agreed to pay more than \$5.6 million in cash and to issue more than \$5.7 million in coupons to purchasers of NASCAR merchandise.¹³ After distributions to class members, fees and expenses, \$2.4 million remained in unclaimed settlement funds available for a *cy pres* distribution.¹⁴

The *cy pres* doctrine is a rule of construction courts use when the original intent of a charitable gift is impossible to achieve. So that the intent of the testators will not be completely frustrated, courts apply the *cy pres* doctrine by identifying an alternative that is as near as possible to the testator’s original intent.¹⁵ By analogy, courts now

⁶ Walker, *supra* note 2.

⁷ *Id.*

⁸ Cokley, *supra* note 1, at 84.

⁹ *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1330 (N.D. Ga. 2000).

¹⁰ *See id.* at 1331 n.1 (“By order entered May 12, 1998, the Court dismissed NASCAR as a Defendant in this case.”).

¹¹ Michael F. Urbanski & James R. Creekmore, *Annual Survey of Virginia Law: Antitrust and Trade Regulation Law*, 33 U. RICH. L. REV. 769, 796-97 (1999).

¹² *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1393 (N.D. Ga. 2001).

¹³ *Id.*

¹⁴ *Id.* at 1395 (“Plaintiffs have advised the Court that, after deducting distributions to class members, fees and expenses, there remains approximately \$2,400,848 in unclaimed settlement funds available for a *cy pres* distribution.”).

¹⁵ *See Pray v. Lockheed Aircraft Corp.*, 644 F. Supp. 1289, 1303 (D.D.C.

apply the *cy pres* doctrine in class actions where there are many consumers who have incurred small damages and where there are unclaimed funds at the end of a distribution period, such as in *In re Motorsports Merchandise Antitrust Litigation*. Courts distribute the unclaimed funds, *cy pres*, to organizations that provide an indirect benefit to injured consumers where a direct benefit is impractical or impossible.¹⁶

In *Motorsports Merchandise* the court approved *cy pres* distributions of \$250,000 to nine different charities and \$100,000 to another.¹⁷ Two charities were law-related organizations, to which courts typically distribute unclaimed funds from consumer antitrust class actions on the theory that the purpose of Fed. R. Civ. P. 23 and class action law suits is "to protect the legal rights of those who would otherwise be unrepresented."¹⁸ Remaining charities included the American Red Cross, the Make-a-Wish Foundation, Duke University Medical Center, and the philanthropic foundation of the State Bar of Georgia.¹⁹

Under the *cy pres* doctrine, a "nexus" must exist between the direct harm consumers have suffered and the indirect benefit the *cy pres* distribution provides to consumers.²⁰ "Charities that do not satisfy the nexus requirement, regardless of how worthy they might otherwise be, are inappropriate under the case law because of the lack of benefit to absent class members."²¹ This case note discusses the *cy pres* distribution in *Motorsports Merchandise* and suggests that, because the court's distribution may not have satisfied the nexus test, the distribution therefore was not consistent with the *cy pres* doctrine as applied in consumer antitrust class actions.

1986).

¹⁶ See *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990).

¹⁷ *Motorsports Merchandise*, 160 F. Supp. 2d at 1395.

¹⁸ Linda Zazove, *The Cy Pres Doctrine and Legal Services for the Poor: Using Undistributed Class Action Funds To Improve Access To Justice*, American Bar Association National Institute on Class Actions (2001).

¹⁹ *Motorsports Merchandise*, 160 F. Supp. 2d at 1396-99.

²⁰ See, e.g., *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 381 (D.D.C. 2002) ("[*Cy pres*] funds [must] be used in a manner reasonably targeted to specifically benefit the health care needs of a substantial number of the persons injured by the increased prices. . .").

²¹ Patricia Sturdevant, *Using the Cy Pres Doctrine to Fund Consumer Advocacy*, 33-NOV TRIAL 80, 83 (1997).

Part II of this note discusses the *cy pres* doctrine and a court's authority to use a *cy pres* remedy in consumer antitrust class actions. This section also considers when a *cy pres* distribution is appropriate and delineates three factors courts consider in approving a *cy pres* distribution: settlement, nexus and process. Part III provides pertinent facts of the *Motorsports Merchandise* cases: *In re Motorsports Merchandise Antitrust Litigation* (hereinafter "*Motorsports Merchandise 2000*"),²² which involves the actual settlement; and *In re Motorsports Merchandise Antitrust Litigation* (hereinafter "*Motorsports Merchandise 2001*"),²³ decided eleven months later, which involves the *cy pres* distribution of unclaimed funds from the settlement. Part IV analyzes authorities upon which the *Motorsports Merchandise* court relies in distributing unclaimed funds to charitable organizations and discusses the relevance of the Eighth Circuit's decisions in *In re Airline Ticket Commission Antitrust Litigation*.²⁴ In that case the Eighth Circuit found that the trial court had abused its discretion in regard to a *cy pres* distribution, when "it merely adopted liaison class counsel's proposed list of mostly local recipients, which had no relationship to the class action suit."²⁵ Part IV also identifies the distributions the court in *Motorsports Merchandise* could have made that are more closely related to the injured class. Part V asserts that the *cy pres* distribution to charitable organizations in *Motorsports Merchandise* could, but should not, have an impact on related cases.

II. Background

The term *cy pres* is a truncated version of the French Norman phrase, *cy pres comme possible*, which simply means, "as near as possible."²⁶ The *cy pres* doctrine is a rule of construction the court

²² *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1330 (N.D. Ga. 2000) (approving the settlement agreement).

²³ *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1393 (N.D. Ga. 2001) (disposing of excess settlement funds).

²⁴ The *cy pres* distribution of the trial court was appealed twice and reversed twice. See *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619 (8th Cir. 2001) [hereinafter *Airline Ticket Comm'n 2001*] and *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679 (8th Cir. 2002) [hereinafter *Airline Ticket Comm'n 2002*].

²⁵ *In re Airline Ticket Comm'n 2001*, 268 F.3d at 626.

²⁶ Kevin M. Forde, *What Can a Court Do with Leftover Class Action Funds? Almost Anything!* 35 JUDGES' J. 19 (1996) (listing *cy pres* distribution cases).

commonly uses in cases involving wills and trusts, where the decedent's original intent cannot be fulfilled.²⁷ A decedent, for example, may have specified an endowment for a hospital that no longer exists. Applying their broad discretionary and equitable powers, courts identify an alternative that is “as near as possible” to the decedent's original intent,²⁸ such as another hospital in the community.

Courts now use the *cy pres* doctrine in the context of consumer antitrust class actions. Where it is impossible or impractical to distribute funds from a settlement to injured class members through a direct distribution or market distribution,²⁹ or where there are unclaimed funds from a direct distribution or market distribution, the court then considers four options:³⁰ (1) *cy pres* distribution;³¹ (2) *pro rata* distribution to class members;³² (3) escheat the funds to a governmental body;³³ or (4) reversion to the defendant.³⁴ This section

²⁷ See RESTATEMENT (SECOND) OF TRUSTS § 399 (1959). Section 399 reads:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

RESTATEMENT (SECOND) OF TRUSTS § 399.

²⁸ See, e.g., *First Nat'l Bank of Chicago v. Elliott*, 92 N.E.2d 66, 73 (Ill. 1950) (stating rules applicable to *cy pres* doctrine to determine intent of decedent).

²⁹ Some class action settlements are paid exclusively in cash or coupons or a combination of both cash and coupons. Giving cash is a direct distribution, whereas providing coupons is a market distribution. The use of coupons to settle consumer class actions seems to be increasing in popularity. Providing an absolute dollar discount or a percentage off of the retail price are two forms of coupon-based settlements. See Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 994-95 (2002).

³⁰ HERBERT B. NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* §§ 10.13, 10.25 (3d ed. 1992).

³¹ See *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1398 (N.D. Ga. 2001).

³² See *Beecher v. Able*, 575 F.2d 1010, 1013-14 (2d Cir. 1978).

³³ See *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1255 (7th Cir. 1984).

discusses the first option, a *cy pres* distribution. This section specifically focuses on the authority of courts to make a *cy pres* distribution and the factors they consider in doing so.

A. Judicial and Prerogative *Cy Pres*

During the American Revolution, two kinds of *cy pres* existed in England: judicial and prerogative.³⁵ Judicial *cy pres* was an equity power of the chancery court, applied then as it is applied today: as long as the court carries out the testator's intention as nearly as possible, the court could use its discretion to modify the terms of a charitable trust, if fulfilling those terms had become impossible, illegal, or impracticable.³⁶ In stark contrast prerogative *cy pres* was a power vested in the king and exercised through the chancery court.³⁷ Prerogative *cy pres* permitted the king to do whatever he wanted with an estate whose terms had become impossible, illegal, or impracticable to fulfill.³⁸ The king could ignore a testator's intention and dispose of a person's property as he wished.³⁹ "There was no duty on the part of the king . . . to honor the testator's wishes."⁴⁰ The case often cited to illustrate prerogative *cy pres* is *Da Costa v. De Pas*.⁴¹ In *Da Costa* a Jewish testator wanted income from a trust to help support an assembly for the reading of Jewish law, but the king, in executing his power of prerogative *cy pres*, directed that the income be used to teach children Christianity.⁴²

³⁴ See *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir. 1989).

³⁵ Vanessa Laird, *Phantom Selves: The Search for a General Charitable Intent in the Application of the Cy Pres Doctrine*, 40 STAN. L. REV. 973, 974 (1988).

³⁶ *Id.* at 973-74.

³⁷ *Id.* at 975.

³⁸ Wendy A. Lee, *Charitable Foundations and the Argument for Efficiency: Balancing Donor Intent with Practicable Solutions through Expanded Use of Cy Pres*, 34 SUFFOLK U. L. REV. 173, 182-83 (2000) ("When exercising the prerogative power, it was not uncommon for a cynical, whimsical or even a well-meaning king to redirect a donor's property to purposes that were entirely against that donor's wishes.").

³⁹ *In re Estate of Bletsch*, 130 N.W.2d 275, 277 (Wis. 1964).

⁴⁰ *Id.*

⁴¹ See Laird, *supra* note 35, at 975 (discussing *Da Costa v. De Pas*, 27 Eng. Rep. 150 (1754)).

⁴² Robert Birmingham, *Proving Miracles and the First Amendment*, 5 GEO. MASON L. REV. 45, 63 (1996).

State courts and legislatures in the United States were slow to adopt the *cy pres* doctrine for several reasons, one of which was the courts' perception of the *cy pres* doctrine as “a rule of arbitrary disposition, giving the chancellor power to remake deeds and wills and to allocate capital or income according to his own social or religious views.”⁴³ In 1867 a Kentucky state court observed that “[u]nder the British statu[t]e, the *cy pres* doctrine became so arbitrary and latitudinary as to prevent the evident object of donors to charities which they never contemplated and to which they would never have contributed.”⁴⁴ Eventually, though, a majority of state courts and legislatures embraced judicial *cy pres*.⁴⁵ Ultimately, they retained judicial *cy pres* and its focus on testator's intent but decidedly rejected prerogative *cy pres* power⁴⁶ and its “arbitrary, tyrannical quality.”⁴⁷

B. Authority of Courts

In a consumer antitrust class action courts may use the *cy pres* doctrine to distribute unclaimed funds for a purpose that is as near as possible to the objectives underlying the lawsuit and the interests of class members.⁴⁸ The court has at least three sources of authority to approve a *cy pres* distribution. First, the court has equitable powers.⁴⁹ It has discretion to adopt a distribution plan that is in the interests of the class as a whole,⁵⁰ and it uses traditional principles of equity to

⁴³ GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 433 (rev. 2d ed. 2003).

⁴⁴ Laird, *supra* note 35, at 987 n.12 (quoting *Cromier's Heirs v. Louisville Orphans' Home Soc'y*, 66 Ky. (3 Bush) 365, 374 (1867)).

⁴⁵ BOGERT, *supra* note 43, at § 433.

⁴⁶ *In re Estate of Bletsch*, 130 N.W.2d 275, 277 (Wis. 1964) (“It is this prerogative doctrine of *cy pres* which has been disavowed in the United States.”); see Mark Petrucci, *The Cy Pres Doctrine—Is It State Action?*, 18 CAP. U. L. REV. 383, 407 (1989) (stating that “prerogative *cy pres* power...was specifically rejected by our ancestors”).

⁴⁷ Laird, *supra* note 35, at 975.

⁴⁸ *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679 (8th Cir. 2002).

⁴⁹ *Superior Beverage Co. v. Owens-Ill. Inc.*, 827 F. Supp. 477, 479 (N.D. Ill. 1993) (citing *United States v. Exxon Corp.*, 561 F. Supp. 816, 856 (D.D.C. 1983), *aff'd* 773 F.2d 1240 (Temp. Emer. Ct. App. 1985)).

⁵⁰ *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 179, 182 (2d Cir. 1986).

resolve the disposition of unclaimed funds.⁵¹

Second, the court enjoys broad supervisory powers over the administration of class action settlements.⁵² In class actions brought under Fed. R. Civ. P. 23, a court order approving a class action settlement is reversed only upon a showing of an abuse of discretion.⁵³ Similarly, a court order prescribing a distribution scheme will not be set aside in the absence of an abuse of discretion.⁵⁴

Third, the court has the discretionary power to interpret statutes. Whether a *cy pres* distribution is possible depends upon the legislative authority under which a class action is brought.⁵⁵ One court advised a “careful case-by-case analysis” of substantive policies where fluid class recovery, a *cy pres* distribution, is appropriate.⁵⁶ Using such an analysis, an Illinois court, for example, concluded that the Illinois Consumer Fraud Act is a regulatory and remedial enactment intended to curb fraudulent abuses.⁵⁷ Based on this statutory interpretation, the court held that fluid class recovery applied to the case before it.⁵⁸

C. When a *Cy Pres* Distribution is Appropriate

Because objectors may appeal a *cy pres* distribution scheme, asserting that a court erroneously approves it,⁵⁹ a court must establish

⁵¹ *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997).

⁵² *Agent Orange*, 818 F.2d at 181.

⁵³ *See In re Airline Ticket Comm’n 2001*, 268 F.3d at 625 (“We review a district court’s *cy pres* distribution for an abuse of discretion.”) (citing *Powell*, 119 F.3d at 706); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995) (finding and discussing abuse of discretion in a class action case).

⁵⁴ *See Simer v. Rios*, 661 F.2d 655, 668 (7th Cir. 1981); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1309 (9th Cir. 1990).

⁵⁵ *Kraus v. Trinity Mgmt. Servs.*, 999 P.2d 718, 732 (Cal. 2000).

⁵⁶ *Simer*, 661 F.2d at 676.

⁵⁷ *Gordon v. Boden*, 586 N.E.2d 461, 468 (Ill. App. Ct. 1991) (quoting *Scott v. Ass’n for Childbirth at Home, Int’l*, 430 N.E.2d 1012, 1017 (Ill. 1981)).

⁵⁸ *Id.* at 468; *see also Bruno v. Superior Court*, 127 Cal. App. 3d 120, 135 (Cal. Ct. App. 1981) (holding that the propriety of using fluid class recovery is largely dependent upon the purposes of the law under which the class action is brought).

⁵⁹ *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997) (holding that the district court’s factual finding in regard to a *cy pres* distribution was not

that a *cy pres* distribution was necessary in a consumer antitrust class action.⁶⁰ In this regard courts typically consider three factors in deciding to use a *cy pres* distribution as opposed to a direct or market distribution: (1) whether the class of consumers represented is large;⁶¹ (2) whether individual consumers within the class are almost impossible to identify;⁶² and (3) whether damage suffered by individual consumers is small.⁶³ Under a direct scheme these variables, when combined, may produce egregiously high administrative costs in comparison to the direct benefit.⁶⁴ In *In re Wells Fargo Securities Litigation*, the court observed that, "[o]bviously, it would be absurd to spend \$5.50 in class funds to send a three cent check to Mr. Allen or a thirty-eight cent check to Mr. Campbell."⁶⁵

The decisions in *New York v. Dairylea Cooperative, Inc.* illustrate a step-by-step approach to be taken when considering a *cy pres* distribution.⁶⁶ This case involved 4.4 million consumers and a \$6.1 million settlement.⁶⁷ The court estimated that a cost-free distribution of the settlement would amount to \$1.50 per household

clearly erroneous); see also *Six Mexican Workers*, 904 F.2d at 1312 (remanding for a reformulation of a distribution method upon expiration of the claims period, because, in part, the district court's *cy pres* application did not adequately target the plaintiff class).

⁶⁰ See *Six Mexican Workers*, 904 F.2d at 1305 (noting that "[f]ederal courts have frequently approved [*cy pres* awards] in the settlement of class actions where the proof of individual claims would be burdensome or the distribution of damages costly.") (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179, 184-85 (2d Cir. 1986)).

⁶¹ *Id.*

⁶² *Powell*, 119 F.3d at 706.

⁶³ *New York ex rel. Koppell v. Keds Corp.*, 1994 WL 97201, at *3 (S.D.N.Y. Mar. 21, 1994).

⁶⁴ Natalie A. DeJarlais, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 737 (1987) (stating that "distribution problems may arise when plaintiffs cannot be located or fail to submit claims, or when the costs of distribution exceed or reduce to a pittance the amount of recovery per individual plaintiff").

⁶⁵ *In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1196 (N.D. Cal. 1998).

⁶⁶ *New York v. Dairylea Coop., Inc.*, 547 F. Supp. 306 (S.D.N.Y. 1982); *State v. Dairylea Coop., Inc.*, 1985 WL 1825, at *1 (S.D.N.Y. June 26, 1985).

⁶⁷ *Dairylea Coop.*, 1985 WL 1825, at *1.

or fifty cents per person.⁶⁸ The court also estimated that the costs of the distribution could be as high as \$2.5 million.⁶⁹ Assessing its options, the court rejected a direct distribution.⁷⁰ It also rejected a market distribution that the state proposed because the state's coupon plan could have placed the defendant's competitors at an unfair economic disadvantage.⁷¹ The court eventually approved a *cy pres* distribution to support school nutrition programs that would otherwise not be funded,⁷² only after it analyzed and ultimately rejected direct and market distributions.⁷³

Even where injured class members can be identified and receive a small direct cash benefit, courts may approve a *cy pres* distribution as one element of a comprehensive settlement.⁷⁴ Recently, in *In re Mexico Money Transfer Litigation*, the court approved a settlement that included the distribution of coupons worth an estimated \$375 million to 13.5 million class members who could be identified from computer records.⁷⁵ However, the court also approved a *cy pres* fund worth \$4.6 million to serve the Mexican and Mexican-American communities in the United States.⁷⁶ The court stated that "[g]iven the size of the class, distribution of the total *cy pres* distribution to individuals would not significantly enhance the value of the settlement for any class member, and could have substantially increased administrative expenses."⁷⁷ A pro rata distribution of \$4.6 million in cash entitled each of the 13.5 million class members to 34 cents—less than the price of a first-class

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*; WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 9.24 n.14 (West Group 2002).

⁷² *Dairylea Coop.*, 1985 WL 1825, at *2. See also Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 402 (1999).

⁷³ *Dairylea Coop.*, 1985 WL 1825, at *1.

⁷⁴ See, e.g., *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1011, 1017, 1034 (N.D. Ill. 2000).

⁷⁵ *Id.*

⁷⁶ *Id.* at 1017, 1031.

⁷⁷ *Id.* at 1032.

stamp.⁷⁸

When the estimated costs of administering a direct distribution would consume most, if not all, of the settlement funds, it is axiomatic that a *cy pres* distribution is appropriate.⁷⁹ However, it begs the question: when are administrative costs of a direct distribution simply too high? The court in *In re Wells Fargo Securities Litigation* formulated a possible answer.⁸⁰ After an initial distribution, there was a residual of \$35,000 to be divided among 2,619 claimants.⁸¹ Processing costs per claim were an estimated \$5.50.⁸² After weighing several alternatives, the court entered an order that stood for the proposition that "the cost of the distribution should not be greater than the amount of the distribution itself."⁸³ The court acknowledged that determining the exact percentage is somewhat arbitrary, but its common-sense approach supports a "rough and ready" rule, namely, where the cost per claim exceeds 100 percent of the cash per claim, a direct distribution is not reasonable.⁸⁴

D. Factors Used to Evaluate a *Cy Pres* Distribution

In evaluating a *cy pres* distribution courts frequently rely on the standard universally used in class actions under Fed. R. Civ. P. 23:⁸⁵ whether the settlement is fundamentally fair, adequate, and

⁷⁸ *But see* *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997) ("Further, there is no reason, when the injured parties can be identified, to deny them even a small recovery in favor of disbursement through some other means.").

⁷⁹ *See In re Matzo Food Products Litig.*, 156 F.R.D. 600, 606 (D.N.J. 1994) (stating that a *cy pres* distribution was the "only reasonable method of distribution because each class member's recovery would be, on the average, less than \$1.00, and the cost of a direct refund would exceed \$1.00 per class member").

⁸⁰ *See In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193 (N.D. Cal. 1998).

⁸¹ *Id.* at 1196.

⁸² *Id.*

⁸³ *Id.* at 1197.

⁸⁴ *See id.* at 1198. The court in *Wells Fargo* distributed all pro rata shares in the residue that were greater than \$11.00, subtracted the cost of each distribution from the pro rata share being distributed, and then dispersed all remaining residue funds to the Stanford Law School Securities Class Action Clearinghouse. *Id.*

⁸⁵ *New York by Vacco v. Reebok Int'l Ltd.*, 903 F. Supp. 532, 535 (S.D.N.Y. 1995); *see also In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000).

reasonable.⁸⁶ To determine whether a *cy pres* distribution actually satisfies these general criteria, courts consider at least three factors: (1) whether the parties reached a settlement; (2) whether there is a nexus between the *cy pres* distribution and members of the injured class; and (3) whether certain points of process are met, such as inconsequential objections to a settlement agreement and consequential opportunities to receive even a small direct benefit.

1. Preference for Settlement

There is a judicial preference for settlements.⁸⁷ Class actions can be complex, expensive and lengthy; hence, a settlement conserves judicial resources.⁸⁸ Where a settlement arises from pretrial negotiations between the parties, a court can provide broader relief.⁸⁹ Courts approve settlements that are fair under the circumstances and *cy pres* distributions that are pragmatic and sensible.⁹⁰ They are inclined to presume that a settlement is fair if “vigorous, competent and experienced” attorneys are involved⁹¹ and engage in intense negotiations.⁹²

It is equally “pragmatic and sensible” to determine the disposition of unclaimed funds within an original settlement agreement.⁹³ The case of *Powell v. Georgia-Pacific Corporation*

⁸⁶ *In re Matzo Food Products Litig.*, 156 F.R.D. 600, 604 (D.N.J. 1994).

⁸⁷ John C. Coffee, Jr., *Class Wars: The Dilemma of The Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1369 (1995) (explaining that courts are eager to see *cy pres* cases settled).

⁸⁸ *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (“The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.”); Coffee, *supra* note 87, at 1369 (discussing “small claimant” class action cases and stating that “courts are eager to see such cases settled” because they can consume “scarce judicial time”).

⁸⁹ *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d. 179, 185 (2d Cir. 1986) (citing to *Local Number 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986)).

⁹⁰ *New York ex rel. Koppell v. Keds Corp.*, 1994 WL 97201, at *3 (S.D.N.Y. Mar. 21, 1994).

⁹¹ *New York by Vacco v. Reebok Int’l Ltd.*, 903 F. Supp. 532, 535 (S.D.N.Y. 1995).

⁹² *Keds Corp.*, 1994 WL 97201, at *2.

⁹³ *Zazove*, *supra* note 18, at 1; see *In re Mexico Money Transfer Litig.*, 164 F.

illustrates the value of this approach.⁹⁴ In *Powell* plaintiffs had already received a distribution several years earlier, but they claimed an equity interest in a contingency fund, which had increased from \$350,000 to \$1 million due in interest income and unclaimed funds.⁹⁵ Plaintiffs, therefore, opposed a planned *cy pres* distribution of the \$1 million to support student scholarships.⁹⁶ The district court denied their claim, and the Eighth Circuit affirmed. The Eighth Circuit observed that, “[A]t the time of the consent decree, both sides in this dispute wanted to use for scholarships any money remaining after distribution, and the district court took care to preserve that original intention.”⁹⁷

2. A Nexus Must be Present

The *cy pres* doctrine requires the existence of a nexus between the consumer injury, which cannot be compensated directly, and the indirect compensation derived from a *cy pres* distribution.⁹⁸ The *cy pres* distribution of benefit should be “as near as possible” to a direct distribution of benefit.⁹⁹ In some cases the nexus between the injured class and the distribution is obvious.¹⁰⁰ In other cases the nexus is remote.¹⁰¹ In a small number of cases the nexus appears

Supp. 2d 1002, 1031 (N.D. Ill. 2000) (“[A]pproval of a [*cy pres*] fund does not depend on its being composed of unclaimed or residual funds.”).

⁹⁴ *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703 (8th Cir. 1997) (affirming *Powell v. Georgia-Pacific Corp.*, 843 F. Supp. 491 (W.D. Ark. 1994)).

⁹⁵ *Id.* at 705.

⁹⁶ *Id.*

⁹⁷ *Id.* at 707.

⁹⁸ See *In re Matzo Food Products Litig.*, 156 F.R.D. 600, 605 (D.N.J. 1994) (“[T]he court, analogizing to *cy pres* principles, may distribute the unclaimed portion for the indirect benefit of the class.”); see also Sturdevant, *supra* note 21, at 81 (stating that the court concluded that *cy pres* awards are appropriate where “there is a nexus between the proposed use of the fund and the class on whose behalf the case was litigated. . .”).

⁹⁹ *In re Airline Ticket Comm’n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002) (stating that “unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit”).

¹⁰⁰ See, e.g., *Mkt. St. Ry. Co. v. R.R. Comm’n*, 171 P.2d 875, 881 (Cal. 1946) (stating that “inasmuch as the people of the city paid the excess fares they are the natural beneficiaries thereof”).

¹⁰¹ See Jeffrey G. Casurella & John R. Bevis, *Class Action Law in Georgia: Emerging Trends In Litigation, Certification, and Settlement*, 49 MERCER L. REV.

absent.¹⁰² The following discussion illustrates that most courts generally operate on the proposition that a nexus may be remote but not absent.¹⁰³

a. Nexus is Obvious

Several cases illustrate that the nexus between harm and *cy pres* distribution is obvious. *State v. Dairylea Cooperative*, for example, involved alleged price fixing among milk wholesalers who served 4.4 million people in an eleven-county area.¹⁰⁴ The court ordered that the entire \$6.1 million settlement be distributed among schools in the same eleven-county area to fund nutrition-related purposes or programs.¹⁰⁵ *Powell v. Georgia-Pacific Corporation* involved employment discrimination.¹⁰⁶ In *Powell* the Eighth Circuit affirmed a \$1 million scholarship program for minority students in a three-county area where the adult victims of the discrimination lived.¹⁰⁷ In *Nelson v. Greater Gadsden Housing Authority*, which involved utility allowances, the court approved use of unclaimed funds to improve the energy efficiency of the apartment units, where members of the injured class lived.¹⁰⁸ Finally, *Market Street Railway Company v. Railroad Commission* involved overcharges for trolley

39, 67 n.158 (1997) (discussing a case involving predatory lending, where the court approved *cy pres* funds for a legal aid society that provides legal assistance to low income homeowners who are victims of predatory lending).

¹⁰² See, e.g., *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) ("Even where *cy pres* is considered, it will be rejected when the proposed distribution fails to provide the 'next best' distribution."); *In re Matzo*, 156 F.R.D. at 607 ("Thus, plaintiffs' rationale for approval of a settlement pursuant to which the class members themselves receive nothing is simply inadequate.").

¹⁰³ *Six Mexican Workers*, 904 F.2d at 1308 ("The district court's proposal benefits a group far too remote from the plaintiff class.").

¹⁰⁴ *State v. Dairylea Coop.*, 1985 WL 1825, at *1 (S.D.N.Y. June 26, 1985).

¹⁰⁵ *Id.*

¹⁰⁶ 119 F.3d 703 (8th Cir. 1997).

¹⁰⁷ *Id.* at 705 ("These areas were selected because most of the class members lived in these counties while working at the Crossett facility.").

¹⁰⁸ 802 F.2d 405, 409 (11th Cir. 1986) (affirming district court's order that any unclaimed funds were to be used by the defendant housing authority "to increase the energy efficiency of the apartment units or to improve the defendant-supplied appliances within the units").

fares.¹⁰⁹ The court in this case directed the streetcar company to use unclaimed funds to improve transportation facilities that injured consumers rode.¹¹⁰

b. Nexus is Remote

Other cases illustrate that the nexus between injury and benefit may be remote. Examples of such cases include, but are not limited to, *cy pres* distributions to consumer trusts and to law-related organizations from class actions brought by state attorneys general. Generally, distributions to law-related organizations are popular choices for a *cy pres* distribution and are rarely disturbed by appellate courts.¹¹¹ As a result, legal services programs often benefit from *cy pres* distributions.¹¹² Presumably, such distributions enhance resources for consumer protection and access to legal services for low-income persons.¹¹³

One Georgia case, for example, involved predatory lending practices that targeted low income homeowners.¹¹⁴ Consumers in *Starr v. Fleet Finance, Inc.* alleged that a lending company had miscalculated loan balances and used abusive collection tactics.¹¹⁵ The company settled and 3,000 borrowers received payments between \$500 and \$5,000 and another 7,000 borrowers received letters clearing their credit histories.¹¹⁶ In addition the court approved a *cy pres* distribution to law-related organizations that combated predatory lending.¹¹⁷ In *Starr* injured consumers and others could have received some kind of benefit, albeit remote, from the court's *cy pres* distribution to a legal aid society that assists low income

¹⁰⁹ 171 P.2d 875, 881 (Cal. 1946).

¹¹⁰ *Id.*

¹¹¹ See Forde, *supra* note 26, at 21-23 (collecting cases).

¹¹² Zazove, *supra* note 18, at 1.

¹¹³ *Id.*

¹¹⁴ Casurella & Bevis, *supra* note 101, at 67 n.158 (discussing *Starr v. Fleet Finance, Inc.*, No. 92-2314-06 (Ga. Super. Ct., Cobb County Mar. 27, 1996)).

¹¹⁵ William D. Gaither, *State-Imposed Interest Rate Ceilings and the Home Equity Loan Scandal in Georgia*, 11 GA. ST. U. L. REV., 591, 596 n.37 (1995) (quoting Shelley Emling, *Fleet agrees to settle last of class-action suits for \$6 million*, ATL. J.-CONST., Aug. 17, 1994, at C8, available at 1994 WL 4426701).

¹¹⁶ *Id.*

¹¹⁷ Casurella & Bevis, *supra* note 101, at 67 n.158.

homeowners who have been victims of predatory lending, to a nonprofit corporation intended to help low income homeowners, or to a law center that promotes reform in consumer rights through legislation.¹¹⁸ Therefore, because the *cy pres* distribution to law-related organizations related to the underlying litigation, a nexus existed between the direct harm and indirect benefit.

There are, however, two well-known examples where appellate courts have rejected distributions to law-related organizations.¹¹⁹ In *In re Folding Carton Antitrust Litigation* the Seventh Circuit rejected a \$6 million distribution to law schools to establish a private antitrust development and research foundation.¹²⁰ The Seventh Circuit characterized this distribution as “unnecessary”¹²¹ and as “carrying coals to Newcastle”¹²² because “voluminous research” had already been done on multidistrict antitrust litigation.¹²³ In a more recent case, *In re Airline Ticket Commissions Antitrust Litigation*, the Eighth Circuit rejected a distribution to a law school because it “had no relationship to the class action suit.”¹²⁴

Cases brought under the Hart-Scott-Rodino Act (“HSR”)¹²⁵ illustrate a second class of cases where the nexus between the direct harm and the indirect benefit is remote. The HSR permits any attorney general of a state to bring a civil action in the name of the

¹¹⁸ See Gaither, *supra* note 115, at 596 (stating that Fleet Finance also “settled dozens of lawsuits brought on behalf of individual borrowers by the Atlanta Legal Aid Society,” which is one of the organizations that the court in *Motorsports Merchandise* funded).

¹¹⁹ See *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252 (7th Cir. 1984); *In re Airline Ticket Comm’n Antitrust Litig.*, 268 F.3d 619 (8th Cir. 2001).

¹²⁰ *Folding Carton*, 744 F.2d at 1252.

¹²¹ *Id.* at 1255; See Forde, *supra* note 26, at 21 (discussing “the saga” of the *Folding Carton* litigation, where the remaining \$2.3 million was eventually distributed to the National Association for Public Interest Law to finance a fellowship program).

¹²² *Folding Carton*, 744 F.2d at 1254. The phrase, “carrying coals to Newcastle,” means to do something pointless or meaningless, because Newcastle in England is a coal mining area that exports coal. The Phrase Finder, at <http://phrases.shu.ac.uk/meanings/85850.html> (last visited Nov. 21, 2003).

¹²³ *Folding Carton*, 744 F.2d at 1254.

¹²⁴ *Airline Ticket Comm’n 2001*, 268 F.3d at 626.

¹²⁵ The Hart-Scott-Rodino Act, Pub. L. No. 94-435, 90 Stat. 1383 (codified at 15 U.S.C. §§ 15c-15h (1976)).

state on behalf of persons residing in the state.¹²⁶ This provision of HSR was aimed at everyday consumer purchases.¹²⁷ Working together, the attorneys general reached settlements regarding the sale of grilling products, pre-recorded music, contact lenses, an anti-hypertension drug, vitamins, shoes, and toys.¹²⁸

In *In re Compact Disc Minimum Advertised Price Antitrust Litigation*,¹²⁹ for example, attorneys general from 43 states and territories alleged misconduct in the distribution and sale of compact music discs.¹³⁰ The settlement totaled \$143 million for consumers: \$67.3 million in cash payments and \$75.7 million worth of CDs to be distributed, *cy pres*, to organizations "to further music-related purposes or programs reasonably targeted to benefit a substantial number of the persons who purchased Music Products from one or more Retailers."¹³¹ Approximately 5.6 million CDs will be distributed to states based on their population and made available to the public to enjoy in libraries and schools free of charge.¹³² In *Compact Disc* injured consumers and others could have received a benefit, albeit remote, from a *cy pres* distribution to libraries and schools. Thus, because the *cy pres* distribution related to the underlying litigation, a nexus existed between the direct harm and indirect benefit.

Cases authorizing the creation of a mission-driven fund to support various programs,¹³³ such as a public health program, illustrate a third kind of instance where the nexus between the direct harm and indirect benefit appears remote. In *West Virginia v. Chas. Pfizer & Company*, for example, the court used part of \$37 million in

¹²⁶ Susan Harriman, *Parens Patriae Actions on Behalf of Indirect Purchasers: Do They Survive Illinois Brick?*, 34 HASTINGS L.J. 179, 184 (1982).

¹²⁷ *Id.*

¹²⁸ Thomas Greene & Robert L. Hubbard, Practising Law Institute, *State Antitrust Enforcement Distribution Restraints*, 1355 PLI/Corp 1289, 1298-1300 (2003) (discussing relevant cases).

¹²⁹ 216 F.R.D. 197 (D. Me. 2003).

¹³⁰ *Id.*

¹³¹ *Id.* at 208.

¹³² *Id.* at 200.

¹³³ See Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Classactions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747, 766 (1988) ("Many decisions have upheld settlements that funded consumer trust funds as part of a larger settlement, usually after a claims procedure.").

funds from an antibiotic antitrust class action settlement to create a trust fund,¹³⁴ providing an indirect benefit to consumers.¹³⁵ Consumers who did not make a claim automatically authorized the attorneys general of their states to use their share of the funds for public health programs.¹³⁶ Such programs provided injured consumers some benefit, albeit remote, because both the injury and the *cy pres* distribution involved health care.

California is at the forefront of establishing mission-driven funds to combat conduct injurious to consumers.¹³⁷ Given the difficulties of making direct and market distributions where the class is large and the damages are small, policy considerations favor the creation of trusts like those established in California.¹³⁸ California has used consumer trust funds in cases as diverse as financial services¹³⁹ and blue jeans.¹⁴⁰ For instance, the California Supreme Court used unclaimed funds to create two trust funds to protect consumers, one operated by the state and a second overseen by a private group.¹⁴¹

Recently, in *In re Vitamin Cases* a California court reviewed a proposed *cy pres* distribution of a \$38 million settlement from a vitamin price fixing case.¹⁴² The vitamins were used not only in

¹³⁴ *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 728 (S.D.N.Y. 1970) (“Others may seek court approval to use the balance of their consumer fund for a public health purpose.”); *Superior Beverage Co. v. Owens-Ill., Inc.*, 827 F. Supp. 477, 479 (N.D. Ill. 1993) (stating that the “remaining funds” in *Chas. Pfizer* “were divided among the states to be used for public health programs that would benefit the unfound class members and the general public. . .”).

¹³⁵ Nat’l Ass’n of Consumer Advocates, *Standards and Guildeines* [sic] for *Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375, 390 (1997) [hereinafter Nat’l Ass’n of Consumer Advocates].

¹³⁶ Hillebrand & Torrence, *supra* note 133, at 756.

¹³⁷ S. Gale Dick, *Fluid Recovery: Flexible Ways to Settle Cases*, 13 ALTERNATIVES TO HIGH COST LITIG. 73, 81 (1995).

¹³⁸ See Kerry Barnett, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591, 1601 (1987); see also Tomas M. Jenkins, *Using Community Foundations to Administer Restitution Funds*, 34 NO. 4 JUDGES’ J. 12, 43 (1995) (giving examples of successful trusts created from settlements).

¹³⁹ See Sturdevant, *supra* note 21, at 80-81 (discussing California cases involving financial services).

¹⁴⁰ See *California v. Levi Strauss & Co.*, 715 P.2d 564, 567 (Cal. 1986).

¹⁴¹ Dick, *supra* note 137, at 81.

¹⁴² *In re Vitamin Cases*, 132 Cal. Rptr. 2d 425, 428 (Cal. Ct. App. 2003); see also Greene & Hubbard, *supra* note 128, at 1299 (reporting that 24 states settled

vitamin supplements but also food products of all kinds, including pet food.¹⁴³ Arguably, nearly every consumer in California would be a class member, which would make the size of an individual recovery quite small.¹⁴⁴ Because it would cost more to process and pay individual consumers than they would receive in payment,¹⁴⁵ the court upheld the distribution of all \$38 million to charitable, governmental, and nonprofit organizations to promote the health and nutrition of the consumer class members or "otherwise further the purposes underlying the lawsuit."¹⁴⁶ In *Vitamin Cases* injured consumers and others may receive some kind of benefit, albeit remote, from this *cy pres* distribution. Therefore, such benefit is possible because the *cy pres* distribution to organizations that promote health and nutrition has a nexus to the case itself.

c. Nexus is Absent

Two cases¹⁴⁷ are cited for, but may not actually stand for, the proposition that the *cy pres* doctrine permits use of funds for public interest purposes unrelated to the injury of the class.¹⁴⁸ The court in *Motorsports Merchandise* relied on both *Superior Beverage Co. v. Owens-Illinois, Inc.* and *Jones v. National Distillers* to support the proposition that "the *cy pres* doctrine . . . also permit[s] distributions to charitable organizations not directly related to the original claims."¹⁴⁹ However, the fact that the nexus between the injury and

damage claims in *Vitamin Cases* for \$305 million).

¹⁴³ *Vitamin Cases*, 132 Cal. Rptr. 2d at 432.

¹⁴⁴ *Id.* at 432-33.

¹⁴⁵ *See id.* at 433-34 (discussing the costs of processing individual claims).

¹⁴⁶ *Id.* at 428; *see also* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 453 n.243 (2003).

¹⁴⁷ *Superior Beverage Co. v. Owens-Ill., Inc.*, 827 F. Supp. 477 (N.D. Ill. 1993); *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355 (S.D.N.Y. 1999).

¹⁴⁸ *Powell v. Georgia-Pacific Corp.*, 843 F. Supp. 491, 497 (W.D. Ark. 1994) (stating that *Superior Beverage* "has concluded the [*cy pres*] doctrine is no longer. . . restricted to the closest comparable alternative. . ."); *see also In re Tarrer*, 273 B.R. 724, 738 (Bankr. N.D. Ga. 2001) (objecting parties cited *Superior Beverage* and *National Distillers* to support the proposition that "any net recovery by the Debtors in excess of their obligations to creditors be paid to charities selected by the Court").

¹⁴⁹ *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d at 1394 (citing *Superior Beverage*, 827 F. Supp. at 478-79).

the benefit may be absent is contrary to the *cy pres* doctrine as applied in consumer antitrust class actions.¹⁵⁰

Superior Beverage involved the distribution of \$2 million among fifteen grantees.¹⁵¹ The court announced that, “the doctrine of *cy pres* and courts’ broad equitable powers now permit use of funds for other public interest purposes. . . .”¹⁵² However, the court awarded only one of fifteen grants to an organization either unrelated to law or wholly unrelated to the class or its injury.¹⁵³

National Distillers involved a mere \$18,400 of unclaimed funds from a settlement with a vineyard.¹⁵⁴ The class argued that these unclaimed funds be distributed to the civil division of a legal aid society,¹⁵⁵ which is a typical use of unclaimed funds.¹⁵⁶ Because the class had a “meaningful equitable stake in the remaining class funds” and because “there [was] no obvious use for the money that provide[d] particular benefit to class members,” the court distributed the funds to a legal aid society.¹⁵⁷

3. Process is Important

Courts consider three points of process in approving a *cy pres* distribution plan. First, they approve *cy pres* distributions to existing organizations¹⁵⁸ with a reputation for managing money and achieving

¹⁵⁰ *Vitamin Cases*, 132 Cal. Rptr. 2d at 429-30 (discussing the theory of a *cy pres* distribution in a consumer class action).

¹⁵¹ *Superior Beverage*, 827 F. Supp. at 477.

¹⁵² *Id.* at 479.

¹⁵³ The court gave \$50,000 to the American Jewish Congress—Midwest Region to support a religious liberty program or programs as the governing council determined. *Superior Beverage*, 827 F. Supp. at 486.

¹⁵⁴ *Jones v. Nat’l Distillers*, 56 F. Supp. 2d 355, 356 (S.D.N.Y. 1999).

¹⁵⁵ *Id.*

¹⁵⁶ See *Thomas v. NCO Fin. Sys.*, 2002 WL 1773035, at *5 (E.D. Pa. 2002) (“Up to \$15,000 of any unclaimed funds would be distributed to the National Consumer Law Center.”).

¹⁵⁷ *Nat’l Distillers*, 56 F. Supp. 2d at 358-59.

¹⁵⁸ Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 396 (1999) (stating that “[t]he *cy pres* distribution to existing charities or to a trust fund has much to recommend it. . .”).

goals.¹⁵⁹ Such organizations have an existing structure,¹⁶⁰ experience in managing money,¹⁶¹ and perhaps links to members of the injured class.¹⁶² Having such attributes helps courts fulfill their fiduciary and supervisory obligations¹⁶³ and make best use of their resources.¹⁶⁴

Second, courts are obligated to protect the interests of the silent class.¹⁶⁵ Hence, whether a court approves a *cy pres* distribution plan depends in part on the extent to which the plan is acceptable to class members and others.¹⁶⁶ The court presumes that a distribution plan is acceptable where few individuals, if any, object to it.¹⁶⁷

Third, based on traditional principles of restitution, past practice, and statute, courts prefer plans that provide a direct

¹⁵⁹ See, e.g., *New York ex rel. Koppell v. Keds Corp.*, 1994 WL 97201, at *1 (S.D.N.Y. Mar. 21, 1994) (“Each state may select one or more charitable distributees from a list of five: the Women’s Sports Foundation; the American Cancer Society; the American Red Cross; the Boys and Girls Clubs of America; and the Better Homes Foundation.”).

¹⁶⁰ See, e.g., *Pray v. Lockheed Aircraft Co.*, 644 F. Supp. 1289, 1302 (D.D.C. 1986) (discussing a distribution to “an established organization which could apply the funds without having to bear heavy start-up and administration expenses”).

¹⁶¹ See, e.g., *Keds Corp.*, 1994 WL 97201, at *3 n.2 (stating, in response to a person who wanted \$75,000 for a project, she “had no demonstrated leadership role in any registered charitable organization and her proposal was not accompanied by any feasibility study”).

¹⁶² See, e.g., *In re Matzo Food Products Litig.*, 156 F.R.D. 600, 605 (D.N.J. 1994) (“[I]n the consumer class action filed against Manischewitz in California state court, the court approved a settlement pursuant to which a \$500,000 Food Fund was distributed to needy California consumers by the B’Nai B’Rith organization.”).

¹⁶³ See *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1986) (stating that the district court failed to supervise).

¹⁶⁴ Leon E. Trakman, *David Meets Goliath: Consumers Unite Against Big Business*, 25 SETON HALL L. REV. 617, 644 (1994) (“The court reduced its own supervision and administration costs by disbursing the residue not paid to claimants to reputable public interest organizations.”).

¹⁶⁵ *Agent Orange*, 818 F.2d. at 186 (observing that the district court has a duty to protect the less vocal and less active members of the class); *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975) (stating that the court has a fiduciary role as “guardian” of the rights of the absentee class member).

¹⁶⁶ *In re Toys “R” Us Antitrust Litig.*, 191 F.R.D. 347, 355 (E.D.N.Y. 2000) (“The response of the class to the proposed Settlement supports approval.”).

¹⁶⁷ *New York by Vacco v. Reebok Int’l Ltd.*, 903 F. Supp. at 532, 537 (S.D.N.Y. 1995).

distribution to any class member who can verify an injury.¹⁶⁸ It can be reasonably anticipated that class members will not bother to verify an injury and forfeit their right to collect money, creating a pool of unclaimed money for a *cy pres* distribution.¹⁶⁹ Nonetheless, direct payment to class members remains the court's first choice.¹⁷⁰

III. The Cases of *Motorsports Merchandise*

In *Motorsports Merchandise 2000* the United States District Court for the Northern District of Georgia approved a settlement agreement between a class of people, who purchased souvenirs and merchandise at NASCAR Winston Cup races held around the country, and the vendors who sold that merchandise.¹⁷¹ From January 1, 1991 to December 31, 1999, these vendors sold souvenirs and merchandise to consumers at purportedly inflated prices as part of an alleged price fixing conspiracy.¹⁷²

Then, in *Motorsports Merchandise 2001* the same court approved the *cy pres* distribution of \$2.4 million in unclaimed funds from the settlement agreement, which required the vendors to pay more than \$5.6 million in cash and issue more than \$5.7 million in coupons to the class.¹⁷³

Read together, these briskly written opinions are a concise primer on consumer antitrust class actions.¹⁷⁴

¹⁶⁸ *Mkt. St. Ry. Co. v. R.R. Comm'n*, 171 P.2d 875, 877 (Cal. 1946) (stating that riders were given an opportunity to collect refunds).

¹⁶⁹ Bradley A. Vauter, *The Next Best Thing: Unclaimed Funds from Class Action Settlements Could Benefit Low-Income Consumers By Deposits In The State Bar Of Michigan Access To Justice Development Fund*, 80-JUL MICH. B.J. 68, 68 (2001) (stating that "the difficulties of identifying the entire class and then reimbursing class members found usually means that a portion of the class award will not be distributed").

¹⁷⁰ *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997) ("Further, there is no reason, when the injured parties can be identified, to deny them even a small recovery in favor of disbursement through some other means.").

¹⁷¹ *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1330 (N.D. Ga. 2000).

¹⁷² *Id.*

¹⁷³ *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1393 (N.D. Ga. 2001).

¹⁷⁴ See Zazove, *supra* note 18, at 1 (stating that *Motorsports Merchandise 2001* illustrates many of the points she discusses in this article on *cy pres* distributions).

A. The Settlement: *Motorsports Merchandise 2000*

The class, purchasers of NASCAR souvenirs and merchandise, alleged that the vendors engaged in an unlawful conspiracy in violation of Section 1 of the Sherman Antitrust Act.¹⁷⁵ The class alleged that vendors¹⁷⁶ conspired to fix prices, *inter alia*, by secretly meeting and entering into agreements, circulating and distributing price lists fixing minimum prices of souvenirs and merchandise, monitoring prices and disciplining and punishing vendors who violated the price-fixing agreement.¹⁷⁷

After discovery, the parties reached a settlement agreement.¹⁷⁸ Fourteen total vendors were involved, two of which agreed to issue only coupons and no cash.¹⁷⁹ The remaining twelve vendors were divided into four settlement groups, differentiated both by the amount of cash each vendor was to contribute towards the \$5.6 million settlement and by the value and characteristics of the coupon to be issued by the vendor.¹⁸⁰ Three vendors in Group A, for example, agreed to pay \$3,467,500 in cash and to honor coupons with a total redeemable value of \$4,350,000; whereas, four vendors in Group D agreed to pay \$167,326 in cash and to issue coupons with a total value of \$120,300.¹⁸¹ Group A coupons provided a 25% discount off the purchase price of goods, for a maximum \$5.00 discount, and five coupons could be aggregated for a single purchase.¹⁸² On the other hand, Group D coupons provided a \$2.00 discount off any goods priced at \$10.00 or more, and two coupons could be aggregated for

¹⁷⁵ Section 1 of the Sherman Act provides in pertinent part that: "(e)very contract, combination the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . is hereby declared to be illegal." Sherman Antitrust Act, § 1, 15 U.S.C. § 1 (1994).

¹⁷⁶ All NASCAR vendors of souvenirs and merchandise are licensed by NASCAR, the speedway or by an affiliate or subsidiary of the speedway. For each NASCAR Winston Cup event, a vendor pays the speedway a fee and a percentage of its gross sales. In turn, the speedway pays a percentage of its gross receipts to NASCAR. *Motorsports Merchandise 2000*, 112 F. Supp. 2d at 1331.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1332 (Stockcar Souvenir Showcase and Circle Track Promotions agreed to issue only coupons).

¹⁸⁰ *Id.* at 1331-32.

¹⁸¹ *Id.* at 1332.

¹⁸² *Motorsports Merchandise 2000*, 112 F. Supp. 2d at 1332.

purchases exceeding \$25.00.¹⁸³

Cash was distributed using a three-tiered scheme: (1) to class members with proof of purchases; (2) to class members with proof of attendance at qualifying races but no proof of purchases; and (3) to class members who submitted sworn claims of purchases but no other proof.¹⁸⁴ Coupons, which commonly appear in antitrust and consumer class actions,¹⁸⁵ were allocated in a manner similar to the cash and were transferable.¹⁸⁶ Until 93.7% of the \$5.7 million in coupons was redeemed, vendors were not discharged.¹⁸⁷ Merely issuing coupons did not satisfy the settlement agreement.¹⁸⁸

An agreement of this kind must be a result of arm's length negotiations and not of collusion.¹⁸⁹ Therefore, to show that no collusion took place, the court analyzed the following factors: when the settlement was reached; the complexity of the case; the length and expense of a possible trial; whether the class could prevail at trial; the range of reasonable recoveries; and the degree of opposition to the proposed settlement.¹⁹⁰ In sum the court assessed whether the settlement was fair, adequate, and reasonable in light of the costs and risks of recovery.¹⁹¹ Having systematically assessed the so-called *Bennett* factors,¹⁹² the court decided to approve the settlement.¹⁹³

The court opined that if the settlement was not approved, it was uncertain that a class could even be certified under the Eleventh

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Leslie, *supra* note 29, at 995.

¹⁸⁶ *Motorsports Merchandise 2000*, 112 F. Supp. 2d at 1332.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1333 ("Overall, the court must be satisfied that the settlement was not a product of collusion but reached pursuant to arms length negotiations between the parties after significant discovery.") (quoting *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 315 (N.D.Ga. 1993)).

¹⁹⁰ *Id.* at 1333.

¹⁹¹ *Id.*

¹⁹² See *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (stating that FED. R. CIV. P. 23(e) "requires judicial approval of any class action settlement, but does not provide any standards for such approval" and then delineating considerations relevant to determining whether a settlement is "fair, adequate and reasonable").

¹⁹³ *Motorsports Merchandise 2000*, 112 F. Supp. 2d at 1338.

Circuit’s antitrust jurisprudence.¹⁹⁴ This jurisprudence requires plaintiffs to demonstrate that they could prove an antitrust impact “without having to resort to lengthy individualized examinations.”¹⁹⁵ Because consumers of NASCAR souvenirs and merchandise might not recall what they purchased from a particular vendor and what they paid for it, the proof of antitrust impact, according to the court, “would require lengthy individualized examinations.”¹⁹⁶ Therefore, plaintiffs may not have achieved class certification.¹⁹⁷ If they did, then the outcome of a trial would be uncertain.¹⁹⁸ If plaintiffs won at trial, then the appeals process would take many more years, delaying or eliminating recovery.¹⁹⁹ Hence, the court concluded, “[t]he complexities of this case, together with the unpredictability of a lengthy trial and appellate process weigh heavily in favor of approving the settlements.”²⁰⁰ Because there is a preference for settlement in consumer antitrust class actions, the court’s decision was not remarkable, and perhaps, a foregone conclusion.²⁰¹

B. The *Cy Pres* Distribution: *Motorsports Merchandise 2001*

Frequently, there are unclaimed funds following the distribution of cash and coupons in a consumer antitrust class action,²⁰² and *Motorsports Merchandise* was no exception. There remained \$2.4 million in unclaimed funds following the distribution period.²⁰³ Frequently, defendants in consumer antitrust class actions

¹⁹⁴ *Id.* at 1333-34.

¹⁹⁵ *Id.* (quoting *Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 328 (5th Cir. 1978)).

¹⁹⁶ *Motorsports Merchandise 2000*, 112 F. Supp. 2d at 1334.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1335 n.372 (2003) (observing that “[g]iven their docket pressures. . . courts are unlikely to fail to approve a settlement absent clear evidence of abuse.”).

²⁰² Douglas M. Schwab & Daniel J. Kroll, *Damage Issues in 10b-5 Class Actions That Go To Trial*, 444 PLI/Lit 515, 528 (1992).

²⁰³ *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001) (“Plaintiffs have advised the Court that after deducting

request that the court return unclaimed money to them on the theory that everyone who wanted to get cash and coupons had done so.²⁰⁴ However, like other courts, the court in *Motorsports Merchandise* declined the defendants' request to return unclaimed funds.²⁰⁵ The court observed that defendants had received the benefit of their settlement bargain and would receive nothing more.²⁰⁶

Instead, the court decided to make a *cy pres* distribution of unclaimed funds to charities.²⁰⁷ Accordingly, it solicited proposals from the charitable organizations suggested by the parties and a few others.²⁰⁸ After considering the submissions, the court distributed the unclaimed funds to ten established organizations serving Atlanta and other areas in Georgia with three exceptions: Duke University Medical Center in Durham, North Carolina; Race Against Drugs in Port Orange, Florida; and the Susan G. Komen Breast Cancer Foundation in Dallas, Texas.²⁰⁹ Nine of the ten organizations received \$250,000 and one received \$100,000.²¹⁰ Of the ten organizations two were legal clinics and three were health care organizations.²¹¹

distributions to class members, fees and expenses, there remains approximately \$2,400,848 in unclaimed settlement funds available for a *cy pres* distribution.”).

²⁰⁴ *Id.* at 1394 (Defendants “argue that because the settlement documents do not address the issue of distribution of excess settlement funds, the Plaintiffs have served their intended purpose, and the Court should use its equitable powers to return the surplus.”).

²⁰⁵ See Nat'l Ass'n of Consumer Advocates, *supra* note 135, at 392 (suggesting that where there are “no ill-gotten gains to be disgorged” or “no incentive for defendants to fail to distribute the damage award or to assist in locating absent class members,” then residues may revert to defendants.); Casurella & Bevis, *supra* note 101, at 68 (stating that “weaker cases of liability or damages typically result in a reversion of any unclaimed or undistributed funds to the defendant”).

²⁰⁶ *Motorsports Merchandise 2001*, 160 F. Supp. 2d at 1395.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1396-98.

²¹⁰ *Id.* at 1395.

²¹¹ The following is a list and brief description of the ten organizations that received a portion of the unclaimed funds in *Motorsports Merchandise*:

- The Make-a-Wish Foundation of Greater Atlanta and North Georgia grants wishes to children between 2 1/2 and 18 years of age with life-threatening illnesses.

IV. Analysis: an Exercise of Prerogative *Cy Pres* Power

Motorsports Merchandise is much like other consumer antitrust class actions. Many consumers purchased low cost items at prices that may have been “stabilized” by an impermissible conspiracy to fix prices.²¹² Confronted with the complexity, uncertainty, and dangers of a trial, the parties settled for \$5.6 million in cash and \$5.7 million in coupons.²¹³ Because the cash and coupons

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- The Atlanta chapter of the American Red Cross provides to local communities a myriad of services that range from disaster relief and health and safety services to youth development programs.
 - Race Against Drugs is a nationwide drug prevention education program aimed at educating young people about the dangers of substance abuse.
 - Children’s Healthcare of Atlanta is a children’s hospital that purchases equipment to diagnose the location and cause of seizures in the hospital’s neurophysiology patients.
 - The Atlanta Legal Aid Society (“ALAS”) provides legal services to low-income clients and serves a five-county metropolitan Atlanta area.
 - The Georgia Legal Services Program (“GLSP”) is similar to the ALAS. The GLSP provides free legal services to low-income clients in the 154 Georgia counties outside the five-county area served by ALAS.
 - KIDS’ CHANCE provides educational scholarships in the form of direct financial aid to children whose parents have been seriously or catastrophically injured or killed in work-related accidents in Georgia.
 - Duke Children’s Hospital and Health Center is part of the Duke University Medical Center. The primary goal of Duke Children’s Hospital is to provide excellent, comprehensive clinical services to infants and children.
 - The Lawyers Foundation of Georgia is a strictly voluntary, philanthropic arm of the State Bar of Georgia.
 - Susan G. Komen Breast Cancer Foundation seeks to eradicate breast cancer as a life-threatening disease by advancing research, education, screening, and treatment.

See *Motorsports Merchandise 2001* at 1396-99. This list is redacted from longer descriptions provided in the court order. *Id.*

²¹² See, e.g., *In re Matzo Food Products Litig.*, 156 F.R.D. 600, 602 (D.N.J. 1994) (alleging that “defendants sold approximately \$25 million worth of Passover matzo products at prices that they and unnamed co-conspirators unlawfully fixed”).

²¹³ *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1331 (N.D. Ga. 2000).

were meaningful to consumers²¹⁴ and the method of distribution was efficient,²¹⁵ the court approved the agreement,²¹⁶ which put both cash and coupons in the hands of injured consumers.²¹⁷

Following the distribution of cash and coupons, as mentioned above, there remained unclaimed funds of \$2.4 million.²¹⁸ While other aspects of the settlement agreement are explicit in *Motorsports Merchandise*, the court for some inexplicable reason did not provide in the settlement agreement a *cy pres* distribution for unclaimed funds²¹⁹ that would provide an indirect benefit to injured consumers “as near as possible” to a direct benefit of cash or market benefit of coupons, as other courts have done.²²⁰ Instead, the class simply requested that the unclaimed funds be distributed to charities.²²¹

In what appears to be an exercise of prerogative *cy pres* power, the court in *Motorsports Merchandise* gave unclaimed funds primarily to seven charities in Georgia that have virtually no relationship to the injured class except for the two law-related organizations, which are courts’ traditional choices for unclaimed funds.²²² The court also gave unclaimed funds to three charities outside of Georgia that have virtually no relationship to the injured class except for Race Against Drugs, which features motorsports celebrity spokespersons. Perhaps, the court may have relied on

²¹⁴ See *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1032 (N.D. Ill. 2000) (stating that “total *cy pres* distribution to individuals would not significantly enhance the value of the settlement for any class member”).

²¹⁵ See *In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1196 (N.D. Cal. 1998) (“Obviously, it would be absurd to spend \$5.50 in class funds to send a three cent check to Mr. Allen.”).

²¹⁶ *Motorsports Merchandise 2000*, 112 F. Supp. 2d at 1338.

²¹⁷ *Id.* at 1331 (“The settlements provide that Defendants will pay more than \$5.6 million in cash and issue more than \$5.7 million in coupons to the class.”).

²¹⁸ *Motorsports Merchandise 2001*, 160 F. Supp. 2d at 1395.

²¹⁹ See *Zazove*, *supra* note 18, at 1 (suggesting that plaintiff and defense lawyers should “anticipate the possibility of residual funds” and make provisions for residual funds in the settlement agreement).

²²⁰ See, e.g., *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 707 (8th Cir. 1997) (finding “[a]t the time of the consent decree, both sides. . . wanted to use for scholarships any money remaining after distribution”).

²²¹ *Motorsports Merchandise 2001*, 160 F. Supp. 2d at 1395; see also *Jones v. Nat’l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (plaintiff moves that unclaimed funds be given to a legal aid society).

²²² See *Forde*, *supra* note 26, at 21-23 (collecting cases).

equivocal authority if the facts of those cases matter more than their words, and it may have operated on the outer edge of its discretion if *In re Airline Ticket Commission Antitrust Litigation* is a valid frame of reference for evaluating the discretion of a court in making a *cy pres* distribution.²²³

A. *Motorsports Merchandise Relies on Equivocal Authority*

The court cited four cases in support of its proposition that “[c]ourts have expanded the *cy pres* doctrine to also permit distributions to charitable organizations not directly related to the original claims.”²²⁴ However, none of these cases actually support this proposition. First, in *West Virginia v. Chas. Pfizer & Co.*²²⁵ sixty-six antitrust class actions against pharmaceutical companies were settled.²²⁶ Settlement funds to benefit individual consumers directly were mostly unclaimed.²²⁷ These funds were then divided among states for public health programs²²⁸ and not a random group of charitable organizations.

Second, in *In re Folding Carton Antitrust Litigation*,²²⁹ unclaimed settlement funds were eventually distributed to the National Association for Public Interest Law (“NAPIL”) eight years after the settlement to support fellowships.²³⁰ The distribution of unclaimed funds actually began in 1983 with a proposal to establish a foundation called “The Antitrust Development and Research Foundation.”²³¹ The Seventh Circuit rejected this proposal, because

²²³ See *In re Airline Ticket Comm’n Antitrust Litig.*, 268 F.3d 619 (8th Cir. 2001).

²²⁴ *Motorsports Merchandise 2001*, 160 F. Supp. 2d at 1394 (citing *Superior Beverage Co. v. Owens-Ill., Inc.*, 827 F. Supp. 477, 478-79 (N.D. Ill. 1993)).

²²⁵ 314 F. Supp. 710 (S.D.N.Y. 1970), *aff’d*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971).

²²⁶ *Id.*

²²⁷ *Superior Beverage*, 827 F. Supp. at 479.

²²⁸ *Id.*

²²⁹ See *In re Folding Carton Antitrust Litig.*, No. MDL 250, 1991 WL 32867, at *1 (N.D. Ill. Mar. 6, 1991) (providing background information on this protracted litigation).

²³⁰ *Id.* at *3.

²³¹ *In re Folding Carton Antitrust Litig.*, 557 F. Supp. 1091, 1094 (N.D. Ill. 1983).

this use of unclaimed funds “would be a miscarriage of justice and an abuse of discretion.”²³² Seven years later and after additional litigation, the unclaimed funds went to support the preparation of public interest lawyers, another law-related interest,²³³ and not to any group of worthy causes.

Third, in *Superior Beverage Co., Inc. v. Owens-Illinois, Inc.*,²³⁴ the court concluded that “while use of funds for purposes closely related to their origin is still the best *cy pres* application, the doctrine of *cy pres* and courts’ broad equitable powers now permit use of funds for other public interest purposes. . . .”²³⁵ Having asserted this proposition, the court then proceeded to fund fourteen organizations with unclaimed funds from a settlement involving an alleged agreement to fix prices of glass containers.²³⁶ Of the fourteen organizations, twelve of them were law-related organizations.²³⁷ Of the remaining organizations, one of them was an art museum, which received \$50,000 “to rent or purchase works of glass art created by one of the pre-eminent glass artists in the world,”²³⁸ and the other group was a service organization, which received \$50,000 to fund its ongoing, religious liberty programs or “programs as the governing council. . . determines.”²³⁹ Among the fourteen programs, only awards to the museum and the service organization might be considered questionable *cy pres* distributions. Arguably, though, the award to the museum has some connection to the injured class, because its members are high volume users of glass, and therefore, might derive an esthetic benefit from glass art. Hence, the reliance of *Motorsports Merchandise* on the “rule” announced in *Superior Beverage* is misplaced; there is a wide chasm between the purported rule and the facts of *Superior Beverage*.²⁴⁰

²³² *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1255 (7th Cir. 1984).

²³³ See Forde, *supra* note 26, at 21 (discussing “the saga” of *Folding Carton*).

²³⁴ 827 F. Supp. 477 (N.D. Ill. 1993).

²³⁵ *Id.* at 479.

²³⁶ *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 122 (N.D. Ill. 1990).

²³⁷ *But see* Vauter, *supra* note 169, at 68 (suggesting that the “State Bar of Michigan Access to Justice Fund be a repository for unclaimed class action settlement funds” within Michigan).

²³⁸ *Superior Beverage*, 827 F. Supp. at 485.

²³⁹ *Id.* at 486 (discussing American Jewish Congress—Midwest Region).

²⁴⁰ See John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*,

Fourth, in *Jones v. National Distillers*,²⁴¹ the court awarded \$18,400 in unclaimed settlement funds to The Legal Aid Society—Civil Division, which serves to help those needing legal assistance for various civil matters.²⁴² Because the settlement fund was intended to help those claiming injury by civil securities fraud, the court in *National Distillers* admitted that the “tie” or nexus between the intent of the fund and the purpose of the legal aid society was “thin.”²⁴³ However, the court added that the tie was “not as thin as it would be if the donation served an entirely unconnected cause such as a dance performance or a zoo.”²⁴⁴ Therefore, the court implicitly followed the *cy pres* doctrine, rejecting wholly unrelated charities such as a zoo or dance performance and funding a legal organization, as courts often do. As with *Superior Beverage*, the facts of *National Distillers* are more important than its words.²⁴⁵ Finally, *National Distillers* is actually more of a thoughtful essay on the limitations of *cy pres* principles when “there is no obvious use for the money that provides a particular benefit to class members”²⁴⁶ than it is a case in support of *cy pres* distributions to unrelated organizations.

B. Airline Ticket Commission and the court’s use of its Discretionary Power in *Motorsports Merchandise*

The Eleventh Circuit has the authority to determine whether the trial court in *Motorsports Merchandise* abused its discretion, given that it awarded \$2.4 million to charities so unrelated to the injured class and so concentrated in Georgia.²⁴⁷ Further, if the decisions of the Eighth Circuit in *In re Airline Ticket Commission Antitrust Litigation*²⁴⁸ provide a relevant frame of reference for

33 LOY. L.A. L. REV. 263, 304-05 (2000) (discussing Llewellyn’s distrust of “mere words” and “his keen attention to facts”).

²⁴¹ 56 F. Supp. 2d 355 (S.D.N.Y. 1999).

²⁴² *Id.* at 356.

²⁴³ *Id.* at 359.

²⁴⁴ *Id.*

²⁴⁵ See Breen, *supra* note 240, at 306 (stating, “Thus for Llewellyn, facts enjoyed a certain priority over language.”).

²⁴⁶ *Nat’l Distillers*, 56 F. Supp. 2d at 358.

²⁴⁷ NASCAR Winston Cup races occur in venues other than Georgia. See NASCAR Winston Cup Series Schedule, available at <http://www.nascar.com/series/wc/> (last visited Nov. 1, 2003).

²⁴⁸ The *cy pres* distribution of the trial court was appealed twice and reversed

evaluation, then the court in *Motorsports Merchandise* either abused its discretion or at least operated on its outer edge.

The Eighth Circuit in *Airline Ticket Commission* found that the trial court had twice abused its discretion with respect to a *cy pres* distribution.²⁴⁹ First, the trial court abused its discretion when it “merely adopted liaison class counsel’s proposed list of mostly local recipients, which had no relationship to the class action suit.”²⁵⁰ The second basis for reversal was the trial court’s failure to distribute unclaimed funds on remand consistent with the opinion of the Eighth Circuit in the case’s first appeal.²⁵¹

Airline Ticket Commission involved a class action that the American Society of Travel Agents (“ASTA”) brought on behalf of travel agencies and agents against several major airlines in 1995.²⁵² The class action alleged antitrust violations, claiming that seven major airlines colluded in order to place caps on commissions paid to travel agents.²⁵³ The law suit was settled in 1996 for \$86 million.²⁵⁴ Following a payout to class members, there remained \$600,000 in unclaimed settlement funds.²⁵⁵ Initially, the trial court ordered a *cy pres* distribution of unclaimed funds to three law schools and several charitable organizations in the vicinity of Minneapolis, Minnesota.²⁵⁶ On appeal the Eighth Circuit found an abuse of discretion and reversed and remanded the *cy pres* distribution.²⁵⁷ On remand the trial court then ordered the funds to be distributed to NAPIL.²⁵⁸ Once again, the Eighth Circuit found an abuse of discretion, reversed and

twice. See *In re Airline Ticket Comm’n Antitrust Litig.*, 268 F.3d 619 (8th Cir. 2001) and *In re Airline Ticket Comm’n Antitrust Litig.*, 307 F.3d 679 (8th Cir. 2002).

²⁴⁹ *Airline Ticket Comm’n 2002*, 307 F.3d at 680 (“When the case was remanded, the district court ordered the funds distributed to the National Association for Public Interest Law (NAPIL). Today we reverse that decision as well.”).

²⁵⁰ *Airline Ticket Comm’n 2001*, 268 F.3d at 626.

²⁵¹ *Airline Ticket Comm’n 2002*, 307 F.3d at 680.

²⁵² *Airline Ticket Comm’n 2001*, 268 F.3d at 620-21.

²⁵³ *Id.*

²⁵⁴ *Id.* at 621.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 622.

²⁵⁷ *Id.* at 626.

²⁵⁸ *Airline Ticket Comm’n 2002*, 307 F.3d at 680.

remanded with specific instructions.²⁵⁹

In both instances the Eighth Circuit found the trial court abused its discretion for approximately the same reason: there was no nexus between the injured class and organizations receiving unclaimed funds through a *cy pres* distribution.²⁶⁰ In the first case, involving a *cy pres* distribution to three law schools and several charitable organizations, the Eighth Circuit found that the trial court had not “carefully weighed all of the considerations”²⁶¹ and sent the case back so that the trial court could fashion “a distribution or distributions more closely related to the origin of this nation-wide class action case concerning caps on commissions paid to travel agencies.”²⁶² In the second case, involving a *cy pres* distribution to NAPIL, the Eighth Circuit reiterated that “unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated.”²⁶³ Consequently, the court found that “NAPIL cannot claim any relation to the substantive issues in this case.”²⁶⁴ For a second time, the court reversed and remanded.²⁶⁵

Notably, the Eighth Circuit in *Airline Ticket Commission* had in mind the “next best recipients” of the unclaimed funds, and they were not law schools, charitable organizations, or NAPIL. Rather, they were travel agencies in Puerto Rico and the U.S. Virgin Islands, not members of the class but agencies “subject to the same allegedly unlawful caps.”²⁶⁶ The trial court in *Motorsports Merchandise* did not have any “next best recipients” to give unclaimed funds, but this should have motivated the court to identify organizations that were “next best” to a direct distribution of cash and an indirect distribution of coupons. *Airline Ticket Commission* adds emphasis to this point, because it teaches that a trial court must choose organizations closely related to the origin of the class action or risk reversal for abuse of

²⁵⁹ *Id.* at 680-81.

²⁶⁰ *Id.*

²⁶¹ *Airline Ticket Comm’n 2001*, 268 F.3d at 626 (quoting *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 707 (8th Cir. 1997)).

²⁶² *Id.*

²⁶³ *Airline Ticket Comm’n 2002*, 307 F.3d at 682-83.

²⁶⁴ *Id.* at 683.

²⁶⁵ *Id.* at 680-81.

²⁶⁶ *Id.* at 683.

discretion.

C. Better Choices for *Motorsports Merchandise*

The trial court in *Motorsports Merchandise* stated that it had “attempted to identify charitable organizations that may at least indirectly benefit the members of the class of NASCAR racing fans.”²⁶⁷ Out of all the charities the court funded, however, only one had a connection to NASCAR race fans. The court approved a grant of \$250,000 to Race Against Drugs, a nationwide organization aimed at educating young people about the dangers of substance abuse by featuring motor sports celebrities as spokespersons.²⁶⁸ There is no doubt that charities, which benefit children and promote health, are worthy choices, but there may have been better choices for NASCAR race fans. By making “better choices,” the organizations could have been “nearer” to injured consumers of NASCAR merchandise. Distributions to organizations whose missions are aligned with traffic safety, driver education, or the prevention of alcohol-related automobile accidents leap to mind. Such organizations have an obvious connection with driving cars, which is a clear interest of the injured class.

Alternatively, the court could have simply given all of the money to the Victory Junction Gang Camp (“Victory Junction”)²⁶⁹ and asked NASCAR to match it, thereby greatly leveraging the value of the unclaimed funds. Founded in part by Paul Newman, actor, philanthropist, and motorsports enthusiast, Victory Junction is intended for children who are too sick to go to ordinary camps.²⁷⁰ Victory Junction is designed to serve children with arthritis, asthma, cancer, diabetes, epilepsy, genetic disorders, heart disease, hemophilia, HIV, sickle cell anemia, and other illnesses.²⁷¹ Scheduled to open this summer, Victory Junction is built around a racing theme and is a “Proud Charity” of NASCAR, the first charity with such a designation.²⁷² Victory Junction is developing partnerships with the

²⁶⁷ *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001).

²⁶⁸ *Id.* at 1396.

²⁶⁹ See Victory Junction Gang Camp, *Feel Your Heart Race*, available at <http://www.victoryjunction.org> (last visited Nov. 2, 2003).

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

medical community, and eventually the camp will implement a year-round program to serve the needs of children with chronic illnesses.²⁷³ Victory Junction is the kind of worthy cause that the court funded anyway in *Motorsports Merchandise*, but the camp still might have been a better choice to receive more of the unclaimed funds, because it's an entity that has close ties to NASCAR racing and the fans who buy its merchandise.

Even if the court in *Motorsports Merchandise* had no other choice but to give the money to worthy causes unrelated to driving cars and located mostly in Georgia, an inspired choice for the court would have been to grant awards in memory of Dale Earnhardt, a seven-time NASCAR Winston Cup Series Champion and the only three-time winner of the Winston All-Star Race.²⁷⁴ Considered to be the greatest driver in the history of NASCAR,²⁷⁵ Earnhardt died on February 19, 2001, from injuries sustained in racing. His death occurred nearly six months before the court in *Motorsports Merchandise* entered its order on August 16, 2001,²⁷⁶ awarding grants to worthy causes. Because Earnhardt was so popular among NASCAR fans, attaching Earnhardt's name to those grants would have provided some nexus to the injured class of NASCAR fans.

Because NASCAR was not a defendant in *Motorsports Merchandise*, the court also could have directed NASCAR to develop a plan for the unclaimed funds. The court could have retained the funds until NASCAR submitted a plan and the court approved it. NASCAR could have reached out to an organization like Speedway Children's Charities ("SCC") to help develop a *cy pres* plan of distribution to worthy causes, traditionally supported by NASCAR fans.²⁷⁷ The SCC might have been particularly helpful to NASCAR, because the SCC has chapters at major NASCAR racing venues such

²⁷³ See Sports Philanthropy Project, Victory Junction Gang Camp, available at <http://www.sportsphilanthropyproject.com/SportsOrg.asp?ID=60> (last visited Nov. 2, 2003).

²⁷⁴ See Dale Earnhardt, Inc., *The Dale Earnhardt Biography*, available at <http://www.daleearnhardtinc.com/content/legacy/bio.aspx> (last visited Nov. 1, 2003).

²⁷⁵ Dave Caldwell, *Auto Racing; Dale Earnhardt, 49, Racing Star*, N.Y. TIMES, Feb. 19, 2001, at D3 (quoting Bill France, Jr., board chairman of NASCAR).

²⁷⁶ *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1393 (N.D. Ga. 2001).

²⁷⁷ See Speedway Children's Charities, available at <http://www.speedwaycharities.org> (last visited Nov. 20, 2003).

as Atlanta; Bristol, Tennessee; and Las Vegas, Nevada.²⁷⁸ Asking NASCAR to devise a plan that would have some nexus with racing fans would not have been novel. After all, in *Powell v. Georgia-Pacific Corporation*, a case involving racial discrimination, the trial court ordered parties to submit an agreed-upon plan to be administered by the philanthropic arm of the corporation actually convicted of discrimination.²⁷⁹

V. Impact of *Motorsports Merchandise*

Motorsports Merchandise is a unique case. There does not appear to be another case that so systematically distributes unclaimed funds to organizations that seem so wholly unrelated to the injury sustained by the class. Where a court can “get its arms around” a case, it typically approves a *cy pres* distribution that, on its face, has a discernible nexus to the injured class, but not in *Motorsports Merchandise*. Almost any randomly selected group of worthy causes would have had the same indirect benefit on NASCAR fans.

Whether other courts will rely on *Motorsports Merchandise* to make *cy pres* distributions to unrelated organizations remains to be seen. In *In re Tarrer*²⁸⁰ an objecting party invited a bankruptcy court to require that “any net recovery by the [d]ebtors in excess of their obligations to creditors be paid to charities selected by the Court.”²⁸¹ The objecting party cited *Motorsports Merchandise* in support of this proposition. The bankruptcy court declined this invitation because the “[d]ebtor has clearly been identified as the party who is entitled to the remaining proceeds, if any, that result from the resolution of his claim against the [o]bjecting [p]arties.”²⁸²

Ideally, the connection between the indirect *cy pres* benefit and the injured consumer would be transparent.²⁸³ Transparency is not always possible, though, and even making a remote connection between the *cy pres* distribution and the injured consumer may be

²⁷⁸ *Id.*

²⁷⁹ *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 704 (8th Cir. 1997).

²⁸⁰ *In re Tarrer*, 273 B.R. 724, 738 (Bankr. N.D. Ga. 2001).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ See *California v. Levi Strauss & Co.*, 715 P.2d 564, 575 (Cal. 1986) (holding that it is the overlap between the injured class of persons and the class to be benefited “that provides the principal criterion for assessing the compensatory effectiveness of a distribution plan.”).

vexing.²⁸⁴ However, when a court strays as far away from the *cy pres* doctrine as the court did in *Motorsports Merchandise*, the use of the *cy pres* doctrine “runs the risk of being a vehicle to punish defendants in the name of social policy, without conferring any particular benefit upon any particular wronged person.”²⁸⁵

VI. Conclusion

The *cy pres* doctrine is a rule of construction traditionally applied by courts in trust cases where the original intention of the decedent could not be fulfilled.²⁸⁶ The doctrine has taken on another life as a tool courts use in class actions where it is impossible or impractical to distribute funds from a settlement to injured class members through a direct or market distribution. When considering a *cy pres* distribution, two questions must be addressed: first, whether a direct distribution or a market distribution is feasible, and second, whether a *cy pres* distribution plan indirectly benefits the injured class. Addressing these questions helps insure that settlements are reasonable and fair and *cy pres* distributions are pragmatic, sensible and “as near as possible” to a distribution that directly benefits injured consumers.

²⁸⁴ See *Jones v. Nat’l Distillers*, 56 F. Supp. 2d 355, 358 (S.D.N.Y. 1999) (“there is no obvious use for the money that provides particular benefit to class members”).

²⁸⁵ *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1312 (9th Cir. 1990) (Fernandez, J., concurring).

²⁸⁶ *Pray v. Lockheed Aircraft Co.*, 644 F. Supp. 1289, 1303-04 (D.D.C. 1986).
