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Cy Pres Settlements: Problems Associated with the Judiciary's Role and Suggested Solutions

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CY PRES SETTLEMENTS: PROBLEMS ASSOCIATED WITH THE JUDICIARY'S ROLE AND SUGGESTED SOLUTIONS

Abstract: Class action settlements frequently generate funds that are never collected by class members. This creates problems associated with determining how these funds should be allocated. This Note discusses one mechanism for distributing unclaimed settlement funds—cy pres distributions to charitable organizations that advance interests in line with those of the class members. This Note discusses two problems that arise out of the role judges play in cy pres distributions: the potential that judges will be perceived as making distributions to pet charities, and the potential that judges may transgress their constitutionally assigned role as arbiters of "cases or controversies" in making such distributions. This Note proposes solving these problems by removing judges from the process of allocating unclaimed class action settlement funds altogether, instead requiring parties to stipulate the treatment of such funds in any settlement agreement.

INTRODUCTION

Class action lawsuits are a common means of resolving a large number of claims in a single proceeding.[1] Issues relating to settling class action lawsuits are frequently litigated due to the high stakes nature of class action litigation and the complexity of many class action settlements.[2]

Recently, courts have grappled with issues surrounding the distribution of unclaimed settlement funds in class action suits.[3] Sometimes excess funds re-

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[1] *See* FED. R. CIV. P. 23 (providing that one or more members of a class may sue on behalf of all members of a class if certain conditions are met); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (noting that the class action is an exception to the usual rule that litigation is conducted by and on behalf of an individual named party); *see also* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 811–12 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_aba_annual/12_6.authcheckdam.pdf, *archived at* http://perma.cc/YN3H-5B6A (concluding that federal district court judges approved 688 class action settlements involving $33 billion dollars from 2006 to 2007).

[2] *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 816 (9th Cir. 2012) (holding that the district court did not abuse its discretion in approving a settlement over the objection of dissenting class members); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 471 (5th Cir. 2011) (holding that the district court abused its discretion in awarding unused class action settlement funds to charitable organizations rather than to class members); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 782 (7th Cir. 2004) (Posner, J. opinion) (holding that the district court abused its discretion in approving a settlement where one sub-class of individuals received no direct compensation).

[3] *See, e.g.*, *In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 35 (1st Cir. 2012) (holding that the district court did not abuse its discretion in awarding unclaimed settlement funds to a group

main in a settlement pool after class members have been compensated.[4] Other times, distribution to class members is economically infeasible because transaction costs associated with distribution substantially outweigh the compensation individual class members are entitled to receive.[5] In these situations, the parties and courts must determine how to distribute the settlement funds that remain uncollected.[6]

To resolve these problems, parties to class action lawsuits and courts have begun distributing uncollected settlement funds to charitable organizations.[7] This action is commonly referred to as a "cy pres" distribution.[8] The idea is that when direct distribution is impossible or infeasible because class members cannot be located or transaction costs outweigh potential recovery, distribution to charitable organizations provides the next best benefit to class members.[9]

Recently, courts and commentators have raised questions about the use of cy pres distributions in class action settlements.[10] Courts and commentators

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researching diseases afflicting class members); *In re* Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 690 (8th Cir. 2002) (holding that the district court failed to distribute unclaimed settlement funds to a qualified recipient). *See generally* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010) (discussing constitutional issues surrounding a commonly used mechanism—cy pres distributions—for distributing unclaimed class action settlement funds).

[4] *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) (noting that a portion of settlement funds frequently remain unclaimed after distribution to class members and discussing possible mechanisms for allocating these funds).

[5] *See Lane*, 696 F.3d at 819 (noting that the costs associated with distributing unclaimed settlement funds can often exceed the pool of unclaimed funds available for distribution).

[6] *See In re Baby Prods.*, 708 F.3d at 172 (explaining that courts faced with unclaimed settlement funds have four principle options for distributing unclaimed settlement funds: further pro rata distribution to class members, reversion to the defendant, escheat to the state, and cy pres distribution to a charitable organization). These four methods of distribution are discussed in more detail later in this Note. *See infra* notes 35–51 and accompanying text.

[7] *See In re Lupron*, 677 F.3d at 24; Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 432 (2d Cir. 2007); *In re Airline Ticket Comm'n*, 307 F.3d at 680.

[8] *See Masters*, 473 F.3d at 436.

[9] *See id.*; *Klier*, 658 F.3d at 474 ("In the class-action context, a cy pres distribution is designed to be a way for the court to put any unclaimed settlement funds to their 'next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'") (citation omitted). *See generally* Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POL'Y & L. 267, 290 (2014) (advocating for use of cy pres distributions to organizations promoting access to justice as a mechanism to achieve a result that will benefit class members, all of whom have an interest in access to justice).

[10] *See Klier*, 658 F.3d at 480–82 (Jones, J., concurring) (expressing concern about the constitutionality of cy pres distributions, and suggesting that courts avoid the problems by returning excess funds to the defendant); Robert E. Draba, Note, *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near as Possible"* 16 LOY. CONSUMER L. REV. 121, 124 (2004) (expressing concern about cy pres distributions to charitable organizations that do not advance interests closely mirroring the interests of the injured class members); Sam Yospe, Note, *Cy Pres Distributions in Class Action Settlements*, 2009 COLUM. BUS. L. REV. 1014, 1021 (arguing that discretion afforded to judges in making cy pres distributions often results in distributions that are arbitrary and unpredictable).

have suggested that the practice raises serious constitutional concerns.[11] Further, circuit courts are not in total agreement about the standards surrounding the use of cy pres distributions in the class action context.[12] Finally, U.S. Supreme Court Chief Justice John Roberts has indicated that there are "fundamental concerns" surrounding the use of cy pres remedies in class action litigation.[13]

This Note addresses problems relating to the proper role of the judiciary in shaping cy pres settlements and suggests solutions to these problems.[14] Part I provides general background on class action litigation and the development of cy pres remedies in this context.[15] Part II introduces and explains two major concerns about the proper role of judges in shaping a cy pres remedy, and examines how courts and commentators have responded to these concerns.[16] Finally, Part III argues that these problems are best solved by removing judges from the process of allocating unclaimed settlement funds to charitable organizations.[17]

I. Class Action Settlements and Cy Pres Distributions

Understanding the problem of cy pres distributions requires some background into class action lawsuits and the mechanism for distributions generally.[18] Section A examines class action lawsuits generally and the role of judges in approving class action settlements.[19] Section B then explains cy pres settlements as a means of accounting for excess settlement funds that are unclaimed by class members.[20]

A. Class Action Settlement Generally

Broadly speaking, Rule 23 of the Federal Rules of Civil Procedure is a procedural mechanism allowing for the aggregation of claims.[21] Under this

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[11] *See Klier*, 658 F.3d at 480–82 (Jones, J., concurring) (suggesting that cy pres distributions may violate Article III standing requirements); Redish et al., *supra* note 3, at 641 (outlining three major constitutional "pathologies" associated with cy pres distributions in the class action context).

[12] *Compare In re Baby Prods.*, 708 F.3d at 176 (requiring courts to estimate the value of plaintiff claims and compare that to direct distributions before approving cy pres distribution), *with Lane*, 696 F.3d at 823 (affirming the district court's approval of a cy pres remedy despite the lack of an evaluation into the value of the plaintiff's claims).

[13] *See* Marek v. Lane, 134 S. Ct. 8, 9 (2013) (statement of Roberts, C.J.).

[14] *See infra* notes 18–211 and accompanying text.

[15] *See infra* notes 18–51 and accompanying text.

[16] *See infra* notes 52–173 and accompanying text.

[17] *See infra* notes 174–211 and accompanying text.

[18] *See infra* notes 21–51 and accompanying text.

[19] *Se infra* notes 21–30 and accompanying text.

[20] *See infra* notes 31–51 and accompanying text.

[21] *See* FED. R. CIV. P. 23(a)(1)–(4) (providing that one or more members of a class may sue or be sued on behalf of all members of that class if certain conditions are met).

Rule, individual plaintiffs can bring claims on behalf on themselves and all other individuals who have similar claims based on common questions of law or fact.[22] The individuals for whom claims are brought ("class members") are not actively involved in the litigation.[23] Class members may be bound by a judgment or a settlement unless they affirmatively opt-out at the certification or settlement stage.[24]

Since judgments and settlements may be binding on non-named class members, there are strict requirements for when a class action may be maintained.[25] As an initial matter, the named plaintiff must show that: (1) the putative class is so numerous that a joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the named plaintiffs are representative of the claims of all class members; and (4) the named plaintiffs will fairly and adequately protect the interests of the unnamed class members.[26]

Judges play an important role in class action settlements because the court must approve all class action litigation settlements.[27] This is because the settlement will be binding on all class members who did not opt-out, and class members who do not opt-out but are not actively involved in the litigation have little control over the terms of the settlement.[28] Without a voice in the litigation, there is a risk that a class settlement will benefit other interests, like class counsel or the named class members, at the expense of unnamed class mem-

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[22] *See id.* 23(b)(3) (providing that a case may proceed on a class basis when common issues of law or fact predominate over any questions affecting individual class members); Sullivan v. DB Invs., Inc., 667 F.3d 273, 335 (3d Cir. 2011) (noting that the requirement that common questions of law or fact must predominate means that a determination of the truth or falsity of the common contention will resolve an issue that is central to the validity of each of the claims in one stroke).

[23] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175 (1974) (noting that, under Rule 23, unnamed class members who can be reasonably identified must be given notice of the action and the opportunity to opt out of the class proceeding so that they may preserve the opportunity to press their claims separately). *See generally* Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079, 1087–88 (outlining the treatment of unnamed class members and the preclusive power of a judgment on such class unnamed class members).

[24] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805 (1985) (noting that principles of res judicata must apply to unnamed class members if purposes of class action litigation are to be fulfilled because without res judicata, absent class members could pursue the defendant in other fora even after a final judgment).

[25] *See* Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 157, 161 (1982) (holding that a class action may only be certified if the rigorous requirements of Rule 23(a) have been satisfied, and noting the potential risk of unfairness to class members bound by a judgment if these requirements are not met).

[26] *See* FED. R. CIV. P. 23(a)(1)–(4).

[27] *See id.* 23(e) (providing that the claims or issues of a certified class may only be compromised with the approval of the court).

[28] *See* Ehrheart v. Verizon Wireless, 609 F.3d 590, 592–93 (3d Cir. 2010) (holding that the purpose of the Rule 23 requirement that a court approve a class action settlement is to protect the interests of the unnamed class members).

bers.[29] To approve a class action settlement, the court must find that the settlement is fair, reasonable, and adequate in the way in which it addresses the interests of all those who will be affected by it.[30]

B. Next Best Beneficiaries: Introduction to Cy Pres Settlements

In many cases, funds remain in a settlement pool because class members fail to come forward to submit their claims.[31] Often, the settlement agreement will provide for how excess funds should be allocated.[32] But if the parties do not agree, the court must determine how to distribute the funds.[33] Cy pres settlements in class action lawsuits were originally pursued to allocate these residual funds.[34]

Courts have traditionally adopted one of four methods to distribute unclaimed settlement funds: (1) pro rata distribution to claiming class members; (2) escheat to a government body; (3) reversion to the defendant; or (4) cy pres distribution.[35] Each of these arrangements has advantages and drawbacks.[36]

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[29] Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) (noting that there is a danger that class counsel may negotiate a less than optimal settlement in exchange for preferential treatment on the payment of its fees). Because of this risk of inadequate representation by class counsel or the named class members, the court approving the class action settlement must act as a fiduciary guarding the rights and claims of the unnamed class members. *See In re* AT&T Corp., 455 F.3d 160, 175 (3d Cir. 2006).

[30] *See* FED. R. CIV. P. 23(e)(2); Rodriquez v. W. Publ'g Corp., 563 F.3d 948, 963 (9th Cir. 2009) (holding that, in considering whether a class action settlement is fair, reasonable, and adequate, a district court may consider several factors, including but not limited to the strength of the plaintiff's case, the extent of discovery conducted, the amount to be received by class members, and the class members' reaction to the settlement).

[31] *See* Yospe, *supra* note 10, at 1015–16 (providing an outline of the various reasons why funds may remain in a settlement pool after distributions to class members who have submitted claims).

[32] *See id.* (noting that parties often agree on how to allocate settlement funds).

[33] *See* Naschin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011) (noting that the cy pres doctrine allows courts to distribute excess settlement funds in a way that provides some indirect benefit to the class members); *see also* Jennifer Johnston, Comment, *Cy Pres Comme Possible to Anything Is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements*, 9 J.L. ECON. & POL'Y 277, 277–78 (2013) (noting that concerns about the extent of judicial discretion inherent in the application of the cy pres doctrine originated in early English law and continue today).

[34] *See Naschin*, 663 F.3d at 1036 (citing Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1307–08 (9th Cir. 1990)) (holding that the cy pres doctrine allows courts to distribute unclaimed or non-distributable portions of settlement funds to the "next best" beneficiaries). *See generally* Tim A. Thomas, Annotation, *Permissible Methods of Distributing Unclaimed Damages in Federal Class Action*, 107 A.L.R. FED. 800 (1992) (outlining and evaluating cases in which courts have utilized or declined to utilize the cy pres remedy to distribute unclaimed or non-distributable settlement funds).

[35] *See* Diamond Chem. Co. v. Akzo Nobel Chems. B.V., 517 F. Supp. 2d 212, 217 (D.D.C. 2007) (citing Powell v. Georgia-Pacific Corp., 843 F. Supp. 491, 495 (W.D. Ark. 1991)). When courts dispose of excess funds with further distribution to class members, whatever funds are left over will be transferred on a pro rata basis to class members who have already collected. *See In re Lupron*, 677 F.3d at 35 (citing *Klier*, 658 F. 3d at 475 (noting that where it is still economically and logistically impossible to make further pro rata distributions to class members, the settlement court should do so)). When escheat is employed, the remaining funds are transferred to the government, the idea being that

Pro rata distribution to already compensated class members increases the total amount distributed to class members, but could result in a windfall to those class members who collect over one hundred percent of their damages at the expense of other class members who did not or could not collect their compensation for whatever reason.[37] Some defendants argue that unclaimed funds should revert to them on the basis that the prospect of reversion might motivate them to provide a greater settlement, knowing that they may receive some money back.[38] But funds that revert to the defendant provide no benefit, either direct or indirect, to the class members.[39] Similarly, there is no direct benefit to class members when unclaimed funds escheat to the government, and any indirect benefit is tenuous.[40]

Because none of the above-mentioned options are particularly attractive, courts have increasingly sought to allocate excess funds to charitable organizations through cy pres distributions.[41] The policy rational behind the use of cy

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the government's use of the money will benefit the entire country and will consequently bring some benefit to class members. *See In re* Folding Carton Antitrust Litig., 744 F.2d 1252, 1255 (7th Cir. 1984) (holding that the district court's decision to use excess settlement funds for a cy pres distribution was an abuse of discretion and directing that the funds escheat to the United States). It should be noted that certain statutory requirements must be met for any funds deposited in the judicial system to escheat to the government. *See* 28 U.S.C. §§ 2041, 2042 (2012) (requiring that funds remain unclaimed for more than five years before they escheat to the United States). Reversion simply means that any unclaimed funds will be transferred back to the class action defendant. *See In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001) (noting that often reversion to the defendant is disfavored because the defendant has already conceded to the full amount offered in the settlement).

[36] *See infra* notes 37–40 and accompanying text (discussing the advantages and drawbacks to each of the four methods of distributing remaining class action settlement funds).

[37] *See In re Lupron*, 677 F.3d at 35; *Klier*, 658 F.3d at 475. The potential for such windfalls has encouraged many courts to allow for further pro rata distribution of excess funds only when it is economically and logistically feasible *and* when such distribution would not result in a windfall to class members who have already recovered one hundred percent of their actual damages. *See Klier*, 658 F.3d at 475. *But see* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (2010) (noting that when further distribution to class members is logistically and economically feasible it is almost always preferable to a cy pres distribution because the risk of windfall associated with further pro rata distribution is insignificant in practice, given that class members almost never recover one hundred percent of their actual damages).

[38] *See* Redish et al., *supra* note 3, at 638.

[39] *See id.*

[40] *See id.*

[41] *See, e.g.*, *Lane*, 696 F.3d at 816 (approving a cy pres distribution in lieu of direct distribution when direct distribution would have been economically infeasible because the cost of distribution surpassed amount available for distribution); *In re Lupron*, 677 F.3d at 37 (holding that district court did not abuse its discretion in directing excess settlement funds to hospitals engaged in research into the same medical conditions afflicting class members). The practice of using funds that cannot go directly to the intended beneficiary has its roots in trust law. *See Mirfasihi*, 356 F.3d at 784 (noting that in trust law the cy pres doctrine is invoked when distribution under the trust is impracticable or impossible under the principle that the settlor would prefer an indirect benefit of distribution to a beneficiary as close as possible to the intended beneficiary rather than a reversion to the settlor's residual legatees). Interestingly, in trust law the doctrine was invoked to provide an indirect benefit to the

pres in class action suits is that application of the doctrine provides the "next best" compensation to class members.[42] The idea is that if class members cannot benefit from a settlement through direct distributions, then the next best benefit to the class members would be achieved by distributing the funds to a charitable organization.[43]

Of course, not any charitable organization will serve to provide the next best aggregate, indirect, and prospective benefit to class members.[44] For example, directing funds arising out of a settlement of a pharmaceutical industry antitrust case to an organization providing low cost housing to law students would do little to benefit uncompensated class members.[45] As such, courts reviewing cy pres distributions require the charitable organization to advance interests that bear a "substantial nexus" to the interests of the uncompensated class members.[46] This requirement is designed to ensure that the funds directed to the cy pres recipient will provide *some* benefit the injured class members.[47]

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settlor—by equitably altering the terms of the trust so as to carry out the settlor's intentions as best as possible—rather than to provide an indirect benefit to the beneficiaries who could not receive distribution. *See id.*

[42] *See* Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012) (citing *Six Mexican Workers*, 904 F.3d at 1305 (holding that a cy pres award must qualify as the "next best" distribution to giving the funds directly to class members)); *Masters*, 473 F.3d at 436 (holding that the purpose of a cy pres distribution is to put the settlement funds to its next best use—the aggregate, indirect, and prospective benefit of the class members).

[43] See *Lane*, 696 F.3d at 821. *But see Mirfasihi*, 356 F.3d at 784 (asserting that there is no indirect benefit to class members by giving funds to a third party, and that the cy pres remedy is purely punitive because the only reason for applying it is to prevent the defendant from "walking away from the litigation scot-free").

[44] *See In re Lupron*, 677 F.3d at 33 (holding that a charitable organization must advance interests that reasonably approximate the interest of the uncompensated class members to qualify as a cy pres distribution recipient); *Lane*, 696 F.3d at 821 (holding that a district court cannot approve a cy pres distribution unless the recipient bears a "substantial nexus" to the interests of the class members, accounting for the nature of the plaintiff's suit, the objectives of any statutes underlying the plaintiff's claims, and the interests of the silent class members).

[45] *See In re Airline Ticket Comm'n*, 307 F.3d at 682 (holding that unclaimed settlement funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit and the interests of the class members). Using excess settlement funds from a pharmaceutical antitrust case to subsidize law student housing would not provide the "next best" benefit because advancing law student housing opportunities is not an objective underlying a pharmaceutical industry antitrust case. *See id.*

[46] *See In re Lupron*, 677 F.3d at 33 (holding that a charitable organization must advance interests that reasonably approximate the interest of the uncompensated class members to qualify as a cy pres distribution recipient).

[47] *See Naschin*, 663 F.3d at 1040. In *Naschin v. AOL, LLC*, the court rejected a cy pres distribution in an unfair trade practices case. *See id.* The court reasoned that the charitable organizations receiving distributions—the Boys and Girls Club and a Legal Aid foundation—did not adequately approximate the interests of the class members. *Id.* This was because the cy pres recipients were concentrated in Southern California and the class members were spread across the entire country. *Id.*; *cf. Six Mexican Workers*, 904 F.2d at 1308 (holding that district court's cy pres distribution was an abuse of discretion because there was no reasonable certainty that any class members—Mexican workers who

Cy pres distributions for funds remaining in the settlement pool have significant advantages over other mechanisms for distributing excess settlement funds.[48] Unlike pro rata distribution of excess funds, cy pres distributions result in no undue windfall to plaintiffs who do collect.[49] Similarly, unlike a reversion to the defendant, cy pres distribution does not winnow the deterrence effect associated with the defendant having to pay for injury underlying the plaintiff's claims.[50] And unlike escheat, cy pres distribution of excess funds creates the potential for the funds to more directly benefit to the class members.[51]

II. The Generous Judiciary: Problems Associated with Cy Pres Distributions

Concerns about the role of the judiciary in shaping cy pres settlements arise from the fact that cy pres settlements force federal judges into an unfamiliar role: selecting one of several equally meritorious charitable organizations for receipt of a cy pres award.[52] Courts and commentators have expressed concerns about putting judges into the role of deciding whether certain nonprofit entities are more or less "deserving" of limited cy pres funds than oth-

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were the victims of unscrupulous employers in the United States—would benefit from the works advanced by the charitable organization, which provided humanitarian relief in Mexico).

[48] *See* Albert A. Foer, *Enhancing Competition Through the Cy Pres Remedy: Suggested Best Practices*, ANTITRUST MAG., Spring 2010, at 87, 87–88 (arguing that in the context of class action antitrust litigation, cy pres distributions should be favored to other distribution mechanisms for excess funds because the funds can be directed to organizations that combat anticompetitive conduct that deprived class members of an efficiently functioning market).

[49] *See Klier*, 658 F.3d at 475 (noting that the pro rata distribution of settlement funds to class members who have already been compensated can create an undue windfall by allowing some class members to collect more than one hundred percent of their actual damages, which can be avoided by using a cy pres distribution to allocate the excess funds to an organization that will provide some indirect benefit to uncompensated class members).

[50] *Six Mexican Workers*, 904 F.2d at 1308 (noting that reversion to the defendant is inappropriate when the goals underlying the plaintiffs' claims include deterrence of similar future unlawful conduct). Unlike with reversion, when settlement funds are distributed through a cy pres remedy, the defendant feels the full economic consequences of its unlawful action because it gets none of the settlement or judgment back. *See Mirfasihi*, 356 F.3d at 784 (asserting that a cy pres remedy is purely punitive).

[51] *Compare* 28 U.S.C. § 2042 (2012) (providing no requirements that government use excess settlement funds obtained by escheat for the direct or indirect benefit of uncompensated class members), *with Dennis*, 697 F.3d at 865 (requiring that cy pres distribution go to charitable organizations that have a substantial nexus to the plaintiffs' interests).

[52] *See In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 38 (1st Cir. 2012) (noting that a distribution of funds at the discretion of the court is not a traditional Article III function); *In re* Compact Disk Minimum Advertised Price Antitrust Litig., 236 F.R.D. 48, 53 (D. Me. 2006) ("Federal Judges are not generally equipped to be charitable foundations: [they] are not accountable to boards or members for the funding decisions [they] make; [they] are not accustomed to deciding whether certain nonprofit entities are more 'deserving' of limited funds than others; and [they] do not have the institutional resources and competencies to monitor that 'grantees' abide by the conditions [they] or the settlement agreements set.").

ers.[53] In particular, Chief Justice John Roberts has expressed concerns about the respective roles that judges and litigants currently play in shaping cy pres remedies.[54]

This Part discusses some of the criticisms of cy pres distributions and examines proposed remedies to these problems.[55] Section A discusses a constitutional concern arising out of the fact that cy pres settlements may violate Article III standing requirements.[56] Section B then examines concerns about the potential for the appearance of impropriety inherent in granting judges the discretion to distribute large sums of money to charitable organizations.[57]

A. Not a Case or Controversy: Standing and Separation of Power Concerns Underlying Cy Pres Distributions

Generally, federal litigation involves two adverse parties, one of whom is seeking redress for an injury from the other party.[58] This is because Article III, section two of the Constitution limits the jurisdiction of federal courts to live cases and controversies.[59] The rational underlying this limitation is the basic necessity for a separation of powers: the unrepresentative judicial branch should be limited to resolving disputes rather than forming and executing substantive policy decisions.[60]

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[53] *See e.g.*, *In re Lupron*, 677 F.3d at 37–38 (expressing concern that litigants vest district courts with discretion in selecting a recipient); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 481 (5th Cir. 2011) (Jones, J., concurring) (noting the potential for abuse or, at least, the potential for appearances of impropriety, when judges dole out large sums of money); *see also* Goutam U. Jois, *The Cy Pres Problem and the Role of Damages in Tort Law*, 16 VA. J. SOC. POL'Y & L. 258, 260 (2008) (asserting that, given the wide range of cy pres beneficiaries, and the tenuous relationships they often bear to the interests of class members, the practice of cy pres distribution is more akin to legislative earmarking than judicial conflict resolution).

[54] *See* Marek v. Lane, 134 S. Ct. 8, 9 (2013) (statement of Roberts, C.J.).

[55] *See infra* notes 58–173 and accompanying text.

[56] *See infra* notes 58–102 and accompanying text.

[57] *See infra* notes 103–173 and accompanying text.

[58] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (noting that the doctrine of standing, which requires a plaintiff to show "injury in fact," is one of those landmarks that serves to identify disputes that are properly resolved through the judicial process); *see also* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 275 (2008) (noting that the U.S. Supreme Court has used the injury in fact requirement to preserve the separation of powers by limiting courts to their traditional role of resolving individual rights).

[59] U.S. CONST. art. III, § 2; *see* Honig v. Doe, 484 U.S. 305, 317 (1988) (noting that Article III of the Constitution limits federal courts to deciding only actual ongoing controversies); *see also* Lewis v. Cont'l Bank Corp., 494 U.S. 472, 577 (1990) (holding that Article III denies federal courts the power "to decide questions that cannot affect the rights of the litigants in the case before them," and restricts courts to resolving "real and substantial controversies admitting of specific relief"); Baker v. Carr, 369 U.S. 186, 206 (1962) (noting that the requirements embodied by the doctrine of standing work to ensure that the litigants have such a personal stake in the outcome of the controversy so that there will be sufficient adverseness to sharpen the presentation of the issues up for resolution).

[60] *See* Allen v. Wright, 468 U.S. 737, 750 (1984), *abrogated on other grounds by* Lexmark Int'l, Inc. v. Static Control Components, 134 S. Ct. 1377 (2014) (citing Valley Forge Christian Coll. v.

Although the Constitution does not explicitly define what amounts to a "case" or a "controversy," the U.S. Supreme Court has an established judicial doctrine defining when a court has the power to make binding decisions on parties.[61] The requirements arising out of this case law are commonly referred to as "standing requirements," which define when a litigant has standing to appear before a court.[62]

To have standing before a federal court, a party must establish three elements.[63] The first is that the party has suffered some "injury in fact": an invasion of a legally protected interest that is concrete and particularized, and "actual or imminent," as in not hypothetical or conjectural.[64] Second, the party must prove that there is a causal connection between the injury and the alleged conduct.[65] This means that the injury must be fairly traceable to the challenged action of the defendant and not the result of independent action by some third party not before the court.[66] Third, the party must show that it is "likely"—as opposed to "speculative"—that the injury will be redressed by a favorable decision.[67] If a party fails to establish any one of these factors, any adjudication by the court violates the dictates of the case or controversy requirement of the Constitution.[68]

The issue with the current cy pres distribution framework is that potential cy pres award recipients do not meet the traditional requirements for Article III standing.[69] They appear before the court, make arguments as to why they should receive a cy pres award, and have their plea decided upon by the judge, despite having suffered no injury and without complaining of harmful conduct

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Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471–76 (1982) (explaining that the standing doctrine defines, with respect to the judicial branch, the idea of separation of powers on which the federal government is founded)); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (holding that no principle is more fundamental to the limited role of the judicial branch than the case or controversy requirement); Warth v. Seldin, 422 U.S. 490, 498 (1975) (holding that the Article III "case or controversy" requirement, and the doctrine of standing to which it gives rise, are founded in concerns about maintaining the proper limited role of the judicial branch in a democratic society).

[61] *See Lujan*, 504 U.S. at 560; *Allen*, 468 U.S. at 751.

[62] *See Lujan*, 504 U.S. at 560; *see also* Heather Elliot, *The Functions of Standing*, 61 STAN. L. REV. 459, 465 (2008) (noting that the three requirements for standing arising out of the case law are so well established that they have been described as "numbingly familiar" by some commentators).

[63] *See Lujan*, 504 U.S. at 560.

[64] *See id.*

[65] *See id.*

[66] *See Simon*, 426 U.S. at 40–41.

[67] *See Lujan*, 504 U.S. at 561.

[68] See Temple v. Abercrombie, 903 F. Supp. 2d 1024, 1030 (D. Haw. 2012) (citing Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)) (holding that the Article III case or controversy requirement is not met if the plaintiffs lack standing, and that in such a case the federal court would lack subject matter jurisdiction).

[69] *See infra* notes 70–81 and accompanying text (outlining the argument that cy pres distributions fail to meet Article III standing requirements).

by any litigant or third party.[70] By making the decision to distribute excess settlement funds to a specific charitable organization, the court has not ruled upon any live case or controversy; rather, it has simply ordered that money be paid from the defendant to a party that is in no way adverse to it.[71]

This lack of any adversarial relationship between the potential cy pres award recipient and the litigants necessary for standing may render this type of function beyond the court's constitutional power.[72] This is because the presence of an "honest and actual antagonistic assertion of rights" to be adjudicated is indispensable to the exercise of the power of the judicial branch.[73]

Standing doctrine plays an important role in federal litigation—it works to ensure that the judicial branch does not encroach on other areas of government.[74] Further, cy pres beneficiaries—who arguably lack any standing—play a key role in the current cy pres distribution framework.[75] The lack of standing inherent in a cy pres beneficiaries' participation in the proceedings creates a

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[70] *See Klier*, 658 F.3d at 480–81 (Jones, J., concurring) (noting that cy pres distributions "likely violate Article III's standing requirements"); *see also* Redish et al., *supra* note 3, at 641 (arguing that introduction of the cy pres recipient into the proceeding transforms the adversarial dispute into a less than adversarial process in which the cy pres recipient participates but complains of no real injury in fact).

[71] *See Klier*, 658 F.3d at 480–81 (Jones, J., concurring). Based on this Note's survey of the case law and secondary literature, no court has specifically addressed the issue of whether a court's decision to distribute excess settlement funds to a charitable organization results in a violation of the case or controversy requirement, and thus constitutes an act beyond the limited sphere of judicial power. *See id.* (noting that the issue of whether cy pres distributions are unconstitutional has not been fully litigated in any court and suggesting that district courts should avoid raising these questions by refraining from making cy pres distributions). In fact, most courts simply assume that they retain full jurisdiction over any excess settlement funds and retain full equitable powers with respect to distribution. *See In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1393 (N.D. Ga. 2001) (citing *In re* Folding Carton Antitrust Litig., 744 F.2d 1252, 1254 (7th Cir. 1984)) (noting that when excess settlement funds remain, neither the defendant nor the class members have a legal claim to the funds and the court retains its equitable powers to distribute the funds).

[72] *See* Flast v. Cohen, 392 U.S. 83, 94–95 (1968) (noting that strict adherence to the case and controversy requirement underlying the standing doctrine defines the role assigned to the judiciary in the tripartite allocation of power and works to ensure that the judicial branch does not intrude into other areas committed to other branches of the government).

[73] *See* United States v. Johnson, 319 U.S. 302, 305 (1943).

[74] *See Flast*, 392 U.S. 83 at 94–95 (noting that strict adherence to the case and controversy requirement underlying standing defines the role assigned to the judiciary in the constitutional balance of power).

[75] *See In re Lupron*, 677 F.3d at 27 (noting that potential cy pres recipients prepared and submitted competing proposals for use of excess settlement funds for the court to review). Although potential cy pres beneficiaries actively participate in the settlement proceedings, they not claim any actual injury in fact. *See id.* For this reason, the cy pres beneficiaries do not meet the black letter requirements for standing. *See Lujan*, 504 U.S. at 559 (holding that, in order for a party petitioning the court to decide or resolve an issue, that party must claim some injury in fact). Because cy pres recipients lack standing, the court's decision as to whether to make a cy pres distribution to that party is arguably beyond the sphere of Article III courts' judicial power to resolve live cases or controversies. *See Flast*, 392 U.S. at 94–95 (holding that strict adherence to the standing requirements works to ensure that the judicial branch does not encroach into areas of government reserved for other branches).

significant risk that the court lacks the constitutional authority to make decisions as to which organizations deserve cy pres awards.[76] Without a solution to this standing issue, the continued viability of these types of settlements may be called into question.[77]

At first glance, it is hard to see how the current standing requirements and the current practice of allowing charitable entities to present themselves as potential cy pres beneficiaries can co-exist.[78] There is no way to get around the fact that cy pres beneficiaries have not suffered an "injury in fact" and thus cannot be considered to have standing in the traditional sense.[79] It is equally clear, however, that under the current cy pres distribution framework cy pres beneficiaries play an important role: they present themselves to the court and thus give the court viable options for distribution of funds.[80] Some resolution of this issue is necessary for the continued viability of the current cy pres distribution framework.[81]

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[76] *See supra* note 72–73 and accompanying text (discussing the fact that potential cy pres recipients lack standing because they have suffered no injury in fact, and in turn that the court does not rule on a live case or controversy when making cy pres distributions).

[77] *See Klier*, 658 F.3d at 480–81 (Jones, J., concurring) (questioning the constitutionality of cy pres distributions based on, among other things, the lack of standing by cy pres beneficiaries participating in the litigation); *see also* Redish et al., *supra* note 3, at 624 (arguing that the constitutional difficulties associated with the current cy pres distribution framework are sufficiently problematic to justify abandoning the practice of cy pres distribution in class action litigation entirely).

[78] *Compare Lujan*, 504 U.S. at 560 (requiring that a party present a concrete and particular invasion of a legally protected interest in order for the court to have jurisdiction to hear that party's petition), *with In re Lupron*, 677 F.3d at 27 (noting that the district court considered proposals submitted by two entirely uninjured charities and eventually selected one of these charities based on the proposals). *See generally* Redish et al., *supra* note 3 (arguing that the standing issue surrounding cy pres recipients, along with other concerns, is sufficient grounds to entirely abandon the practice of cy pres distributions).

[79] *See Baker*, 369 U.S. at 206 (noting that the requirements embodied by the doctrine of standing work to ensure that the litigants have such a personal stake in the outcome of the controversy that there will be sufficient adverseness to sharpen the presentation of the issues up for resolution). Based on the idea that one policy underlying standing is to ensure that the parties have a sufficient personal stake in the outcome, one could argue that standing exists because cy pres recipients are often in competition, and submit competing proposals, for the same distribution. *Cf.* Yospe, *supra* note 10, at 1049 (arguing that one way to limit the amount of discretion afforded to judges would be to make cy pres distributions in the context of competing proposals between potential recipients).

[80] *See In re Lupron*, 677 F.3d at 27–28 (detailing how a cy pres recipient presented itself to the court and submitted a proposal as to why it should receive funds). *But see In re Motorsports*, 160 F. Supp. 2d at 1398 (noting how the court unilaterally selected cy pres beneficiaries). Cy pres recipients often present themselves to the court and are active participants, but sometimes they have no involvement in the proceedings. *See In re Lupron*, 677 F.3d at 27–28; *In re Motorsports*, 160 F. Supp. 2d at 1398.

[81] *See Klier*, 658 F.3d at 480–82 (Jones, J., concurring) (expressing concern about the constitutionality of the current cy pres distribution framework, and noting that as of yet the issue has not been fully litigated in any court). Although the issue of whether cy pres beneficiaries' lack of standing creates impermissible separation of powers issues has not been fully litigated, the increasing amount of criticism of the current practice in the literature suggests that the issue may be addressed soon. *See*

One scholar has suggested that the lack of standing of potential cy pres beneficiaries, together with other problems associated with the practice, is sufficient grounds to entirely abandon the practice of cy pres settlements in general.[82] The basis for this argument is that the practice of allowing judges to go beyond resolving live cases and controversies—by making choices as to the proper cy pres award recipient—contravenes the core constitutional dictate of limited judicial power and undermines the validity of the use of the class action process.[83]

Despite the merits of this line of argument, it is not necessarily a reason to abandon the entrenched practice of cy pres distributions.[84] In response, courts and commentators should look beyond the obvious fact that potential cy pres distribution recipients do not have Article III standing, and recognize that, in practice, such distribution decisions are often made in the context of a very real dispute over whether such a distribution is proper.[85] Since litigants—particularly plaintiffs seeking further pro rata distributions of excess settlement funds—genuinely dispute a proposed distribution, there is an adversarial nature to these situations.[86] As such, the court can make its decision whether to

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generally Yospe, *supra* note 10, at 1021 (questioning the level of discretion afforded to federal judges in cy pres distributions).

[82] *See* Redish et al., *supra* note 3, at 624 (arguing that the current cy pres framework should be abandoned because of constitutional issues).

[83] *See id.*; *see also* Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 771 (2000) (holding that standing requirements are an essential and unchanging part of the Article III case or controversy requirement, which serves to limit the power of the judicial branch).

[84] *See infra* notes 85–102 and accompanying text (explaining ways courts may get around the Article III standing requirement).

[85] *See, e.g.*, *In re Lupron*, 677 F.3d at 32 (providing an example of a case in which consumer plaintiffs challenged the court's decision to distribute some of residual funds to a cancer treatment center, arguing that the funds should have been made available for further pro rata distribution to class members); *Klier*, 658 F.3d at 471 (providing an example of a case in which plaintiffs challenged the court's decision to ignore the terms of the settlement agreement and instead distributing excess funds as a cy pres award).

[86] *See, e.g.*, *In re Lupron*, 677 F.3d at 32 (providing an example where plaintiffs challenged the court's decision to distribute some of residual funds to a cancer treatment center); *Klier*, 658 F.3d at 471 (providing an example where plaintiffs challenged the court's decision to ignore the terms of the settlement agreement, instead distributing excess funds as a cy pres award). It should be noted that, generally, the dispute arises in the context of some class members challenging that the settlement is fair, reasonable, and adequate on the grounds that they should receive further pro rata distributions rather than have the excess funds go to a charitable organization. *See In re Lupron*, 677 F.3d at 32. The ideal situation would be an adversarial proceeding in which the class members claim that a cy pres distribution violates their right to receive further pro rata distributions and the cy pres beneficiary along with the defendant defends the propriety of a cy pres distribution. *See id.* This is because in such a case there is no standing issue, since the plaintiffs are claiming an injury in fact and the cy pres beneficiary steps into the role of the defendant to advocate for why a cy pres distribution does not cause an intrusion on the plaintiffs' legally cognizable rights. *See Lujan*, 504 U.S. at 560 (noting that plaintiffs would have an injury in fact if they allege an invasion of some legally protected interest). In this case, the legally protected interest infringed upon the by cy pres distribution would be the class mem-

distribute to this or that cy pres beneficiary—or to distribute excess funds pro rata to class members—based on the arguments advanced by the litigants and the cy pres beneficiary.[87] In this way, one could argue that the purpose underlying standing requirements is met.[88] This is because there is often a real adversarial proceeding underlying the distribution, which helps ensure that judges remain firmly engrained in their roles as arbiters of disputes rather than legislators or executives.[89]

Although a semi-adversarial process to determine whether cy pres distribution is proper is a solution that could potentially achieve the purposes underlying standing requirements, it will not have this result in all cases.[90] For example, this approach will fail in cases where the class members and the defendant agree to cy pres in general, but no potential beneficiaries present themselves to compete for a distribution.[91] In these cases, the judge would simply be forced to decide on an organization to which the funds should be distributed.[92] In this way the judge would be put back into the potentially constitution-

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bers' rights to fully recover for their actual damages. *See id.*, 504 U.S. at 560 (noting that plaintiffs would have an injury in fact if they allege an invasion of some legally protected interest).

[87] *See In re Compact Disk*, 370 F. Supp. 2d at 322. In 2005 in *In re Compact Disk Minimum Advertised Price Antitrust Litigation*, the U.S. District Court for the District of Maine created a semi-adversarial process by requiring the parties and the potential cy pres beneficiaries to submit competing proposals for how the funds should be used by charitable organizations to provide the next best benefit to the class members. *See id.* Some commentators have suggested that this type of semi-adversarial proceeding works to increase the chances of the court reaching an appropriate result, but as of now it is unclear whether any court has considered whether such a proceeding would resolve the standing issues discussed in this Note. *See* Yospe, *supra* note 10, at 1050–51.

[88] *See Allen*, 486 U.S. at 752 (noting that the law of Article III standing is built on the idea of separation of powers). Cy pres distributions where a judge unilaterally selects a cy pres recipient likely infringes on the separation of powers doctrine, because in that capacity a judge is not performing the traditional role of resolving disputes and is instead functioning like a legislator by appropriating funds under government control. *Compare* U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . . ."), *and* United States v. Butler, 297 U.S. 1, 64 (1936) (noting that the legislative branch has the exclusive power to appropriate funds for the general welfare of the nation), *with* U.S. CONST. art. III (providing that the judicial branch of the government shall have jurisdiction over cases or controversies, but notably lacking any mention of a judicial appropriation of funds).

[89] *See Flast*, 392 U.S. at 95 (noting that the Article III case or controversy requirement restricts the business of the judicial branch to questions presented in an adversarial context).

[90] *See* Yospe, *supra* note 10, at 1052 (not addressing the constitutional question of standing for cy pres beneficiaries, but noting that a semi-adversarial process for cy pres distributions does not always achieve ideal results).

[91] *But see* Diamond Chem. Co. v. Akzo Nobel Chems. B.V., 517 F. Supp. 2d 212, 217 (D.D.C. 2007) (explaining the existence of an adversarial dispute despite no competing cy pres beneficiaries presenting themselves because class members and defendants heavily litigated the propriety of the cy pres distribution and the propriety of class members' proposed recipient).

[92] *See In re Motorsports*, 160 F. Supp. 2d at 1395–96 (in which an adversarial process was achieved because defendants opposed plaintiffs' proposed cy pres distribution *and* the court solicited and considered proposals from potential cy pres award recipients).

ally impermissible role of appropriating funds outside of the context of resolving a live case or controversy.[93]

Another possible solution to the standing issue would be to remove the potential cy pres beneficiaries from the litigation process.[94] To do this, courts could simply mandate that a settlement will not be approved unless the parties agree as to how the potential excess funds will be distributed.[95] In this agreement, the parties could stipulate that all or part of the remaining funds will be distributed to a cy pres beneficiary.[96] If the parties agree to distribute potential excess funds to cy pres beneficiaries, they must designate which entities will receive distributions and in what proportion the funds will be distributed.[97]

One problem with requiring the parties to contractually agree upon a cy pres recipient is that it could impede the settlement process.[98] Courts have recognized that in some cases defendants may want to choose a cy pres recipient that would provide it with some sort of indirect benefit—like a charitable organization in which employees of the defendant would play a major role.[99] Class members would be unlikely to agree to such an arrangement, and would likely demand distribution to the charitable organization that would most di-

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[93] *See Allen*, 486 U.S. 737, 752 (1984) (noting that the case or controversy requirement is designed to ensure that the unelected judicial branch remains within the confines of its defined role—adjudicating disputes—within our system of government).

[94] *See* Yospe, *supra* note 10, at 1055–56 (noting that a potential solution to some problems arising from cy pres distributions would be to require the parties to contractually agree upon how excess funds will be distributed prior to the certification stage).

[95] *See* FED. R. CIV. P. 23(e)(2) (requiring the representative parties to fairly and adequately represent the interests of the absent class members as a condition of class certification). Courts could require such an agreement about how excess settlement funds will be distributed in the event of a settlement on the basis that this is necessary to ensure that the unnamed class members will be adequately represented in the proceedings. *See id.*

[96] Yospe, *supra* note 10, at 1055–56 (giving an example of a clause that could be introduced into an agreement between the class members and the defendant stipulating how unclaimed funds should be allocated).

[97] *See id.* It would be essential that the parties stipulate particular charities and the proportion of any unclaimed funds that go to each charity, because if they do not, the judge will be put back into the role of determining how to allocate the funds. *See infra* notes 157–162 and accompanying text (explaining how judges can only accept or reject settlement agreements; they do not have the authority to force parties to agree to specific terms unilaterally).

[98] *See infra* notes 99–102 and accompanying text (analyzing the potential impact of requiring cy pres beneficiary designations to be part of any class action settlement agreements).

[99] *See Marek*, 134 S. Ct. at 9 (statement of Roberts, C.J.) (noting that, despite opposition from class members, plaintiffs' counsel and the defendant agreed on a cy pres distribution to a newly created foundation governed, in part, by the defendant's employees). For example, in *Lane v. Facebook, Inc.*, a group of class members objected to a settlement under which unnamed class members would receive no direct distributions and the vast majority of funds would go to class counsel and to a charitable organization in which the defendant would play a major—and public—role. *See* 696 F.3d 811, 817–18 (9th Cir. 2012). In that case, the fact that the defendant would reap the benefit of goodwill based on its public participation in the cy pres recipient organization could have played a role in motivating some class members to challenge the settlement. *See id.*

rectly advance the interests underlying their case.[100] In this inevitable situation, requiring the parties to agree upon the cy pres beneficiary could impede the parties from actually reaching a settlement.[101] In practice, however, this concern probably would not extinguish this solution as a viable alternative because the choice of a cy pres recipient would be a small portion of a much larger settlement agreement, and would almost certainly not be the most contentious point in the agreement.[102]

B. No Checks on Power: Unfettered Judicial Discretion with Cy Pres Distributions

This Section discusses the potential for appearances of impropriety associated with granting unelected judges the discretion to distribute large sums of money in cy pres distributions.[103] Cy pres remedies present a unique problem: they often require federal judges to determine which of several competing entities—none of whom are interested in the underlying litigation—will receive potentially large sums of money.[104] Courts, commentators, and the media have noted this problem.[105] The appearance of impropriety is particularly striking

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[100] *Cf. Lane*, 696 F.3d at 820 (explaining how class members challenged the propriety of a cy pres distribution to an organization on the grounds that a person with ties to the defendant served on the board of the charitable organization). *But see Diamond Chem.*, 517 F. Supp. 2d at 220 (detailing how a class of chemical purchasers allegedly injured by suppliers' anticompetitive actions proposed and defended a cy pres distribution to an endowment at a law school to fund research into foreign and domestic consumer antitrust law, an allocation of funds that arguably provides little benefit to these specific plaintiffs).

[101] *See* Bourlas v. Davis Law Assocs., 237 F.R.D. 345, 356 (E.D.N.Y. 2006) (explaining how class members and the defendant reached a settlement specifically providing for a cy pres distribution of unclaimed funds while identifying specific cy pres beneficiaries in the settlement agreement); Hopson v. Hanesbrands, Inc., No. CV-08-0844 EDL, 2009 WL 928133, at * 9–10 (N.D. Cal. Apr. 3, 2009) (approving a settlement where the parties agreed that if unclaimed settlement funds were below a certain threshold, those funds would be distributed to specifically agreed upon charities, even though those charities lacked any substantial nexus to the interests of the class members).

[102] In some cases, the potential amount of unclaimed funds is relatively small in comparison to the overall settlement, and the negotiation over the cy pres recipient may not have a negative impact on the parties' ability to come to an agreement. *See Hopson*, 2009 WL 928133, at * 9–10.

[103] *See infra* notes 104–173 and accompanying text.

[104] *See In re Compact Disk*, 236 F.R.D. at 53 (expressing concern that federal judges are not equipped to operate as charities because they lack the resources to ensure that the funds are used as directed and they are not accountable to any board of directors, or even the general population, given their unelected status and lifetime tenure); *see also In re Lupron*, 677 F.3d at 38 (remarking that federal judges' Article III functions ordinarily does not include disbursement of funds to charitable organizations). *See generally* Yospe, *supra* note 10, at 1021 (questioning whether there is something fundamentally wrong with vesting judges with relatively unchecked discretion to distribute excess settlement funds to charitable organizations and proposing potential alternative distributions schemes).

[105] *See, e.g.*, *Klier*, 658 F.3d at 480-81 (Jones, J., concurring); *In re* Airline Ticket Comm'n Antitrust Litig., 268 F.3d 619, 625 (8th Cir. 2001) (noting that application of the cy pres doctrine in class action litigation has been a subject of controversy in federal appellate courts); SEC v. Bear, Sterns & Co., 626 F. Supp. 2d 402, 416 (S.D.N.Y. 2009) (noting that absent specific legislation courts have

when the cy pres recipient bears little or no relationship to the class members or the objectives underlying the lawsuit.[106] Underlying these distributions is an interpretation and application of the cy pres doctrine that is accepted in some courts but disfavored by others.[107] This interpretation is essentially that there are no limitations on a court's discretion to distribute excess settlement funds to charitable organizations.[108]

As an example, in the 2011 case *In re Motorsports Merchandise Antitrust Litigation* in the U.S. District Court for the Northern District of Georgia, consumers brought a price-fixing suit against vendors of merchandise sold at professional stock car races.[109] There, nearly $2 million remained in the settlement pool after distributions were made to all plaintiffs who filed claims.[110] The court solicited proposals from charitable organizations and ultimately decided to distribute $250,000 to nine different organizations, including the Lawyers Foundation of Georgia, a drug prevention program, a breast cancer foundation,

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generally unfettered discretion to distribute large sums of excess settlement funds to charitable organizations); Adam Liptack, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007), http://www.nytimes.com/2007/11/26/washington/26bar.html?_r=0, *archived at* http://perma.cc/CV4Z-LL6M (noting that cy pres distributions are an invitation to "wild corruption of the judicial process"); Editorial, *When Judges Get Generous*, WASH. POST (Dec. 17, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/12/16/AR2007121601433.html, *archived at* http://perma.cc/A8AR-BR3G (asserting that it borders on distasteful when judges allocate excess settlement funds to charitable organizations that bear little or no relationship to the plaintiffs or the underlying litigation); *see also* Johnston, *supra* note 32, at 278 (noting that concerns about the potential for abuses of discretion date back to as early as 1801 when one English jurist, Lord Kenyon, remarked that "the doctrine of cy pres goes to the utmost verge of the law . . . and we must take care that it does not run wild").

[106] *See When Judges Get Generous*, *supra* note 105 (criticizing a district court's decision to distribute excess settlement funds to groups combating substance abuse and eating disorders in a case involving allegations of antitrust violations by modeling agencies).

[107] *Compare In re Lupron*, 677 F.3d at 33 (emphasizing that failing to distribute cy pres funds to organizations that reasonably approximate the interests of the class or the objectives underlying their claims can lead to reversal), *with* Superior Beverage Co., v. Owens-Illinois, Inc., 827 F. Supp. 477, 479 (N.D. Ill. 1993) (holding that the cy pres doctrine permits courts to distribute funds for public interest purposes other than those approximating the interests of the class members and the purposes underlying their claims).

[108] *See Superior Beverage Co.*, 827 F. Supp. at 479 (holding that the cy pres doctrine permits courts to distribute funds for public interest purposes other than those approximating the interests of the class members and the purposes underlying their claims). Some courts will entirely eschew any requirement of a nexus. *See* Jones v. Nat'l Distillers, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1998) (approving of the proposition that, in the absence of an obvious cy pres recipient, courts may distribute excess settlement funds to a use completely unrelated to the interest of the class members). Without the requirement that there be some nexus between the class members' interests and the interests advanced by the cy pres recipient, it is harder to ensure that the funds will provide the intended indirect benefit to the class members. *See, e.g.*, *Lane*, 696 F.3d at 821 (holding that a cy pres recipient must bear a "substantial nexus" to the interests of the class members so as to increase likelihood of providing the "next best benefit").

[109] *See In re Motorsports*, 160 F. Supp. 2d at 1393.

[110] *See id.* at 1395.

and a children's hospital.[111] Although these organizations are undoubtedly dedicated to advancing the public interest in important ways, it is unclear how they provide any more benefit to class members—NASCAR fans in Georgia—than they would to the general public, or how they advance the purposes underlying plaintiff's lawsuit.[112]

Despite a court's best intentions, unrestricted discretion to distribute large amounts of funds remaining in a settlement pool will at best provoke litigants to question the fairness of the distribution and at worst provoke suspicions of impropriety.[113] In addition to the potential for appearances of impropriety, this unfettered discretion can be a burden on court resources.[114]

Further, burdening judges with unfettered discretion to distribute large cy pres funds can make the judges themselves uncomfortable not only with the possibility of improper appearances, but also with performing a task with which they are neither accustomed nor experienced.[115] One former federal judge describe the task of distributing cy pres funds as "not a true judicial function" that can "lead to abuses," and noted that it made him "more than a little uncomfortable that groups would solicit [him] for consideration as recipients of cy pres awards."[116]

The remainder of this Section outlines three ways to mitigate these problems.[117] First, Subsection 1 discusses the "substantial nexus" requirement between the interests of the class and the interests advanced by the cy pre recipient.[118] Subsection 2 then explains how parties could be required to select cy pres recipients.[119] Finally, Subsection 3 examines how legislative action could designate mandatory default cy pres beneficiaries.[120]

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[111] *See id.*

[112] *See* Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012) (requiring a substantial nexus between the interests advanced by the cy pres recipient and the interests of the class members to ensure that the award will result in the "next best" benefit to class members). In this case, the nexus between the objectives underlying the plaintiffs' suit and the interests advanced by the cy pres award recipients is clearly lacking. *See In re Motorsports*, 160 F. Supp. 2d at 1397–98. This is especially true given that one of the recipients—a Duke University children's hospital—is located in North Carolina, since most of the class members are located in Georgia. *See id.* at 1398; *see also Superior Beverage Co.*, 827 F. Supp. at 485 (granting a cy pres distribution from funds derived from antitrust suit brought by industrial glass consumers to an art museum to commission works by a preeminent glass artist).

[113] *See* Liptack, *supra* note 105 (noting that cy pres distributions are an invitation to "wild corruption of the judicial process"); *When Judges Get Generous*, *supra* note 105 (asserting that it borders on distasteful when judges allocate excess settlement funds to charitable organizations that bear little or no relationship to the plaintiffs or the underlying litigation).

[114] *See In re Compact Disk*, 236 F.R.D. at 53 (noting that federal judges do not have the institutional resources and competencies to act as charitable foundations).

[115] *See* Liptack, *supra* note 105.

[116] *See id.*

[117] *See infra* notes 121–173 and accompanying text.

[118] *See infra* notes 121–156 and accompanying text.

[119] *See infra* notes 157–162 and accompanying text.

[120] *See infra* notes 163–173 and accompanying text.

1. The "Substantial Nexus" Requirement

Courts, legislatures, and commentators have proposed different solutions to the problems arising out of vesting the judiciary with unfettered discretion to distribute excess settlement funds.[121] The primary solution—advanced by many circuit courts and the American Law Institute ("ALI")—is to require that cy pres recipients advance interests that "reasonably approximate" the interests of the class.[122] Generally speaking, this principle requires some level of congruence between the objectives of the cy pres recipient and the interests the class sought to advance through their suit.[123]

In some cases, the key factor limiting the potential for appearances of impropriety inherent in unfettered judicial discretion to make cy pres distributions is the fact that the court was restricted to considering those organizations that reasonably approximate the interests of the class.[124] The following examples are offered to illustrate the type of close nexus courts should strive to find between the interests of the class members and the interests advanced by the cy pres recipient so as to reduce the appearance of judges inappropriately dolling out settlement funds.[125]

In 2001, in *In re Lupron Marketing and Sales Practices Litigation*, the U.S. Court of Appeals for the First Circuit reviewed a case where the plaintiffs—a class of individuals who alleged to having been overcharged for a drug used to treat prostate cancer, endometriosis, and premature puberty in children—agreed to a settlement whereby unclaimed funds would be distributed at the discretion of the district judge.[126] Given the high mortality rate of class members, the multiple rounds of notices expected to inform class members of their right to compensation resulted in only a fraction of class members actual-

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[121] *See, e.g.*, *In re Lupron*, 677 F.3d at 33 (requiring that charitable organizations must advance interests that reasonably approximate the interest of the uncompensated class members to qualify as a cy pres distribution recipient); Jois, *supra* note 52, at 258 (arguing that judicial discretion to distribute unclaimed settlement funds should be abandoned in favor of general escheat to the state).

[122] *See In re Lupron*, 677 F.3d at 33. Some circuit courts have adopted the "reasonable approximation" language first proposed in the ALI's *Principles of the Law of Aggregate Litigation*. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (2010). Other courts have adopted a "substantial nexus" requirement. *See Lane*, 696 F.3d at 821 (holding that a district court should not approve a cy pres distribution unless it bears a "substantial nexus" to the interests of the class members).

[123] *See In re Lupron*, 677 F.3d at 33 (holding that cy pres distributions must reasonably approximate the interests of the class members, and instructing trial courts to consider the following factors in making this decision: (1) the purposes of any statute the class seeks remedy under, (2) the nature of the injury to the class members, (3) the geographic scope of the class members, (4) the reasons why settlement funds have gone unclaimed, and (5) the "closeness in fit" between the class and the cy pres recipient).

[124] *See In re Lupron*, 677 F.3d at 33.

[125] *See infra* notes 126–144 and accompanying text.

[126] *See In re Lupron*, 677 F.3d at 22.

ly filing for distributions.[127] Ultimately, after $11.4 million remained in the settlement fund once the consumer class members had filed for distributions, it was determined that additional notice campaigns would be unlikely to yield additional claimants.[128] According to the terms set out in the settlement agreement, which gave the district court the discretion to distribute excess settlement funds, the district court determined that it would distribute the balance of the remaining settlement funds to an organization dedicated to researching medical conditions treated by the drug Lupron.[129]

On appeal, some class members challenged the settlement as an abuse of the court's discretion, but the First Circuit affirmed the district court's approval of the settlement and found that there was no abuse of discretion.[130] In affirming, the First Circuit emphasized that the distribution to the research institutions was proper because class members would receive tangible benefits from research into the types of conditions that required them to purchase the drugs for which they were overcharged.[131]

Similarly, in 1997, in *Powell v. Georgia-Pacific Corp.*, the U.S. Court of Appeals for the Eighth Circuit reviewed a case in which plaintiffs were a class of workers who alleged that their employer had violated their rights under Title VII.[132] According to the terms of the settlement agreement, any funds remaining in the settlement pool after distribution would be distributed at the district court's discretion.[133] After distributions to individual class members and a determination that additional class members were unlikely to materialize, nearly $1 million remained in the settlement fund, most of which was the result of interest accrued on the funds.[134]

Nearly eight years after the initial disbursement of funds to class members, the plaintiffs eventually filed a motion for the court to distribute the remaining $1 million in settlement funds at its discretion.[135] In this motion, the plaintiffs requested that the court use the funds to establish academic scholarships for themselves and their relatives.[136] In addition, the defendant corporation filed a status report at the request of the court seeking to have the funds

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[127] *See id.* at 26–27.

[128] *See id.*

[129] *See id.*

[130] *See id.* at 37.

[131] *See id.* at 34–35. It is this type of indirect benefit to the class members that distinguishes distributions meeting the substantial nexus requirement from distributions that do not meet this standard. *See Superior Beverage Co.*, 827 F. Supp. at 485 (granting a cy pres distribution from funds derived from an antitrust suit brought by industrial glass consumers to an art museum to commission works by a preeminent glass artist).

[132] *See* 119 F.3d 703, 704 (8th Cir. 1997).

[133] *Id.*

[134] *See id.* at 705.

[135] *Id.*

[136] *Id.*

distributed to its chartable subsidiaries for the purposes of establishing a scholarship fund for black high school students.[137] Despite the initial basic agreement between the plaintiffs and the defendants as to how the remaining funds should be utilized, the plaintiffs ultimately decided to change their minds and seek further pro rata distribution directly to class members.[138] The district court ultimately rejected the plaintiffs' amended motion for direct pro rata distribution and ordered the parties to submit an agreed upon scholarship program.[139] Upon the advice of the parties, the district court distributed the funds to a scholarship program intended to be available only to black students in the vicinity of Crossett, Arkansas—the town in which the class members resided.[140]

Plaintiffs appealed the district court's approval of this cy pres distribution, seeking to secure further pro rata distributions directly to class members.[141] On appeal, the Eighth Circuit held that the district court did not abuse its discretion in approving distribution of the remaining settlement funds to the scholarship programs.[142] In so holding, the Eighth Circuit emphasized that the distribution for scholarships not only provided a relatively close indirect benefit to class members by subsidizing education for their children and relatives, but also sought to address the concerns underlying plaintiffs' claims—the employment opportunities available to African Americans living near the defendant's facilities in Crossett, Arkansas.[143] As in *In re Lupron*, the nexus between the interests of the class members—equalizing employment opportunities for African American citizens living near defendant's facilities—and the interests advanced cy pres recipient—furthering higher educational opportunities for African American students living near defendant's facilities so as to improve employment prospects—was sufficient to find no abuse of discretion.[144]

This congruence or "substantial nexus" is required by many courts—and suggested by the ALI—because it not only increases the chances that a cy pres distribution will actually provide the "next best" benefit to class members, but because it also decreases the likelihood that either the litigants or the general public will perceive any impropriety by the presiding district court judge in making the cy pres distribution.[145] In this way, adoption and strict application

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[137] *See id.*

[138] *See id.*

[139] *See id.*

[140] *See id.* at 707.

[141] *See id.*

[142] *See id.*

[143] *See id.*; *see also In re Airline Ticket Comm'n*, 307 F.3d at 683 (discussing and approving of the *Powell* court's decision to affirm the district court's cy pres distribution for the purposes of establishing the scholarship funds).

[144] *See In re Lupron*, 677 F.3d at 36–37; *Powell*, 119 F.3d at 707.

[145] *See In re Lupron*, 677 F.3d at 33; PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 (2010).

of the "substantial nexus" or "reasonable approximation" requirement is a strong mechanism for shielding courts and judges from the potential for appearances of impropriety inherent in the unrestricted discretion to make cy pres distributions.[146]

Despite the benefits of applying and strictly construing a substantial nexus requirement, this requirement is an imperfect solution to the potential for appearances of impropriety inherent in vesting judges with the discretion to make cy pres distributions.[147] Specifically, this solution fails to address the problem because of two related factors.[148] First, application of the substantial nexus requirement does not fully remove judicial discretion in making cy pres distributions, and as such the potential for appearances of impropriety will always remain.[149] This is because courts can strain the boundaries of the substantial nexus requirement.[150] Courts do this to varying degrees of success, but generally arrive at distributions that may appear to bear a nexus to the interest of the class, but in reality provide no more indirect benefit to the class members than it would to the general public.[151]

Second, there are often situations in which the court could try its best to apply the substantial nexus standard, but fail to arrive at a distribution with a

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[146] *See* Draba, *supra* note 10, at 135–40 (discussing the advantages of requiring a nexus between the interests of the plaintiffs and the interests advanced by the cy pres recipient and commenting on the problems that can arise when there is a cy pres distribution that lacks a nexus to the interests of the class).

[147] *See id. See also generally* Yospe, *supra* note 10 (discussing cases in which the court applied the substantial nexus requirement on its face, but reached a distribution that in reality bore a highly attenuated link to the interests of the class).

[148] *See infra* notes 149–154 and accompanying text.

[149] *See generally* Yospe, *supra* note 10 (discussing cases in which the court applied the substantial nexus requirement on its face, but reached a distribution that in reality bore a highly attenuated link to the interests of the class).

[150] *See, e.g.*, *In re* Infant Formula Multidistrict Litig., No. 4:91-CV-00878-MP, 2005 WL 2211312, at *3 (N.D. Fla. Sept. 8, 2005) (applying the nexus requirement to arrive at a distribution of $1 million in excess settlement funds to Hurricane Katrina relief when a settlement arose out of a nationwide infant formula price-fixing case because one major issue faced by relief agencies was providing essential food and drink to victims).

[151] *See* Diamond Chem. Co. v. Akzo Nobel Chems. B.V., Nos. 01-2118(CKK), 02-1018(CKK), 2007 WL 2007447, at *5 (D.D.C. July 10, 2007) (approving a cy pres distribution to George Washington Law School to fund national and international antitrust research in a case involving alleged price-fixing of industrial chemicals). Cases like the 2007 decision *Diamond Chemical Co. v. Akzo Nobel Chemicals B.V.* from the federal District Court in D.C. serve as a perfect example of poor application of the substantial nexus requirement, because at first there appears to be a nexus—the class brought an antitrust action and the recipient planned to do antitrust research—but without guidance on what type of antitrust research the school would perform, there is no guarantee that the research would benefit the chemical purchaser class member any more than it would benefit other consumers generally. *See id.* It is difficult to see how the distribution in *Diamond Chemical Co.* provided the "next best" benefit to the class members. *See id.*; *see also* Naschin v. AOL LLC, 663 F.3d 1034,1036 (9th Cir. 2011) (noting that the cy pres doctrine is to be applied to distribute funds to the "next best" class of beneficiaries).

sufficiently close nexus to avoid any potential for appearances of impropriety.[152] This is due to the fact that, given the diverse range of interests advanced by class action litigants, there is a significant chance that there will not be an existing charity advancing similar interests.[153] When judges are stuck with a class that has interests not reasonably approximated by any existing charity, they are forced to strain the substantial nexus requirement or eschew it all together.[154]

It is not suggested that courts strain the application of the substantial nexus requirement to advance their own interests; rather, judges are forced to strain it because it is often the case that there are no charitable organizations reasonably approximating the interests of the class.[155] As such, the substantial nexus requirement is an imperfect solution because anytime there is a tenuous connection between the class and the beneficiary the specter of impropriety will be present.[156]

2. Requiring Parties to Select a Cy Pres Recipient as a Condition of Settlement

In addition to the "substantial nexus" or "reasonable approximation" requirements, some courts and commentators have suggested another solution to

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[152] *See In re Motorsports*, 160 F. Supp. 2d at 1395.

[153] *See id. In re Motorsports* is a perfect example of this phenomenon—the class members were NASCAR fans who alleged that they were overcharged for their Dale Earnhardt Jr. trucker caps because of price-fixing among the vendors. *See id.* The issue is that there are no charities advancing the interests of NASCAR fans who were the victims of price-fixing, so the court simply chose random charities. *See id.* The court could have gone the route of the *Diamond Chemical Co.* court and allocated the funds to an antitrust research and enforcement foundation. *See Diamond Chem.*, 2007 WL 2007447, at *5. But this would still run into the problem that not all victims of alleged antitrust violations have the same interests—allocation of funds to an antitrust research organization will not, without specific directives on what industry the research should focus on, benefit NASCAR fans any more than it would benefit victims of alleged antitrust violations in the industrial chemical industry. *See Diamond Chem.*, 2007 WL 2007447, at *5; *In re Motorsports*, 160 F. Supp. 2d at 1395. In this way, support of antitrust research generally is unlikely to provide the "next best" benefit to victims of alleged antitrust violations in a specific industry. *See Diamond Chem.*, 2007 WL 2007447, at *5; *supra* note 154 and accompanying text (explaining how a court cannot monitor cy pres distributions effectively after they are made).

[154] *Compare Superior Beverage Co.*, 827 F. Supp. at 479 (eschewing the substantial nexus requirement and distributing funds to organizations that promote the public interest generally rather than any interest advanced by the class), *with In re Infant Formula*, 2005 WL 2211312, at *3 (applying the substantial nexus requirement, but straining to justify a tenuous nexus between a nationwide class alleging that they were overcharged for baby formula and Hurricane Katrina relief organizations).

[155] *Cf. In re Motorsports*, 160 F. Supp. 2d at 1395 (exemplifying that no charitable organization existed which reasonably approximated interests of class).

[156] *See Naschin*, 663 F.3d at 1039 (noting that the specter of judges and outside entities dealing in the distribution of settlement money can create the potential for appearances of impropriety); *When Judges Get Generous*, *supra* note 105 (asserting that it borders on distasteful when judges allocate excess settlement funds to charitable organizations that bear little or no relationship to the plaintiffs or the underlying litigation).

the problem of potential appearances of impropriety on behalf of courts making cy pres distributions would be to require the parties to reach an agreement about a particular cy pres recipient amongst themselves.[157] One method hinted at by some courts and commentators would be to require the parties to reach an agreement about a particular cy pres recipient rather than put this decision solely on the court.[158] Under this solution, the court would not approve of a settlement unless the parties had agreed to how any unclaimed funds would be appropriated.[159]

Imposing such a requirement on parties during the settlement process, along with strictly applying the "substantial nexus" or "reasonable approximation" requirement, would achieve two important results.[160] First, it would extinguish the possibility that class members would see the distribution as unfair or that the judge had somehow acted improperly in selecting the cy pres recipient.[161] Second, it would alleviate the significant burdens associated with determining which competing cy pres applicants should receive a cy pres award by shifting these costs to the litigants.[162]

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[157] *See infra* notes 158–162 and accompanying text (discussing requiring that parties select a cy pres beneficiary as a potential solution to the problem for appearances of impropriety).

[158] *See In re Lupron*, 677 F.3d at 38 (expressing concern about the parties abandoning the process of settling how to allocate unclaimed funds to the court, and emphasizing that courts could avoid these concerns by requiring the parties to identify cy pres recipients); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(c) (2010) (providing that, whenever feasible, the court should require the parties to select a cy pre beneficiary that reasonably approximates the interests of the class). Courts and commentators have suggested that once a settlement has been reached and there are excess funds remaining, the court should require the parties to select a cy pres beneficiary. *See In re Lupron*, 677 F.3d at 38. This Note argues that the court should require the parties to allocate potential unclaimed settlement funds *before* the approval of any settlement—i.e., courts should not approve settlements unless there is an agreed upon disposition of unclaimed funds. *See infra* notes 190–211 and accompanying text (arguing that judges should reject settlement agreements that do not contemplate what happens to excess funds); *see also* Yospe, *supra* note 10, at 1055–56 (suggesting that problems associated with the current unfettered discretion afforded to judges regarding the disposition of unclaimed settlement funds could be alleviated if the parties agree on how to distribute these funds prior to distribution of the settlement).

[159] *See Bourlas*, 237 F.R.D. at 356 (providing an example of a court approved settlement where the parties had already agreed on how excess settlement funds would be distributed).

[160] *See infra* notes 161–162 and accompanying text.

[161] *When Judges Get Generous*, *supra* note 105 (suggesting that it is inappropriate for judges to unilaterally select cy pres recipients and make distributions to those organizations). If the parties were to select the cy pres recipients themselves—or agree that the unclaimed funds should be allocated in some other manner, like reversion—there would be little concern that the judge was abusing his or her discretion. *See Naschin*, 663 F.3d at 1039 (noting that the specter of judges and outside entitles dealing in distribution of settlement money can create the potential for appearances of impropriety).

[162] *See In re Lupron*, 677 F.3d at 37–38 (noting that having judges research and select cy pres recipients taxes judicial resources).

3. Statutorily Mandating Cy Pres Recipients

Another way to shield judges from the potential for appearances of impropriety inherent in an unstructured cy pres distribution framework could originate in the legislative branch.[163] Rather than require judges to solicit, evaluate, and ultimately select charitable organizations for cy pres awards in the absence of any agreement by the litigants, the legislature could determine how excess funds should be distributed.[164]

Some state legislatures have already mandated that a certain portion of uncollected class action settlement funds be distributed to certain charitable organizations.[165] For example, Washington's court rules define the types of funds that may be subject to cy pres distribution—"residual funds."[166] The rules also require not only that any order approving a settlement agreement must provide for the distribution of residual funds, but also that no less than twenty five percent of such funds be distributed directly to the Legal Foundation of Washington.[167] Once at least twenty five percent of the residual funds have been distributed to the Legal Foundation of Washington, the courts have discretion to direct the remaining residual funds to any organization that bears a direct or indirect relationship to the objectives underlying the litigation, or to any organization that would otherwise promote the substantive or procedural interests of the class members.[168]

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[163] *See Bear, Sterns & Co.*, 626 F. Supp. 2d at 416 (outlining two state statutes that govern the distribution of unclaimed class action settlement funds); *see also* Yospe, *supra* note 10, at 1058–63 (discussing the development of state statutes mandating cy pres distribution of unclaimed class action settlement funds to specified organizations).

[164] *See* WASH. CT. R. 23(f)(2) (mandating that at least one quarter of residual settlement funds be distributed to the Legal Foundation of Washington to support access to the justice system for low income residents); MASS. R. CIV. P. 23(e) (providing that residual funds shall be distributed to a charitable organization which "support[s] projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based" or to Massachusetts IOLTA Committee, an organization dedicated to improving access to the justice system for low income citizens); *see also* N.C. GEN. STAT. § 1-267.10 (2013) (providing that any unclaimed funds in class action litigation will be divided equally among the Indigent Persons Attorney Fund and the North Caroline State Bar to provide legal services for indigent persons).

[165] *See* N.C. GEN. STAT. § 1-267.10; WASH. CT. R. 23(f)(2).

[166] *See* WASH. CT. R. 23(f)(1) (defining "residual funds" as funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorney's fees, and other court approved disbursements to implement the relief granted).

[167] *See id.* (f)(2). The Legal Foundation of Washington is an organization dedicated to promoting access to justice for low-income residents of Washington. *See* LEGAL FOUND. OF WASH., http://www.legalfoundation.org, *archived at* http://perma.cc/F9AL-27PU (last visited Mar. 21, 2015).

[168] *See* WASH. CT. R. 23(f)(2); *see also* Yospe, *supra* note 10, at 1061 (arguing that the Massachusetts statute providing for the distribution of unclaimed settlement funds is the most sound of all the state statutes because it mandates for some connection between the interests of the class and the interests advanced by the cy pres recipient, whereas other state statutes simply mandate a percentage of the unclaimed funds go to a particular charity regardless of whether there is a connection to the interests of the class members).

State statutes providing for the distribution of excess settlement funds are an effective means of curtailing the problems arising out of unfettered judicial discretion—and could serve as a model should Congress act on this problem—however, they give rise to several problems.[169] First, these statutes often direct residual funds towards entities that bear little or no relationship to the interests of class members.[170] This is problematic because courts have generally accepted that excess settlement funds should be used to provide the "next best" benefit to class members.[171] Second, such statutes often do not totally remove the potential for appearances of impropriety since they do not remove all discretion from the court in making cy pres awards.[172] These problems result in inadequate distribution mechanisms, because the statute will either fail to remove judicial discretion or fail to allow for the cy pres distribution to be customized to the particular interests of the class.[173]

III. An Anti-Judiciary Judicial Remedy: Requiring Cy Pres Beneficiary Designations in All Cy Pres Settlement Agreements

Although cy pres settlements have a lot of potential, both constitutional and practical issues create serious problems with the system as it stands.[174] The best way to avoid these problems is to require parties in class action settlements to determine where excess funds will go before the court approves the settlement agreement.[175] Section A explains the root of the two major problems

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[169] *See infra* notes 170–173 and accompanying text (discussing some of the problems of a legislative solution to cy pres distributions); *see cf.* Yospe, *supra* note 10, at 1061 (advocating for more legislation regarding cy pres distributions like that found in Massachusetts).

[170] *See* WASH. CT. R. 23(f)(2) (requiring not less than one quarter of residual funds be distributed to the Legal Foundation of Washington to support access to the justice system for low income residents). *But see* MASS. R. CIV. P. 23(e) (codifying the "substantial nexus" requirement for cy pres distributions).

[171] *See Dennis*, 697 F.3d at 865 (holding that cy pres award must qualify as the "next best" benefit to giving funds directly to class members); *In re Airline Ticket Comm'n*, 307 F.3d at 683 (requiring that the cy pres award go to an organization that would provide the "next best" benefit to class members).

[172] *See* WASH. CT. R. 23(f)(2) (affording judges the discretion to distribute three quarters of the unclaimed funds).

[173] *Compare* N.C. GEN. STAT. § 1-267.10 (2013) (providing that the settlement court shall direct the defendant to pay any unclaimed settlement funds to two particular charities, thereby removing judicial discretion as to the disposition of the funds but failing to allow for distribution to be tailored so that it goes to an organization that supports the causes underlying class members claims), *with* MASS. R. CIV. P. 23(e) (providing that the distribution of unclaimed settlement funds can be tailored to best advance the interests of the class, but failing to place concrete limits on judicial discretion).

[174] *See* Redish et al., *supra* note 3, at 641 (noting that separation of powers concerns arise because cy pres beneficiaries lack standing, thus forcing judges beyond the role of deciding a live case or controversy); Liptack, *supra* note 105 (noting the potential for appearances of impropriety that arise out of judges distributing unclaimed settlement funds).

[175] *See infra* notes 190–211 and accompanying text.

with the current cy pres distribution framework.[176] Then, Section B argues that these problems can be alleviated by requiring judges to reject any settlement agreement that does not contains a plan for how to allocate excess funds.[177]

A. Unconstitutional with a Tinge of Impropriety: The Root of the Problem

Two irreconcilable problems relating to the role of the court arise under the current cy pres analytical framework.[178] First, separation of powers problems arise when, under the current cy pres framework, judges are forced to unilaterally make cy pres distributions to charitable organizations that lack Article III standing because they have suffered no injury in fact.[179] The judge's role as distributor of funds creates separation of powers issues because allocating residual funds is arguably beyond the judicial branch's constitutionally designated role as arbiter of live "cases or controversies."[180] This is because there is no case or controversy when a judge makes a cy pres distribution, and the distribution is closer to an appropriation of funds—a role preserved for the legislature.[181]

The second problem relating to the role of judges under the current cy pres framework arises out of the relatively unfettered discretion afforded to judges in performing a distributive—rather than adjudicative—function.[182] When judges can select cy pres beneficiaries, particularly charities that bear little or no relation to the issues underlying the litigation, there is the potential

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[176] *See infra* notes 178–189 and accompanying text.

[177] *See infra* notes 190–211 and accompanying text.

[178] *See infra* notes 179–189 and accompanying text (arguing that there is no way around the clash between cy pres distributions and Article III standing requirements).

[179] *See Lujan*, 504 U.S. at 560 (noting that the doctrine of standing, which requires a plaintiff to show that they have suffered an "injury in fact," is one of those landmarks that serves to identify disputes that are properly resolved through the judicial process). Cy pres beneficiaries lack standing because they complain of no injury in fact. *See id.* (noting that an injury in fact is an invasion of some legally protected interest).

[180] *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000) (noting that a litigant's standing is an essential component of the case and controversy requirement, which serves to limit the power of the judicial branch).

[181] *See* Redish et al., *supra* note 3, at 624 (arguing that the current cy pres framework should be abandoned because of constitutional issues); *see also Vt. Agency of Natural Res.*, 529 U.S. at 771 (holding that the three requirements for standing form an irreducible constitutional minimum standard, which is a key mechanism for limiting the power and activities of the judicial branch so as to ensure appropriate separation of powers).

[182] *See In re* Compact Disk Minimum Advertised Price Antitrust Litig., 236 F.R.D. 48, 53 (D. Me. 2006) (expressing concern that federal judges are not equipped to operate as charities because they lack the resources to ensure that the funds are used as directed, and they are not accountable to any board of directors, or even the general population, given their unelected status and lifetime tenure); *see also In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 38 (1st Cir. 2012) (remarking that federal judges' Article III functions ordinarily does not include disbursement of funds to charitable organizations).

for appearances of impropriety.[183] This problem is partially solved by requiring a "substantial nexus" between the interests of the class members and the interests advanced by the cy pres recipient.[184] But this requirement does not extinguish the potential for appearances of impropriety because judges still retain a fair amount of discretion, and there will inevitably be cases in which no existing charity bears a sufficient nexus to the interests of the class to qualify as the distribution with the "next best" benefit.[185] Furthermore, this nexus requirement does not entirely remove the cy pres beneficiaries from the process, and, as such, fails to solve the separation of powers issues associated with forcing judges outside of their constitutionally designated roles.[186]

The separation of powers problem and the potential for appearances of impropriety both arise because the current cy pres framework forces courts out of the role for which they were designed and which the public understands and expects.[187] Courts are constitutionally limited to resolution of disputes, and are expected by the public to remain securely planted in this role.[188] As such, it is not surprising that both courts and the public are concerned about the role currently played by judges in the current cy pres framework.[189]

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[183] *See When Judges Get Generous*, *supra* note 105 (asserting that it borders on distasteful when judges allocate excess settlement funds to charitable organizations that bear little or no relationship to the plaintiffs or the underlying litigation).

[184] *See In re Lupron*, 677 F.3d at 33 (holding that failing to distribute cy pres funds to organizations that reasonably approximate the interests of the class or the objectives underlying their claims can lead to reversal on appeal).

[185] *See* Draba, *supra* note 10, at 135–40 (discussing the advantages of requiring a nexus between the interests of the plaintiffs and the interests advanced by the cy pres recipient and commenting on the problems that can arise when there is a cy pres distribution that lacks a nexus to the interests of the class).

[186] *See* Yospe, *supra* note 10, at 1025 (discussing cases in which the court applied the substantial nexus requirement on its face, but reached a distribution that in reality bore a highly attenuated link to the interests of the class).

[187] *See* U.S. CONST. art. III (providing that the jurisdiction of the courts extends to resolution of "cases" and "controversies"); Flast v. Cohen, 392 U.S. 83, 99 (1968) (citing Baker v. Carr, 369 U.S. 186, 204 (1962)) (noting that issues historically viewed as being capable of judicial resolution are those that are presented in adversarial context); *When Judges Get Generous*, *supra* note 105 (expressing unease at the prospect of judges moving beyond the role of arbiters of disputes and into the role of making large charitable distributions to cy pres beneficiaries).

[188] *See* U.S. CONST. art. III; *Flast*, 392 U.S. at 99; *When Judges Get Generous*, *supra* note 105 (expressing concern about the current role of judges in making cy pres distributions).

[189] *See, e.g.*, Marek v. Lane, 134 S. Ct. 8, 9 (2013) (statement of Roberts, C. J.) (expressing concern about the role of the judicial branch under the current cy pres distribution framework); *In re Lupron*, 677 F.3d at 38 (providing a cautionary note to district courts engaged in cy pres distributions); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 480–82 (5th Cir. 2011) (Jones, J., concurring) (expressing concern that the current role of judges and cy pres beneficiaries raises constitutional standing issues).

B. Avoiding the Problem Entirely: Removing Judges from the Cy Pres Equation

Because these problems arise out of the role judges currently play in the cy pres framework, the best solution is to remove the judges from playing any role in making cy pres distributions.[190] Although some commentators have suggested that simply limiting the discretion judges have in awarding cy pres distributions will solve the problem, this is an imperfect solution because the court still performs a function beyond its constitutionally limited role of adjudicating disputes.[191] Instead, judges and cy pres beneficiaries should not play any role in the distribution of excess settlement funds.[192] To do this, courts should simply require litigants to contractually agree as to how any excess settlement funds would be distributed.[193]

This solution solves the constitutional issues discussed and extinguishes the potential for appearances of impropriety inherent in the current cy pres framework.[194] Shifting the burden of allocating excess settlement funds to the litigants will have the effect of eliminating the separation of powers concerns discussed above, because judges would not be forced out of their constitutionally designated roles of resolving cases or controversies.[195] Further, requiring the parties to agree to a distribution scheme for unclaimed settlement funds

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[190] *See infra* notes 191–211 and accompanying text (arguing that judges should require cy pres beneficiary designations in settlement agreements before approval); *cf.* Yospe, *supra* note 10, at 1048–49 (suggesting that judges roles in cy pres distributions should be limited to choosing between competing beneficiaries presented by the litigants).

[191] *See* Yospe, *supra* note 10, at 1048–49 (discussing limiting judges' roles surrounding cy pres distributions as a solution to problems associated with the current level of discretion afforded to judges in the process).

[192] *See infra* notes 193–211 and accompanying text (arguing that judges should remove themselves, and potential cy pres beneficiaries, from the process of allocating excess settlement funds by requiring the parties to agree upon how excess funds will be allocated).

[193] *See In re Lupron*, 677 F.3d at 38 (expressing concern about the parties abandoning the process of settling how to allocate unclaimed funds, and emphasizing that courts could avoid these concerns by requiring the parties to identify cy pres recipients in settlement agreements); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(c) (2010) (providing that whenever feasible, courts should require parties to select a cy pre beneficiary that reasonably approximates the interests of the class). Courts and commentators suggest that once a settlement has been reached and there are excess funds, the court should require that the parties select a cy pres beneficiary. *See In re Lupron*, 677 F.3d at 38. This Note suggests that the court should instead require the parties to allocate potential unclaimed settlement funds prior to approval of any settlement; in other words, the court will not approve a settlement unless there is a plan of disposition for unclaimed funds. *See* Yospe, *supra* note 10, at 1055–56 (suggesting that problems associated with the current unfettered discretion afforded to judges could be alleviated if the parties agree on how to distribute these funds prior to the settlement distribution).

[194] *See infra* notes 195–211 and accompanying text.

[195] *See supra* notes 58–102 and accompanying text (noting that separation of powers issues associated with judges making cy pres distributions arise because judges go beyond their constitutionally defined sphere of power in making cy pres distributions because they are not resolving a case or controversy).

would totally eliminate the potential for appearances of impropriety, as the judge would play no role in selecting the beneficiary.[196]

Although some courts and commentators have explored settlement agreements specifying how unclaimed settlement funds should be distributed, it is unclear why this solution has not been widely discussed or adopted.[197] One reason this contractual solution has not been more thoroughly explored could be that it is beyond the court's power to mandate that the parties include terms providing for the treatment of unclaimed funds in their settlement agreements.[198] Rule 23 is clear that the claims of a certified class may be settled only with court approval.[199] The rule provides that the court can only approve a class action settlement that is binding on the class members after a hearing in which it determines that the settlement is fair, reasonable, and adequate.[200] The policy underlying Rule 23(e)(3) is to ensure that the settlement is in the best interests of those class members whose claims against the defendant will be extinguished.[201]

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[196] *See* Liptack, *supra* note 105 (noting the potential for appearances of impropriety when judges actively participate in the selection of cy pres beneficiaries). This solution would also have two ancillary benefits; first, it would free judicial resources currently being expended in researching and selecting charitable organizations for cy pres distributions. *See In re Lupron*, 677 F.3d at 37–38 (noting that having judges research and select cy pres recipients taxes judicial resources). Second, it could facilitate settlement by allowing more predictability. *See id.*

[197] *See* Bourlas v. Davis Law Assocs., 237 F.R.D. 345, 356 (E.D.N.Y. 2006) (noting that the class members and defendant reached a settlement specifically providing for a cy pres distribution of unclaimed funds to identified cy pres beneficiaries in the settlement agreement); Hopson v. Hanesbrands Inc., No. CV-08-0844 EDL, 2009 WL 928133, at * 9–10 (N.D. Cal. Apr. 3, 2009) (approving a settlement where the parties agreed that if unclaimed settlement funds were below a certain threshold those funds would be distributed to specific charities, even though those charities lacked any substantial nexus to the interests of the class members); *see also* Yospe, *supra* note 10, at 1055–56 (discussing contractual agreements as a mechanism for avoiding problems with unfettered judicial discretion).

[198] *See* FED. R. CIV. P. 23(e) (providing that the claims of a class may only be settled with court approval).

[199] *See id.*; *see also* Stanton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003) (noting that Rule 23 prohibits the court from approving a settlement unless it conducts a hearing and concludes that the settlement terms are fair, reasonable, and adequate).

[200] *See* FED. R. CIV. P. 23(e)(2). Further, the factors a court may consider in determining whether a settlement is fair, reasonable, and adequate are consistent across the federal circuits. *See, e.g.*, Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 117 (2d Cir. 2005) (noting that the established factors courts consider in determining whether a proposed settlement is fair, reasonable, and adequate include: (1) the risk and expenses of future litigation; (2) the reaction of the class to the settlement; and (3) the amount of the settlement in relation to the strength of the plaintiffs' claims); *In re* Cendant Corp. Litig., 264 F.3d 201, 232 (3d Cir. 2001) (same); Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1242 (9th Cir. 1998) (holding that a Rule 23(e)(2) determination requires the balancing of several factors including: (1) the strength of the plaintiffs' case; (2) the risk and expense of further litigation; (3) the amount of the settlement; and (4) the reaction of class members to the settlement).

[201] *See In re* Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995) (noting that courts and commentators have uniformly interpreted Rule 23(e)(2) to require courts to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extin-

The language of Rule 23(e) is unclear as to whether a court may impose certain terms on the parties' settlement to ensure that the settlement fairly, adequately, and reasonably represents the interests of the absent class members.[202] Ideally, the settlement court could use its Rule 23(e) authority to compel the parties to reach an agreement about unclaimed settlement funds.[203] The idea would be that unless the parties agree to disposition of unclaimed funds, the settlement would be unfair and inadequately represent the interests of the class members because it will inevitably result in costly further proceedings to determine distribution of the unclaimed funds.[204]

Rule 23(e) is silent on whether the authority to reject an unfair settlement includes the power to impose terms necessary to make that settlement fair, reasonable, and adequate.[205] The U.S. Supreme Court, however, has construed Rule 23(e) as limiting a court's power in the settlement process to approval or disapproval, and has rejected the proposition that a settlement court may require the parties to accept a settlement to which they have not agreed.[206] A settlement court may, however, advise the litigants that it will not accept a settlement as fair, reasonable, or adequate unless certain terms are deleted or modified.[207]

The practical significance of the Supreme Court's interpretation of Rule 23(e) is that a court may not unilaterally impose a provision providing for the distribution of unclaimed funds over the objections of the parties, but it *may* tell the litigants that it will not approve a settlement unless they themselves agree on a distribution scheme.[208] Settlement courts faced with the likely prospect that some of the settlement funds will be unclaimed after distribution to

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guished") (citation omitted). The court acts as a fiduciary during the settlement approval process, and must serve as guardian of the rights of absent class members. *See id.* (citing Grunin v. Int'l House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975)).

[202] *See* FED. R. CIV. P. 23(e)(3).

[203] *See id. But see* Red Ball Interior Demolition Corp. v. Palmadessa, 173 F.3d 481, 484 (2d Cir. 1999) (holding that settlement agreements are contracts and that general principles of contract law apply); Goldman v. Comm'r of Internal Revenue, 39 F.3d 402, 405–06 (2d Cir. 1994) (noting that settlements are a matter of contract, and general principles of contract law govern settlement agreements).

[204] *See In re Cendant*, 264 F.3d at 232 (noting that courts commonly consider the risk and expense of further litigation in determining whether a settlement meets the Rule 23(e)(2) requirement of being fair, reasonable, and adequate).

[205] *See* FED. R. CIV. P. 23(e).

[206] *See* Evans v. Jeff D., 475 U.S. 717, 726 (1986) ("[T]he power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed").

[207] *See id.*

[208] *See id.*; *see also* Jack B. Weinstein & Karin S. Schwartz, *Notes from the Cave: Some Problems of Judges in Dealing with Class Action Settlements*, 163 F.R.D. 369, 376 (1995) (discussing the role of judges in shaping class action settlements, and the limitations on a judge's ability to unilaterally impose settlement terms on the parties).

the class members can and should inform the litigants that it will not approve the settlement unless they provide for the distribution of these funds.[209]

Under this solution, judges would remove themselves from the cy pres distribution process by refusing to approve any settlement that does not provide for the distribution of excess settlement funds.[210] The judge could exercise this discretion on the grounds that a settlement that does not provide for excess funds will invite further litigation when the inevitable happens and funds remain after initial distribution to the class members.[211]

CONCLUSION

The current role judges play in making distributions of unclaimed class action settlement funds is concerning for two reasons. First, judges are often forced to go beyond their constitutionally defined role as arbiters of cases and controversies by making distributions to uninjured charitable organizations. Second, the discretion afforded to judges in this distribution process raises the potential for appearances that judges are favoring particular organizations that bear little or no relationship to the underlying class. The best way to resolve these issues is to remove judges from the process of allocating unclaimed settlement funds. This would solve the separation of powers issue because it would obviate the need for

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[209] *See Evans*, 475 U.S. at 726; *see also Bourlas*, 237 F.R.D. at 356 (providing an example of a settlement agreement that provides for the distribution of excess settlement funds).

[210] *See supra* notes 192–193 and accompanying text (noting that judges cannot unilaterally impose settlement terms over the objection of the parties, but can refuse to approve a settlement unless the parties themselves agree to modify the agreement). In many instances, the difference between a judge unilaterally imposing a term and refusing to approve a settlement unless a term is modified or added is somewhat fleeting because such action can often amount to coercion. *See* Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985) (holding that, although the law favors voluntary settlement, it does not sanction efforts by trial judges to effect a settlement through coercion). For example, in a heavily negotiated settlement in which the parties are truly motivated to settle, it is unlikely that they would be willing to risk the court not approving of a settlement even if they do not agree with the judge's proposed changes. *See* Brooks v. Great Atl. & Pac. Tea Co., 92 F.2d 794, 796 (9th Cir. 1937) (holding that a judge must not compel agreement by his or her *arbitrary* use of his power, and that an attorney must not meekly submit to a judge's suggestion, though it may be strongly urged). In this case, however, the use of the judge's power to compel agreement as to allocation of excess settlement funds would not be arbitrary, as an agreed upon allocation is necessary to avoid future litigation. *See Linney*, 151 F.3d at 1242 (holding that the risk of future litigation is a factor courts may consider in determining whether a settlement is fair, reasonable, and adequate). In many instances the difference between a judge unilaterally imposing a term and refusing to approve a settlement unless a term is modified or added is somewhat fleeting. *See id.* This is because a judge's refusal to approve a settlement unless a modification or additional is made can often amount to coercion if the stakes are high enough. *See id.* For example, in a heavily negotiated settlement in which the parties have a lot riding and want to settle, it is unlikely that they would be willing to risk the court not approving of a settlement even if they do not agree with the judges proposed changes. *See id.*; *see also* Redish et al., *supra* note 3, at 625 (noting the potential for a court to coercively order distribution of excess settlement funds to charitable organizations).

[211] *See Linney*, 151 F.3d at 1242 (allowing courts to consider the risk and expense of future litigation in determining whether a settlement is fair, reasonable, and adequate).

judges to do more than resolve cases and controversies. Additionally, it would solve the potential for appearances of impropriety issue because judges would play no role in the distribution of unclaimed funds, so there would no potential that judges could be seen as allocating funds to favored organizations. Judges can and should do this by refusing to approve settlement agreements that do not account for unclaimed settlement funds. Only judges can reign in their own power to help maintain the constitutional integrity of Article III courts.

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