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Saving Charitable Settlements

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ARTICLES

SAVING CHARITABLE SETTLEMENTS

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This Article defies the conventional wisdom that all charitable distributions from a class action settlement fund are types of cy pres*. Instead, it proposes a radical delineation between "*cy pres *remainders" (meaning settlement funds left over after individual monetary distributions) and "charitable settlements" (meaning money initially distributed to charities as part of class action settlements). While both have* cy pres *roots, these two settlement structures have been conflated, jeopardizing the potential utility of charitable settlements. After articulating more precise nomenclature for these distinct distribution methods, this Article justifies why we must preserve charitable settlements. This defense is particularly timely, as charitable settlements face growing attacks spurred by Chief Justice Roberts's comments in the 2014* Marek v. Lane *appeal. Once unchained from the strictures of the* cy pres *doctrine, charitable settlements become a tool to promote the larger regulatory objectives underlying class action procedures, including access to justice and deterrence.*

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INTRODUCTION

The next frontier of class action reform pits a legal favorite against a legal villain. Charities have long been judicial darlings.[1] By contrast, recent decisions demonstrate a clear disdain for class actions[2] and the lawyers who bring them.[3] The two intersect in charitable class action settlements, often called *cy pres*.

Charitable distributions equitably solve settlement disbursement problems, particularly in cases where administrative costs exceed individual compensation.[4] Take, for example, a small-stakes class action settlement where individual class members stand to recover $3. Because some class members are difficult to locate or forego making claims, significant settlement funds may be leftover. What should be done with the money? To date, the standard solution is to distribute the remainder to a non-profit or charity. In approving such distributions, courts use the *cy pres* doctrine, an equitable concept that allows a court to modify trust funds used for a specific charitable purpose when the trust is no longer viable.[5]

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1. *See, e.g.*, Wooton v. Fitz-Gerald, 440 S.W.2d 719, 726 (Tex. App. 1969) ("[C]harities are favorites of the law."); *see also In re* Farrow, 602 A.2d 1346, 1348 (Pa. Super. Ct. 1992).

2. *See, e.g.*, Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1375 (D. Minn. 1985) ("The judiciary have not always been receptive to creative and efficient ways to vindicate the rights of large groups of victims. We have now seen that many judges openly and on the record have suspicion and disdain for class actions as a means of redress."); Jean Macchiaroli Eggen, *The Synergy of Toxic Tort Law and Public Health: Lessons from a Century of Cigarettes*, 41 CONN. L. REV. 561, 606 (2008) (discussing how current class action reform "demonstrate[s] the suspicion and even disdain with which the class action device is viewed in some circles").

3. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 671–72 n.3 (1986) ("[I]t is interesting to note the frequency with which judicial opinions favoring new restrictions on the availability of class actions or other remedies criticize the plaintiff's attorney."); J. Thomas Rosch, Comm'r, FTC, Promoting Innovation: Just How "Dynamic" Should Antitrust Law Be? 19 (Mar. 23, 2010) (discussing how "recent Supreme Court precedent . . . has shown a disdain for the private class action bar").

4. *See, e.g.*, Powell v. Georgia-Pacific Corp., 119 F.3d 703, 706 (8th Cir. 1997); *In re* "Agent Orange" Prods. Liab. Litig., 597 F. Supp. 740, 841 (E.D.N.Y. 1984); *In re* Wells Fargo Secs. Litig., 991 F. Supp. 1193, 1194 (N.D. Cal. 1998). *See generally* RACHAEL P. MULHERON, THE MODERN CY-PRÈS DOCTRINE: APPLICATIONS & IMPLICATIONS 215–52 (2006) (discussing the application of *cy pres* in the class action context).

5. RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

Now, take a slightly different scenario. What if the parties anticipated the low claims rate from the outset? Since the administrative costs for distributing settlements often range from $5 to $10 per class member, such costs could exhaust a substantial portion of the settlement fund. To solve this problem, the parties negotiate a settlement agreement that *from its inception* distributes the money to a related charity or non-profit.

This type of settlement is now in jeopardy. Just last term, in *Marek v. Lane*[6]—an appeal stemming from a class action over Facebook's "Sponsored Stories" feature—Chief Justice Roberts signaled his interest in removing such settlements from the judicial toolkit. The appeal challenged a settlement directing Facebook to distribute $6.5 million to create a non-profit organization that provides online privacy education.[7] Because of settlement pay-out complications,[8] the distribution was in lieu of any monetary payment to class members.[9] After approval from the trial court[10] and Ninth Circuit,[11] objectors appealed to the U.S. Supreme Court.[12]

The Supreme Court denied the appeal[13] but not before Justice Roberts used the petition to issue a public statement against charitable class action settlements.[14] Such a statement accompanying a certification denial is rare—particularly for Justice Roberts.[15] Justice Roberts described what he characterized as the "disconcerting feature[]" of the settlement.[16] Citing legal scholarship critical of class actions,[17] Justice Roberts left little doubt about his skepticism of such settlements, noting his

> fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be

6. 134 S. Ct. 8 (2013).
7. *Id.* at 8–9.
8. *Id*. at 9.
9. *Id.*
10. Lane v. Facebook, Inc., No. C 08–3845 RS, 2010 WL 9013059 (N.D. Cal. Mar. 17, 2010).
11. Lane v. Facebook, Inc., 696 F.3d 811, 816 (9th Cir. 2012), *reh'g en banc denied*, 709 F.3d 791 (9th Cir. 2013).
12. Petition for Writ of Certiorari, *Marek*, 134 S. Ct. 8 (No. 13-136).
13. *Marek*, 134 S. Ct. at 8.
14. *Id.*
15. Robert M. Yablon, *Justice Sotomayer and the Supreme Court's Certiorari Process*, 123 YALE L.J. F. 551, 551–52 (2014) (noting such statements are issued just a "handful of times each year," most frequently by Justice Sotomayor, not Justice Roberts).
16. *Marek*, 134 S. Ct. at 9.
17. *Id.* (*citing* 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, 653–56 (2010) [hereinafter Redish et al., Cy Pres *Relief*]). Professor Martin Redish has published numerous works critical of class action mechanisms. *See, e.g.*, MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 71 (suggesting class actions are "judicial blackmail"); *see also* Jay Tidmarsh, *Superiority As Unity*, 107 NW. U. L. REV. 565, 568 (2013) (describing Redish's significant contributions to legal scholarship on class actions).

> selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on. This Court has not previously addressed any of these issues.[18]

Roberts's shot across the bow is hardly the first attack on class actions. Procedural gatekeeping in class actions is on the rise.[19] Private enforcement of business torts is significantly more difficult than a decade ago.[20] However, the "open invitation for objectors to bring a better case before the court" is the Court's first strike at class actions' settlement approval stage.[21]

Given the Facebook settlement in *Lane* and Roberts's accompanying call to arms, questions about charitable class action settlements are ripe for scholarly examination.[22] To date, however, no scholarship or jurisprudence has distinguished between various charitable distribution structures; instead, the trend is to conflate multiple, distinct methods under the generic rubric of *cy pres*.[23]

Scholars and the judiciary have explored arguments for and against *cy pres* remainders, i.e., charitable distributions of leftover settlement funds.[24]

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18. *Marek*, 134 S. Ct. at 9.

19. Christine P. Bartholomew, *Death by* Daubert*: The Continued Attack on Private Antitrust*, 35 CARDOZO L. REV. 2147, 2163 (2014) (discussing increased procedural gatekeeping in class actions); Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1261 (2014) ("[Justice] Roberts['s] Court decisions have also restricted access to class action litigation."); Scott Dodson, *Squeezing Class Actions*, SCOTUSBLOG (Aug. 30, 2011, 3:35 PM), http://www.scotusblog.com/2011/08/squeezing-class-actions/.

20. Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 457 (2014) ("Over the past decade, the Supreme Court and a number of influential circuit courts have revealed deep-seated skepticism (and hostility) to class action litigation, finding doctrinal and policy-based rationales to support cutting back on this potent procedural device."); *see also* Dodson, *supra* note 19 ("The Supreme Court's 2010 Term in particular evinces both skepticism of and hostility to class actions.").

21. Daniel Fisher, *Roberts Puts* Cy Pres *Settlements in Crosshairs As He Lets Facebook Pact Pass*, FORBES (Nov. 5, 2013, 9:43 AM), http://www.forbes.com/sites/danielfisher/2013/11/05/roberts-puts-cy-pres-settlements-in-crosshairs-as-he-lets-facebook-pact-pass/.

22. Partly in response to Justice Roberts's concerns, the Federal Rules Advisory Committee's Subcommittee on Rule 23 recently circulated a draft amendment to Rule 23 to address *cy pres* distributions. *See* ADVISORY COMM. ON CIVIL RULES, RULE 23 SUBCOMMITTEE REPORT 264 (2015), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2015-04.pdf.

23. *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, 269–70 (2014); Natalie A. DeJarlais, *The Consumer Trust Fund: A* Cy Pres *Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729 (1987); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2080 (2010); Jennifer Johnston, 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, 290 (2013); Kerry Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591 (1987).

24. *See, e.g.*, Boies & Keith, *supra* note 23, at 269–70; DeJarlais, *supra* note 23; Fitzpatrick, *supra* note 23, at 2080; Johnston, *supra* note 23, at 290; Barnett, *supra* note 23, at 1596–1600. In fact, the Civil Rules Advisory Committee has recognized the debate and is

However, distributions as in *Lane*, where an earmarked portion of a settlement went to a charity, have yet to be specifically analyzed. In this particular form, settlements are consciously structured for exclusive distribution to third parties: charitable distributions are not reserved for unclaimed funds but instead substitute for distributions to class members.[25] This Article coins a new term—"charitable settlements"—to describe such distributions.

Distinguishing between *cy pres* remainders and charitable settlements is not merely an exercise in semantics. Charitable settlement challenges raise basic questions about whether the purpose of a damages class action is compensation or social justice. Borrowing from *cy pres* doctrine requirements, some contend monetary class action settlements must always first attempt a distribution to class members.[26] This position bars most charitable settlements. In small stakes cases, individual distribution is often costly if not impossible.[27] Some critics already have submitted draft legislation prohibiting all charitable distributions.[28]

Questions about the propriety of charitable settlements impact more than just the settlement approval phase of class actions. Challenges to such settlements now bleed into the class certification process, with courts entertaining arguments that class actions should not be certified if only a charitable settlement is likely.[29] For example, in *Ramirez v. Dollar Phone Corp.*,[30] Judge Weinstein denied class certification for a group of low-income, non-English-speaking, immigrant calling card consumers.[31]

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currently exploring potential options regarding such settlements. *See* ADVISORY COMM. ON CIVIL RULES, *supra* note 22, at 27–38 (discussing various perspectives on *cy pres* distributions).

25. *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 817 (9th Cir. 2012); *In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1356 (S.D. Fla. 2011); *In re* Toys "R" Us Antitrust Litig., 191 F.R.D. 347, 353–54 (E.D.N.Y. 2000).

26. *See, e.g.*, Boies & Keith, *supra* note 23, at 281 ("[A] *cy pres* distribution of residual funds to a third party is permissible only when it is not feasible to make distributions to class members in the first instance or to make further distributions to class members.").

27. *See* Fitzpatrick, *supra* note 23, at 2079; *see also* Susan Beth Farmer, *More Lessons from the Laboratories:* Cy Pres *Distributions in* Parens Patriae *Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 393 (1999) ("Sometimes funds remain undistributed because the costs of distribution outweigh the individual share to which each . . . group member is entitled."); Goutam U. Jois, *The* Cy Pres *Problem and the Role of Damages in Tort Law*, 16 VA. J. SOC. POL'Y & L. 258, 264 (2008) ("[T]he costs of identifying and notifying the class members may be higher than the amount of their potential recovery, such that notifying the members would deplete the entire fund.").

28. Lawyers for Civil Justice's draft legislation aims to limit charitable settlements by attacking them on two fronts. *See* LAWYERS FOR CIVIL JUSTICE, TO RESTORE A RELATIONSHIP BETWEEN CLASSES AND THEIR ACTIONS: A CALL FOR MEANINGFUL REFORM OF RULE 23 (2013), *available at* http://www.reedsmith.com/files/uploads/DrugDeviceLawBlog/LCJ%20Comment_Class%20Action%20Reform_8-9-13.pdf. The first proposal would flatly prohibit any settlement that distributed funds to non-class members. *Id.* at 8–9. In the alternative, the legislation pushes for extreme reform by denying class attorneys compensation for funds given to nonclass members, thus undercutting the likelihood that small-stakes cases will be brought in the future. *Id.* at 23.

29. *See, e.g.*, Ramirez v. Dollar Phone Corp., 668 F. Supp. 2d 448 (E.D.N.Y. 2009).

30. 668 F. Supp. 2d 448 (E.D.N.Y. 2009).

31. *Id.* at 467.

Individually, alleged damages were minimal[32]—making this a case well-suited for a charitable distribution in place of direct compensation. However, the court held that because consumers suffered only small individual damages, a class action was not superior to other avenues of redress, such as legislative reform.[33] Accordingly, resolving how charitable settlements provide class members valuable relief is imperative for settlement approval and for class certification inquiries.

This Article sounds a different note, demonstrating how taking charitable settlements off the table would effectively gut the use of class actions for private enforcement of laws designed to protect consumers.[34] The Article proceeds as follows. Part I details judicial response to *cy pres* remainders and charitable settlements, explaining their shared origin, but more importantly, exploring the practical and conceptual differences between the two. It proposes the term "charitable settlements" to highlight these important differences. Part II defends charitable settlements, detailing their equitable and theoretical justifications. In doing so, Part II details, and then debunks, criticism of such settlements. With the theoretical roadblocks cleared, Part III identifies discrete and practical alterations to judicial evaluation of charitable settlements. These revisions strike a balance between saving charitable settlements and maintaining rigor in the settlement approval process under Federal Rule of Civil Procedure 23(e).

I. CHARITABLE SETTLEMENTS IN CLASS ACTIONS

Understanding charitable settlements requires some background on the *cy pres* doctrine and class action settlements. This part discusses: (1) the rise of charitable distributions and (2) judicial evaluation of charitable settlements.

A. The Rise of Charitable Distribution

Like many other areas of law, class actions are likely to settle before trial.[35] All federal class action settlements are evaluated by the same standard, Federal Rule of Civil Procedure 23(e), which requires "fair, reasonable, and adequate" settlements.[36] While courts encourage

32. *Id.* at 450 (noting the named class representative's claim would be for approximately $2).

33. *Id.* at 468 ("In the present case, the only adequate and appropriate way to protect the rights of the Rule 23(b)(3) class is through regulation and enforcement by a federal administrative agency.").

34. *See, e.g.*, *In re* Serzone Prods. Liab. Litig., 231 F.R.D. 221, 240 (S.D. W. Va. 2005) ("A class action significantly reduces the overall cost of complex litigation, allowing plaintiffs' attorneys to pool their resources and requiring defendants to litigate all potential claims at once, thereby leveling the playing field between the two sides." (citing *In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 842 (E.D.N.Y. 1984))); *see also* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 433 (2001) ("Class actions can reduce disparities in bargaining power between plaintiffs and defendants.").

35. WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 13:1 (5th ed. 2014).

36. *See* FED. R. CIV. P. 23(e)(2). This standard equally applies post-certification and to classes certified for settlement purposes.

settlements,[37] the approval process is extensive.[38] Courts consider: (1) the litigation's complexity and duration; (2) the class's reaction to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability and damages; (5) the risks of maintaining a class action; (6) the defendant's ability to withstand a greater judgment; (7) the settlement's reasonableness in light of the best recovery; and (8) its reasonableness in light of all the attendant risks of litigation.[39]

If the proposed settlement satisfies these criteria, the court grants preliminary approval.[40] It is then vetted by class members, who are notified of the pending settlement.[41] Disgruntled class members must elect one of two options: (1) they can opt out of the settlement, which preserves their due process rights and allows them to bring a subsequent suit for the alleged misconduct; or (2) they can object.[42] Once a class member opts out, he

37. *See* RUBENSTEIN ET AL., *supra* note 35, § 13:1 (noting that there is a "strong judicial policy in favor of class action settlement") (internal quotation marks omitted); *see, e.g.*, *In re* HealthSouth Corp. Secs. Litig., 572 F.3d 854, 862 (11th Cir. 2009) ("Public policy strongly favors the pretrial settlement of class action lawsuits." (quoting U.S. Oil & Gas Litig., 967 F.2d 489 (11th Cir. 1992))); Robinson v. Shelby Cnty. Bd. of Educ., 566 F.3d 642, 648 (6th Cir. 2009) ("[P]ublic policy strongly favors settlement of disputes without litigation . . . . Settlement agreements should therefore be upheld whenever equitable and policy considerations so permit." (quoting Ford Motor Co. v. Mustangs Unlimited, Inc., 487 F.3d 465, 469 (6th Cir. 2007))); Macedonia Church v. Lancaster Hotel, LP, No. 05-0153 (TLM), 2011 WL 2360138, at *9 (D. Conn. June 9, 2011) ("Federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain.").

38. Class actions pursued under Fair Labor Standards Act section 216(b) are beyond the scope of this Article. Section 216(b) does not apply in this case because it deals specifically with claims for minimum wages or overtime pay. *See, e.g.*, Sari M. Alamuddin et al., *Differences Between Rule 23 Class Actions and FLSA § 216(B) Collective Actions; Tips for Achieving Class and Collective Action Certification: And Certification Post-Dukes*, 890 PRACTISING L. INST. 293 (2012). Unlike compensatory Rule 23 cases, where class members generally are included unless they opt-out of the settlement, section 216(b) claims are described as "opt-in" actions because party plaintiffs must give written consent to become a party in the action. *Id.* at 301.

39. Some courts reference these factors by different names (e.g., the *Reed* factors and the *Girsh* factors). Despite different names, what each list of factors evaluates is common. *Compare In re* Cendant Corp. Litig., 264 F.3d 201, 232–33 (3d Cir. 2001) (citing Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)) (*Girsh* factors), *with In re* Oil Spill by Oil Rig "Deepwater Horizon," 295 F.R.D. 112, 146 (E.D. La. 2013), *and In re* Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., 851 F. Supp. 2d 1040, 1063 (S.D. Tex. 2012).

40. *See, e.g.*, Cook v. Howard Indus., Inc., No. 2:11CV199-KS-MTP, 2013 WL 943664, at *2 (S.D. Miss. Mar. 11, 2013); Wallace v. Powell, 288 F.R.D. 347, 371 (M.D. Pa. 2012); *In re* Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 633 (E.D. Pa. 2004).

41. *See* FED. R. CIV. P. 23(e)(1) (requiring the court to direct notice to "all class members who would be bound by the proposal"). The purpose of such notice is to permit absent class members an opportunity to review the settlement terms and be heard if they want to object or respond to the proposed settlement. *See, e.g.*, *In re* Prudential Ins. Co. Am. Sales Practice Litig., 148 F.3d 283, 326–27 (3d Cir. 1998); Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1407 (9th Cir. 1989).

42. FED. R. CIV. P. 23(e)(4)–(5). Opt-out numbers matter. First, as part of the settlement approval, courts often inquire about the number of opt-outs as an indicator of the fairness of the settlement. Second, some settlements are structured to include "blow provisions"—meaning if there are too many class members who opt-out, the settlement is no longer

loses standing to object to the settlement.[43] After hearing objections, the court decides whether to grant final approval.[44]

Once the settlement is approved, eligible class members usually stand to receive a monetary distribution. However, given the representative nature of class action suits, many class members cannot be located or are either unable or unwilling to satisfy claim requirements.[45] Some class members never learn of the settlement[46] or forego filing claims.[47] Even with directly mailed settlement checks, some are returned or never cashed.[48] Other times, the claim's process costs exceed individual settlement amounts. This is particularly true with low individual damage cases (often called "small-stake claims"), where the time and effort involved may not incentivize class members to submit claims.[49]

Hence, distribution of settlement funds is a key issue in any damages class action under Federal Rule of Civil Procedure 23(b)(3).[50] When settlement funds cannot be distributed to class members, courts can return the money to defendants ("reverters"); let the money escheat to the state ("escheatment"); or find an equitable way to distribute the money under the *cy pres* doctrine.[51] Of these, courts often reject reverters and

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binding. *See, e.g.*, Carlough v. Amchem Prods., Inc., 10 F.3d 189, 196 (3d Cir. 1993). Hence, opt-outs serve as a stopgap for potentially problematic settlements.

43. *See* Mayfield v. Barr, 985 F.2d 1090, 1092 (D.C. Cir. 1993); New Mexico *ex rel.* Energy & Minerals Dep't v. U.S. Dep't of the Interior, 820 F.2d 441, 445 (D.C. Cir. 1987); *see also* Jenson v. Cont'l Fin. Corp., 591 F.2d 477, 482 n.7 (8th Cir. 1979); *In re* Sunrise Sec. Litig., 131 F.R.D. 450, 459 (E.D. Pa. 1990); RUBENSTEIN ET AL., *supra* note 35, § 13:23.

44. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.635 (2004).

45. *See* MARCY HOGAN GREER, A PRACTITIONER'S GUIDE TO CLASS ACTIONS 37 (Supp. 2012).

46. *See, e.g.*, Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1306 (9th Cir. 1990) ("[A] substantial number of class members would never be located for distribution of the damage award.").

47. *See, e.g.*, SEC v. Bear Sterns & Co., 626 F. Supp. 2d 402, 405 (S.D.N.Y. 2009); Folding Carton Antitrust Litig., 557 F. Supp. 1091, 1104 (N.D. Ill. 1983). Foregoing claims filing is a particular problem for elderly or ill class members. Rhonda Wasserman, Cy Pres *in Class Action Settlements*, 88 S. CAL. L. REV. 97, 104 (2014).

48. *See, e.g.*, All Plaintiffs v. All Defendants, 645 F.3d 329, 330 (5th Cir. 2011) ("The settlement administrator sent checks to the last known addresses of plaintiffs, but many were returned as undeliverable or were never cashed."); Powell v. Ga.-Pac. Corp., 119 F.3d 703, 707 (8th Cir. 1997) ("[O]ver 125 checks were returned as undeliverable.").

49. *See, e.g.*, Nachsin v. AOL, LLC, 663 F.3d 1034, 1037 (9th Cir. 2011); Fitzpatrick, *supra* note 23, at 2080 ("[S]ometimes the amounts class members are entitled to under the judgment are so small that they do not come forward to claim their awards.").

50. FED. R. CIV. P. 23(b)(3) (setting forth the requirement for a monetary damages class action). The 1966 Amendment to Rule 23 resulted in larger classes, which correspondingly made it more difficult to reach all class members. *See* Johnston, *supra* note 23, at 281 (discussing how the 1966 amendments to the Federal Rules resulted in increased use of class action procedures). This amendment resulted in the growth of class actions in the 1970s. *Id.* It was during the rise of class actions that problems with the one plaintiff/one check settlement model came to light. *Id.* This Article focuses exclusively on 23(b)(3) class actions.

51. RUBENSTEIN ET AL., *supra* note 35, § 12:28; *see also Six (6) Mexican Workers*, 904 F.2d at 1307.

escheatment.[52] Reverters undermine class actions' deterrence goals, while escheatment is overly cumbersome and risks only benefiting local governments rather than advancing the goals of the underlying claims.[53] Consequently, courts instead approve settlements that provide alternative distributions under an expansive interpretation of the *cy pres* doctrine.[54]

Cy pres, meaning "as near as possible,"[55] is an equitable doctrine that allows the court to modify trust funds used for a specific charitable purpose when the trust is no longer viable.[56] *Goree v. Georgia Industrial Home*[57] provides a discrete example. There, the testator bequeathed money to "the Central Howard Association, an Orphan's Home located in Macon, Georgia."[58] However, no such association existed. Consequently, the court applied the *cy pres* doctrine, modifying the trust to allow the money to help orphaned children in Macon, Georgia.[59]

While the *cy pres* doctrine originated from trust law over a century ago, it since has been used in a variety of contexts—including class actions.[60] Courts have used *cy pres* as a shorthand for many different class action settlement structures during the last thirty years. Such options once included price rollbacks, discounts, and coupons.[61] But these distribution

52. *See, e.g.*, *In re* Lease Oil Antitrust Litig. (No. II), No. 1206 (MDL), 2007 WL 4377835, at *18 (S.D. Tex. Dec. 12, 2007) (rejecting escheatment); Sylvester v. CIGNA Corp., 369 F. Supp. 2d 34, 46 (D. Me. 2005) (rejecting settlement involving reverter); *accord* Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004) (labeling a reversion provision a "questionable feature" of a settlement agreement); *Sylvester*, 369 F. Supp. 2d at 52 ("[R]everter clauses are generally 'suspect' and need to be viewed cautiously since they 'undercut the deterrent effect of class actions . . .'"); Zawikowski v. Beneficial Nat'l Bank, No. 98 C 2178, 2001 WL 290402, at *2 (N.D. Ill. Mar. 22, 2001) ("[R]eversion provisions need careful scrutiny."). *But see In re* Online DVD-Rental Antitrust Litig., No. 12-15705, 2015 WL 846008, at *8 (9th Cir. Feb. 27, 2015) (permitting reverter).

53. *See* Boies & Keith, *supra* note 23, at 269; 2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 8:15 (10th ed. 2013) ("[A]n earmarked distribution to the government is cumbersome because it entails government involvement.").

54. *See, e.g.*, *In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001) ("[T]he substantive policies underlying the statutes upon which the plaintiffs sued would dictate a preference for an appropriate *cy pres* distribution rather than a reversion of undistributed funds to the defendant, the alleged wrongdoer." (quoting HERBERT B. NEWBERG & ALBA C. CONTE, NEWBERG ON CLASS ACTIONS § 11.20 (3d ed. 1992))).

55. RONALD CHESTER ET AL., THE LAW OF TRUSTS AND TRUSTEES § 431 (2000) (quoting Brudenell v. Elwes, 102 Eng. Rep. 171, 174 (1801)).

56. RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

57. 200 S.E. 684 (Ga. 1938).

58. *Id.* at 684–85.

59. *Id.* at 686.

60. *See* RESTATEMENT (THIRD) OF TRUSTS § 67 ("Occasionally, the term 'cy pres' is casually used to refer to reformations or judicial modifications in other contexts in which some modified effect is given to dispositions that would otherwise exceed what the law allows."); *cf.* Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 437 (2005) (applying the *cy pres* doctrine to donated conservation easements).

61. *See* Theodore H. Frank, Cy Pres *Settlements*, CLASS ACTION WATCH, Mar. 31, 2008, at 1; Johnston, *supra* note 23, at 292.

methods fell out of favor because they often advantage defendants by generating new sales out of alleged misconduct.[62]

Concerns about nonmonetary distributions spurred courts and the judiciary to limit such settlements, particularly for coupon deals. In 2005, the Class Action Fairness Act[63] (CAFA) created significant obstacles for settlement approval. Because of these restrictions, by 2008 the term *cy pres* generally referenced any settlement where funds went to a charity or a non-profit because of distribution problems—a settlement structure CAFA was notably silent on.

Rather than recognizing different forms of charitable distributions, courts and scholars universally call any class action settlement where money goes to charities or non-profits "*cy pres*." In some instances, courts use *cy pres* to signify the distribution of leftover settlement funds.[64] Other times, *cy pres* means settlements given entirely to charity.[65] Still other times, *cy pres* means settlements where the money is split between class members and a designated charity.[66]

In some ways, this generic phrase makes sense. All these settlements result in third party disbursements, solve distribution problems, and extend from courts' equitable power. However, in actuality, courts are approving two different types of charitable distributions: (1) *cy pres* remainders; and (2) charitable settlements. Though this Article is the first to make this distinction, the delineation is justified.

Cy pres remainders result from settlements where all the funds are intended to be distributed to class members. For example, take a $30 million settlement that gives each of the five million class members $6. In small-stake settlements, roughly 10 percent of class members submit

62. *See* Severin Borenstein, *Settling for Coupons: Discount Contracts As Compensation and Punishment in Antitrust Lawsuits*, 39 J.L. & ECON. 379, 399 (1996) (explaining how coupons may give defendants a competitive advantage); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1039 (2002) (same).

63. *See* 28 U.S.C. § 1712 (2012). *See generally* Andrew McGuiness & Richard Gottlieb, *New Class Action Law Contains Pitfalls for Defendants*, 28 CHI. LAW. 60 (2005) (discussing coupon settlement provisions in CAFA).

64. *See, e.g.*, *In re* Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 31–32 (1st Cir. 2009); Simon II Litig. v. Philip Morris USA, 407 F.3d 125, 131 (3d Cir. 2005); *In re* Mex. Money Transfer Litig., 267 F.3d 743, 746 (7th Cir. 2001); Diamond Chem. Co. v. Akzo Nobel Chems. B.V., No. 01-2118 (CKK), 2007 WL 2007447, at *1 (D.D.C. July 10, 2007).

65. Lane v. Facebook, Inc., 696 F.3d 811, 816 (9th Cir. 2012) *reh'g en banc denied*, 709 F.3d 791 (9th Cir. 2013); *see also* New York v. Reebok Int'l Ltd., 903 F. Supp. 532, 534 (S.D.N.Y. 1995) (settlement distributed to state recreational activities and facilities); *In re* Toys "R" Us Antitrust Litig., 191 F.R.D. 347, 353–54 (E.D.N.Y. 2000) (distributing $57 million to charity and schools); *In re* Vitamin Cases, 107 Cal. App. 4th 820, 831–32 (2003) (affirming charitable distribution as entire settlement).

66. *See, e.g.*, *In re* Holocaust Victim Assets Litig., 424 F.3d 132, 141 n.10 (2d. Cir. 2005); *In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1354–57 (S.D. Fla. 2011); Stanley v. U.S. Steel Co., No. 04-74654, 2010 WL 299493, at *1 (E.D. Mich. Jan. 20, 2010).

claims.[67] Hence, a significant pot of money is leftover—the amount of which varies depending on how many class members make a claim, but here it would be close to $27 million. That leftover pot is then distributed to a charity or non-profit, a distribution this Article calls a *cy pres* remainder. The settlement attempted to distribute directly to class members, which partly failed, so the court substituted a different recipient using its equitable powers.[68] Analogically, this is similar to courts' power in charitable trusts, thus justifying the *cy pres* label.[69]

In contrast, charitable settlements involve the settlement itself, not just a remainder, making them analytically distinct from *cy pres*. Severing charitable settlements from *cy pres* recognizes notable differences between the distribution methods.[70] Charitable settlements do not rely on failed distributions; rather, the original settlement specifically designates money to go to a non-profit or charity.[71] Consequently, charitable settlements are purely a solution to distribution problems and, at most, an extension of the equitable principles underlying the trust doctrine of *cy pres*—rather than an extension of the doctrine itself.

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67. *See, e.g.*, Walter v. Hughes Commc'ns, Inc., No. 09-2136 SC, 2011 WL 2650711, at *13 (N.D. Cal. July 6, 2011) ("[A]verage claims submission rates in similar class actions are typically ten percent or less."); Declaration of Shannon R. Wheatman, Kendrick v. Standard Fire Insur. Co., Nos. 2:06-CV-00141(DLB), 2:08-CV-00129(DLB), 2010 WL 4168582, at *1 (E.D. Ky. June 28, 2010) ("Typical claims rate are well under 5% so, in my opinion, a claims rate over 10% is very high."). These low claim rates are likely attributable to the reality that "individuals are not risk averse with respect to small losses." Fitzpatrick, *supra* note 23, at 2067.

68. *See, e.g.*, Superior Beverage Co., Inc. v. Owens-Ill., Inc., 827 F. Supp. 477, 479 (N.D. Ill. 1993) (describing charitable distributions as part of the judiciary's "broad equitable powers"); *In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1394 (N.D. Ga. 2001) (noting courts' broad equitable powers allow for charitable distributions).

69. *See, e.g.*, Folding Carton Antitrust Litig., 557 F. Supp. 1091, 1109 (N.D. Ill. 1983) ("We note that, because this fund already exists, the analogy between this case and the trust law origins of the *cy pres* doctrine is a particularly close one.").

70. For example, unlike in *cy pres* settlement, in the charitable settlement context, there is no settlor, meaning there is no one who originally created the fund, with an intent to create a gift at the time of funding. *See, e.g.*, Quinn v. Peoples Trust & Sav. Co., 60 N.E.2d 281, 286–87 (Ind. 1945); State *ex rel.* Att'y Gen. v. Van Buren Sch. Dist., 89 S.W.2d 605, 608 (Ark. 1936). With *cy pres* settlements, class members had at least an indirect possessory interest in the potential monetary distribution under the terms of the settlement. *Cf.* Boeing Co. v. Van Gemert, 444 U.S. 472, 480 (1980) ("Their right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel."). Thus, they can arguably satisfy the settlor requirement. This is not the case with charitable settlements, where the settlement terms do not provide class members with any possessory interest. While the defendant's coffers fund the settlement, the defendant does not satisfy this requirement. The settlement represents money allegedly wrongfully obtained from the class, not a charitable donation. Defendants' funding of the settlement is not wholly voluntary but rather intended to end litigation—thus meaning they lacked the intent to create a true gift. Thus, there is no settlor in the charitable settlement context—further justifying a distinction between the two settlement forms.

71. *See, e.g.*, New York v. Reebok Int'l Ltd., 903 F. Supp. 532 (S.D.N.Y. 1995) (settlement distributed to state recreational activities and facilities); *In re* Toys "R" Us Antitrust Litig., 191 F.R.D. 347, 349 (E.D.N.Y. 2000) (settlement distributed about or approximately $37 million in new toys through the Toys for Tots program and established a $20 million fund to buy books and computers for schools).

Charitable settlements are either earmarked or wholly charitable.[72] Earmarked charitable settlements designate funds for direct distribution to class members and funds to be distributed to a non-profit or charity. For example, the settlement in *In re Checking Account Overdraft Litigation*[73] included an earmarked settlement—the agreement split the $410 million settlement between class members and charity.[74] In contrast, wholly charitable settlements, like the Facebook settlement Justice Roberts questioned, give the entire settlement fund to a non-profit or charity: no settlement portion is directly distributed to class members.[75]

Instead of recognizing these nuances, judicial evaluation of charitable distributions is in a state of chaos. A discussion of judicial review of charitable settlements—and the accompanying confusion—is the focus of the next section.

B. Judicial Evaluation of Charitable Settlements

Rule 23(e) requires no special tests for assessing the fairness of charitable distributions. However, because such settlements can involve significant sums of money—often millions of dollars[76]—judges have generated supplementary common law requirements. These requirements include: a qualifying trigger; sufficient nexus; and lack of collusion.[77] From there, courts also consider how to calculate attorney fees in cases involving charitable distributions.[78] In applying these requirements and quantifying fees, judicial interpretation differs, resulting in confusion and inconsistent outcomes.

First, before permitting an alternative distribution, courts require some problem exist with directly distributing funds to class members, i.e., a

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72. *Compare* Assets Litig., 424 F.3d 132 (2d. Cir. 2005) (earmarked charitable settlement), and Stanley v. U.S. Steel Co., No. 04-74654, 2010 WL 299493 (E.D. Mich. Jan. 20, 2010) (same), *with In re* Netflix Privacy Litig., No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *1 (N.D. Cal. Mar. 18, 2013) (wholly charitable settlement), and *In re* Vitamin Cases, 107 Cal. App. 4th 820, 824 (2003) (same).

73. 830 F. Supp. 2d 1330 (S.D. Fla. 2011).

74. *Id.* at 1354–57. The earmarked portion reflected the portion of the class who could not be located because of a problem with defendant's recordkeeping. *See id.* In addition to an earmarked charitable distribution, the settlement agreement also included a *cy pres* remainder for any direct distributions that failed. *Id.* Hence, the percentage of the overall settlement going to charity would not be known until the end of the settlement distribution process. *Id.*

75. Lane v. Facebook, Inc., 696 F.3d 811, 817 (9th Cir. 2012), *reh'g en banc denied*, 709 F.3d 791 (9th Cir. 2013); *see also In re Vitamin*, 107 Cal. App. 4th at 831–32 (affirming *cy pres* award of an entire settlement).

76. *See, e.g.*, *In re Netflix Privacy*, 2013 WL 1120801, at *1 (approving $9 million wholly charitable settlement); *In re Vitamin*, 107 Cal. App. 4th at 824 (approving charitable distribution of $38 million to promote the health and nutrition of class members).

77. *See, e.g.*, *Lane*, 696 F.3d at 821; Nachshin v. AOL, LLC, 663 F.3d 1034, 1038–41 (9th Cir. 2011).

78. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 178 (3d Cir. 2013); Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 435 (2d Cir. 2007); Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990).

"trigger" requirement.[79] This trigger varies: some courts mandate a direct distribution be impossible or impracticable[80] while others allow mere inefficiency to justify charitable distributions.[81]

Generally, *cy pres* remainders—where leftover funds exist after distribution to class members—satisfy this trigger,[82] but the trigger for charitable distributions is unsettled. For net-zero cases, where the distribution's administrative costs exceed class members' individual monetary distributions, most courts approve charitable settlements.[83]

Courts are uncertain how to apply the trigger to low-sum cases, however, where costs do not fully exhaust the settlement fund. Some courts define the trigger requirement to require an attempted class member distribution before any distribution to a third party can occur.[84] For example, in *In re Lupron Marketing & Sales Practices Litigation*,[85] the First Circuit held distributions to third parties can occur only after meeting "the American Law Institute's benchmark of '100 percent recovery' for all class members."[86] Other courts have a more generous trigger requirement. For instance, the Second Circuit upheld a settlement in *New York v. Reebok International Ltd.*[87] without demanding any individual distribution prior to creating a charitable settlement. Rather, it approved a wholly charitable settlement because it would be "impracticab[le] [to] attempt[] to distribute the settlement proceeds among the multitude of unidentified possible

79. *See, e.g.*, *infra* notes 75–76 and accompanying text.

80. *See, e.g.*, *In re* Matzo Food Prods. Litig., 156 F.R.D. 600, 605 (D.N.J. 1994) (allowing charitable distribution when "distribution [is] economically impossible"); *In re* Dep't of Energy Stripper Well Exemption Litig., 578 F. Supp. 586, 591 (D. Kan. 1983).

81. *See, e.g.*, *Lane*, 696 F.3d at 825 ("[T]here is no dispute that it would be 'burdensome' and inefficient to pay the $6.5 million in *cy pres* funds that remain . . ."); *In re* Ins. Brokerage Antitrust Litig., 282 F.R.D. 92, 117 (D.N.J. 2012) ("Given the large number of class members, distribution of the Settlement Fund to each member would be inefficient and ineffective.").

82. *See, e.g.*, *In re* Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 684 (8th Cir. 2002); *In re* Folding Carton Antitrust Litig., 744 F.2d 1252, 1254 (7th Cir. 1984); Glen Ellyn Pharmacy, Inc. v. La Roche-Posay, LLC, No. 11 C 968, 2012 WL 619595, at *1 (N.D. Ill. Feb. 23, 2012).

83. *See, e.g.*, Jones v. Nat'l Distillers, 56 F. Supp. 2d 355, 357–58 (S.D.N.Y. 1999); New York *ex rel.* Koppell v. Keds Corp., No. 93 CIV. 6708(CSH), 1994 WL 97201, at *3 (S.D.N.Y. Mar. 21, 1994); *In re Matzo*, 156 F.R.D. at 605–06.

84. Courts adopting this narrow definition often reference the ALI's Principles of the Law of Aggregate Litigation, which states that "the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair." PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(b) (2010). Following the ALI Principles' lead, the recent Rule 23 Subcommittee Report uses similar language but alters it slightly to consider whether "the distributions are sufficiently large to make individual distribution economically viable." ADVISORY COMM. ON CIVIL RULES, *supra* note 22, at 265.

85. 677 F.3d 21 (1st Cir. 2012).

86. *Id.* at 30.

87. 96 F.3d 44, 49 (2d Cir. 1996) (upholding the charitable settlement allotted by the Southern District of New York); New York. v. Reebok Int'l Ltd., 903 F. Supp. 532, 534–35 (S.D.N.Y. 1995) (showing how California would distribute these funds to schools, parks, recreation departments, and community youth groups).

claimants" without depleting the settlement funds.[88] Thus, the trigger for approving a charitable settlement depends on the court.

Second, the common law nexus requirement evaluates the proposed third-party recipients.[89] Most courts evaluate whether the recipient's interests "reasonably approximate those being pursued by the class."[90] The closer the nexus, the more gain for class members.[91] For example, *Cohen v. Chilcott*[92] involved a $1.5 million charitable settlement from an antitrust class claim against hormonal contraceptive manufacturers who allegedly conspired to deny access to cheaper generics.[93] The settlement required the distribution be given to doctors, university health centers, and charities that provide reproductive health services.[94] In approving the settlement over objections that class members should instead receive money, the court highlighted how the distributions increased access to needed drugs—a societal benefit intended by the underlying antitrust claim.[95]

How the nexus requirement applies varies by court. At least one court has rejected the requirement altogether.[96] Some courts require a close nexus between the asserted claim and the charitable distribution, in terms of purpose and geographic scope of the charitable distribution.[97] Others focus the nexus requirement on the underlying statute's purpose—not the specific claim asserted—and the charitable distribution.[98] In these courts, it is enough for a charitable distribution to advance judicial access or consumer

88. *Reebok*, 96 F.3d at 49.

89. Charitable distributions have been used in a variety of ways. *See, e.g.*, *In re* EasySaver Rewards Litig., 921 F. Supp. 2d 1040, 1045–46 (S.D. Cal. 2013) ("The Cash Fund is non-reversionary . . . to fund higher education projects relating to internet privacy and consumer protection . . . ."); *In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1355 (S.D. Fl. 2011) (promoting "financial literacy"); *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 199 (D. Me. 2003) (music distributions to libraries and educational institutions); Diamond Chem. Co., Inc. v. Akzo Nobel Chems. B.V., No. 01 2118 CKK, 2007 WL 2007447, at *3 (D.D.C. July 10, 2007) (research on globalization and private antitrust enforcement); C. BRUCE LAWRENCE & BARBARA FINKELSTEIN, SPECIAL COMM. ON FUNDING FOR CIVIL LEGAL SERVS., *CY PRES* FOR CIVIL LEGAL SERVICES: A REPORT TO THE HOUSE OF DELEGATE FROM THE SPECIAL COMMITTEE ON FUNDING FOR CIVIL LEGAL SERVICES 3 (2006), *available at* https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26860 (legal representation for indigent populations).

90. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(c) (2010).

91. *See EasySaver*, 921 F. Supp. 2d at 1052; *In re* Eunice Train Derailment, No. 00-1267, 2012 WL 70651 (W.D. La. Jan. 9, 2012).

92. 522 F. Supp. 2d 105 (D.D.C. 2007).

93. *Id.* at 111.

94. *Id.* at 112.

95. *Id.* at 119; *accord* Albert A. Foer, *Enhancing Competition Through the* Cy Pres *Remedy: Suggested Best Practices*, 24 ANTITRUST 86 (2010) ("[B]ecause the funds will be used to promote competition or dissuade the kinds of actions that constituted an antitrust violation, or will benefit society in general, class members who did not assert a claim are indirectly benefited.").

96. *See* Shapira v. City of Minneapolis, No. 06-cv-2190, 2012 WL 1438813, at *2 (D. Minn. Apr. 26, 2012).

97. *See, e.g.*, *In re* Airline Ticket Comm'n Antitrust Litig., 268 F.3d 619, 626 (8th Cir. 2001).

98. *See, e.g.*, Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011) (requiring a "driving nexus"); *In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 33 (1st Cir. 2002).

protection research; the distribution's use need not perfectly align with the specific facts of the case.

A recent Third Circuit opinion has added another wrinkle to the nexus requirement. In *In re Baby Products*,[99] the court interpreted Rule 23 to require a "direct benefit" to class members.[100] The court did not fully explain the rationale behind this requirement beyond saying that "in our view . . . [charitable settlements] are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action—to compensate class members."[101] Nor did the court clarify how direct a benefit must be, though it explicitly left open the possibility of charitable distributions in lieu of monetary compensation.[102]

The third test (a lack of collusion) also has led to judicial confusion. For this test, courts determine if the charitable settlement demonstrates the parties acted in their own self-interest.[103] Some courts have identified three supposed indicia of collusion. These "red flags" are: (1) a high percentage of the settlement going to charity;[104] (2) clear sailing provisions—whereby defendants agree not to contest fee awards up to a certain monetary value;[105] and (3) reverters, meaning settlements where unclaimed funds return to the defendant.[106] While these red flags may have value for evaluating a *cy pres* remainder, they add little value for a charitable settlement. After all, any charitable settlement would raise the first of these red flags because the bulk of the settlement goes to charity.

Finally, even if a charitable settlement survives this three-prong analysis, courts differ on how to compute attorneys' fees. As part of the settlement approval process, class counsel submits fee applications to reimburse for the time and expenses spent litigating the class claim.[107] The Federal Rules of Civil Procedure give district court judges the discretion to grant class

99. 708 F.3d 163 (3d Cir. 2013).

100. *Id.* at 181.

101. *Id.* at 169.

102. *Id.*

103. *See id.* at 175; *In re* Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946–47 (9th Cir. 2011) (vacating approval of settlement in case with "warning signs" of collusion); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004) (stating because class actions are "rife with potential conflicts," district courts must scrutinize a proposed settlement to ensure that class counsel are acting "as honest fiduciaries for the class as a whole").

104. *See* Murray v. GMAC Mortg. Corp., 434 F.3d 948, 952 (7th Cir. 2006); Crawford v. Equifax Payment Servs., Inc., 201 F.3d 877, 882 (7th Cir. 2000).

105. Lobatz v. U.S. W. Cellular of Cal., Inc., 222 F.3d 1142, 1148 (9th Cir. 2000) (contending clear sailing provisions carry "the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class"); *see also* Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) ("[L]awyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.").

106. *In re Bluetooth*, 654 F.3d at 947; *Mirfasihi*, 356 F.3d at 785.

107. *See* Strong v. BellSouth Telecomm., Inc., 137 F.3d 844, 850 (5th Cir. 1988) (discussing how part of a court's duty in reviewing the fairness of a proposed settlement is to review a fee request).

counsel a "reasonable fee award for their efforts."[108] A fee petition's reasonableness is frequently determined by using the percentage of the settlement fund method,[109] which "resembles a contingent fee in that it awards counsel a variable percentage of the amount recovered for the class."[110] In calculating settlement values, some courts treat charitable distributions the same as money paid directly to class members, on a dollar-for-dollar basis.[111] But others have discounted charitable distributions in computing attorneys' fees.[112]

Between Rule 23(e) and the common law trigger, nexus, and collusion tests, the settlement review process appears highly structured. In reality, however, there is still a great deal of judicial discretion, which has led to inconsistent decisions over similar charitable settlements and created openings for objectors to challenge any charitable distribution.

Objections are a double-edged sword. On one side, objectors can provide a check to ensure in-depth judicial evaluation of a proposed settlement.[113] On the other side, objections can result in wasted judicial and attorney resources. As Professor Greenberg cogently explains:

> [I]n reality, all too frequently, objectors and their counsel see an opportunity to extract money from the parties or class counsel, whose efforts brought about the settlement, by threatening to upset or seriously detour the settlement. Objectors make arguments that are groundless yet

108. FED. R. CIV. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees . . . .").

109. In calculating fees, courts adopt one of three approaches: a percentage of the settlement fund; lodestar; or percentage of the fund with a lodestar cross-check. The lodestar method awards fees based on the number of hours worked on the case multiplied by a reasonable hourly rate. This figure then can be adjusted based on the risk of nonrecovery. *See* Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973) (creating the lodestar approach). Some courts use the cross-check method, which compares the first and second approaches. *See, e.g.*, *In re* Prudential Ins. Co. Sales Practice Litig., 148 F.3d 283, 333–34 (3d Cir. 1998). A great deal of scholarship exists that discusses the strengths and weaknesses of these methods. *See, e.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Actions*, 54 U. CHI. L. REV. 877, 887 (1987) (arguing in support of the percentage of the fund method because it "can align [clients'] interests with their own"); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 139–47 (2006) (arguing that lodestar cross-checks undermine optimal deterrence).

110. *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819 n.38 (3d Cir. 1995).

111. *See, e.g.*, Harris v. Vector Mktg. Corp., No. C-08-5198 EMC, 2012 WL 381202, at *5 (N.D. Cal. Feb. 6, 2012); McKinnie v. JP Morgan Chase Bank, N.A., 678 F. Supp. 2d 806, 816 (E.D. Wis. 2009); Parker v. Time Warner Entm't Co., 631 F. Supp. 2d 242, 269 (E.D.N.Y. 2009).

112. *See In re* Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) ("Discounting the amount of the *cy pres* payment in determining its value to the class is consistent with the nature of the indirect benefit *cy pres* provides to the class."); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13 cmt. a (2010) ("[B]ecause *cy pres* payments . . . only indirectly benefit the class, the court need not give such payments the same full value for purposes of setting attorneys' fees as would be given to direct recoveries by the class.").

113. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 44, § 21.643.

> sufficient to delay the settlement approval process for months or years unless class counsel or the parties agree to "buy off" the objector or the objector's counsel. Objector tactics can prove lucrative because the other parties may prefer to "buy off" the objectors rather than suffer the delay and additional expense necessary to defeat the objection.[114]

At this point, objections are almost pro forma with charitable settlements.[115] Objectors have seized on the supplemental requirements for charitable distributions developed by the courts. They challenge whether a distribution is impracticable, the nexus is sufficiently tailored, or the proposed recipient satisfies the nexus requirement.[116] They also challenge compensation for class counsel.[117] However, the most divisive issue with charitable settlements is whether the parties must first attempt a monetary distribution to class members.[118] Using the Third Circuit's "direct benefit" requirement, objectors and class action critics have attacked the entire concept of charitable settlements.[119]

The remainder of this Article deals with these challenges, making the case for charitable settlements and clarifying how to evaluate them under Rule 23(e). Part II responds to the objectors' argument that one must first attempt a monetary distribution to the class before a charitable settlement can be approved. Part III responds to the objectors' points regarding the common law requirements and calculating attorneys' fees.

II. THE CASE FOR CHARITABLE SETTLEMENTS

The defining feature of charitable settlements is also its most contentious: under such settlements class members forego direct compensation. While a *cy pres* remainder first attempts to distribute settlement funds to class members, charitable settlements do not. The charitable distribution is in

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114. Bruce D. Greenberg, *Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements*, 84 ST. JOHN'S L. REV. 949, 950 (2010).

115. *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 820 (9th Cir. 2012); *In re* Netflix Privacy Litig., No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *1 (N.D. Cal. Mar. 18, 2013); *In re* EasySaver Rewards Litig., 737 F. Supp. 2d 1159 (S.D. Cal. 2010).

116. *See, e.g.*, Dennis v. Kellogg Co., 697 F.3d 858, 863 (9th Cir. 2012) (challenging whether the proposed distribution and recipients were sufficiently tailored); *Lane*, 696 F.3d at 820 (challenging, inter alia, whether distribution was impracticable); *In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 37 (1st Cir. 2012) (challenging proposed recipient).

117. *See supra* note 109 and accompanying text; *accord In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1361 n.30 (S.D. Fla. 2011) ("[M]ost if not all of the Objections are motivated by things other than a concern for the welfare of the Settlement Class. Instead, they have been brought by professional objectors and others whose sole purpose is to obtain a fee by objecting to whatever aspects of the Settlement they can latch onto.").

118. *Compare In re* Auction Houses Antitrust Litig., No. 00 CV 0648, 2001 WL 170792, at *15 (S.D.N.Y. Feb. 22, 2001) (rejecting settlement as unfair for not providing initial direct compensation), *with In re* Vitamin Cases, 107 Cal. App. 4th 820, 832 (2003) (stating there is no requirement "that a settlement allow for individual claims before its fund can be distributed to *cy pres* relief").

119. *See, e.g.*, Poertner v. Gillette Co., No. 6:12-cv-803-Orl-31 (DAB), 2014 WL 4162771 (M.D. Fla. Aug. 21, 2014) (challenging proposed settlement, in part, because of the settlement does not directly benefit class members monetarily); Dryer v. Nat'l Football League, No. 09-2182 (PAM/AJB), 2013 WL 5888231, at *7 (D. Minn. Nov. 1, 2013).

lieu of a payday for class members. Some courts and scholars take issue with this result, arguing charitable settlements are per se invalid because they do not directly compensate class members.[120] This part explains why this argument is wrong.

As a starting point, such arguments confuse *cy pres* remainders and charitable settlements. While both resolve distribution problems, as discussed in Part I, they are distinct settlement structures. Under the *cy pres* doctrine, courts can substitute payouts to class members with "the next best" recipient, i.e., a charitable organization, but only if the initial distribution to the class fails or becomes impracticable.[121] In contrast, with charitable settlements, there is no requirement for a preliminary attempt to distribute to class members. That requirement only comes from the *cy pres* doctrine, not from any explicit requirement under Rule 23(e). Requiring all charitable distributions have an initial unsuccessful attempt to distribute money to class members reflects an unfortunate blurring of two very different settlement structures.

More fundamentally, though, arguing that charitable settlements must fail because they do not distribute money to class members has larger implications for class action jurisprudence. It subtly redefines the goals of class actions, making compensation the only purpose of Rule 23(b)(3). The better view is that compensation is just a by-product of a class action's regulatory function.[122] A class action is a procedural mechanism that allows individuals to "supplement regulatory agencies both by requiring wrongdoers to give up their ill-gotten gains and by ferreting out misconduct

120. Some argue *cy pres* still may be an option for a remainder, but others take issue with any charitable distribution—including *cy pres*. For more ardent critics, only monetary distributions benefit class members. *Compare* Boies & Keith, *supra* note 23, at 281 (arguing in favor of *cy pres* settlements but against charitable settlements), *with* Redish et al., Cy Pres *Relief*, *supra* note 17, at 621–24 (arguing against all charitable distributions). Often, portions of the American Law Institute Principles are cited to support this conclusion. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013). However, when read in its entirety, the ALI Principles do not create a presumptive barrier but rather recognize such distributions still may be appropriate for small-stakes cases: if the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (2010).

121. *See, e.g.*, *Dennis*, 697 F.3d at 865 ("[T]o ensure that the settlement retains some connection to the plaintiff class and the underlying claims, however, a *cy pres* award must qualify as 'the next best distribution' to giving the funds directly to class members."); Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990) ("Even where *cy pres* is considered, it will be rejected when the proposed distribution fails to provide the 'next best' distribution.").

122. *See, e.g.*, Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 228 (2004) ("[I]t must be kept in mind that the objective of consumer class actions is not only compensation, but also deterrence and disgorgement of wrongful profits.").

that may have escaped the regulators' observance."[123] As a result, class actions serve a larger collective good: they allow individuals to vindicate their legal rights and deter wrongdoing, minimizing future harm.[124] Therefore, there are broader regulatory goals, beyond mere compensation, behind the federal system for aggregate litigation.

Assessing class actions with an eye toward their regulatory potential makes particular sense for small-stakes cases. Where individual recovery is minimal, non-compensatory goals rise to the foreground. The focus should not be on whether a class member is compensated for his $2 injury.[125] Rather, as Justice Berger described:

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.[126]

Thus, the proper question is whether the relief charitable settlements offer fulfills the regulatory function of class actions. This part explains how the charitable settlements promote individuals' opportunity to vindicate rights and deter future wrongdoing.[127]

A. Charitable Settlements Vindicate Substantive Rights

Charitable settlements serve a valuable purpose, consistent with class action goals, because they preserve putative class members' ability to assert

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123. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 232 (1987). The purpose of class actions have long since been debated, with some arguing that class actions are more about autonomy and efficiency than about regulatory goals. *See, e.g.*, Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 49 (1975); *see also* Edward Brunet, *Improving Class Action Efficiency by Expanded Use of* Parens Patriae *Suits and Intervention*, 74 TUL. L. REV. 1919, 1939 (2000) (describing competing law and economic class action arguments). However, a more practical approach recognizes both justifications as synergistic rather than in tension. In some cases, class actions are more efficient than multiple potential cases. In other situations, multiple cases are unlikely—particularly when potential damages hardly cover the costs of bringing suit. In those cases, regulatory goals justify a class actions' utility. *See, e.g.*, Leszczynski v. Allianz Ins., 176 F.R.D. 659, 676 (S.D. Fla. 1997) ("Class actions are particularly appropriate, where, as here, multiple lawsuits would not be justified because of the small amount of money sought by the individual plaintiffs."). Thus, because charitable settlements primarily arise in small-stakes cases, focusing on class actions' regulatory function is appropriate.

124. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 666 (1979) (discussing "the societal benefits derived from deterring socially proscribed conduct and providing small claim rectification" through class actions).

125. *See* Fitzpatrick, *supra* note 23, at 2067 ("[I]ndividuals are indifferent between, say a loss of $1 and a 1% chance of losing $100.").

126. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

127. *See, e.g.*, Miller, *supra* note 124, at 666 ("Even if the negative effects of class actions were assumed, they would have to be balanced against the societal benefits derived from deterring socially proscribed conduct and providing small claim rectification—considerations that thus far have escaped measurement and perhaps always will.").

substantive legal rights.[128] Access to justice—meaning a realistic avenue to air grievances—is an essential component of effective regulation via class actions.[129] As the Advisory Committee for the Federal Rules of Civil Procedure noted, class action mechanisms "provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[130] The substantive laws primarily pursued as class actions lack a minimum damages requirement, demonstrating Congress already has decided that even in cases where an individual has little money at stake, he has the right to make a claim.[131] Charitable settlements protect a class member's ability to effectuate these statutory rights, thus providing the specific relief intended by class action mechanisms—the ability to assert claims.[132] Essentially, charitable settlements promote access to justice by: (1) allowing aggrieved individuals to stand against alleged wrongdoing; (2) advancing democratic participation; and (3) ensuring financial hurdles do not limit opportunities to air grievances.

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128. *Cf.* HON. WILLIAM W. SCHWARZER ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL, NATIONAL EDITION Ch. 10-C (2008) ("[C]lass actions exist to enable persons of modest means to vindicate the rights of many.").

129. *Accord* Jay Tidmarsh, *Living in CAFA's World*, 32 REV. LITIG. 691, 708 (2013) ("By 'justice' I do not mean a fair determination of contested legal rights by a court. Rather, I use justice to refer to any process that commences with aggrieved persons laying their complaints of legal wrongdoing before a neutral party."); Francisco Valdes, *Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective*, 24 GA. ST. U. L. REV. 627, 649 (2008) ("[T]he virtue of the class action was and is in the effort to provide access to justice—to deliver justice to those who don't have access to justice."); *cf.* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (explaining the purpose of the 1966 Amendment of Rule 23 was to expand access to justice "even at the expense of increasing litigation").

130. *See* Kaplan, *supra* note 129, at 497.

131. *Cf.* Max Helveston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 BUFF. L. REV. 749, 772–73 (2012) (discussing how restricting access to class actions "means that a number of the rights and protections that lawmakers have afforded individuals are essentially unenforceable"); Valdes, *supra* note 129, at 654–55 ("The class action device does not itself seek to establish or promulgate those substantive policy choices [reflected in substantive law]; the class action instead provides the vehicle to give them some real-world bite. The class action, like other procedures, is a vehicle for the enforcement and vindication of substantive rights and obligations embodied in positive policy choices that pre-exist the class action.").

132. *See* Deposit Guar. Nat'l. Bank v. Roper, 445 U.S. 326, 338 (1980) (explaining that "[t]he use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise"); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (noting that class action suits allow plaintiffs to pursue causes of action that otherwise would not be economical); James M. Finberg, *Class Actions: Useful Devices That Promote Judicial Economy and Provide Access to Justice*, 41 N.Y.L. SCH. L. REV. 353, 353–54 (1997) ("Even more importantly, [class actions] provide access to justice. Our justice system is not a system only for the rich and powerful. It is also a system for everyday Americans who need legal redress when they have been wronged. Class actions give them that opportunity by allowing them to aggregate their claims and to fight rich and powerful corporations. By aggregating their claims, they can hire the experts and lawyers who can do the analysis that is necessary.").

First, the ability to assert a right has value independent of whether class members receive direct compensation.[133] Permitting charitable settlements allows class members to "level the playing field" and hold large corporations responsible for wrongdoing that results in small individual damages but large aggregate harm.[134] Taking a public stand matters to class members[135] and is often an overlooked benefit of charitable distributions.[136] Eligible class members can be difficult to locate, sometimes as a result of defendants' faulty recordkeeping.[137] Even then, administrative costs for individual distribution can exhaust the entirety of the settlement fund.[138] Charitable settlements overcome these issues, ensuring substantive rights are not curtailed due to distribution challenges.[139]

Second, charitable settlements advance democratic participation and protect the perceived fairness of the legal system, as potential claims are not precluded because of distribution problems.[140] Enhancing fairness by

133. *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 275 (2004) ("[T]he value of participation cannot be reduced to a function of the effect of participation on outcomes . . . .").

134. *See, e.g.*, Helveston, *supra* note 131, at 772–73 (discussing how restricting access to class actions "means that a number of the rights and protections that lawmakers have afforded individuals are essentially unenforceable"); Katie Melnick, *In Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response to Common Criticisms*, 22 ST. JOHN'S J. LEGAL COMMENT. 755, 756 (2008).

135. *See* Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 90–91 (2011) (discussing "the desire to make a public statement about defendant's conduct" as a collective justice motivation for named class members).

136. *See id.*

137. *See, e.g.*, *In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1354 (S.D. Fl. 2011); *cf.* Powell v. Ga.-Pac. Corp., 119 F.3d 703, 706 (8th Cir. 1997) (permitting *cy pres* because class members were no longer readily locatable because a decade passed from the initial distribution).

138. This includes most securities, antitrust, and consumer actions. *See* Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1564 n.3 (2005).

139. *Cf.* Christopher v. Harbury, 536 U.S. 403, 414–15 (2002) (right of access to courts "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court"); Cunningham v. Dist. Att'ys Office for Escambia Cnty., 592 F.3d 1237, 1271 (11th Cir. 2010) ("[T]he plaintiff must have an underlying cause of action the vindication of which is prevented by the denial of access to the courts." (citing *Christopher*, 536 U.S. at 415)); Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003) (exploring the right to a remedy through access to the courts).

140. Avenues for participation strengthen cooperation with the legal system, which in turn encourages compliance with the legal system. *Cf.* Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63, 72 (2008) (discussing how parties are more willing to follow procedural requirements when perceived as fair); *see also* Floyd Feeney, *Evaluating Trial Court Performance*, 12 JUST. SYS. J. 148, 159 (1987) (describing research suggesting that "decisions perceived as unfair are economically inefficient because of the increased resistance" to them). When procedures are considered fair, people are more likely to "obey the law" and have greater respect for the legal system. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 368 (1990); Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367, 368 (1987).

guaranteeing judicial access is a gain separate from (and potentially more important than) monetary compensation—particularly to class members.[141] Claimants privilege fairness of the adjudicative process over monetary results.[142] Ensuring judicial access promotes individual dignity, which is an essential value in democratic societies.[143] "Dignity is most clearly offended when a person believes that she is the victim of governmental arbitrariness or private abuse and is barred at the courthouse door or forced to participate without assistance or resources."[144] However, these gains are undermined when a swath of otherwise cognizable claims cannot be adjudicated because of distribution problems.[145]

Third, charitable settlements overcome financial obstacles that might otherwise limit access to justice. Often, aggrieved individuals are limited to private litigation to redress alleged wrongdoing, as government agencies rarely pursue small-stakes claims.[146] Charitable distributions mostly occur in cases where financial barriers make individual litigation irrational.[147] Theoretically, an individual has the legal right to assert a claim but "is [often] shut out of the courthouse by economic realities."[148] Few class

141. When court procedures do not prioritize constituents' larger needs—not just provide monetary compensation—this triggers increased risks of discontent and mistrust of the legal system. *See, e.g.*, Shestowsky & Brett, *supra* note 140, at 72.

142. *See id.* at 68–69.

143. Ensuring judicial access advances values of individual dignity, which in turn promotes a primary value of democratic societies. *See* Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 745 (1980); Ronald Pennock, *Due Process, Fraternity, and a Kantian Injunction*, 18 NOMOS 172 (1977) (discussing the importance of the government's fair treatment of individuals, including instilling dignity and self-respect).

144. Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 388 (1990); *see also* Frank Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1974 DUKE L. REV. 527, 547.

145. *See* Finberg, *supra* note 132, at 357 ("[I]f Americans are to have faith in the judicial system, they need to believe that they have access to the courthouse."); Meili, *supra* note 135, at 74 ("[M]any named plaintiffs have a broader view of success and fairness, measuring them in terms of achieving social changes that extend beyond the defendant in their particular case.").

146. Government enforcement ebbs and flows with an administration's politics or ability to fund such efforts. *See* Georg Berrisch, Eve Jordan & Rocio Salvador Roldan, *E.U. Competition and Private Actions for Damages*, 24 NW. J. INT'L L. & BUS. 585, 586 (2004) ("[P]ublic authorities lack sufficient resources to investigate and prosecute every single infringement of competition rules."); Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 230 (2003) ("[E]nforcement priorities change from administration to administration, or with appointment of a new Assistant Attorney General or FTC chair."); *see also* Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 310–11 (2004); Daniel R. Shulman, *A New U.S. Administration and U.S. Antitrust Enforcement*, 10 SEDONA CONF. J. 1, 5 (2009).

147. *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 816 (9th Cir. 2012), *reh'g en banc denied*, 709 F.3d 791 (2013); *In re* Netflix Privacy Litig., No. 5:11-CV-00379, 2013 WL 1120801, at *1 (N.D. Cal. Mar. 18, 2013); *In re* EasySaver Rewards Litig., 737 F. Supp. 2d 1159 (S.D. Cal. 2010).

148. *Consumer Class Action: Hearings Before the Consumer Subcomm. of the S. Comm. on Commerce*, 92d Cong. 38 (1971) (statement of Sen. Frank E. Moss, Chair, S. Comm. on Commerce).

members can afford to undertake years-long litigation on their own, especially when individual recovery is minimal.[149] However, by allowing class counsel to recover attorneys' fees based on charitable settlements, access to justice is restored.[150] Class counsel are key to assisting aggrieved individuals bring claims.[151] They often "ferret out" the alleged wrongdoing[152] and advance the fees and costs necessary for suit.[153] As the Supreme Court has noted, "[a] class action solves [the] problem" that "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" by "aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."[154] Instead of being fully shut out of the judicial process, aggrieved individuals can instead participate in a representative fashion—whereby class representatives and class counsel work together to vindicate class members' rights.[155]

Charitable settlements also may help overcome financial hurdles to judicial access in subsequent cases. Through the nexus requirement, charitable settlements ensure defendants pay for wrongdoing, then distribute that payment to a charity whose resources and experience are used to advance interests aligned with the underlying goals of the class action claim.[156] Recognizing the access to justice purpose behind aggregate

149. *See* Mathias Reinmann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 817 n.351 (2003) (discussing why the high costs of discovery can work against a plaintiff as "those with small and medium-sized claims" may not be able to fully pursue these claims as the costs of discovery will often outweigh the small sum sought in the recovery); Nina Yadava, *Can You Hear Me Now? The Courts Send a Stronger Signal Regarding Arbitration Class Action Waivers in Consumer Telecommunications Contracts*, 41 COLUM. J.L. & SOC. PROBS. 547, 554–55 (2008) ("Without the ability to aggregate these small sums, securing legal representation is difficult and the financial incentive of affected individuals to bring action is lacking when attorney's fees are larger than the amount in controversy.").

150. *See* David J. Cook, *Class Actions and the Limits of Recovery: The Glass Jaw of Justice (Part 1 of 2)*, 5 J. LEGAL TECH. RISK MGMT. 1, 21 (2010) ("[C]lass action plaintiffs are heavily dependent upon the class counsel in the overall strategic and tactical management of the case as supervised by the court."); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1186 (2009) ("For such negative-value suits, the most important element in ensuring justice is making sure that some agent—dare we say, any agent—will rise to the occasion to take up the case.").

151. *See* Cook, *supra* note 150, at 21.

152. *See, e.g.*, FED. R. CIV. P. 23(g) (enumerating criteria courts must consider in appointing class counsel, including work to identify or investigate potential claims).

153. *See, e.g.*, RUBENSTEIN ET AL., *supra* note 35, § 3:69.

154. Amchen Prods. Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

155. *See* Elizabeth J. Cabraser, *The Essentials of Democratic Mass Litigation*, 45 COLUM. J.L. & SOC. PROBS. 499, 510 (2012) (crediting Judge Weinstein for describing a formal class action as "an expression of representative democracy"); Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 26 (2009) ("[T]he debate over class actions implicates a more fundamental debate about the role of the courts in policy making in a representative democracy."); *cf.* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1037 (1997) (characterizing class actions as a type of representative democracy).

156. *See, e.g.*, *In re* EasySaver Rewards Litig., 921 F. Supp. 2d 1040, 1052 (S.D. Cal. 2013) (discussing how the proposed charitable settlement advanced "the objectives of the

litigation, many charitable distributions go directly to non-profit providers of legal services and are dedicated to providing judicial access for those who cannot obtain or afford representation.[157] Consequently, charitable settlements provide two tiers of judicial access: (1) class members receive the benefit of access to justice for the claim generating the charitable settlement, and (2) they (and similarly situated individuals) also can gain from increased access in future cases.

Focusing on compensation as the sole goal of class actions overlooks these gains. Nonetheless, critics often try to redirect arguments about access to justice, pointing out class actions limit participation in comparison to traditional, non-aggregate cases.[158] Because of the representative nature of such cases, these critics are accurate in noting not every class member is equally heard to the same degree as in individual litigation.[159] However, in the context of small-stakes claims where charitable settlements usually occur, the comparison is not between class actions and individual litigation. Rather it is between class actions and no litigation. In fact, as the Manual for Complex Litigation explains, the "[a]dequacy of the settlement involves a comparison of the relief granted relative to what class members might have obtained without using the class action process."[160] Since charitable settlements provide greater access to justice than otherwise possible, they provide sufficiently valuable relief—even without providing class members monetary compensation.

B. Charitable Settlements Deter Wrongdoing

Charitable settlements also deter wrongdoing, further fulfilling class actions' regulatory objectives. Class actions are notably different than individual civil litigation,[161] as deterrent potential is a key reason consumers bring aggregate claims. A study of named plaintiffs in class actions bears out how a primary goal of such cases is ensuring that others do not experience the same problems in the future—not just receiving monetary compensation.[162] Focusing on deterrence goals is particularly

underlying statute(s)"); *In re* Eunice Train Derailment, No. 00-1267, 2012 WL 70651, at *2 (W.D. La. Jan. 9, 2012) (discussing how the proposed charitable distribution "is intimately connected to the objectives of this suit and the class").

157. *See, e.g.*, Lessard v. City of Allen Park, 470 F. Supp. 2d 781, 784 (E.D. Mich. 2007) (allowing charitable distribution for the Michigan Bar's Access to Justice Fund).

158. *See, e.g.*, Martin H. Redish & Clifford W. Berlow, *The Class Action As Political Theory*, 85 WASH. U. L. REV. 753 (2007).

159. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2022 (2007) ("The class action relies on representation to satisfy participation demands, but it is not clear how representation can substitute for personal participation when participation is valued on dignitary grounds."); Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545 (2012) (arguing class actions undermine autonomy and thus hinder dignity).

160. MANUAL FOR COMPLEX LITIGATION, *supra* note 44, § 21.62 (listing over thirty factors for evaluating a proposed settlement).

161. *See, e.g.*, Meili, *supra* note 135, at 87; Tamara Relis, *It's Not About the Money!: A Theory of Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 718 (2006).

162. Meili, *supra* note 135, at 87.

important for the low individual value claims that most commonly trigger charitable settlements. As Professor Isaacharoff stated, "More critical than the limited compensatory relief now offered in these low-value class actions is the prospect that the law would be unable to deter future misconduct absent an effective policing mechanism."[163]

Deterrence is an extension of class actions' regulatory function.[164] Congress adopted Federal Rule of Civil Procedure 23 to allow individuals to serve as private attorneys general—deterring future wrongdoing through class actions functioning as ex-post regulation.[165] Exposure to potential liability incentivizes actors to avoid wrongdoing[166] and affects widespread change.[167] For example, a company may elect to spend more money testing a new product or invest in more compliance training to minimize potential class action exposure.[168] This deterrent effect applies not only to named defendants but also to other industry members[169] and can extend over multiple years, so long as there is "sustained and repeated enforcement activity."[170]

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163. Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 816 (1997).

164. YEAZELL, *supra* note 123, at 232; *see also* Lopez v. Youngblood, No. CV-F-07-0474, 2011 WL 10483569, at *14 (E.D. Cal. Sept. 2, 2011) ("[O]ne important purpose of the class action device is that defendants should not benefit from their wrongdoing, and should be deterred from doing so by being vulnerable to class actions to remedy their wrongful conduct."); Abels v. JBC Legal Group, P.C., 227 F.R.D. 541, 546 (N.D. Cal. 2005).

165. *See, e.g.*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338–39 (1980); RUBENSTEIN ET AL., *supra* note 35, §§ 1.1, 1.8.

166. *See generally* David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1890–91 (2002) (explaining optimal deterrence maximizes society's total welfare by encouraging potential wrongdoers to avoid unreasonable risks).

167. This widespread effect is not limited to consumer class actions. *See* Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 590 (2005) ("From school desegregation to fair housing, environmental management to consumer protection, the impact of the private attorney general litigation is rarely confined to the parties in a given case.").

168. For example, in interviewing corporate representatives in 2000 (when class actions mechanisms were more permissive), the Rand Institute found: "Corporate representatives . . . interviewed said that the burst of new damage class action lawsuits ha[d] . . . caus[ed] them to review financial and employment practices. Likewise, some manufacturer representatives noted that heightened concerns about potential class action suits have had a positive influence on product design decisions." DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 9 (2000), *available at* http://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR969.1.pdf; *see also* Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223 (2004) (providing a more exhaustive analysis of the Rand report).

169. *See* Michael K. Block & Jonathan S. Feinstein, *The Spillover Effect of Antitrust Enforcement*, 68 REV. ECON. & STAT. 122, 122 (1986) (discussing how antitrust deterrence is most effective when targeted at other firms in the same industry as the violator); *cf.* Jared N. Jennings et al., *The Deterrent Effects of SEC Enforcement and Class Action Litigation* 5 (Working Paper, 2011), *available at* http:ssrn.com/abstract=1868578. A 2011 empirical study analyzed both SEC and class action enforcement of securities laws and found class actions curb aggressive reporting behaviors of industry peers—not just the corporation sued. *Id.*

170. Jennings et al., *supra* note 169, at 30.

Charitable settlements are aligned with class actions' deterrence objective and provide class members valuable relief by enhancing public welfare.[171] Deterrence gains occur regardless of whether the defendants' distribution goes to class members or third parties.[172] It is the threat of litigation coupled with monetary sanctions that matters.[173] Potential monetary exposure raises transactional costs, which motivates avoiding such behavior in the first place.[174] This is particularly true for the small individual sum class actions best suited for charitable settlements:

> [T]he primary purpose of small claims class actions is not individual plaintiff compensation but rather aggregate deterrence of the defendant's activities. Compensation is not a primary goal because each class member has been harmed such a small amount that getting those funds to them may be inefficient and/or class members are unlikely to spend time coming forward to claim such small amounts. However, the aggregate effect of the defendant's actions may be significant and need to be deterred. Creating a fund that truly penalizes the defendant by fully disgorging a significant amount of money serves this deterrent effect regardless of where the funds are sent.[175]

In fact, charitable distributions' deterrence value is potentially greater than other nonmonetary relief options. Optimal deterrence does not occur when relief comes in the form of a defendant's product or a service that can be offered at little or no opportunity cost,[176] such as coupon deals.[177]

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171. *See* Elizabeth Chamblee Burch, *Securities Class Actions As Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 96 (2008) ("[D]eterrence enhances public welfare by preventing unreasonable risks that cost more to incur than to prevent."); Catherine M. Sharkey, *Punitive Damages As Societal Damages*, 113 YALE L.J. 347, 365 (2003) ("Social welfare is maximized by minimizing the sum of the costs of (1) losses produced by accidents; (2) defendants' efforts to exercise care; (3) plaintiffs' efforts to take precautionary measures; and (4) the costs of administering the torts (or alternative) system.").

172. *See, e.g.*, *In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1355 n.24 (S.D. Fl. 2011); Rosenberg, *supra* note 166, at 1892 ("In seeking to minimize the sum of accident costs, there is no necessary linkage between the determination of liability and the distribution of damages. The two functions are severable and distinct. How damages are distributed among plaintiffs—whether averaged, allotted by need, apportioned according to some other criterion, or not distributed at all—is generally (with the exception of its effect on plaintiff incentives) irrelevant to achieving deterrence."); *cf.* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 873 (1984).

173. *See* Elizabeth Chamblee Burch, *CAFA's Impact on Litigation As a Public Good*, 29 CARDOZO L. REV. 2517, 2550 (2008) (explaining how the threat of monetary class actions "deters risky behaviors . . . and results in safer products and better corporate practices"); *see also* William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 711 (2006).

174. Jennings et al., *supra* note 169, at 30.

175. *In re* Dep't of Veterans Affairs (VA) Data Theft Litig., 653 F. Supp. 2d 58, 60–61 (D.D.C. 2009); *see also* Gilles & Friedman, *supra* note 109, at 105 (asserting that real value of class actions lies not in compensation but in deterring the defendant-wrongdoer by "caus[ing it] to internalize the social costs of its actions").

176. Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 445 (1997).

177. *Id.*; Jois, *supra* note 27, at 270 n.41 ("[O]ptimal deterrence is not reached when there are unclaimed coupons (because the tortfeasor only bears a cost if a coupon is cashed in) but

Reverters, which provide no guaranteed payouts,[178] are not better deterrents, nor is injunctive relief.[179] Instead, the potential for real financial exposure, regardless of whether the money goes to class members, a charity, or a non-profit, achieves more deterrence—a benefit to class members that does not require receiving a $5 check first.

Thus, charitable settlements are essential stopgaps to safeguarding deterrence.[180] They optimize deterrence by ensuring the defendants are exposed to potential litigation for all types of wrongdoing, not just wrongdoing where damages can be efficiently distributed to individual class members.[181] A requirement that all settlements first distribute funds to class members, however, runs the risk of under-deterrence.[182] Individual recovery and optimal deterrence are conflicting goals.[183] When individual compensation becomes the primary goal, less optimal deterrence results because the threat of litigation disappears if charitable settlements are not allowed. Few lawyers would file claims that have no effective resolution prospect.[184]

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that optimal deterrence could be reached when there is undistributed money (because the tortfeasor has already internalized the costs of his tortuous conduct).").

178. *See, e.g.*, Diamond Chem. Co., Inc. v. Akzo Nobel Chems. B.V., 517 F. Supp. 2d 212, 218 (D.D.C. 2007) (discussing how reversion does not fulfill deterrence goals); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 (2010) ("One option is to return the remaining funds to the defendant even when the settlement does not contain a provision for reversion to the defendant. That option, however, would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable."); Boies & Keith, *supra* note 23, at 269 ("Reversion to the defendant undermines the deterrent effect of class actions.").

179. *Cf.* Neil K. Gehlawat, Note, *Monetary Damages and the (b)(2) Class Action: A Closer Look at* Wal-Mart v. Dukes, 90 TEX. L. REV. 1535, 1551 (2012) (discussing how injunctive relief does not provide the same deterrence as monetary damages).

180. *See* Burch, *supra* note 173, at 2551 (discussing the harm resulting from minimizing class actions' deterrence potential, given "the American system's heavy reliance on litigation as ex post regulation").

181. *See* Stephen D. Susman, *Prosecuting the Antitrust Class Action*, 49 ANTITRUST L.J. 1513, 1515–16 (1980) ("[W]ithout Rule 23 the small claimant [would] be deprived of effective relief.").

182. *See, e.g.*, Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 719 (9th Cir. 2010) (discussing the underdeterrence risks associated with denying class certification); Genevieve G. York-Erwin, Note, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1800 (2009) ("An economic analysis suggests that without this collective mechanism, corporations would not fully internalize the costs of their conduct, causing inefficiencies, undercompensation, underdeterrence, and other social losses.").

183. Gilles & Friedman, *supra* note 109, at 107 ("[T]he introduction of compensationalist norms into class action policymaking not only is gratuitous, but also undermines the efficacy of many rules and practices as deterrents."); Rosenberg, *supra* note 166, at 1890 (discussing the conflict between optimal deterrence and compensation in terms of optimal insurance theory).

184. The economic reality is that if class counsel cannot expect potential recovery for the vast time and monetary outlay associated with pursuing a class claim, attorneys simply will not take the case. *See* Sofia Adrogué & Hon. Caroline Baker, *Litigation in the 21st Century: The Jury Trial, the Training & the Experts*, ADVOC., Fall 2011, at 12; Bartholomew, *supra* note 20, at 2149–50 (discussing how increased risks disincentive counsel from pursuing claims); Melnick, *supra* note 134, at 776 (discussing how class action attorneys are paid from settlements, thus making the success of the case relevant to an attorney's decision to

Critics often overlook deterrence gains in challenging charitable settlements. For example, Public Citizen, a repeat objector to *cy pres* and charitable settlements, took issue with the proposed settlement for antitrust violations in *In re Toys "R" Us Antitrust Litigation*.[185] The settlement included an earmarked distribution of $36.6 million to Toys for Tots.[186] Public Citizen contended the settlement only provided class members "ephemeral" relief.[187] The court rejected such a narrow definition of benefit:

> [I]n claiming that the method of distribution means that consumers will not benefit from the Settlements, [Public Citizen] ignores the deterrent effect that inheres in the defendants' large payout of toys and cash. The Settlements, with their significant monetary cost to defendants, must be evaluated not only in terms of their direct value to the public but also in terms of their deterrent effect on antitrust violators, an effect of value to consumers.[188]

Similarly, objectors in *In re Checking Account Overdraft Litigation*[189] ignored deterrence gains in attacking an earmarked charitable distribution.[190] There, as described previously,[191] the bulk of a $410 million settlement was dispersed to identifiable class members, with a portion earmarked for distribution to organizations that promote financial literacy.[192] This settlement portion represented the amount allocable to class members who could not be identified because the defendant's older transaction data was not searchable.[193]

In rejecting objectors' challenges to the settlement, the trial court cited Professor Fitzpatrick's explanation of charitable settlements' deterrent value, which echoed Professor Rubenstein:

> In small-stakes cases, the most important function of the class action device is not compensation of class members but deterrence of wrongdoing . . . [and] if defendants did not pay someone—even third parties like *cy pres* charities—for such harms, then defendants would have every incentive to cause such harms in the future . . . . Thus, in such [small-stakes] cases, the most important thing is that the defendant pays

undertake representation). As challenges to charitable distributions mount, the safer course for class counsel is to diversify the risk by filing other types of cases, rather than invest limited resources in an uncertain terrain. *See* Nantiya Ruan & Nancy Reichman, *Hours Equity Is the New Pay Equity*, 59 VILL. L. REV. 35, 75 (2014) (discussing how greater judicial scrutiny means "fewer private plaintiffs' attorneys are willing to risk the high costs of these cases").

185. 191 F.R.D. 347 (E.D.N.Y. 2000).

186. *Id.* at 349.

187. *Id.* at 355.

188. *Id.* at 356.

189. 830 F. Supp. 2d 1330 (S.D. Fla. 2011).

190. *Id.* at 1354–57.

191. *See supra* Part I.B.

192. *In re Checking Account*, 830 F. Supp. 2d at 1355. This case is another example of a court using the generic term *cy pres* to discuss a settlement where the charitable distribution is not limited to a remainder. Hence, the charitable distribution involved in the case is more accurately described as an earmarked charitable settlement.

193. *Id.* at 1354.

> for the wrongs it has perpetrated—it is less important *who* the defendant pays.[194]

Stated differently, "ex ante, the individual would rationally prefer a legal system that allocates enforcement resources to prevent unreasonable risk rather than merely to compensate it."[195] Thus, the more substantiated position recognizes charitable settlements provide valuable deterrence.

In sum, charitable settlements are well-aligned with class actions' regulatory function. They are an equitable distribution method that furthers individuals' ability to vindicate statutory rights and regulate behavior, by deterring future wrongdoing and disgorging ill-gotten gains. Thus, theoretical arguments that class actions should be limited to cases where direct monetary payouts to class members are feasible undermine class actions' larger utility.

C. Collusion and Procedural Concerns Are Unfounded

As detailed above, charitable settlements offer class members valuable relief by promoting access to justice and deterring wrongdoing by using ill-gotten gains to effectuate collective goals. Precluding charitable settlements would significantly undercut class actions' regulatory enforcement potential.

Nonetheless, challenges to charitable settlements often build on the faulty premise that such settlements do not benefit class members because they do not compensate them. Class action objectors commonly repeat two lines of attack. First, charitable settlements allegedly incentivize class counsel and defendants to "sell out" class members. From there, some critics assert such settlements entice counsel to forego vigorously advocating on behalf of class members—thus raising due process concerns.[196] The remainder of this part focuses on the flaws in these derivative arguments, refuting the remaining theoretical obstacles to judicial approval of charitable settlements.

1. Collusion Fears Are Overblown

Critics still hold onto a narrow definition of benefit by arguing charitable settlements incentivize class counsel to "sell out" the class.[197] This attack recycles an oft-asserted criticism of small-sum class actions: class

194. *Id.* at 1355 n.24 (citing Supp. Decl. of Prof. Brian T. Fitzpatrick, ¶¶ 6, 9).

195. David L. Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 840 (2002).

196. Redish et al., Cy Pres *Relief*, *supra* note 17, at 650–51.

197. *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1373–74 (1995); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1112 (1996); John C. Coffee, Jr. & Susan P. Koniak, *Rule of Law: The Latest Class Action Scam*, WALL ST. J., Dec. 27, 1995, at 11 ("Paying the class's lawyers to sell out their clients is invariably cheaper for defendants than paying the class.").

attorneys receive millions while class members receive little or nothing.[198] Assuming a charitable settlement is by definition "selling out," any such settlement is circumstantial evidence of collusion between class counsel and defendants. Some further claim charitable settlements are "cheaper" for defendants because they avoid payouts to individual class members.[199]

Such collusion concerns in the charitable settlement context are more perception than reality. While class actions potentially can create conflicts of interest, this does not justify assuming charitable settlements are collusive. A charitable settlement can represent the full, fair value of the class' claims, especially when administrative costs exceed individual compensation.[200] Safeguards already exist to prevent the collusive behavior feared by critics.

First, the process for negotiating attorneys' fees is the same regardless of the settlement structure. Though no express prohibition against concurrent fee and settlement negotiations exists, in many class actions, the attorneys' fees discussions are deferred until after all settlement terms are fully negotiated.[201] There is no guarantee defendants will agree to generous class counsel compensation when the settlement includes a charitable distribution. Such settlements are often also overseen by mediators, further offsetting potential collusion concerns.[202]

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198. *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371–72 (2000) ("[W]here the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest."); Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 AM. U. L. REV. 1429, 1433 (1997); Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1390 (2000).

199. *See, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/us/supreme-court-may-hear-novel-class-action-case.html?_r=0 (quoting objectors' counsel to Facebook settlement).

200. *See, e.g.*, Nachshin v. AOL, LLC, 663 F.3d 1034, 1037 (9th Cir. 2011) (describing charitable settlement "[i]n lieu of a cost-prohibitive distribution to the plaintiff class" where defendants' maximum liability per person would be roughly three cents).

201. *See, e.g.*, *In re* Oil Spill by Oil Rig Deepwater Horizon, 295 F.R.D. 112, 138 (E.D. La. 2013) ("[T]he Parties did not begin to negotiate fees until they had already delivered an otherwise complete settlement agreement to the Court."); *In re* Sw. Airlines Voucher Litig., No. 11 C 8176, 2013 WL 4510197, at *2 (N.D. Ill. Aug. 26, 2013) ("It is undisputed that there was no negotiation regarding attorney's fees until after the parties had reached agreement on settlement of the class members' claims."); *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 335 (3d Cir. 1998) ("There is no indication the parties began to negotiate attorneys' fees until after they had finished negotiating the settlement agreement."); Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 233 (D.N.J. 2005) ("[T]he parties did not commence negotiations on the amount of attorneys' fees and expenses that MassMutual would agree to pay until all material terms of the Settlement had been agreed upon, about one year after settlement negotiations began.").

202. *See, e.g.*, *In re* EasySaver Rewards Litig., 921 F. Supp. 2d 1040, 1054 (S.D. Cal. 2013) ("There were numerous settlement proceedings, several of which were presided over by well-respected retired district court judges and magistrate judges. By all accounts, the settlement resulted from an arms-length negotiation process with the benefit of the class members in mind.").

Second, courts explicitly evaluate whether the settlement is the product of collusion.[203] This requirement is hardly pro forma. The district judge acts as a fiduciary of the class; if a trial judge fails in executing his duty, circuit courts will reverse the decision.[204] Courts have approved settlements and still cut requests for attorney fees, which also minimizes risks of selling out the class.[205]

Moreover, the approval process is particularly arduous for charitable settlements, which already receive heightened scrutiny.[206] Objectors in such cases are commonplace, causing courts to provide more exhaustive review given the very likely appeal stemming from any settlement approval.[207] At the same time, defendants have reason to only promote class settlements that satisfy the Rule 23 settlement approval process. A collusive settlement creates problems with the class's adequacy of representation—negating the validity of the settlement.[208] The resources defendants spent reaching an agreeable settlement, litigating the settlement's preliminary approval, and negotiating the settlement notice would be for naught if ultimately disapproved by the court.

Third, collusion assumes agreement between class and defendants' counsel, at the expense of class members; it takes two to collude.[209] While defendants are motivated to provide the smallest settlement possible,[210] the amount defendants pay is the same whether it is a monetary distribution or a

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203. *See, e.g.*, Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279 (7th Cir. 2002); Joel A. v. Giuliani, 218 F.3d 132, 138 (2d Cir. 2000); *In re* Cell Phone Terminations Fee Cases, 180 Cal. App. 4th 1110, 1118 (2010).

204. *See, e.g.*, Culver v. City of Milwaukee, 277 F.3d 908, 915 (7th Cir. 2002); *In re* Cendant Corp. Litig., 264 F.3d 201, 231 (3d Cir. 2001); Grant v. Bethlehem Steel Corp., 823 F.2d 20, 22 (2d Cir. 1987); Stewart v. Gen. Motors Corp., 756 F.2d 1285, 1293 (7th Cir. 1985).

205. *See, e.g.*, Evans v. Jeff D., 475 U.S. 717, 737 (1986) (upholding district court's decision to waive attorney's fees completely); Cobell v. Norton, 407 F. Supp. 2d 140, 177 (D.D.C. 2005); Garabedian v. L.A. Cellular Tel. Co., 118 Cal. App. 4th 123, 127 (2004).

206. *See, e.g.*, *In re* Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 947 (9th Cir. 2011) (listing "warning signs" to consider in evaluating class action settlements); Mirfasihi v. Fleet Mortg. Corp., 450 F.3d 745, 747 (7th Cir. 2006) (same); *see also* Foer, *supra* note 95, at 88 ("The *cy pres* remedy today is coming under closer public and legal scrutiny than at any previous time.").

207. *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 835 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 8 (2013) (overruling objectors' challenges after lengthy examination); *In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1335–36 (S.D. Fla. 2011) (same).

208. *See* Debra Lyn Bassett, *The Defendant's Obligation to Ensure Adequate Representation in Class Actions*, 74 UMKC L. REV. 511, 539 (2006) (discussing how the Restatement (Second) of Judgments section 41 applies to both defendants and plaintiffs). Professor Bassett goes on to explain why defendants, thus, have an interest in ensuring adequate representation: "[T]he Restatement gives a defendant no place to hide when the defendant knew that the class members were not accorded adequacy of representation—under such circumstances, the judgment is not binding on the inadequately represented class members." *Id.*

209. *See* Brian W. Warwick, *Class Action Settlement Collusion: Let's Not Sue Class Counsel Quite Yet . . . .*, 22 AM. J. TRIAL ADVOC. 605, 611 (1999).

210. *See* Jacob Kreutzer, *The Difficulties of Encouraging Cooperation in a Zero-Sum Game*, 65 ME. L. REV. 147, 159 (2012) (describing "the settlement range [as] the range from the smallest offer the plaintiff should accept and the largest offer the defendant should make").

charitable settlement. While charitable settlements minimize administrative costs possibly paid by defendants, defendants still fund the settlement, pay for notice, and pay attorneys' fees.[211]

Fourth, fears of defendants pushing for charitable settlements over monetary distributions are overblown because not all Rule 23(b)(3) cases qualify for charitable settlements. Such settlements are the exception to the rule.[212] They are limited to cases with distribution problems.[213] While the guidelines for the trigger test can be shored up, as discussed in Part III, even as presently applied, this requirement significantly restrains such settlements' growth.

Finally, collusion is less likely with charitable settlements than with alternative, nonmonetary distribution options like reverters. Charitable settlements still financially motivate class counsel to push for a high distribution. As the settlement amount rises, so does class counsel's payday, which is based on the value of the settlement.[214] At the same time, defendants will try to limit the settlement amount. This is unlike reversion provision settlements, where undistributed funds return to the defendants' coffers. Reverters incentivize the parties to falsely inflate settlement fund values for judicial approval. Such provisions "decouple"[215] class counsel's incentive to maximize the settlement amount and its corresponding deterrent and disgorgement impact.[216] Hence, charitable settlements actually minimize collusion concerns as compared to other forms of class action settlement.

On the whole, accusations of collusion are almost routine in challenging charitable settlements. Yet fears of "selling out" class members to receive a generous payday have not necessarily materialized into realistic concerns. At the least, objectors and critics should face the burden of coming up with actual proof of collusion before removing this valuable distribution option from the judicial arsenal.

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211. *Cf.* Warwick, *supra* note 209, at 611 ("[F]or collusion to influence the settlement of a class action, the defendant must also be willing to actively participate.").

212. Thus, in settled class actions, particularly for antitrust and securities claims, "the great bulk of the money received from the defendants actually is distributed to class members." Miller, *supra* note 124, at 667.

213. *See supra* Part I.B (discussing the "trigger" requirement for charitable settlements).

214. *See supra* note 102 and accompanying text.

215. Int'l Precious Metals Corp. v. Waters, 530 U.S. 1223 (2000) (statement of O'Connor, J., respecting the denial of the petition for a writ of certiorari).

216. Such a falsely inflated settlement value was rejected by the District Court of Maine in *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34 (D. Me. 2005). The settlement was presented as a $3.4 million opt-in fund but included a reverter. *Id.* at 38. As a result of the reverter, class members received $449,159.81 while the defendants would have received $1,644,601.94. *Id.* at 47. Recognizing such a settlement structure would provide "real value" to defendants and class counsel but provide little deterrent impact, the Court denied the settlement as unfair. *Id.* at 53.

2. Charitable Distributions Do Not Create Procedural Problems

Beyond collusion, some contend charitable settlements violate substantive due process[217] by improperly expanding class members' substantive rights and foregoing proof of individual damages.[218] This critique focuses on the Rules Enabling Act, which defines the scope of procedural rules the judicial branch may adopt.[219] Since charitable distributions would not occur in individual litigation, allowing them in class actions supposedly makes them more like improper civil fines than true damages.[220] However, this position advances an overly narrow definition of the Rules Enabling Act and fails to acknowledge that charitable settlements do not alter individualized damage calculations.[221]

First, Rules Enabling Act arguments face a high bar; the Supreme Court has rejected virtually all such arguments.[222] This is not surprising given judicial authority is generously defined to include "the ability to adopt procedural rules that impact the future conduct of lawyers and parties in judicial proceedings."[223] In a recent opinion, Justice Scalia confirmed this

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217. Some critics of charitable settlements also claim failing to provide class members monetary distributions raises procedural due process problems. Redish et al., Cy Pres *Relief*, *supra* note 17, at 650 ("[U]se of *cy pres* relief in class actions also gives rise to fatal violations of procedural due process."). These challenges are easily dismissed. Procedural due process does not create a mandate for monetary distributions. Rather, it simply requires class members "receive notice plus an opportunity to be heard and participate in the litigation." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). A charitable settlement should satisfy procedural due process so long as class members can opt-out and the settlement notice spells out who receives the charitable settlement and for what purpose. *See In re* Vitamin Cases, 107 Cal. App. 4th 820, 829 (2003) ("The requirements of due process [are] met when, as in this case, the notice explain[s] that the proposed settlement provides solely for the distribution of funds to nonprofit organizations and foundations, states that there will be no payments to individual [California] consumers, and informs the class members of their options of opting out or objecting.").

218. *See, e.g.*, Redish et al., Cy Pres *Relief*, *supra* note 17, at 646.

219. 28 U.S.C. § 2072(a)–(b) (2012) (providing that the "Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts[,] . . . [and] [s]uch rules shall not abridge, enlarge or modify any substantive right"). As Justice Brandeis stated: "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

220. Redish et al., Cy Pres *Relief*, *supra* note 17, at 646; *cf.* Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 481 (5th Cir. 2011).

221. *See* Donald L. Doernberg, *"The Tempest":* Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*: The Rules Enabling Act Decision That Added to the Confusion—But Should Not Have*, 44 AKRON L. REV. 1147, 1183 (2011) (discussing arguments that the Rules Enabling Act uses a narrow definition no court has ever adopted); *see also* Tidmarsh, *supra* note 17, at 571 (discussing how arguments against class actions rooted in the Rules Enabling Act run contrary to the Act's current interpretation); ADVISORY COMM. ON CIVIL RULES, *supra* note 22, at 266 n.36 (explaining that *cy pres* settlements do "not invent[] a new 'remedy' to be used in litigated actions").

222. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407 (2010) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

223. John H. Wigmore, *All Legislative Rules for Judicial Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). For a more thorough discussion of the Rules

broad judicial power, noting how courts can design "[a] judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[224]

The Rules Enabling Act does not prohibit federal judges from fashioning "procedural devices."[225] Judges' equitable discretion over how to distribute settlement funds is well within the judiciary's procedure-making power. Such discretion falls within the "justly administering remedy and redress" language—approving a charitable settlement is administering a remedy.[226] Moreover, charitable settlements do not "add, subtract, or define any of the elements necessary"[227] but rather distribute damages already properly defined under the substantive laws at issue.

Approving charitable settlement distributions under Rule 23 is analogous to other procedural rules that do not violate the Rules Enabling Act. For example, *McCalla v. Royal MacCabees Life Insurance Co.*[228] evaluated a Nevada law governing when a litigant may make a motion for prejudgment interest.[229] The Ninth Circuit held Federal Rule of Civil Procedure 59(e), not Nevada law, controlled the timing of prejudgment interests—even though it would result in an overall larger amount paid out.[230] The court explained the Rule defines "when and how" interest can be reviewed.[231] Consequently, it did not violate the Rules Enabling Act "because its application affects only the process of enforcing litigants' rights and not the rights themselves."[232] Similarly, charitable settlements are concerned with "when and how" damages are distributed, not how damages are quantified, which is properly left to the requirements of the underlying claim.[233] Thus,

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Enabling Act in the context of class actions, see Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 475 (1997).

224. *See Shady Grove*, 559 U.S. at 407 (quoting *Sibbach*, 312 U.S. at 14).

225. *See id.* at 420. Further, there is no true conflict between the substantive claims and the procedural requirements; thus, unlike many Rules Enabling Act arguments, there are not concerns of conflicting federal procedural requirements and state laws. *Cf. id.* at 400–01 (comparing New York state law prohibiting certain class actions with Fed. R. Civ. P. 23). The underlying state claims now being heard in federal court post-CAFA are primarily silent on questions of charitable distributions. Hence, without an express conflict, there are also no overlapping Rules Enabling Act/*Erie*-type problems.

226. *But cf.* Boies & Keith, *supra* note 23, at 274 (discussing why Rules Enabling Act attacks on charitable distributions are unfounded).

227. McCalla v. Royal MacCabees Life Ins. Co., 369 F.3d 1128, 1135 (9th Cir. 2004).

228. 69 F.3d 1128 (9th Cir. 2004).

229. *Id.* at 1135.

230. *Id.* at 1136.

231. *Id.* at 1135 (quoting Freund v. Nycomed Amersham, 347 F.3d 752, 762 (9th Cir. 2003)).

232. *Id.* (internal quotation marks omitted).

233. *See* Boies & Keith, *supra* note 23, at 274.

> There are broader problems with the Rules Enabling Act attack. Even ardent opponents of class action *cy pres* awards concede that, rather than transforming underlying substantive law claims into a civil fine, the disposition of unclaimed property is a "legal issue wholly distinct from the substantive law enforced in the suit that [gives] rise to the unclaimed award in the first place."

Id. (quoting Redish et al., Cy Pres *Relief*, *supra* note 17). In this way, charitable settlements can be construed as analogous to ancillary relief, like administrative agencies that utilize

charitable settlements should not be seen as a violation of the Rules Enabling Act.

Second, and perhaps more importantly, the Rules Enabling Act argument stems from the nomenclature problems that have long since plagued charitable distributions. Not only have *cy pres* distributions and charitable distributions been conflated, some courts also blur fluid recovery and charitable settlements[234]—adding mud to already murky waters. Fluid recovery is a broad concept that covers both damage calculation and disbursement. It has three steps. The class (1) aggregates a damage calculation for purposes of certification; (2) uses a summary claim procedure; and (3) distributes claims to indirectly benefit class members.[235] The distribution can come in multiple forms, including price rollbacks, coupons, and charitable payouts.[236]

The first step of fluid recovery, aggregating damages, potentially triggers Rules Enabling Act issues.[237] A quick example highlights this problem. Assume class member *A*'s and class member *B*'s damages were $2 and $6 respectively; using fluid recovery would generate aggregate damages of $8, meaning $4 per member. Accordingly, under fluid recovery, critics argue that class member *A* would be overcompensated at the expense of class member *B*, thus altering "defendants' substantive right to pay damages reflective of their actual liability."[238] Consequently, some jurisdictions reject the first step of fluid recovery[239] or, at a minimum, greatly constrict its application.[240]

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ancillary remedies. While these remedies are not expressly authorized by statutes, administrative agencies can seek ancillary remedies to justly administer remedy and redress. George W. Dent, *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 MINN. L. REV. 865 (1983). For instance, like ancillary remedies, charitable settlements deter future violations, help preserve the status quo, and most importantly, benefit social good aimed at fighting violations. This analogy further supports the argument that charitable settlements are procedural rather than substantive and do not disrupt the Rules Enabling Act.

234. *See*, *e.g.*, CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1784 (3d ed. 2005 & Supp. 2014).

235. *See, e.g.*, California v. Levi Strauss & Co., 41 Cal. 3d 460, 472–73 (1986); JEROLD S. SOLOVY ET AL., *Class Action Controversies, in* CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE (PLI Litig. & Admin. Practice Course Handbook Series No. 499, 1994).

236. *See, e.g.*, Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990); *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 620 (W.D. Wash. 2003).

237. *See* 2 MCLAUGHLIN, *supra* note 53, § 8:16 ("Calculating damages in the aggregate cannot be squared with the Rules Enabling Act where class members' alleged damages can be reliably quantified only through individualized proof.").

238. *See, e.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 231–32 (2d Cir. 2008).

239. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1008 (2d Cir. 1973) (rejecting fluid recovery); *see also* Dumas v. Albers Med., Inc., No. 03-0640-CV-W-GAF, 2005 U.S. Dist. LEXIS 33482, at *7 (W.D. Mo. Sept. 7, 2005) (stating fluid recovery "is not appropriate when it is used to assess the damages of the class without proof of damages suffered by individual class members" and class action was otherwise unmanageable); City of Philadelphia v. Am. Oil Co., 53 F.R.D. 45, 72 (D.N.J. 1971). While courts have followed *Eisen*, the case's arguments on fluid recovery have been hotly criticized. *See, e.g.*, *Managing the Large Class Action:* Eisen v. Carlisle & Jacquelin, 87 HARV. L. REV. 426, 453 (1973).

240. For example, in the Ninth Circuit fluid recovery is allowed when "conventional methods of proof are demonstrably unavailable." Guiterrez v. Wells Fargo & Co., No. C 07-

However, charitable settlements are distinct from fluid recovery in a simple but important way. They impact disbursement, not damage calculations.[241] Rule 23 requirements are not altered by a charitable settlement. The class is still obligated to show common issues predominate for purposes of certification.[242] As a result, the distribution method does not impact defendants' obligation to pay a settlement reflective of their actual liability. Rather, as the Third Circuit explains, "a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves . . . without engaging in any substantive adjudication of the underlying causes of action."[243] Hence, arguments that class members cannot show they have suffered damages are red herrings.

Since charitable distributions benefit class members without raising substantiated concerns regarding collusion or due process, no theoretical legal barriers to approving such settlements exist. Given their ability to advance the goals of the underlying substantive claims,[244] charitable settlements are a necessary distribution method for class actions. That said, there are still ways to refine such settlements to provide clearer contours for their application. These refinements are described in Part III.

III. PROTECTING CHARITABLE SETTLEMENTS THROUGH CLEARER GUIDELINES

Despite the foregoing, some courts reject charitable settlements outright or discourage them by denying accompanying attorneys' fee applications.[245] While the majority of trial courts have demonstrated a willingness to approve charitable settlements, even these decisions are laden

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05923 WHA, 2009 WL 1247040, at *3 (N.D. Cal. May 5, 2009); *cf.* Hilao v. Estate of Marcos, 103 F.3d 767, 782–86 (9th Cir. 1996) (allowing statistical sampling for class damages because of the "extraordinarily unusual nature of the case").

241. *See, e.g.*, Nat'l Ass'n of Consumer Advocates, *Standards & Guidelines for Litigating & Settling Consumer Class Actions*, 176 F.R.D. 375, 391 (1997) ("Those issues are very different from the question of *cy pres* distribution of unclaimed funds, an issue which does not subject defendants to greater liability or alter their substantive rights.").

242. *See* FED. R. CIV. P. 23(b)(3) (setting forth predominance requirements for monetary class actions).

243. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 n.8 (3d Cir. 2013) (quoting Sullivan v. DB Invs., Inc., 667 F.3d 273, 312 (3d Cir. 2011)).

244. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (explaining that "[p]rivate enforcement . . . provides a necessary supplement" to public enforcement); George D. Hornstein, *Legal Therapeutics: The 'Salvage' Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658, 663 (1956) ("Every successful suit duly rewarded encourages other suits to redress misconduct and by the same token discourages misconduct which would occasion suit."); Salil K. Mehra, *Deterrence: The Private Remedy and International Antitrust Cases*, 40 COLUM. J. TRANSNAT'L L. 275, 280 (2002) ("U.S. [antitrust] law has adopted rules that favor the aim of deterring wrongful conduct over the aim of providing recovery."); Fred O. Williams, *Adelphia Faces 22 Shareholder Lawsuits*, BUFF. NEWS, Apr. 28, 2002, at B13 ("The SEC is overwhelmed . . . nothing would be done except for class-action lawyers.").

245. *See, e.g.*, *In re* Dep't of Veterans Affairs (VA) Data Theft Litig., 653 F. Supp. 2d 58, 61 (D.C. Cir. 2009) (reducing fee request); Fraley v. Facebook, Inc., No. C11-1726 RS, 2012 WL 5838198, at *5 (N.D. Cal. Aug. 17, 2012) (discussing how attorneys' fee requests in a charitable settlement raises "serious concerns").

with inconsistent standards. This inconsistency—coupled with Justice Roberts's call to arms—has emboldened objectors.[246]

Objectors pose a particular problem for charitable settlements. Objector allegations of collusion or unsubstantiated claims that such settlements are inferior to monetary distributions have slowed the settlement approval process and generated unnecessary fees and expenses while wasting judicial resources.[247] In refuting objections to a recent earmarked charitable settlement, Judge Gertner noted:

> [P]rofessional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose benefit the appeal is purportedly raised, gains nothing.[248]

Rather than endlessly relitigating whether the charitable settlement concept is appropriate, settlement approval should instead focus on the particular proposed distribution. To assist in this evaluation, this part offers clearer standards for ensuring charitable settlements achieve their fullest regulatory utility. These proposals focus on three aspects of a charitable settlement: (1) the trigger for such a settlement; (2) evaluating the proposed recipient; and (3) computing attorneys' fees.

Once a charitable settlement and accompanying fee petition meet these guidelines, objections should be limited to a pay-to-play basis. Objectors should be responsible for attorneys' fees and costs generated responding to meritless objections. This ensures the settlement approval process does not devolve into unwarranted lengthy satellite litigation.[249]

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246. *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 820 (9th Cir. 2012); *In re* Netflix Privacy Litig., No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *1 (N.D. Cal. Mar. 18, 2013); *In re* EasySaver Rewards Litig., 737 F. Supp. 2d 1159 (S.D. Cal. 2010).

247. *See, e.g.*, *In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1336–37 (S.D. Fla. 2011) (rejecting objectors' lengthy challenges to the reasonableness of the settlement, the amount of the settlement, settlement notice, the scope's release, fee petition, and charitable distributions "find[ing] that they are both completely unsupported in the record (no Objector having submitted even a single affidavit to provide facts or expert opinions supporting their positions) and unpersuasive as to the substance of their complaints").

248. *See id.* at 1361 n.30 (quoting Barnes v. Fleet Bos. Fin. Corp., No. 01-10395-NG, 2006 U.S. Dist. LEXIS 71072, at *3–4 (D. Mass. Aug. 22, 2006)); *see also In re* UnitedHealth Group Inc. PSLRA Litig., 643 F. Supp. 2d 1107, 1108–09 (D. Minn. 2009); O'Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003); Snell v. Allianz Life Ins. Co. of N. Am., No. Civ. 97-2784 (RLE), 2000 WL 1336640, at *9 (D. Minn. Sept. 8, 2000); Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 975 (E.D. Tex. 2000).

249. The torrid procedural history of *Mirfasihi v. Fleet Mortgage Corp*. is a telling example of how objections to charitable settlements can exhaust valuable judicial resources without generating gain. 450 F.3d 745 (7th Cir. 2006). There, plaintiffs alleged the defendant improperly sold mortgage information to third-party companies, which then marketed financial products to two sub-classes of mortgagers. *Id.* at 746–47. The parties eventually negotiated a settlement totaling $2.4 million, whereby one class would receive monetary compensation and the other class's relief was an earmarked charitable distribution. *Id.* at 747. If distributed to the entire class, the settlement would have amounted to 17 cents per class member. *Id.* The trial court approved the settlement's fairness, but objectors

A. Clearer Trigger for Impracticability

First, recognizing charitable settlements as the exception rather than the rule raises the question, at what point should the exception apply? Stated differently, what is the "trigger" requirement for a charitable settlement? Clearer, more consistent standards are needed to identify cases where charitable settlements are appropriate.[250] Net-zero cases, where the administrative costs exhaust the settlement, should regularly trigger charitable distributions.[251] Yet as mentioned in Part I, objectors routinely challenge such settlements for not distributing funds to class members first.[252]

Currently, courts import the *cy pres* standard for all types of charitable distributions, defining the trigger as the point at which a monetary distribution becomes "unlawful, impossible, or impracticable."[253] Since, as previously discussed,[254] charitable distributions are distinguishable from *cy pres*, importing definitions from the trust context is illogical, but more importantly, provides little concrete guidance. Even in the trust context, there is "significant variance in the degree of impossibility or impracticability required" to trigger *cy pres*.[255] In fact, commentators do not even agree on whether the *cy pres* doctrine is expanding or narrowing.[256]

How the terms are used outside the *cy pres* context is equally unhelpful. For example, in contract law, the doctrine of "impracticability" requires an unforeseen supervening circumstance not within the contemplation of the

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appealed not once but three times. Mirfasihi v. Fleet Mortg. Corp., 551 F.3d 682, 685 (7th Cir. 2008); *Mirfasihi*, 450 F.3d at 746; Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 782 (7th Cir. 2004). Ultimately, six years after the settlement agreement, in a third opinion, the Seventh Circuit affirmed the charitable distribution, finding it fair and adequate given the significant risks associated with successful prosecution of the underlying claims. *Mirfasihi*, 551 F.3d at 685.

250. *Compare* McLaughlin, *supra* note 60, at 465–77 (discussing how clarifying the trigger for when a conservation easement is "impossible or impracticable" would "yield more predictable results").

251. *See, e.g.*, *In re Netflix Privacy*, 2013 WL 1120801, at *6.

252. *Id.* at *2. For example, in the *In re Netflix Privacy* settlement, the trial court granted preliminary approval of a $9 million wholly charitable settlement stemming from claims that Netflix unlawfully retained and disclosed private customer information. The class constituted approximately 62 million claimants. *See id.* at *1. Thus, the parties argued any distribution of the settlement fund would be de minimis, at best. *See id.* at *7. Nonetheless, objectors challenged the settlement, arguing instead that the settlement should provide individual compensation. *See id.* at *11. Although the court overruled the objections, explaining that no other realistic settlement distribution option existed, objectors forced the court to spend time and money responding to their meritless challenge. *See id.* at *12.

253. *See* Restatement (THIRD) OF TRUSTS § 67 (2003).

254. *See supra* Part I.A (distinguishing *cy pres*, earmarked charitable settlements, and wholly charitable settlements).

255. McLaughlin, *supra* note 60, at 465–67 ("Decisions regarding whether the charitable purpose of a gift or trust has become 'impossible or impracticable' are based on the particular facts of each case, and no precise definition of the standard exists.").

256. *Id.* at 467 ("Although some commentators have noted a 'prevailing conservative mood' in the approach of the courts to this first step in the *cy pres* process, others have noted that the trend in the case law has been to broaden the circumstances in which *cy pres* can be applied.").

parties at the time of the contract.[257] This definition is not a workable trigger for charitable distributions because it is known in advance that circumstances will make a distribution to the class members impracticable. The remaining trigger terms, "impossible," "inefficient," and "wasteful," are also plagued by vague, inconsistent definitions.[258]

The lack of an easily transferable, preexisting trigger point for charitable settlements highlights the need for more clarity.[259] To address this need, this Article proposes the following straightforward inequality:[260]

$$2(A)>C$$

"*A*" represents the average cost per class member to administer the settlement fund. This variable is appropriate because it changes depending on the facts of the case, thus reflecting potential distribution problems. If class members are transient or difficult to locate, administrative costs rise. In contrast, clear records facilitating the location of class members lower costs. Multiplying *A* by two ensures administrative costs are justified when compared to the potential monetary gain of consumers.[261] "*C*" is the approximate individual consumer distribution. If the settlement is tiered, meaning some class members are eligible for a different distribution amount, the formula should apply per tier. Consequently, some tiers may trigger a potential charitable settlement while others do not.[262] Assuming

257. U.C.C. § 2-615 cmt. 1 (2013).

258. *See, e.g.*, JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 315 (2003) (discussing "competing definitions of efficiency"); William V. Roth, Jr., *The "Malmanagement" Problem: Finding the Roots of Government Waste, Fraud, and Abuse*, 58 NOTRE DAME L. REV. 961, 964 (1983) (noting "no definition of waste fits everyone's notion of what constitutes wasteful activity"); Karen A. Russell, *Wasting Water in the Northwest: Eliminating Waste As a Way of Restoring Streamflows*, 27 ENVTL. L. 151, 163 (1997) (discussing "the lack of a clear definition of waste").

259. *In re* Wells Fargo Sec. Litig., 991 F. Supp. 1193, 1197 (N.D. Cal. 1998) ("[T]here is an appealing symmetry to the proposition that the cost of the distribution should not be greater than the amount of the distribution itself.").

260. This formula stems from Judge Walker's decision in *In re* Wells Fargo Securities Litigation. *Id.* The case involved remainder, which could be distributed as a second distribution or as *cy pres*. In approving a *cy pres* distribution, Judge Walker compared administrative cost versus individual distribution, permitting a distribution so long as the individual distribution is double the administrative cost. *See id.* at 1197–98. Professor Brian Fitzpatrick offers an alternative proposal, whereby class counsel receive all settlement distributions in cases involving $100 or less in individual compensation. *See* Fitzpatrick, *supra* note 23, at 2067–71. His argument has some allure from a deterrence-insurance perspective. Moreover, the Rule 23 Subcommittee's recent draft proposed amendments to Rule 23(e), which incorporated the $100 threshold. *See* ADVISORY COMM. ON CIVIL RULES, *supra* note 22, at 264–71. But by Professor Fitzpatrick's own admission, "It goes without saying that it would be politically difficult for judges to award fees equal to 100% of small-stakes class judgments even if they had the legal authority to do so." Fitzpatrick, *supra* note 23, at 2075. Thus, this Article's proposed inequality triggers a more pragmatic proposal.

261. *Accord In re Wells Fargo*, 991 F. Supp. at 1197 ("The court could simply direct class counsel to pay all claimants who are entitled to more than $5.50 from the residue . . . [but] the claims administrator would spend $5.50 to send Mr. Casagrande a check for fifty-two cents. . . . [Therefore] the line must be set at a higher point than $5.50.").

262. Different tiers of distribution are fairly common in class action settlements, even for cases that do not include sub-classes. *See, e.g.*, Pelletz v. Weyerhaeuser Co., 255 F.R.D. 537,

the settlement otherwise satisfies Rule 23(e), if *2(A)* is greater than *C*, a rebuttable presumption exists supporting a charitable distribution.[263]

For example, take a hypothetical settlement of $250,000 for a class of 30,000 consumers, with an estimated administrative cost of $100,000, roughly $3.34 per class member. Assume administrative costs come from the total settlement fund, leaving $150,000 for distribution. Class members would then receive $5 at an administrative expense of $3.34, creating an inequality of 6.68 > 5—triggering a charitable settlement.

This formula is a fair trigger point for three reasons. First, it is consistent with a generic definition of efficiency as a system that "exhibit[s] a high ratio of output to input."[264] The administrative costs reflect the input while the individual compensation is the output. Multiplying the administrative costs by two ensures the input-to-output ratio is not just marginally greater. It reflects individual distributions where the administrative costs involved are not justified given the negligible monetary gain to consumers.

Second, this formula is consistent with one definition of "wasteful" as meaning a mechanism that is more expensive than an equally beneficial alternative.[265] The two relevant alternatives are monetary distributions and charitable distributions. The quality of a particular charity can be assessed by its administrative cost ratio, specifically, how much is used for administrative overhead versus how many cents per dollar are used to advance the charity's work.[266] For better charities, the ratio is roughly 2:1—meaning approximately 66 cents per dollar are distributed, while 33 cents are used on overhead.[267]

Building on this, individual distributions in cases that do not satisfy the proposed formula are wasteful compared to a wholly charitable distribution. Take, for example, a $12 settlement where the administrative cost is $6 per consumer and each consumer would only receive $6. Such a settlement

539 (W.D. Wash. 2009) (involving multitiered settlement in a consumer class action); *In re* Vitamins Antitrust Litig., No. MISC. 99-197 (TFH) MDL 1285, 2001 WL 34312839, at *1 (D.D.C. July 16, 2001) (discussing settlement involving four separate settlement funds for different types of claimants); *In re* Lease Oil Antitrust Litig. (No. II), 186 F.R.D. 403, 416 (S.D. Tex. 1999) (discussing multiple claimant tiers in antitrust class action settlement).

263. The standard for settlement approval goes beyond whether a charitable settlement is appropriate and considers the overall fairness of the settlement. *See supra* Part I.A (detailing the settlement approval process).

264. Paul L. Tractenberg, *Beyond Educational Adequacy: Looking Backward and Forward Through the Lens of New Jersey*, 4 STAN. J. C.R. & C.L. 411, 426 (2008) (looking at efficiency in the context of education reform). This definition is probably closest to allocative efficiency. *See, e.g.*, Walter Adams & James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 284 (1995) ("Productive efficiency means the effective use of resources by individual firms.").

265. *See* Paul E. Kalb, *Controlling Health Care Costs by Controlling Technology: A Private Contractual Approach*, 99 YALE L.J. 1109, 1113 n.18 (1990) ("In economic terms, a wasteful technology is one whose costs outweigh its benefits or one that is more expensive than an equally beneficial alternative.").

266. *See, e.g.*, Roy Lewis, *Check Out Your Charity*, MOTLEY FOOL (July 18, 2003) (detailing criteria for "efficient and effective" charities), *available at* http://www.fool.com/personal-finance/taxes/2003/07/18/check-out-your-charity.aspx.

267. *See id.*

does not satisfy the proposed formula—nor should it. If given to an adequate charity, 66 percent of the $12 is used for collective good, meaning roughly $9 rather than $6. Thus, the charitable distribution is a cheaper alternative that provides the class equal deterrence and access to justice.

Third, this formula minimizes the potential waste from limiting charitable distributions to *cy pres* remainders. In class actions where claims rates are low, the leftover funds are usually distributed as *cy pres* remainders, but the *cy pres* amounts are diminished by administrative costs that could have been minimized by using a charitable distribution from the outset.[268] *Pearson v. NBTY, Inc.*[269] provides an example of how charitable settlements could prevent waste. There, the parties reached a $14.2 million settlement in a pending consumer class action against Target.[270] After class notice and completion of the claim process, only $865,284 of the settlement fund was distributed to class members, while notice costs were twice as much as actual class payouts.[271] Rather than spending over $1.5 million in claims administration, a larger portion of the settlement could have gone directly to a charitable distribution.[272]

Admittedly, this formula may be criticized for being too generous or not generous enough. Some may squabble that *A* should actually be *3(A)* or *.5(A)*—and such critiques may have merit depending on the case. However, this test provides a brighter line[273] to assess potential charitable settlements, while simultaneously maintaining the flexibility courts need to fulfill their equitable function in evaluating settlements.[274] By coupling this formula with a rebuttable presumption, courts can consider the facts of a particular

268. *See, e.g.*, Diamond Chem. Co. v. Akzo Nobel Chems. B.V., 517 F. Supp. 2d 212, 214–15 (D.C. Cir. 2007) (distributing approximately half the settlement to a charity after individual distributions were made).

269. No. 11 CV 7972, 2014 WL 30676, at *3 (N.D. Ill. Jan. 3, 2014).

270. *See id.*

271. *See id.* at *4.

272. *See, e.g.*, STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 189–99 (1987) (explaining that individuals are indifferent about a potential loss that is minimal in relation to his income); Fitzpatrick, *supra* note 23, at 2067 ("[A] loss of a few or a few hundred dollars does not appreciably affect the marginal utility an individual derives from additional wealth.").

273. *See, e.g.*, Novella v. Westchester Cnty., 661 F.3d 128, 145 (2d Cir. 2011) (discussing the "logic and appeal" of bright-line rules); Midwest Imports, Ltd. v. Coval, 71 F.3d 1311, 1316 (7th Cir. 1995) (discussing how bright-line rules are "essential to obtaining compliance with the rule and to ensuring that long-run aggregate benefits in efficiency inure to district courts"); *cf.* Kevin C. Mcmunigal & Calvin William Sharpe, *Reforming Extrinsic Impeachment*, 33 CONN. L. REV. 363, 375 (2001) ("One advantage a bright line rule generally has over a case-by-case rule is the comparative cost of administering the rule—the time and other resources judges and parties would expend weighing the benefits and costs of extrinsic evidence under a case-by-case rule. A bright line rule is superior on this ground to a case-by-case rule precisely because of its simplicity.").

274. *See, e.g.*, Fermin v. Moriarty, No. 96 CIV. 3022 (MBM), 2003 WL 21787351, at *2 (S.D.N.Y. Aug. 4, 2003) (discussing how rebuttal presumptions provide flexibility); *see also, e.g.*, Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin., 822 F.2d 1105, 1113 (D.C. Cir. 1987) (same).

case in evaluating the adequacy of a given charitable settlement.[275] Consequently, adopting this trigger would ensure small-stakes claims, or cases with other distribution challenges, do not generate unnecessarily protracted objections during the settlement approval process.

B. Clearer Nexus Requirement

In addition to trigger requirement challenges, objectors often contest the proposed recipient in charitable settlements. In making this objection, the assault is more destructive than constructive; alternative recipients are rarely proposed.[276] For settlement approval, the test should not be whether the proposed recipient is the best possible option,[277] as this undermines the settlement negotiation process's integrity and invites subjectivity.[278] Instead, this section clarifies the standard for determining whether a particular organization is the appropriate recipient of a charitable settlement.

To begin, the parties, not the court, should select recipients. This minimizes judicial favoritism and potential conflict of interest challenges.[279] As Judge Kleinfeld noted, "The rules of judicial ethics have in many forms for over a hundred years prohibited judges from endorsing charities, because of the risk that lawyers and litigants will feel compelled to contribute to them."[280] Mostly, this proposal is already in effect for charitable settlements.[281] Unlike *cy pres* remainders, which are not always

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275. *See generally* Joel S. Hjelmaas, *Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 DRAKE L. REV. 427, 433 (1993) (describing the differences between a rebuttal presumption and an inference).

276. *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 820 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 8 (2013) (challenging proposed charitable settlement recipient); Nachshin v. AOL, LLC, 663 F.3d 1034, 1037–38 (9th Cir. 2011) (challenging charitable distribution by contending "the charities selected by the parties do not relate to the issue in the case and are not geographically diverse"); *In re* Mex. Money Transfer Litig., 164 F. Supp. 2d 1002, 1031 (N.D. Ill. 2000) ("The California Objectors argue that the *cy pres* provisions are not 'narrowly tailored.'").

277. *Lane*, 696 F.3d at 820–21 ("We do not require as part of that doctrine that settling parties select a *cy pres* recipient that the court or class members would find ideal. On the contrary, such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process.").

278. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172–74 (3d Cir. 2013) ("[S]ettlements are private contracts reflecting negotiated compromises. The role of the district court is not to determine whether the settlement is the fairest possible resolution. . . .").

279. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(c) (2010) ("The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class."); *see also In re Baby Prods.*, 708 F.3d at 180 n.16 ("The judicial role is better limited to approving *cy pres* recipients selected by the parties."); *In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 38 (1st Cir.), *cert. denied*, 133 S. Ct. 338 (2012) ("[H]aving judges decide how to distribute *cy pres* awards both taxes judicial resources and risks creating the appearance of judicial impropriety."); *accord* Boies & Keith, *supra* note 23, at 288 ("First, it is preferable that the parties (rather than the court) select the charities that will receive a *cy pres* distribution and ideally articulate such selection clearly in any settlement agreement.").

280. *Lane*, 696 F.3d at 834.

281. *See, e.g.*, *id.* at 820–21.

anticipated in settlement agreements,[282] charitable settlements are identified by the parties from the outset and should be included in settlement notices.[283]

With this foundational point in place, the question then becomes how to refine the nexus requirement. Most courts ensure the proposed recipient: (1) advances the objectives of the underlying statutes (the "objectives" factor), (2) targets the plaintiff class (the "targets the class" factor), and (3) provides reasonable certainty that any member will be benefitted (the "reasonable certainty" factor).[284] However, how courts apply these factors varies[285]—which allows objectors to test if a particular judge may entertain nexus challenges. Clarifying the three factors would simplify the settlement approval process for charitable settlements and ensure consistency.

First, for the "objectives" factor, courts should define this factor broadly and consider the objectives of class actions, not just the underlying claim.[286] Courts should be careful not to narrowly fixate on finding the most ideal organization. As discussed in Part I.A, charitable settlements are distinct from *cy pres* in charitable trusts. But even for charitable trusts, from where the *cy pres* analogy is drawn, the Restatement Third of Trusts

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282. *See, e.g.*, Better v. YRC Worldwide Inc., No. CIV.A. 11-2072-KHV, 2013 WL 4482922, at *10 (D. Kan. Aug. 19, 2013) ("By not identifying the proposed *cy pres* recipient, the parties have restricted the Court's ability to conduct the searching inquiry required to approve such a distribution." (citing Dennis v. Kellogg Co., 697 F.3d 858, 867 (9th Cir. 2012))).

283. *See, e.g.*, *id.* ("[T]he failure to designate a proposed *cy pres* recipient deprives class members of notice and the ability to object."); *see also Dennis*, 697 F.3d at 867 (discussing the importance of identifying charitable distribution recipient during the settlement approval process). *But see In re Baby Prods.*, 708 F.3d at 180 ("Young contends that the settlement notice was inadequate because it did not identify the *cy pres* recipients who will receive excess settlement funds. His primary concern is that unnamed class members will not have the opportunity to object to the selection of the *cy pres* recipients, who are intended to serve as proxies for the class members' interests. While a valid concern, failure to identify the *cy pres* recipients is not a due process violation.").

284. Though this list is often written in the disjunctive ("or" instead of "and"), judicial application highlights how all three factors are regularly considered. *See, e.g.*, Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011); Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990).

285. *Compare* New York v. Dairylea Coop., Inc., No. 81 Civ. 1891 (RO), 1985 WL 1825, at *1 (S.D.N.Y. June 26, 1985) (detailing wholly charitable settlement that was used to fund nutrition-related purposes or programs in the same geographic area as the alleged price fixing among milk wholesalers), *with In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1394 (N.D. Ga. 2001) ("Courts have expanded the *cy pres* doctrine to also permit distributions to charitable organizations not directly related to the original claims."). For a thorough discussion of the *Motorsports* decision, see generally Robert E. Draba, *Motorsports Merchandise: A* Cy Pres *Distribution Not Quite "As Near As Possible,"* 16 LOY. CONSUMER L. REV. 121, 142 (2004).

286. For example, in *Dennis v. Kellogg*, consumers claimed Kellogg falsely advertised. 697 F.3d at 858. The $5 million proposed settlement included food distributions to charities dedicated to feeding the hungry. *Id.* at 861. The court noted that "[t]his noble goal [of feeding the indigent], however, has 'little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved.'" *Id.* at 866 (quoting *Naschin*, 663 F.3d at 1039). The court continued: "Thus, appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising." *Id.* at 867.

has moved away from "the next best" substitute requirement. Only "a charitable purpose that reasonably approximates the designated purpose" is required.[287] Courts in the United States and abroad recognize this more liberal construction of the *cy pres* doctrine for trusts.[288] In fact, the current Restatement's comments support a "more liberal application of *cy pres*" that does not require the "*nearest* possible" substitute but rather "one reasonably similar."[289] Thus, holding charitable settlements to a higher standard than *cy pres* trusts is highly questionable.

One alternative is to identify a list of presumptively appropriate recipients, which advances the nexus requirement by ensuring a relationship between the proposed recipient and charitable distribution.[290] Some states already have adopted this approach for *cy pres* remainders.[291] If either the American Law Institute or the Judicial Conference of the United States generated similar lists, parties would have increased certainty about proposed recipients.[292]

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287. RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

288. *See, e.g.*, McDonald & Co. Sec., Inc., Gradison Div. v. Alzheimer's Disease & Related Disorders Ass'n, Inc., 747 N.E.2d 843, 849 (Ohio Ct. App. 2000) ("In equitable matters, the court has considerable discretion . . . to fashion any remedy necessary and appropriate to do justice in a particular case."); A.G. for New S. Wales v. Fulham [2002] NSWSC 629 (Austl.); John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 178 (2010).

289. RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. (d); *see also* PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 440 (2009).

290. *See, e.g.*, Fraley v. Facebook, Inc., 966 F. Supp. 2d 939, 946 (N.D. Cal. 2013) (explaining how the nexus requirement ensures the recipients "are not merely 'worthy' recipients with 'noble goals,' but organizations and institutions with demonstrated records of addressing issues closely related to the matters raised in the complaint"); Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1307 (9th Cir. 1990) (detailing how the nexus requirement ensures the settlement is "guided by the objectives of the underlying statute and the interests of the silent class members").

291. *See, e.g.*, IND. R. TRIAL P. 23(F)(2) (requiring partial distribution of *cy pres* remainders to the Indiana Bar Foundation and the Indiana Pro Bono Commission); KY. R. CIV. P. 23.05(6) (requiring partial distribution of *cy pres* remainders to the Kentucky IOLTA Fund Board of Trustees); N.C. GEN. STAT. § 1-267.10 (2005) (requiring equal distribution of *cy pres* remainders to the Indigent Person's Attorney Fund and the North Carolina State Bar); PA. R. CIV. P. 1716 (directing partial distribution of *cy pres* remainders to the Pennsylvania IOLTA Board); WASH. SUPER. CT. CIV. R. 23(f)(2) (requiring distribution of partial *cy pres* remainders to the Legal Foundation of Washington).

292. In generating a list, a natural starting point is identifying charities that promote judicial access, as that is an underlying policy behind all class actions. *See, e.g.*, Safran v. United Steelworkers of Am., AFL-CIO, 132 F.R.D. 397, 401 (W.D. Pa. 1989) ("[T]he general theory behind class action lawsuits . . . [is] to conserve judicial resources and increase judicial access."); Elizabeth J. Cabraser, *The Procedural Vision of Arthur R. Miller: A Practitioner's Tribute*, 90 OR. L. REV. 929, 931 (2012) ("The purpose and function of class actions . . . [is] to provide judicial access to investors, consumers, and tort victims whose claims, if brought alone, would not survive the expense and delay of solo litigation."). Preidentified charities listed in state statutes could be included as appropriate for cases where class members are geographically concentrated. Moreover, organizations with broader geographic impact, appropriately used for nationwide classes, should be included. The broader category could include the ACLU, the National Legal Aid and Defender Association's Civil Legal Services Division, Legal Services Corporation, and the American Bar Association.

Next, to clarify the "targets the class" factor, courts should include an assessment of the class's geographic distribution.[293] Currently, both the Ninth and Eighth Circuits have expressly incorporated this aspect into their nexus tests.[294] This geographic factor is a functional one, as it does not require the recipient be located in the same place as class members. Rather, it ensures the proposed use of the funds overlaps with the class definition.[295] For example, in a nationwide consumer class, a California-based consumer protection institution can still satisfy the nexus requirement so long as its work has nationwide impact.[296] If, however, the institute only worked on California-related questions, it would not satisfy the nexus test's geographic factor—not because of its location but because of the limited reach of its work.[297] A narrower definition of the "targets the class" factor coupled with the broader definition of "objectives" gives courts flexibility in identifying potential recipients while still promoting a nexus between the pending litigation and the resulting benefit.

Last, the "reasonable certainty" factor evaluates the propriety of a proposed charitable recipient. Too often, objectors use this factor as an open invitation to reargue that direct compensation must occur before any charitable distribution.[298] Such arguments should be outright rejected. Instead, this factor should focus on the proposed recipient and its plan for the charitable settlement.

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293. Superior Beverage Co., Inc. v. Owens-Ill., Inc., 827 F. Supp. 477, 480 (N.D. Ill. 1993); *see also In re* Bank of Am. Corp. Sec. Litig., No. 4:99-MD-1264 CEJ, 2013 WL 3212514, at *4 (E.D. Mo. June 24, 2013), *vacated and remanded*, 775 F.3d 1060 (8th Cir. 2015) ("The geographic scope of the instant case is clear; as lead counsel points out, the multi-district litigation was transferred to this district because much of the harm suffered by the class was felt by individuals in the St. Louis region. Therefore, a *cy pres* distribution to a regional organization is proper.").

294. *See, e.g.*, *In re* Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 683 (8th Cir. 2002) (describing the geographic nexus requirement); Powell v. Ga.-Pac. Corp., 119 F.3d 703, 705 (8th Cir. 1997) (describing charitable distribution with appropriate geographic nexus because the settlement program distributed money to the United Negro College Fund for scholarships in the region class members resided).

295. *See, e.g.*, *In re* EasySaver Rewards Litig., 921 F. Supp. 2d 1040, 1052 (S.D. Cal. 2013) ("On the whole, the location of the recipient is less important than 'whether the projects funded will provide 'next best' relief to the class.'" (quoting *In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 36 (1st Cir. 2012))); *Lupron Mktg.*, 677 F.3d 21 at 36, *cert. denied*, 133 S. Ct. 338 (2012) ("It is not the location of the recipient which is key; it is whether the projects funded will provide 'next best' relief to the class.").

296. *Cf. EasySaver*, 921 F. Supp. 2d at 1052 (approving San Diego–based recipient in a case involving a nationwide class because "the funds will directly contribute to the national academic dialogue involving internet privacy and security").

297. *Cf.* Nachshin v. AOL, LLC, 663 F.3d 1034, 1041 (9th Cir. 2011) (rejecting charitable distribution in a nationwide claim against AOL where the recipient only benefited the Los Angeles area).

298. *See, e.g.*, *In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1335–36 (S.D. Fla. 2011); New York v. Dairylea Coop., Inc., No. 81 CIV. 1891 (RO), 1985 WL 1825, at *1 (S.D.N.Y. June 26, 1985).

Preference should be given to charities rated by an independent organization.[299] Grades of "C" or lower should be presumptively inadequate for purposes of Rule 23(e). Three well-respected watchdog organizations that provide such ratings are the American Institute of Philanthropy, Better Business Bureau's Wise Giving Alliance, and Charity Navigator.[300] When a charity grade is unavailable, the charity's administrative overhead costs should be presented to the court.[301] The court should assess this by considering information on employment compensation and administrative overhead—as these amounts indicate how much money will actually be used to advance the organization's mission.[302] Consequently, preference will be given to preexisting organizations, since new ones lack data about administrative costs.[303] Thus, in the recent Facebook case, where the proposed recipient was a newly formed organization, the court was correct in noting, "we have never held that [charitable distribution] funds must go to extant charities in order to survive fairness review."[304] However, under the principles proposed in this Article, the court should have interrogated why a new organization was warranted.

Further, the settlement agreement should lay out how the intended recipient will use the money. To date, courts have been inconsistent on the breadth and detail required. Sometimes generic promises to promote consumer rights or research sufficed.[305] Parties should provide a detailed

299. *See, e.g.*, Lloyd Hitoshi Mayer, *The "Independent" Sector: Fee-for-Service Charity and the Limits of Autonomy*, 65 VAND. L. REV. 51, 118 (2012) (discussing charitable grading).

300. *See, e.g.*, KARL E. EMERSON, STATE SOLICITATION REQUIREMENTS (2006), *available at* 2006 WL 5839022, at *7 (listing these three organizations as the primary private charity watchdogs); *see also* Karen Donnelly, *Good Governance: Has the IRS Usurped the Business Judgment of Tax-Exempt Organizations in the Name of Transparency and Accountability?*, 79 UMKC L. REV. 163, 168 (2010); Jennifer Miller Oertel et al., *Proving That They Are Doing Good: What Attorneys and Other Advisers Need to Know About Program Assessment*, 59 WAYNE L. REV. 693, 699–700 (2013) (detailing Charity Navigator's rating process).

301. This information is publicly available for over 850,000 charities. *See* GUIDESTAR, www.guidestar.org (last visited Apr. 23, 2015) (providing financial reporting on charities, including overhead costs). If a particular proposed charity is not listed, such information should still be proffered to the court. Charities are interested in receiving charitable settlement funds. They are motivated to provide this information, so obtaining such information should not be particularly onerous.

302. *See* Lewis, *supra* note 266 (describing how to assess how much was spent on program services versus general and administrative costs).

303. This is not intended as an absolute rule, as there could be instances where the preexisting charity has other problems—such as high administrative overhead or too narrow a geographic reach. But if there is an alternative, preexisting charity that does not raise any obvious red flags, the parties should bear a heavier burden to prove distribution to a new organization is warranted. This allows trial courts to consider the organization's track record, as well as helps to ensure the money received is not exhausted by set-up costs for a new organization.

304. Lane v. Facebook, Inc., 696 F.3d 811, 822 (9th Cir. 2012).

305. *See, e.g.*, *In re* Google Buzz Privacy Litig., No. C 10-00672 JW, 2011 WL 7460099, at *1 (N.D. Cal. June 2, 2011) (approving settlement with distribution for consumer protection); *In re* Publ'n Paper Antitrust Litig., No. 3:04MD1631SRU, 2009 WL 2351724, at *2 (D. Conn. July 30, 2009) (approving charitable distribution to "charitable institutions designed to guard against antitrust injury and protect consumers").

plan on how to use the money as part of the settlement approval process.[306] This will help the court evaluate whether the recipient has the experience and know-how to fulfill the distribution's intended purpose. Minute detail is not needed, but the court should be confident the recipient has a plan and is well-positioned to execute it.[307] Further, requiring continued reports to ensure the plan is fulfilled maximizes the benefits derived from charitable settlements.[308]

Promotion of a clearer nexus requirement assists courts and class members. These revisions provide courts more information to evaluate proposed charities and distributions. This information then can be passed on to class members in settlement notices, thus averting wasteful objections.

C. Calculating Attorneys' Fees for Charitable Settlements

Third, objectors often attempt an end-run attack on charitable settlements. In addition to challenging the distributions, objectors regularly challenge fee petitions in charitable settlements, contending money that goes to charity should not be included in calculating attorneys' fees.[309] In support, objectors rely on what some courts have called "red flags"—or factors that suggest a collusive or problematic settlement. As previously listed in Part I,[310] these red flags are: (1) a high percentage of the settlement going to charity;[311] (2) clear sailing provisions—whereby defendants agree not to contest fee awards up to a certain monetary

306. *See, e.g.*, *Lane*, 696 F.3d at 822, *cert. denied*, 134 S. Ct. 8 (2013) (discussing how the settlement agreement articulated "exactly how funds will be used—to 'fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats'").

307. *See, e.g.*, Diamond Chem. Co., Inc. v. Akzo Nobel Chems. B.V., Nos. 01 2118 (CKK), 02-1018 (CKK), 2007 WL 2007447, at *3 (D.D.C. July 10, 2007) ("In addition to arguing about the hypothetical virtues of the proposed Center, Class Plaintiff provides the Court with significant concrete detail as to both the mission and the nascent plans for the proposed Center."); *accord* Foer, *supra* note 95, at 89 (discussing proposed best practices for antitrust *cy pres*).

308. *See, e.g.*, *In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 38–39 (1st Cir.), *cert. denied*, 133 S. Ct. 338 (2012) (requiring annual reports to the court to "ensure that the *cy pres* fund is distributed in a way that is both financially sound and comports with the interests of the class and that the auditing function will not fall on the district court").

309. *See, e.g.*, *In re* EasySaver Rewards Litig., 921 F. Supp. 2d 1040, 1053 (S.D. Cal. 2013); *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. M 07-1827 SI, 2013 WL 1365900, at *8 (N.D. Cal. Apr. 3, 2013); *In re* Ins. Brokerage Antitrust Litig., 282 F.R.D. 92, 121 (D.N.J. 2012); *In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011); *In re* MetLife Demutualization Litig., 689 F. Supp. 2d 297, 351 (E.D.N.Y. 2010). These challenges are not limited to charitable distributions. Rather, generic objections to fee petitions are an epidemic in class actions. *See, e.g.*, Spark v. MBNA Corp., 289 F. Supp. 2d 510, 514 (D. Del. 2003) ("The objector's 'opposition' to class counsel's fee petition appears to be nothing more than an attempt to receive attorneys' fees."). *See generally* Greenberg, *supra* note 114, at 950 (detailing meritless objections and the problems they pose to enforcement and deterrence goals).

310. *See supra* Part I.B.

311. *See* Murray v. GMAC Mortg. Corp., 434 F.3d 948, 952 (7th Cir. 2006); Crawford v. Equifax Payment Servs., Inc., 201 F.3d 877, 882 (7th Cir. 2000).

value;[312] and (3) reverters, or settlements where unclaimed funds return to the defendant.[313] If successful in convincing the court to reduce the fee award, objectors stand to gain—fee reduction is a basis for objectors to request fees of their own.[314] Hence, objectors have financial motivation to recycle claims that charitable settlements are not beneficial to class members.[315] As Professor Hay explained, "Among critics, the contention that class members have received too little in a class settlement almost always is accompanied by the corresponding charge that class'[s] counsel has received too much."[316]

Rather than fostering such objections, the better course is to clarify how to calculate attorneys' fees for charitable settlements. To begin, when the revised trigger and nexus requirements are satisfied, the charitable distribution should not alter the attorneys' fee evaluation. Such settlements should be treated the same as any other monetary settlement. A contrary position risks underenforcement.[317] The next step is revising the "red flags" as the current ones do not identify problematic settlements and lead to false positives, thus generating unsubstantiated fears of collusion.

Fee awards are essential for class actions to supplement enforcement of key substantive laws.[318] The potential to recover fees incentivizes class

312. Lobatz v. U.S. W. Cellular, Inc., 222 F.3d 1142, 1148 (9th Cir. 2000) (detailing the alleged dangers of clear sailing provisions); *see* Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) ("[L]awyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.").

313. *In re* Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 947 (9th Cir. 2011); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004).

314. *See* Petruzzi's Inc. v. Darling-Del. Co., Inc., 983 F. Supp. 595, 622 (M.D. Pa. 1996) (using lodestar analysis, the court noted that the objector "will only be compensated for hours which were expended in a manner that benefitted that class as a whole"); *cf. In re* Cardinal Health, Inc. Sec. Litig., 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008) ("An objector to a class-action settlement is not normally entitled to a fee award unless he confers a benefit on the class.").

315. *See* Barnes v. Fleet Bos. Fin. Corp., No. 01-10395-NG, 2006 WL 6916834, at *3 (D. Mass. Aug. 22, 2006) ("Repeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements."); Spark v. MBNA Corp., 289 F. Supp. 2d 510, 514 (D. Del. 2003) (stating that groundless objection by serial objector counsel "appears to be nothing more than an attempt to receive attorneys' fees"); Greenberg, *supra* note 114, at 963 ("Thus, perversely, professional objectors have purely monetary incentives to find even a quibble to raise in opposition to a settlement—even as class counsel and the court are bound to ensure that the settlement is within the range of reasonableness.").

316. Hay, *supra* note 198, at 1433.

317. *See, e.g.*, Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 23 (explaining how attorneys' fees play a role in private enforcement); Fitzpatrick, *supra* note 23, at 2057 (discussing that fee awards are a necessary aspect of class actions' deterrence potential).

318. *See, e.g.*, Ressler v. Jacobson, 149 F.R.D. 651, 657 (M.D. Fla. 1992) ("Attorneys who bring class actions are acting as 'private attorneys general' and are vital to the enforcement of the securities laws. Accordingly, public policy favors the granting of counsel fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions."); Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L.J. 873 (2002).

action attorneys to front fees and expenses and undertake risky, complex litigation. As Judge Manning noted:

> If the class members had to file individual suits seeking $100–$1,000 each and had to pay attorneys' fees for each case, they would likely not bother, and if they did, they would still receive a pittance if they received any money at all. Congress has elected to allow class actions to create an incentive for lawyers to take cases where the recovery of individual class members creates a disincentive to file suit.[319]

This policy goal is particularly applicable to small sum cases, where but for potential fees such claims would likely not be brought.[320] Hence, fees ward against creating an immunity carve-out, whereby defendants could avoid liability simply by keeping individual damages low enough to make litigation unrealistic.

In fact, these policy arguments are partially why most courts, including the Second, Third, and Ninth Circuits, have considered charitable distributions in calculating fee awards.[321] As the Third Circuit recently explained,

> We think it unwise to impose, as [an objector] requests, a rule requiring district courts to discount attorneys' fees when a portion of an award will be distributed [to charity] . . . . Nor do we want to discourage counsel from filing class actions in cases where few claims are likely to be made but the deterrent effect of the class action is equally valuable.[322]

While the Supreme Court has yet to address the question, including charitable distributions in computing settlement values would be a logical extension of prior precedent. In *Boeing Co. v. Van Gemert*,[323] the Supreme Court affirmed a fee application that used the entire settlement to calculate fees, even though part of the settlement reverted to the defendant.[324] Since a reversion can count for calculating fees, a charitable distribution, which is more valuable for class members, should as well.[325] Hence, in terms of

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319. Murray v. Cingular Wireless II, LLC, 242 F.R.D. 415, 421 (N.D. Ill. 2005).

320. *See, e.g.*, AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1760–61 (2011) (Breyer, J., dissenting) ("The maximum gain to a customer for the hassle of a $30.22 dispute is still $30.22. What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?").

321. *See, e.g.*, Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 437 (2d Cir. 2007). In *Masters*, the court explained:

> The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not. We side with the circuits that take this approach.

Id.; *see also* Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990) ("Nothing in this case requires departure from the 25 percent standard award.").

322. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 178 (3d Cir. 2013).

323. 444 U.S. 472 (1980).

324. *Id.* at 480–81.

325. That said, the Supreme Court has demonstrated a fair bit of animus toward class actions. Hence, it is possible the Court will distinguish *Van Gemert*. As Justice Kagan noted in her dissent to *American Express Co. v. Italian Colors Restaurant*, "To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23,

policy and precedent, including charitable settlements for calculating attorneys' fees is the proper course. This ensures the regulatory enforcement goals of class actions remain at the forefront of Rule 23.

Nonetheless, objectors still rely on red flags to challenge such petitions. Yet, these red flags are just another vestige of conflating *cy pres* and charitable settlements that results in wasteful false-positives. These red flags need substantial revision to effectively identify collusive settlements.

First, objectors often contend charitable distributions result in disproportionate awards to class counsel, when compared to the amount class members receive.[326] However, a charity receiving a high percentage of the settlement indicates a distribution problem, not collusion. Admittedly, with such settlements, class counsel receive more money than class members.[327] But, this is also true for non-charitable class action settlements. Only the percentage of the attorneys' fees compared to the overall settlement value is possible indicia of a problematic fee request.[328] No evidence suggests that attorneys receive bigger payouts from charitable settlements than other kinds of class action settlements.

Second, the red flags are not particularly helpful in identifying collusion because while a reverter raises the specter of a suspect settlement, a charitable distribution does not. A reverter undermines a defendant's incentive to support the claims process, which is problematic because defendants often possess the essential information to successfully notify class members of a pending settlement.[329] Moreover, reverters have no deterrence benefits.[330] In contrast, with a charitable distribution, parties do not gain by weakening the settlement notice process and such distributions support deterrence. Consequently, the red flags are suspect because they incorrectly treat charitable settlements and reverters as equally

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everything looks like a class action, ready to be dismantled." *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

326. *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 820–21 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 8 (2013); *In re* Vitamin C Antitrust Litig., No. 06-MD-1738 (BMC) (JO), 2012 WL 5289514, at *8 (E.D.N.Y. Oct. 23, 2012).

327. *See, e.g.*, *Lane*, 696 F.3d at 820–21.

328. For example, in *In re Bluetooth*, the court vacated an attorney fee award in an amount eight times the charitable distribution. *In re Bluetooth*, 654 F.3d 935 (9th Cir. 2011). Even there, however, there was reason to assume collusion. The court vacated the settlement and attorney fee approval, directing the trial court to further evaluate the equity of the settlement. In doing so, the court did acknowledge that the trial court ultimately approved the award, noting it "express[ed] no opinion on the ultimate fairness of what the parties have negotiated." *Id.* at 950.

329. Many criticisms of class actions focus on class action lawyers, without discussing the role of defendants. While defendants do not owe a duty to class members, by the time a settlement is reached, both class counsel and defendants' counsel should have a shared incentive to promote the settlement. *Cf.* Bassett, *supra* note 208, at 539 (discussing how the RESTATEMENT (SECOND) OF JUDGMENTS § 41 applies to both defendants and plaintiffs).

330. *In re* Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001) ("[T]he substantive policies underlying the statutes upon which the plaintiffs sued would dictate a preference for an appropriate *cy pres* distribution rather than a reversion of undistributed funds to the defendant, the alleged wrongdoer . . . ." (quoting NEWBERG & CONTE, *supra* note 54, § 11.20)).

questionable. Instead, charitable distributions should be included in fee award calculations.

Third, clear sailing provisions—agreements by the parties not to challenge class counsels' fee petition—are not necessarily problematic. When fee arrangements are negotiated, after settlement resolution and in the presence of an experienced mediator, concerns of collusion dissipate.[331] Instead, it is the presence of a reverter that again raises concerns.[332] As the Ninth Circuit explains, "The clear sailing provision reveals the defendant's willingness to pay, but the [reverter] deprives the class of that full potential benefit if class counsel negotiates too much for its fees."[333] The mere "willingness to pay," signaled by the clear sailing provision, is not particularly helpful for the court's assessment of a fee petition, as it invites baseless objections.

Hence, the current red flags do not necessarily help courts identify suspect fee requests. Rather, they provide objectors a legal hook to raise red herring arguments. A better alternative is using preexisting, well-established criteria for fee awards in class actions generally. These include: (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiff's counsel; and (7) the awards in similar cases.[334] Charitable distributions should be counted in calculating the size of the fund and should not alter these other criteria so long as: (1) the trigger and nexus requirements are met; (2) no reverter is involved; and (3) fees are agreed upon after settlement fund negotiations are complete and in the presence of a mediator.

Though modest in design, the proposed alterations to judicial review provide substantial teeth for evaluating charitable settlements, thus maintaining the integrity of Rule 23(e) while avoiding further inconsistency. When the revised trigger, nexus, and fee guidelines are fulfilled, objectors should have to pay to play, making them responsible to reimburse the parties' time and expenses incurred in responding to generic challenges.

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331. *See supra* Part II.B (discussing why collusion fears are overblown).

332. *See, e.g.*, Sylvester v. CIGNA Corp., 369 F. Supp. 2d 34, 45 (D. Me. 2005) ("Specifically, the Court remains troubled by the combination of the reverter clause and the clear sailing provision. In concert, the Court believes that these two provisions give rise to inferences that there was a lack of arm's length negotiations and a lack of zealous advocacy for the Class by Plaintiffs' counsel."); Ralph C. Ferrara & Riva Khoshaba Parker, *Tontine or Takeback: Reversion Provisions in Class Action Settlement Agreements*, 62 BUS. LAW. 971, 979 (2007) (discussing the troublesome "interrelation of the reversion and clear sailing provision").

333. *In re Bluetooth*, 654 F.3d at 949.

334. *See, e.g.*, *In re* Diet Drugs Prod. Liab. Litig., 582 F.3d 524, 541 (3d Cir. 2009); Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007); *In re* AT&T Corp., 455 F.3d 160, 165 (3d Cir. 2006) (noting these factors overlap with the criteria for evaluating the adequacy of a settlement); Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 121 (2d Cir. 2005); *In re* Synthroid Mktg. Litig., 264 F.3d 712, 719 (7th Cir. 2001).

CONCLUSION

This Article confronts the erosion of class action procedures. It takes a stand to protect against an attack on settlement procedures that further aggregate litigation's regulatory purpose. Charitable settlements offer efficient, equitable solutions for cases where individual distributions are problematic. Denying charitable settlements runs the risk of strangling small-stakes cases in their cradle: there is little reason to file a claim if there is no realistic way to bring the case to conclusion.

The case for charitable settlements advanced in this Article accepts the assumption that one purpose of class action damages under Rule 23(b)(3) is to provide class members individual monetary distributions—but that is hardly the sole purpose of class actions. The argument here is one based in reality rather than the abstract. Sometimes individual distributions simply make little sense. Recognizing this, charitable settlements' judicial access and deterrence gains far outweigh any imagined theoretical challenges against them.

This Article provides the necessary starting point for saving charitable settlements. Distinguishing charitable settlements from *cy pres* remainders advances scholarly evaluation of these distinct settlement structures. When viewed in isolation, charitable settlements' utility becomes apparent. Through minor modifications to the criteria for evaluating such settlements and accompanying fee petitions, courts can clear the path for charitable settlements—a path that saves not only charitable settlements but also preserves class actions' larger regulatory goals.