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Comment on the Use of "Cy Pres" in Class Actions in Ohio

GEOFFREY J. RITTS♣

Note: This commentary is adapted from testimony to the Committee on Civil and Commercial Law of the Ohio House of Representatives, delivered on May 18, 2010. The subject of the testimony was House Bill 427, which (along with its companion bill, Senate Bill 157) would declare that it is the public policy of Ohio that unclaimed funds resulting from class-action settlements or judgments should be paid to charity.

Several other states have recently adopted legislation or rules relating to so-called "cy pres" and class actions. The use of cy pres in class actions has been the subject of extensive debate, including in the context of the American Law Institute's recent adoption of its Principles of the Law of Aggregate Litigation. *My comments on the proposed Ohio legislation, and why it should not be adopted, generally apply to legislation adopted or proposed elsewhere.*

PROPOSED "CY PRES" LEGISLATION

The Ohio legislature considered two bills during the 128th General Assembly that called for the use of "cy pres" to distribute unclaimed funds resulting from class-action settlements or judgments.[1] The bills would have declared that Ohio's public policy is that such unclaimed funds should be directed to one or more charities or nonprofits as ordered by the trial court.[2]

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1. The term "cy pres" derives from the Law French phrase "*cy pres comme possible*," meaning "as close as possible." The doctrine arose in the context of trusts and estates law, where it is used by courts to redirect a charitable bequest to a use that reasonably approximates the intent of the testator when the use specified by the testator becomes impossible or impractical. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 67 (2003) (discussing application of cy pres doctrine in trusts and estates law).

2. H.R. 427, 128th Gen. Assem., Reg. Sess. (Ohio 2010), would have enacted a new section of the Ohio Revised Code that would have provided:

(A) This section applies to an action maintained as a class action in which the settlement agreement or judgment includes a monetary award, including compensatory or punitive and

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Ohio Northern University Law Review, Vol. 37 [], Iss. 2, Art. 3

Both bills would have made cy pres the default rule in class actions, although under the proposed legislation, the parties to a case would have been free to agree to a settlement that did not include a cy pres distribution, and the court would have been permitted to approve such a settlement.[3]

The legislation provided minimal guidance or limitation on which charities or nonprofits could receive cy pres distributions. The House bill required only that the recipient be tax-exempt under section 501(c)(3) of the Internal Revenue Code.[4] The Senate bill did not contain even that restriction; under its terms, the court would have been permitted to direct a cy pres distribution to any "charit[y], nonprofit organization[], [or] charitable program[.]"[5]

The principal proponents of the legislation were a prominent plaintiffs' attorney and law firm that have been involved in a number of cy pres distributions and have engaged in extensive efforts to publicize those distributions, including through an organization called "Ohio Lawyers Give Back" and its website, http://ohiolawyersgiveback.org.[6]

> exemplary damages, restitution, or any other payment of money due from each defendant to the members of the class.
>
> (B) It is the policy of this state, insofar as it is not inconsistent with federal law, that, except as otherwise provided by court order, all unpaid moneys remaining after the distribution to the members of the class of monetary awards in class actions described in division (A) of this section shall be used for charitable public purposes. All of those unpaid moneys shall be distributed to charities, nonprofit organizations, and charitable programs selected in the action and approved by the court. A charity, nonprofit organization, or charitable program must be exempt from federal income taxation under section 501(c)(3) of the "Internal Revenue Code of 1986," 26 U.S.C. 1, 100 Stat. 2085, as amended in order to qualify as a recipient of the unpaid moneys under this section.

S. 157, 128th Gen. Assem., Reg. Sess. (Ohio 2010), would have enacted a new statutory section identical to that in House Bill No. 427, minus the last sentence of subsection (B) concerning an organization's eligibility to receive a cy pres distribution:

> (A) This section applies to an action maintained as a class action in which the settlement agreement or judgment includes a monetary award, including compensatory or punitive and exemplary damages, restitution, or any other payment of money due from each defendant to the members of the class.
>
> (B) It is the policy of this state, insofar as it is not inconsistent with federal law, that, except as otherwise provided by court order, all unpaid moneys remaining after the distribution to the members of the class of monetary awards in class actions described in division (A) of this section shall be used for charitable public purposes. All of those unpaid moneys shall be distributed to charities, nonprofit organizations, and charitable programs selected in the action and approved by the court.

3. *See* H.R. 427, 128th Gen. Assem., Reg. Sess. (Ohio 2010); S. 157, 128th Gen. Assem., Reg. Sess. (Ohio 2010).

4. H.R. 427, 128th Gen. Assem., Reg. Sess. (Ohio 2010).

5. S. 157, 128th Gen. Assem., Reg. Sess. (Ohio 2010).

6. *See generally* News and Media, http://www.ohiolawyersgiveback.org/media/ (last visited May 20, 2010) (detailing efforts by proponent law firm to promote passage of cy pres legislation).

THE CURRENT TREATMENT OF UNCLAIMED FUNDS IN CLASS-ACTION LITIGATION

Ohio case law and procedural rules do not address the treatment of unclaimed funds in class-action settlements or judgments. While Ohio has an unclaimed property statute that arguably might apply, there is no decisional law analyzing whether or how the statute bears upon class-action residual funds.[7]

Courts and commentators elsewhere generally have recognized several alternatives for dealing with unclaimed class-action funds: 1.) reversion to the defendant, 2.) escheat to the state, 3.) distribution to class members who previously submitted claims in the case, and 4.) cy pres.[8] The American Law Institute, in its recent *Principles of the Law of Aggregate Litigation*, endorsed further distribution to class members as the preferred mechanism for dealing with unclaimed funds (unless the plaintiff and defendant agree that unclaimed funds will revert to the defendant).[9] The ALI principles permit a court to approve a settlement that includes a cy pres distribution only in limited circumstances when it is impractical or uneconomical to distribute leftover funds to class members, and they require that a cy pres distribution be closely related to the class and the claims being asserted on behalf of the class.[10]

PROBLEMS WITH CLASS-ACTION "CY PRES" LEGISLATION

Legislation endorsing the use of cy pres in class actions as "the policy of this state" could undermine the fairness of the judicial process in class actions, open the door to ethical abuses, prejudice the rights of class members on behalf of whom class actions are brought, and damage Ohio's business climate.

The cy pres device has been subject to significant abuse in class actions. Enacting legislation that lacks adequate protection against abuses would invite misconduct and even corruption into the class-action litigation

7. OHIO REV. CODE ANN. §§ 169.01-169.99 (West 2010).

8. *See* Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 COLUM. BUS. L. REV. 1014, 1041-46.

9. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(b) (2010) ("the settlement should presumptively provide for further distributions to participating class members" of residual funds); *id*. § 3.07 cmt. b ("This Section begins from the premise that funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members (and that the settlement has not been structured so that any funds remaining revert to the defendant).").

10. *Id*. § 3.07(b) (cy pres should be utilized only if "the amounts involved are too small to make individual distributions [to class members] economically viable or other specific reasons exist that would make such further distributions impossible or unfair"); *id* § 3.07(c) (cy pres recipient's interests should "reasonably approximate[] the interests being pursued by the class").

Ohio Northern University Law Review, Vol. 37 [], Iss. 2, Art. 3

process. A fair and neutral judicial system is of paramount importance to all Ohio citizens and businesses, and the legislature should not adopt any measure that would tend to undermine the impartial treatment of litigants in our courts.

What follows are the main flaws in the legislation proposed during the 128th General Assembly:

1. Cy Pres Legislation Would Invite Corruption and Abuse

The cy pres device has been subject to significant abuse in class actions in Ohio and elsewhere, and legislation enshrining it as the public policy of this state could increase the incidence of those abuses. The proposed bills had no mechanisms or protections of any kind to guard against conflicts of interest.[11] There was nothing in either bill to prevent cy pres distributions that directly or indirectly benefit plaintiffs' counsel or the presiding judge, and there was nothing in the bills requiring that a cy pres distribution have any kind of relationship to the claims being asserted in the action or to the class on whose behalf the lawsuit is being brought.[12]

For example, neither bill included language that would prevent cy pres funds from being distributed to recipients with business, political, or family connections to the judge or plaintiffs' counsel.[13] There was nothing to keep cy pres funds from being directed to a judge's (or plaintiffs' counsel's) law school or college alma mater.[14] There was nothing to stop cy pres money from being directed to a nonprofit that is run by a relative of the plaintiffs' counsel or the judge.[15] There was nothing to stop cy pres funds from going to a nonprofit whose board includes political supporters of the judge or even the judge himself.[16] These sorts of cy pres distributions could create, at the very least, an appearance of impropriety and undermine public confidence in the impartiality of the civil justice system.

Unfortunately, these are not theoretical dangers. There are real-world examples of questionable uses of the cy pres device in Ohio and elsewhere. Public records disclose the following instances within the last few years:

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11. *See generally* H.R. 427, 128th Gen. Assem., Reg. Sess. (Ohio 2010); S. 157, 128th Gen. Assem., Reg. Sess. (Ohio 2010).
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. H.R. 427, 128th Gen. Assem., Reg. Sess. (Ohio 2010); S. 157, 128th Gen. Assem., Reg. Sess. (Ohio 2010).

- In a case in Ohio, a cy pres distribution of almost a half-million dollars was directed to a nonprofit whose purpose was to buy "historically appropriate" furniture and accessories for the courthouse in which the presiding judge sat.[17]
- Cy pres distributions have been directed to nonprofits that included sitting judges or their spouses on their boards of directors.[18]
- In a case in Ohio, a cy pres distribution went to a plaintiffs' bar organization dedicated to supporting and promoting class-action employment-law cases against employers.[19]
- The United States District Court for the Southern District of New York has observed that "many cy pres distributions are channeled to organizations that support the work done by plaintiffs' attorneys, thus indirectly benefiting the plaintiffs' attorneys."[20]
- In an extreme case in Kentucky, millions of dollars were directed to a charity on whose board of directors sat the presiding judge and three plaintiffs' attorneys, each of whom allegedly was paid several thousand dollars for their "service."[21] The same settlement resulted in a distribution of $1 million to the alma mater of one of the plaintiffs' attorneys, which then allegedly hired the

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17. *See* Cy Pres Donation for Geauga County Courthouse, http://www.ohiolawyersgiveback.org/charities/geauga_courthouse.asp (last visited May 21, 2010) (describing $450,368.09 cy pres distribution to the "Geauga County Courthouse Improvement Fund," to be used, among other things, for "furnishing the courtrooms and offices with historically appropriate furniture and accessories").

18. *See* Nathan Koppel, *Proposed Facebook Settlement Comes Under Fire*, WALL ST. J., Mar. 2, 2010 ("Late last year, in a class action claiming that tech giant AOL LLC improperly inserted footers in its users' emails, Los Angeles federal judge Christina Snyder awarded $25,000 in settlement funds to a Los Angeles legal-aid organization that has the judge's husband on the board."). *See also infra* note 21 and accompanying text.

19. *See* Cy Pres Donation for N.E.L.A., http://www.ohiolawyersgiveback.org/charities/employee_rights.asp (last visited May 21, 2010) (describing $225,184.04 cy pres distribution to the "National Litigation Strategy Project" of the National Employment Lawyers Association); National Employment Lawyers Association, http://www.nela.org/NELA/ (last visited May 21, 2010) ("NELA is the country's largest professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters.").

20. SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009).

21. *See* Indictment, U.S. v. Gallion, No. 2:07-CR-39 (E.D. Ky.) (June 14, 2007); Beth Musgrave, *Fen-phen Attorneys Sentenced To Decades In Prison*, LEXINGTON HERALD-LEADER, Aug. 18, 2009; Adam Liptak, *Fraud Inquiry Looks At Lawyers In Diet-Drug Case*, NEW YORK TIMES, Mar. 24, 2007; Walter Olson, *Judge Resigns in Ky. Fen-Phen Scandal*, OVERLAWYERED, Mar. 6, 2006, *available at* http://overlawyered.com/2006/03/judge-resigns-in-ky-fen-phen-scandal/; Dan Horn and Jim Hannah, *How a $200 Million Diet Drug Payout Turned Nasty*, CINCINNATI ENQUIRER, Nov. 9, 2007.

Ohio Northern University Law Review, Vol. 37 [], Iss. 2, Art. 3

lawyer for $100,000 a year to do nothing.[22] The judge eventually was removed from office and two of the lawyers were convicted.[23]

- In a case in the District of Columbia, a cy pres distribution of over $5 million went to the law school attended by the lead plaintiffs' counsel.[24] In a case in Tennessee, a cy pres distribution of almost $3 million went to the law school from which several of the plaintiffs' counsel graduated.[25] In a Florida case, a cy pres distribution went to the plaintiffs' counsel's law school alma mater.[26]
- In a West Virginia case, an $8 million cy pres award was directed to the law school attended by the presiding judge.[27]

Nothing in the proposed Ohio cy pres legislation would have impeded any of these kinds of abuses. Indeed, under the bills' terms, each one of these cy pres distributions would be permissible, as long as the receiving organization was tax-exempt.[28] As these examples highlight, the cy pres device is susceptible to misuse, and potential misuses tend to be insulated from scrutiny by the notion that cy pres distributions merely "help charity."

Professor Samuel Issacharoff of the New York University Law School has called cy pres "an invitation to wild corruption of the judicial process."[29] The American Law Institute, in its recently adopted *Principles of the Law of Aggregate Litigation*, has taken the position that cy pres distributions never should be permitted if "the court or any party has any

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22. *See supra* note 21 and accompanying text.

23. *See supra* note 21 and accompanying text.

24. GW News Center, *GW Law School Receives $5.1 Million Cy Pres Award*, July 11, 2007, http://www.gwu.edu/~newsctr/pressrelease.cfm?ann_id=25908.

25. Michael Cass, *VU Gets $2.9M Windfall From Suit*, TENNESSEAN, at 1A Oct. 31, 2005; Walter Olson, *Litigation slush funds, cont'd: $2.9 million for Vanderbilt Law*,, http://www.pointoflaw.com/archives/2005/12/litigation-slus-2.php (Dec. 5, 2005).

26. Cecillia M. Altonaga, *American Express Settlement Goes To Law School, Charities*, DAILY BUS. REV., Jan. 20, 2010, http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202466539232&hbxlogin=1 (describing cy pres distribution to University of Miami Law School); *see* Martindale, http://www.martindale.com/Adam-M-Moskowitz/806943-lawyer.htm (last visited May 21, 2010) (Martindale-Hubbell profile page for co-lead attorney for plaintiffs, reflecting attendance at University of Miami School of Law).

27. Andrew Clevenger, *WVU Receives $8M Gift; Money Is Left Over From Class-Action Against H&R Block*, CHARLESTON GAZETTE, May 3, 2008, at 1A ("Kanawha Circuit Judge Duke Bloom presided over the case, and suggested the WVU College of Law as a potential beneficiary of the money left over after settlement payments were completed."); *see* Martindale, http://www.martindale.com/Louis-H-Bloom/1783009-lawyer.htm (last visited May 21, 2010) (Martindale-Hubbell "Judge Profile" page, stating that presiding judge attended West Virginia University Law School).

28. H.R. 427, 128th Gen. Assem. Reg. Sess. (Ohio 2010); S. 157, 128th Gen. Assem. Reg. Sess. (Ohio 2010).

29. Adam Liptak, *Doling Out Other People's Money*, N. Y. TIMES, Nov. 26, 2007 (quoting Prof. Isaacharoff).

significant prior affiliation with the intended recipient."[30] Rather than providing opportunities for corruption and abuse, legislators should be asking how the impartiality and integrity of our civil justice system can be protected and promoted. Instead of expanding the use of cy pres in class actions, attention should be focused on restricting it to prevent its abuse. The proposed cy pres legislation, had it been adopted, would have been a step in the wrong direction.[31]

2. The Proposed Cy Pres Legislation Would Have Tilted the Playing Field Against Class-Action Defendants

Enshrining cy pres as the public policy of the state would tilt the playing field against defendants in class-action litigation by introducing extraneous considerations into the minds of judges and jurors. If the class-action litigation process were unfairly tilted against defendants, Ohio's business climate might suffer and businesses might find Ohio a less attractive place to locate or expand. Perversely, Ohio's charities – the supposed beneficiaries of the legislation – could have suffered as a result inasmuch as they receive many millions of dollars in donations every year from Ohio businesses and their employees.

How would cy pres legislation tilt the class-action playing field? It is not difficult to imagine:

- Unless class actions are dismissed on motion or class certification is denied, they almost invariably settle.[32] Certified class actions virtually never go to trial.[33]
- Because class actions are almost never tried, if cy pres becomes the default rule judges will know that a class action will eventually settle – and probably result in a cy pres distribution – if the court

30. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (2010) (Professor Isaacharoff was the Reporter for the ALI Aggregate Litigation project).

31. A former federal judge who is now dean of the Duke University School of Law has said that the distribution of cy pres funds "is not a true judicial function and can lead to abuses . . . . It made me more than a little uncomfortable that groups would solicit me for consideration as recipients of cy pres awards. I know that other judges felt that there was something unseemly about this system." Liptak, *supra* note 29 (quoting Dean David F. Levi).

32. Emery G. Lee III & Thomas E. Willging, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* (2008), at 11 (A 2008 Federal Judicial Center study of 300 class actions found that 100% of the cases in which a class was certified settled; not a single one was tried). As prominent federal appeals court Judge Posner explained, companies simply cannot "roll these dice" on a potentially catastrophic verdict by a single jury in a class action, and so are under "intense pressure . . . to settle even if they have no legal liability," once a class is certified. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298-99 (7th Cir. 1995).

33. *See* Lee, *supra* note 32 and accompanying text.

Ohio Northern University Law Review, Vol. 37 [], Iss. 2, Art. 3

simply denies enough motions, certifies a class, or otherwise lets the case continue long enough.

- This creates the prospect of a judge thinking that if he grants a class certification motion or denies a summary judgment motion, his law school or college might get a contribution via a cy pres distribution.
- A judge might think that if she grants class certification, she will eventually get to distribute a cy pres payment to a politically-prominent local charity that can deliver electoral support to the judge.
- In the unusual circumstance where a class action is tried, jurors might believe that local charities would benefit if they decide in favor of the plaintiffs regardless of the merits of the case.

Judges and jurors may be more likely to sustain marginal claims if they think that charities will benefit instead of just a plaintiff. Adding a potential cy pres distribution into the mix in every class action in an Ohio state court would tempt judges and juries to take into account factors other than the merits as they make their decisions. The Ohio legislature should not do anything that would cause observers to question the ability of the state's courts to decide disputes in a fair and neutral fashion.

3. Cy Pres Legislation Would Incentivize Class Counsel to Disregard Their Duties to Absent Class Members

The members of the class are supposed to be the sole beneficiaries of a class action. The class members effectively are the clients of class counsel, and class counsel owes serious ethical duties to them.[34] Class counsel is supposed to devote his or her efforts to advancing the interests of the class and to maximizing the recovery to class members.[35] Class counsel is not allowed to place counsel's personal interests or the interests of an organization that is a stranger to the case before the interests of the class.[36]

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34. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. l (2000) ("according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class").

35. *See, e.g.*, MODEL R. PROF. CONDUCT 1.3 cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor").

36. *See, e.g.*, MODEL R. PROF. CONDUCT 1.7(a); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125 cmt. f (2000) ("a lawyer may not represent a client if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests"; class lawyer must therefore "reject[]" settlement arrangements that "subordinat[e] the interests of the lawyer's client to the lawyer's own interest").

Cy pres legislation, however, can give class counsel the incentive to do just that.

As noted previously, the cy pres device has been subject to significant abuse. Cy pres distributions have been directed to pet charities of class counsel; they have been used to curry favor with courts; they have been used to underwrite and support the bringing of further class-action litigation; and they have been used as a form of advertising for plaintiffs' law firms.[37] In each instance, class counsel apparently permitted the proceeds of the action to benefit someone other than the class.[38] Given the substantial personal interests that class counsel can serve via cy pres distributions, there can be powerful incentives for class counsel to make sure that there are funds left over for a cy pres distribution – which means making sure that the proceeds of the action do not go entirely to the class.

Where a possible cy pres distribution looms, class counsel therefore will have the incentive not to make sure that all class members get notice of a proposed settlement, not to make sure that as many class members as possible submit claim forms, and so forth. Because class counsel gets a larger personal benefit by directing the marginal dollar to a cy pres recipient rather than to a class member, the cy pres device encourages class counsel to disregard his or her duties to the class.

There is yet another way that the proposed Ohio legislation would have tended to undermine the interests of class members. Nothing in the bills required that the recipient of a cy pres distribution have any relationship whatsoever to the class on whose behalf the lawsuit was brought or to the claims at issue in the case.[39] The proposed legislation would have permitted the lion's share of a settlement fund to be diverted to a cy pres recipient who provides zero benefit to any member of the class.[40] This is not an uncommon problem in cy pres distributions. For example, in a recent case arising out of a hotel fire in Puerto Rico, the court ordered a cy pres distribution not to a charity in Puerto Rico or to a nonprofit focused on fire safety, but to the Animal Legal Defense Fund in California.[41] The Animal Legal Defense Fund may be a worthwhile charity (or not). But that is not the point. The point is that the charity's works had nothing to do with the lawsuit, and giving it money did not serve any of the goals of the underlying

37. *See* sources cited *supra* notes 17-20.

38. *Id*.

39. H.R. 427, 128th Gen. Assem., Reg. Sess. (Ohio 2010); S. 157, 128th Gen. Assem. Reg. Sess. (Ohio 2010).

40. *Id*.

41. Koppel, *supra* note 18.; *see In re* San Juan Dupont Plaza Hotel Fire Litig., 687 F. Supp. 2d 1 (D.P.R. 2009).

Ohio Northern University Law Review, Vol. 37 [], Iss. 2, Art. 3

case or help the class members. Similarly, making a cy pres distribution to the law school that the judge or class counsel attended does nothing for the class. But under the proposed Ohio legislation, those kinds of distributions would have been entirely permissible.

Put differently, what these bills proposed was not "cy pres" at all. When the cy pres doctrine is applied in the area of trusts and estates law – where it originated – courts interpret it to mean that the funds in question should be directed to a use that best approximates the original intent of the testator.[42] After all, the phrase from which the term "cy pres" is derived means "as close as possible."[43] That principle, however, found no expression in the proposed Ohio legislation. Not only were cy pres distributions under the bills not required to be "as close as possible" to a distribution to class members, a cy pres distribution did not need to have any relation at all to the class members.[44]

The proposed legislation also conflicted with the American Law Institute's *Principles of the Law of Aggregate Litigation*,[45] which was recently adopted after a five-year study process involving leading jurists, scholars, and practitioners.[46] The ALI determined that cy pres distributions never should be permitted where further distributions to class members are feasible.[47] Thus, in a case where some class members make claims against a settlement fund but a portion of that fund remains unpaid at the end of the claims process, the ALI would require a second distribution to the claiming class members rather than cy pres. In the rare circumstance where a further distribution to class members would not be feasible, the ALI's position is that a cy pres distribution may be made only to a recipient whose interests

42. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

43. *See supra* note 1.

44. Moreover, even if a cy pres distribution provided little or no benefit to the class, the legislation still would have permitted the value of the cy pres distribution to be counted in calculating the plaintiffs' lawyer's contingency fee. A settlement that ended up paying $1 million to the class but $5 million in a cy pres distribution to the law school that the judge attended thus could result in an attorneys' fee not of $333,333 (1/3 of $1 million), but $2 million (1/3 of $6 million). Even though the plaintiffs' counsel in this example delivered only $1 million in benefit to his clients (the class members), he would be paid the same as if he had delivered a $6 million benefit to them.

Under these circumstances, the plaintiffs' counsel would have a perverse incentive to *minimize* the benefits actually delivered to his clients: he would be paid the same if a substantial cy pres distribution were made, and would enjoy collateral personal benefits from the cy pres distribution that he would not receive if the funds went to the class members.

45. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010).

46. *See* Current Projects: Principles of the Law of Aggregate Litigation, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=7 (last visited Mar. 23, 2011).

47. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07, § 3.07 cmt. b (2010).

reasonably approximate those being pursued by the class, and never to a recipient with prior connections to the court or plaintiffs' counsel.[48]

4. Cy Pres Legislation Would Tend to Result in Increased Filing of Marginally Meritorious Class-Action Litigation.

Cy pres distributions often are used to generate more class-action litigation. There was nothing in the proposed Ohio legislation, however, to prevent cy pres awards from going to nonprofits with litigation-related agendas, which then would use the money to spawn more litigation.[49] Had the legislation been enacted, it would not have been unreasonable to expect to see cy pres payments in toxic tort cases or products liability cases funneled into organizations that are dedicated to so-called "junk science" supporting plaintiffs' positions in those kinds of cases. As noted above, the main proponent of this legislation had directed cy pres distributions to the "National Litigation Strategy Project" of an organization that supports employment-related class-action litigation.[50]

5. The Proposed Cy Pres Legislation Would Have Been Economically Inefficient Social Engineering

As discussed earlier, once a class action is certified, the defendant has little practical choice but to settle regardless of the merits of the case.[51] In such settlements, there has been no adjudication of wrongdoing and the settlement agreement typically states that the defendant denies any liability and is entering into the settlement solely to avoid the expense and risk of further litigation. Given these facts, it was simply incorrect to say – as proponents of the cy pres legislation suggested – that the bills had anything to do with "guilty" defendants who had "stolen" money.

In light of the realities of class-action settlements, it is arguable that cy pres legislation would result in an economically inefficient form of wealth redistribution. There is no obvious reason to believe that it would be more socially beneficial for a residual fund to be directed to a nonprofit that may have been selected because of its ties to a plaintiffs' lawyer or a judge than

48. *Id*.
49. H.R. 427, 128th Gen. Assem., Reg. Sess. (Ohio 2010); S. 157, 128th Gen. Assem., Reg. Sess. (Ohio 2010).
50. *See* sources cited *supra* note 19.
51. *Supra* note 32 and accompanying text.

Ohio Northern University Law Review, Vol. 37 [], Iss. 2, Art. 3

for that money to be returned to the defendant to be used to invest in a plant, equipment or to hire new employees.[52]

6. Class-Action Cy Pres Would Not Necessarily Result in Increased Receipts to Charities

One of the proponents' main arguments in favor of cy pres legislation was that it would help charities.[53] It was asserted (without citation to supporting data) that as much as $60 million per year in class-action settlement funds go unclaimed in Ohio state court cases and that cy pres legislation would result in much or all of those funds being directed to charities on top of their current donation receipts.[54] But the legislation would not necessarily have had that effect for two reasons. First, the legislation did not require that cy pres distributions be incremental to a defendant's ordinary charitable contributions.[55] If a defendant makes a $100,000 contribution to a charity by means of a cy pres distribution there is no reason why the defendant could not reduce its other charitable contributions by the same amount. In that case, the net result would be, at most, a change in the recipient of the donation from one selected by the defendant to one selected with the participation of (and perhaps because of connections to) class counsel or the court.

A second reason why cy pres would not necessarily be beneficial to Ohio charities has to do with the long-term effects of class-action cy pres on the civil justice system and the class-action process in particular. To the extent that class-action cy pres causes a tilting of the playing field against class-action defendants in Ohio courts, it could: a) reduce the profits of

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52. Moreover, the judiciary lacks the institutional competence to make determinations about which non-profits are more "deserving" than others. "Distributing grants and reviewing the effectiveness of their use is not an appropriate use of judicial resources and transforms courts into eleemosynary institutions." *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 404, 415 (S.D.N.Y. 2009)). One federal judge has written that:

> judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more "deserving" of limited funds than others; and we do not have the institutional resources and competencies to monitor that "grantees" abide by the conditions we or the settlement agreements set.

In re Compact Disc Minimum Advertised Price Antitrust Litig., 236 F.R.D. 48, 53 (D. Me. 2006).

53. *See House Members Give 'Cy Pres' Bill Proponents Third Degree*, 79 GONGWER OHIO REP., Rep. 81, Art. 4, Apr. 27, 2010.

54. *Id*. (citing witness testimony that "about $60 million a year go unclaimed from class action settlements in Ohio"); Testimony of Rep. Mark A. Schneider to the Committee on Civil and Commercial Law of the Ohio House of Representatives on House Bill 427, Apr. 27, 2010 (same); Testimony of Patrick J. Perotti to the Insurance, Commerce and Labor Committee of the Ohio Senate on Senate Bill 157, Nov. 10, 2009 (same).

55. H.R. 427, 128th Gen. Assem., Reg. Sess. (Ohio 2010); S. 157, 128th Gen. Assem., Reg. Sess. (Ohio 2010).

those defendants thereby reducing the surplus out of which corporate charitable donations are made, and b) make Ohio a less attractive place for those defendants to locate or expand their operations, reducing the pot out of which corporate or employee donations are made. In the long run, the health of Ohio charities depends on the health of the state's economy and its business climate, both of which are promoted by a civil justice system that has the appearance and reality of being neutral and unbiased.

7. The Constitutionality of the Proposed Cy Pres Legislation was Questionable

The Ohio Constitution's Modern Courts Amendment of 1968 granted the Supreme Court of Ohio the power to make rules governing procedural matters with the legislature having the power only to approve those rules submitted by the Supreme Court.[56] The procedural matters reserved to the Supreme Court include procedures in class actions. Because the proposed legislation would have defined procedures to be applied in class action settlements – a topic already covered by Civil Rule 23[57] – it is unclear that the bills fell within the constitutional authority of the legislature. Notably, five of the seven states that have enacted class-action cy pres measures have done so through their rules of civil procedure.[58]

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Class-action cy pres legislation would be bad for Ohio businesses, charities, and citizens alike. Enshrining cy pres as the public policy of the state would introduce an unacceptable risk of corruption, abuse, unethical conduct, and bias into the class-action process. Given that the legislation was unnecessary (because parties already can implement cy pres provisions in their settlement agreements if they wish) and of questionable constitutionality, the costs of enacting this proposed legislation would have outweighed any benefits.

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56. OHIO CONST. art. IV, § 5(B).
57. OHIO R. CIV. P. 23.
58. *See* CAL. CIV. PROC. CODE § 384 (Deering 2010); 735 ILL. COMP. STAT. ANN. 5/2-807 (LexisNexis 2010) (part of the Illinois Code of Civil Procedure); MASS. R. CIV. P. ANN. 23(e) (LexisNexis 2010); TENN. R. CIV. P. ANN. 23.08 (2010); WASH. CT. R. ANN. 23(f) (LexisNexis 2010).