

# Cy Pres and the Optimal Class Action

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## ABSTRACT

*This Article examines the problem of cy pres relief in class actions through the lens of optimal claim structure and class membership. It finds that the present cy pres doctrine does little to advance the creation of optimal class actions, and that it may do some harm to achieving that goal. The Article then proposes an alternative “nudge” to induce putative class counsel to structure class actions in an optimal way: setting attorneys’ fees so that counsel is compensated through a combination of an hourly market rate and a percentage of the net recovery to the class itself. The Article demonstrates that this approach to attorneys’ fees aligns the interests of the class in maximizing its recovery, class counsel in obtaining a profitable and reasonable fee, and society in certifying the class action with the greatest expected net benefit. This approach also eliminates many of the agency-cost problems associated with class counsel failing to attend to the interests of the class. Finally, this approach eliminates most of the incentive for class counsel to seek cy pres relief, although in some cases cy pres relief may yet be appropriate.*

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## INTRODUCTION

Cy pres is a controversial topic in aggregate litigation. The issue arises because, in many aggregate settlements, the parties negotiate a global settlement rather than individual awards. Assume that a defendant allegedly cheats 100,000 credit card customers out of \$50 apiece. The victims aggregate their claims into a class action. The defendant’s

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liability is debatable, and it is costly to prosecute the case. Thus, a settlement seems advisable.<sup>1</sup> One way to negotiate the settlement is to provide a set amount of relief to each class member who steps forward—in this example, let's say \$30—out of which costs and attorneys' fees (let's say \$10) are also paid. If only 25,000 victims file claims, the defendant pays \$750,000 in damages, \$500,000 of which goes to the victims and \$250,000 of which goes to class counsel. This claims-made approach raises no cy pres problems.

Another way to negotiate a settlement is to provide a lump-sum award to the class. With lump-sum settlements, three distinct cy pres issues can occur. First, too few victims may assert claims against the settlement fund. For instance, assume that, in the case described above, class counsel and the defendant negotiate a \$750,000 settlement: \$500,000 to the class and \$250,000 to class counsel for costs and fees. The settlement calls for a payment to each class member of \$20. If exactly 25,000 class members assert claims against the fund, the numbers work out exactly as in the claims-made hypothetical. If too few claims are filed, however—for example, 12,500—a question arises: What should happen to the unclaimed excess?<sup>2</sup>

Four answers are possible. One is to return unclaimed funds to the defendant.<sup>3</sup> This solution suffers from a significant downside: it is a windfall to the alleged wrongdoer.<sup>4</sup> A second option is to increase payments to those who file claims (perhaps doubling awards to \$60 apiece, with \$20 of that amount going toward attorneys' fees). This approach may result in overcompensation for some victims. A third

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1 See Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 63-69 (1982) (discussing the conditions under which lawsuits settle).

2 There is also a subsidiary question: How should the amount of the excess be calculated (i.e., should the attorneys' fees be adjusted downward to account for the lower-than-anticipated number of claims)? One approach would permit the award of the full fee even if fewer claims are made. Thus, if only 12,500 claims are made, the unclaimed excess amounts to \$250,000: \$750,000 less \$250,000 in paid claims less \$250,000 in costs and attorneys' fees. On a different approach, class counsel would not recover fees (and perhaps costs) for unclaimed amounts. Under this approach, the excess is \$375,000: \$750,000 less \$250,000 in paid claims less \$125,000 in costs and fees. For present purposes, the answer to this subsidiary question is unimportant, but the desire for a larger fee is one reason that the cy pres approach, which directs the unclaimed excess toward another purpose, may be attractive to counsel.

3 The Supreme Court has raised reversion as a possible outcome when funds are unclaimed. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 482 (1980).

4 The windfall problem was noted in the seminal comment on the use of cy pres in the class action context. See Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 456 (1972) (noting that cy pres is "preferable to the unjust enrichment of the defendant").

option is to escheat the unclaimed funds to the government. This solution prevents both a windfall to defendants and overcompensation to plaintiffs, but the government's entitlement to the funds is weak at best. Thus, the final option: give the unclaimed funds to a group of people similarly situated to the victims or to an organization with a mission that is generally in line with the purpose of the lawsuit—perhaps a consumer-advocacy group or an educational institution that will work on issues of indirect benefit to class members. This final approach is the first use of cy pres relief.<sup>5</sup> It enjoys the advantage of neither providing a windfall to the defendant nor overcompensating some victims, while also ensuring that the unclaimed funds will be turned toward some purpose generally advantageous to the victims' litigation interests (which an escheat cannot do).<sup>6</sup>

A second use of cy pres occurs when it is impossible or infeasible to distribute settlement proceeds to the victims. For instance, it may

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<sup>5</sup> As courts and commentators have often observed, the doctrine of cy pres developed in the law of trusts to handle the situation in which the trust could no longer perfectly fulfill the charitable wishes of the grantor. Rather than reverting the funds to the persons who held the residual interest in the grantor's estate, courts sometimes modified the terms of the trust to allow the trustee to use trust funds to accomplish a purpose closely aligned with the grantor's wishes. See, e.g., *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 168 n.2 (3d Cir. 2013); AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. a (2010) [hereinafter LAW OF AGGREGATE LITIGATION]. The use of cy pres relief in the aggregate-litigation context is by analogy; no one suggests that a settlement fund is a charitable trust.

In aggregate litigation, the terms "fluid recovery" and "cy pres" are sometimes used interchangeably, although they are technically distinct. Fluid recovery involves the distribution of funds to present individuals who occupy more or less the same position as the victims of the defendant's past wrongdoing; for instance, if the defendant cheated past consumers on their credit card transactions, relief might be given to the present credit card holders as an approximation. On the other hand, cy pres relief involves the provision of relief to third parties—typically charities—whose connection to the wrongdoing is more attenuated. See 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, 620 (2010) (discussing the distinction). Because nothing in my analysis in this Article hinges on the distinction, I use cy pres to refer to both forms of relief.

<sup>6</sup> For a recent discussion of these options, see *Baby Products*, 708 F.3d at 172 ("When excess settlement funds remain after claimants have received the distribution they are entitled to under the terms of the settlement agreement, there are three principal options for distributing the remaining funds—reversion to the defendant, escheat to the state, or distribution of the funds *cy pres*."). For other cases discussing cy pres relief when the filed claims failed to consume the available settlement fund, see *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21 (1st Cir. 2012) (permitting court to give unclaimed funds in case involving overcharges for prostate drug to prostate cancer research); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007) (discussing permissible uses of cy pres and remanding to apply correct standard).

Professor Redish and his co-authors also raise a fifth option: deny class certification. Redish et al., *supra* note 5, at 639-40. This option may be realistic if no other solution to the problems that require the use of cy pres is possible. The point of this Article, however, is to suggest such an alternative.

be too difficult (due to informational and cost constraints) to identify the victims of conduct that occurred years earlier or to assess their damages accurately.<sup>7</sup> This second form of cy pres relief may also arise under conditions exactly opposite from the situation that justifies the first form of cy pres: too many victims claim against the fund rather than too few. For instance, assume that, contrary to expectations, all 100,000 claimants assert claims against the fund. The evident solution is to cut the award for each claimant from \$30 (of which the claimant receives \$20 after deduction for fees and costs) to \$7.50 (of which the claimant receives \$5). Suppose, however, that the claims-administration process costs \$8 per claim. Now it is no longer economically viable to provide relief to any claimant. Returning the funds to the defendant is a perversely bad idea, and overcompensating some victims is no longer an option. Escheat is possible, but providing cy pres relief to entities sympathetic to the victims' interests again seems a better option.<sup>8</sup>

Cy pres is also possible in a third situation: the parties can negotiate for (or the court can order) all or some portion of a fund to be distributed to charitable organizations—even when distributions to the victims are feasible.<sup>9</sup> This form of cy pres stands on the weakest

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7 See, e.g., *Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451, 454–57 (D.C. Cir. 1996) (permitting cy pres relief when it was impossible to identify with precision the victims of transit overcharges twenty-five years earlier).

8 The technical or economic infeasibility of providing individual relief can arise in a range of other situations in which it is impossible to identify with an acceptable level of accuracy and expenditure the exact victims or the amount of their loss, or when class members have died. See generally *LAW OF AGGREGATE LITIGATION*, *supra* note 5, § 3.07(b) (permitting cy pres relief when funds remain “because some class members could not be identified” or because “the amounts involved are too small to make individual distributions economically viable,” or because “other specific reasons exist that would make such further distributions impossible or unfair”). Cf. *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 196, 198 (5th Cir. 2010) (disapproving settlement in which the costs and attorneys' fees might consume the bulk of the award, leaving even the possibility of cy pres relief in doubt; noting in addition that settlement notice failed to advise class members that cy pres was a possible remedy).

9 One of the earliest examples of this use of cy pres occurred in the Agent Orange litigation, in which Judge Weinstein, after soliciting the views of class members about the possible distributions of the \$180 million settlement fund, ordered that a quarter of the fund be set aside for veterans' advocacy organizations. See *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985), *aff'd in part and rev'd in part*, 818 F.2d 179 (2d Cir. 1987). The Second Circuit rejected the approach because it was uncomfortable with the injection of the court into advocacy efforts. See *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 185–86 (2d Cir. 1987). On remand, Judge Weinstein restructured the program. See *In re Agent Orange Prod. Liab. Litig.*, 689 F. Supp. 1250, 1259–60 (E.D.N.Y. 1988). For a recent approval of a class action settlement in which all of the net proceeds went to establish a new charity organization that worked on internet-privacy issues that would indirectly benefit class members and others, see *Lane v. Facebook, Inc.*, 696 F.3d 811, 817, 826 (9th Cir. 2012). *Lane* upheld the cy pres award in large

ground because cy pres is no longer a last-resort solution for a problem of claims administration. The concern for compensating victims is ignored (at least unless the indirect benefits of the cy pres award flow primarily to the victims). Here, the argument for cy pres is deterrence, pure and simple.<sup>10</sup> Because deterrence requires only that a defendant pay an amount equal to the plaintiffs' losses—not that the plaintiffs receive compensation for those losses<sup>11</sup>—a cy pres payment can accomplish deterrence at a lower cost than a claims process that delivers compensation to individual victims.

It is evident that the strength of the arguments for cy pres varies with the circumstances. In all cases, as the third form of cy pres shows most directly, the principal argument for cy pres relief lies in deterrence. The argument for victim compensation does not support cy pres relief,<sup>12</sup> although it can perhaps tolerate the previously described

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part because the individual claims were so small that it was too costly to make individual awards—thus making *Lane* a hybrid of the second and third forms of cy pres relief. See *id.* at 820-21. For a disapproval of a settlement that set aside more than half of the settlement for hunger relief in a case alleging false advertising on cereal, see *Dennis v. Kellogg Co.*, 697 F.3d 858, 861 (9th Cir. 2012). See also *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 945-46 (9th Cir. 2011) (overturning approval of a settlement agreement that provided injunctive relief of some value to class members but provided monetary payments only to various charities; also remanding to determine if class counsel's fees should be grounded principally in the value of the settlement to class members); Redish et al., *supra* note 5, at 656-58 (documenting the frequency with which “*ex ante* cy pres” awards are negotiated).

<sup>10</sup> Cf. Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 322 (2010) (noting the view of some courts that cy pres “distributions confer little or no benefit to class members, but rather serve the broader public interests of . . . deterrence”).

<sup>11</sup> For one discussion of this proposition, see David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1916-19 (2002). A standard deterrence-based argument for requiring compensation to plaintiffs is the need to provide victims with an incentive to hold wrongdoers accountable. They have no reason to bring suit if the money goes to some other purpose—a result that would create a socially suboptimal level of deterrence. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.10 (7th ed. 2007) (arguing that damages must “be paid to the victim rather than to the state” because “otherwise the victim will have no incentive to sue”); cf. Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (discussing the divergence between public and private incentives to bring lawsuits). In the class action context, however, the prospect of a large attorneys' fee, combined with some incentive payments to class representatives, provides class counsel with adequate incentive to bring the case even if the class does not receive the compensation. See John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 218 (1983) (“The conventional theory of the private attorney general stresses that the role of private litigation is not simply to secure compensation for victims, but is at least equally to generate deterrence . . .”).

<sup>12</sup> See Redish et al., *supra* note 5, at 646 (noting that cy pres “differ[s] dramatically from the victim compensation expressly dictated in the substantive law being enforced in the class proceeding”).

first and second uses of cy pres as a matter of administrative necessity. Further, the argument for individual autonomy—that a court cannot constitutionally extinguish plaintiffs' valuable claims by handing that value over to other persons—never supports cy pres.<sup>13</sup>

Also mixed into the argument over cy pres is the issue of agency costs.<sup>14</sup> One problem is the conflict of interest that lump-sum settlements create for counsel who must make allocation decisions among their clients.<sup>15</sup> Moreover, cy pres relief creates the risk that class counsel will sell out the class when the defendant dangles the prospect of a large attorneys' fee that is calculated (and justified) in part on cy pres recovery.<sup>16</sup>

For example, if there were a substantial chance that an overwhelming number of claims would reduce the per-claim recovery from \$30 to \$7.50, and the per-claim administrative cost was \$8, class counsel who vigorously represented the class's interests might think to include an escape clause in the settlement that allows counsel to go back to the bargaining table and seek a per-claim payment of more than \$8.<sup>17</sup> Counsel, however, has less incentive to do so, or to press for higher per-member payments, when counsel is assured of a fee calculated on the substitutionary cy pres relief.<sup>18</sup> Likewise, if the initial

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<sup>13</sup> For an argument along these lines, see *id.* at 650-51. The authors there leave open the theoretical possibility of cy pres relief of the "fluid recovery" type. See *id.* at 661-64.

<sup>14</sup> On the general problem of agency costs in aggregate litigation, see Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) (proposing an auction of small-stakes claims as a way to combat the lack of an incentive for the principals (the class members) to control the work of their agent (class counsel)).

<sup>15</sup> See Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1468 (1998) ("Conflicts of interests and associated tradeoffs among plaintiffs are an unavoidable part of all group lawsuits and all group settlements.").

<sup>16</sup> See Redish et al., *supra* note 5, at 650-51 (arguing that failing to base counsel fees on the amount of compensation provided to the class "threatens to undermine [class counsel's] constitutionally imposed obligations" to represent the class adequately).

<sup>17</sup> Indeed, some types of escape clauses are not uncommon. For instance, defendants may insert a clause permitting them to withdraw from the settlement if too many claimants opt out of the class action. See FED. R. CIV. P. 23(b)(3), (c)(2)(B), (e)(4) (providing an opt-out right in certain class actions); JAY TIDMARSH, *FED. JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES* 54 (1998) (noting a settlement provision allowing defendants to withdraw from the settlement if too many claimants opted out).

<sup>18</sup> From class counsel's viewpoint, the only reason to insert such a clause or to seek higher payouts when an overwhelming number of claims are asserted is if counsel believes that the marginal gain in expected fees from an expected higher settlement outweighs the opportunity cost from not being able to pursue other work. The probability that no higher settlement can be negotiated (and that negotiations may collapse and leave counsel with no fee) must be factored into the expectation, as must counsel's risk preferences.

submission of claims is low, counsel has no incentive to encourage more class members to file claims, or to argue for supercompensatory relief for claiming class members, if cy pres is an available and easily administered alternative that results in the same fee award.

A neutral observer might legitimately ask whether the game is worth the candle—whether it would be best to allow only claims-made settlements and to abolish cy pres altogether. There are both practical and theoretical reasons not to do so. At a practical level, a claims-made settlement may be difficult to negotiate; class counsel may not want to take the risk that too few claims will be filed, and the defendant may not want to take the risk that too many will be filed. Negotiating a lump-sum settlement is a tool that limits the risks on both sides, thus fostering the settlement of controversies that are often difficult or impossible to try. If lump-sum settlements are thus a good thing, some mechanism to deal with the problems of insufficient or excessive claims against the settlement fund must be developed, and pragmatically, cy pres has some advantages.<sup>19</sup> At a theoretical level, the unavailability of cy pres in cases involving unclaimed funds or infeasible distributions might lead a court to return the undistributed funds to the defendant<sup>20</sup>—an outcome that limits the deterrent capacity of group litigation.

Are these advantages of cy pres sufficient to keep the practice afloat? To a large extent, the answer to that question depends on the availability of alternatives with fewer drawbacks. In this Article, I take as a given the basic argument for cy pres relief: courts should attempt to achieve the greatest feasible level of deterrence. Relying on this assumption, Part I takes a step back to describe two foundational assumptions that must guide courts in their approach to class actions: first, that class actions should be used only when they are superior to other methods for resolving a wide-scale dispute (the “superiority principle”); and second, that a court with multiple class structures before it should choose the class action that yields the greatest net social benefit (the “optimality principle”). Part II shows how cy pres often fails to ensure the creation of optimally structured

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<sup>19</sup> Note that this practical argument does not extend to the third form of cy pres, which is the most difficult of the three forms to justify.

<sup>20</sup> Compare *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) (arguing that unclaimed funds should be distributed to class members unless it was infeasible to do so), with *id.* at 482 (Jones, C.J., concurring) (arguing that unclaimed funds should ordinarily be returned to defendants).

class actions and may indeed exacerbate the problem by creating incentives to create suboptimal class actions.

Part III suggests an alternative: basing counsel's award on a contingency fee that combines an hourly rate and a percentage of the amount distributed to class members (as opposed to the gross recovery). This alternative advances both superiority and optimality by providing an incentive to construct class actions that can be expected to yield the largest net social benefit. As a practical matter, the approach also is likely to limit the use of cy pres relief.

### I. STARTING POINTS: SUPERIORITY AND OPTIMALITY

If the goal of a class action system is to achieve the greatest feasible level of deterrence consistent with victim compensation, then a court considering whether to certify a class action must start from a simple principle: courts should certify class actions if and only if they are superior to other forms for resolving a dispute. "Superiority" in this sense is determined by expected net social benefit (expected gross benefit less expected costs).<sup>21</sup> Thus, a class action may be certified when it can be expected to yield more net social benefit—or, put differently, more feasible deterrence—than any other method for resolving the dispute.<sup>22</sup> It must not be certified when some other form, or combination of forms, can be expected to yield a greater net social benefit.

I have written elsewhere about using superiority as the foundational principle for constructing a class action rule.<sup>23</sup> The idea has its immediate genesis in the superiority requirement of Rule 23(b)(3).<sup>24</sup>

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21 The familiar formula for determining the expected net social benefit of a lawsuit requires multiplying the probability of recovery ( $P$ ) by the likely recovery ( $L$ ), and then subtracting from that product the costs of the litigation ( $C$ ), or  $(P \times L) - C$ . See POSNER, *supra* note 11, § 21.4, at 598 ("[T]he plaintiff's net expected gain from litigating is the judgment if he wins discounted by his estimate of the probability that he will win, minus his litigation costs."); Shavell, *supra* note 1, at 57 (discussing how risk-neutral parties make valuations based on expected value, "discounting possible outcomes by their probabilities"). As part of this calculus, superiority and optimality require a court to assess intangible social costs, such as loss of litigant autonomy, in addition to the standard out-of-pocket costs.

22 Among the methods for resolving the dispute is letting the loss lie where it falls. In some instances, the costs of pursuing a claim may be so great that individual victims have no incentive to seek legal redress, and if no method of dispute resolution is cost-effective, society is better off with such a result.

23 See JAY TIDMARSH, CLASS ACTIONS: FIVE PRINCIPLES TO PROMOTE FAIRNESS AND EFFICIENCY § 2.02 (2014) [hereinafter TIDMARSH, CLASS ACTIONS]; Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565 (2013) [hereinafter Tidmarsh, *Superiority*].

24 See FED. R. CIV. P. 23(b)(3) (permitting class certification when "the court finds that the questions of law or fact common to class members predominate over any questions affecting



Superiority relies principally on a welfarist economic intuition—that courts should act to maximize social welfare—and on the acknowledgment, well recognized in the cases and literature, that class actions have both benefits and drawbacks.<sup>25</sup> Because class actions can entail significant costs, especially the loss of individual litigant autonomy and the attendant agency costs that separating the ownership and control of legal claims can cause, employing a class action only when its expected net benefits exceed the expected net benefits of other dispute-resolution forms makes sense.

Superiority is an inherently comparative inquiry, requiring a court to examine the costs and benefits of different ways to resolve a dispute. The superiority principle alone, however, cannot guide a judge's decision; superiority will eliminate some class actions from consideration, but not all. For instance, a classic situation in which a class action may meet the superiority standard is the negative-value case, in which there are a large number of small-value claims that would be cost-prohibitive to bring individually.<sup>26</sup> Negative-value class

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only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"). Courts often honor the literal language of Rule 23(b)(3) in the breach by dodging a true superiority inquiry and examining instead whether a class action is manageable. *See, e.g.,* Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1304-07 (9th Cir. 1990) (upholding certification after examining only issues of manageability); *see also* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 191 (3d Cir. 2001) (noting that a class action must be the "best" method for resolving the dispute, but in fact analyzing superiority almost exclusively in terms of the class action's manageability); Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 491 (E.D. Cal. 2006) ("Whether a case is manageable as a class action can be an overriding consideration in determining superiority." (internal quotation marks omitted)); *cf. In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (noting that the "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored"), *overruled in part by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006). Even courts that tackle the superiority inquiry head-on often develop short-cut rules that do not lead to the use of class actions if and only if they yield more expected net social welfare. *See* Tidmarsh, *Superiority*, *supra* note 23, at 582.

<sup>25</sup> For descriptions of the benefits and costs of class actions, see POSNER, *supra* note 11, § 21.11, at 615-17; TIDMARSH, *CLASS ACTIONS*, *supra* note 23, §§ 1.03-1.04.

<sup>26</sup> To meet the superiority requirement, a class action would also need not only be better than individual actions but also better than other aggregated proceedings. The cost of collectivizing claims through any method other than a class action, though, would also likely be cost-prohibitive. For this reason, the Supreme Court, as well as many lower courts, has suggested that the argument for using class actions is particularly salient in the negative-value context. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (noting that Rule 23(b)(3) "does not exclude from certification cases in which individual damages run high," but that such claims are not the core reason for using class actions); Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996) (arguing that small-stakes cases present "[t]he most compelling rationale for finding superiority in a class action"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) ("In most class actions—and those the ones in which the rationale for the procedure is most

actions of different sizes, though, are still possible. In the credit card hypothetical with which this Article opened, class counsel could construct a nationwide class of all victims, a class just of victims from Minnesota, or a class just of victims who had lost at least \$8. Assuming that all three would yield more net social benefit than any nonclass alternative, all three meet the superiority requirement. If a judge has all three class actions before her, which class action should the judge certify?

In addition to the size of the class, different class actions may assert different numbers of claims. One class action may restrict its allegations to the most directly applicable federal credit card statute. Another may assert a RICO<sup>27</sup> violation as well. A third may add claims under the relevant states' consumer protection laws. If a judge has class actions of all three varieties of claim structure before her, which one should she certify?

Applying the social-welfarist insight to the problem of the optimal class and claim structure yields a simple answer: choose the class action that yields the greatest expected net social welfare.<sup>28</sup> Although related to superiority, this "optimality principle" is nonetheless distinct. Superiority determines whether a class action should be certified in the first instance. Optimality is a choosing principle that guides a judge's decision when more than one putative class action is pending before her. If a judge does not have multiple class actions from which to choose, a judge is not justified in using the optimality principle to deny class certification merely because a better class action could in theory be constructed. The better is not the enemy of the best; as long as the only putative class action pending before a judge is superior to nonclass alternatives, it should be certified.

Obviously, the use of social-welfarist criteria to structure procedural rules is subject to criticism,<sup>29</sup> although it is hardly irrational.<sup>30</sup>

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compelling—individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation.”).

<sup>27</sup> Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-1968 (2012).

<sup>28</sup> David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies*, 79 GEO. WASH. L. REV. 542, 570 (2011).

<sup>29</sup> Criticism may come from those who believe that the goal of procedure is to achieve just outcomes for individuals (where justice is determined on some scale other than the greatest aggregate welfare), to obtain accurate outcomes, or to vindicate outcome-independent values such as dignity, participation, equality, or uniformity. See FED. R. CIV. P. 1 (stating that the Federal Rules of Civil Procedure “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding”); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*,

For purposes of this Article, however, I wish to bracket that criticism and to put to the side the more general arguments about the legitimacy of constructing a class action rule on this foundation. Rather, my goal is to uncover the insights that this approach yields for the problem of cy pres relief, whose fundamental support is also an argument from social welfare. Therefore, I proceed on the assumption that, if a judge has multiple potential class actions from which to choose, she should choose the one with the optimal class and claim structure—with optimality determined by the greatest expected net social benefit.

To give an example of how optimality works, assume that, in a case involving 150,000 credit card consumers, one-third of the class has claims worth \$60, one-third has claims worth \$30, and one-third has claims worth \$10. The likelihood of success on each member's claim is fifty percent. The fixed cost for proving common issues (inclusive of attorneys' fees allocable to proof of common issues) is \$150,000. The variable claim-specific costs—such as notice, the expected cost of delivering the remedy, and attorneys' fees allocable to handling individual claims—are \$6 per claim. Assume also that counsel could add a second legal theory to the case, which would enhance the expected value of each class member's claim by ten percent. The additional fixed costs for proving the additional claim are \$75,000; the additional claim also adds \$1 (for a \$7 total) to the variable per-claim cost.

Now assume that the judge has three putative class actions pending before her: a class consisting of all 150,000 victims, who allege just the first theory; a class consisting only of the 100,000 victims with the largest claims, who allege just the first theory; and a class consisting of all 150,000 victims, who allege both theories of recovery.<sup>31</sup> On these numbers, the judge should choose the second class action; it yields the greatest expected net social benefit.<sup>32</sup> A couple of observations on

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87 GEO. L.J. 887, 919 (1999) (arguing that the value of procedural rules can be measured against an efficiency metric, a rights-based metric, or a process-based metric); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 305-06 (2004) (arguing that participatory values should generally be ranked higher than efficiency values in the formulation of procedural principles).

<sup>30</sup> See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1164-1225 (2001) (analyzing legal procedure from the viewpoint of social welfare); *id.* at 1168 ("Most analysts . . . recognize a need to trade off the right to bring suit and legal costs.").

<sup>31</sup> For present purposes, we can also assume that all three of the classes meet the superiority requirement—that no other method for resolving the dispute would yield as great a benefit as the benefit that the class action yields.

<sup>32</sup> For all three classes the gross expected benefit is \$30 ( $0.5 \times \$60$ ) for the largest claims, \$15 ( $0.5 \times \$30$ ) for the next group of claimants, and \$5 ( $0.5 \times \$10$ ) for the last group on the first

this result, however, are in order. First, the judge's decision is fact-specific; if the additional claim added no additional variable costs, for instance, the judge should choose the third class action.<sup>33</sup> Second, on these facts there exists a class action that is more socially beneficial than any of the actions on offer: a class action composed only of the \$60 and \$30 claimants that assert both legal theories.<sup>34</sup>

This example reveals three related difficulties with the optimality principle in practice. The first is the reality that class actions may be dispersed among several courts; no single judge may have all the class actions pending before her.<sup>35</sup> The second is the limited incentive that

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claim. If a second claim is added, these numbers are increased by ten percent and become \$33, \$16.50, and \$5.50.

In the first class action, the expected net benefit is \$1,450,000: the gross expected benefit of \$2,500,000 ( $(\$30/\text{claim} \times 50,000 \text{ claims}) + (\$15/\text{claim} \times 50,000 \text{ claims}) + (\$5/\text{claim} \times 50,000 \text{ claims})$ ) less fixed costs of \$150,000 and per-claim costs of \$900,000 ( $\$6/\text{claim} \times 150,000 \text{ claims}$ ). In the second action, the expected net benefit is \$1,500,000: an expected gross benefit of \$2,250,000 ( $(\$30/\text{claim} \times 50,000 \text{ claims}) + (\$15/\text{claim} \times 50,000 \text{ claims})$ ) less fixed costs of \$150,000 and per-claim costs of \$600,000 ( $\$6/\text{claim} \times 100,000 \text{ claims}$ ). In the third action, the expected net benefit is \$1,475,000: an expected gross benefit of \$2,750,000 ( $(\$33/\text{claim} \times 50,000 \text{ claims}) + (\$16.50/\text{claim} \times 50,000 \text{ claims}) + (\$5.50/\text{claim} \times 50,000 \text{ claims})$ ) less fixed costs of \$225,000 and per-claim costs of \$1,050,000 ( $\$7/\text{claim} \times 150,000 \text{ claims}$ ).

<sup>33</sup> Under this scenario, the third class action yields an expected net benefit of \$1,625,000: an expected gross benefit of \$2,750,000 ( $(\$33/\text{claim} \times 50,000 \text{ claims}) + (\$16.50/\text{claim} \times 50,000 \text{ claims}) + (\$5.50/\text{claim} \times 50,000 \text{ claims})$ ) less fixed costs of \$225,000 and per-claim costs of \$900,000 ( $\$6/\text{claim} \times 150,000 \text{ claims}$ ). One of the interesting features of this outcome is that it makes sense to include some plaintiffs with losing claims—here, the \$5 claimants whose claims cost \$7.50 to process (\$1.50 in fixed costs and \$6 in variable costs). The reason is the capacity of the class action to spread the fixed costs across more individuals, which can lower per-claim costs enough to more than offset the losses created for the newly joined members. It may seem unfair and mercenary to bring victims into a class action merely because they enhance the value of other members' claims more than they will lose. See *Kamilewicz v. Bank of Bos. Corp.*, 92 F.3d 506, 508, 512 (7th Cir. 1996) (affirming a district court's refusal to enjoin a state court settlement in which the plaintiffs received \$2.19 in benefits and paid \$91.33 in attorneys' fees).

I agree, and I have argued elsewhere that the representation of the class cannot be adequate if it leaves any class members worse off than they would have been had they maintained individual control over their claims. Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137 (2009). This "do no harm" approach to adequacy should also be part of a well-functioning class action rule, in addition to superiority and optimality. See TIDMARSH, CLASS ACTIONS, *supra* note 23, § 4.03, at 159–60 (discussing how the superiority, optimality, and "do no harm" principles interact). Paying attention to the "do no harm" principle does not require exclusion of the class members with losing claims, as long as the other class members who gain from including the losing class members hold the losers harmless for their losses.

<sup>34</sup> As discussed previously, the best class action pending before the judge yields an expected net benefit of \$1,500,000. See *supra* note 32 and accompanying text. The class action proposed in the text above, however, would yield a benefit of \$1,550,000: an expected gross benefit of \$2,475,000 ( $(\$33/\text{claim} \times 50,000 \text{ claims}) + (\$16.50/\text{claim} \times 50,000 \text{ claims})$ ) less fixed costs of \$225,000 and per-claim costs of \$700,000 ( $\$7/\text{claim} \times 100,000 \text{ claims}$ ).

<sup>35</sup> It is not unusual for different class counsel to seek to bring class actions in different courts. See Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461 (2000) (discussing

the principle provides to class counsel to construct an optimal class action; as the example showed, none of the class actions created by counsel was the most socially beneficial action, and the judge had no power to require that a better class action be constructed.<sup>36</sup> The third is the classic informational difficulty of any social-welfarist approach: the problem of accurately measuring the expected benefits and costs of different class and claim structures.<sup>37</sup>

These problems can spawn additional difficulties. For instance, the prospect of multiple class actions sets up a realistic concern that multiple class counsel will engage in a race to the bottom, with counsel's self-interested desire to garner the fees creating a dynamic in which each counsel tries to undercut the others by settling as cheaply as possible. The defendant is only too happy to foment this "reverse auction."<sup>38</sup> Such a race can impose substantial agency costs on class members, who end up with pennies on the dollar for their claims while their counsel reaps a significant fee. Thus, rather than providing an incentive to maximize claim values for class members, which an optimality principle ideally fosters, the potential for warring class actions creates a perverse incentive to minimize class recovery.

To an extent, techniques like broadened subject matter jurisdiction over class actions,<sup>39</sup> multidistrict consolidation,<sup>40</sup> or antisuit in-

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the problems created by multiple class actions); cf. Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000) (proposing a way to eliminate all duplicative federal-state litigation).

<sup>36</sup> If one lawyer files a putative class action that is suboptimal, a perfectly competitive market in class actions would induce other counsel to file class actions that yield a greater expected net benefit, and the judge could then choose the most socially beneficial of the class actions on offer. The costliness of class action litigation and the difficulty of identifying a client who can be an adequate class representative, however, create barriers to a fully functioning market.

<sup>37</sup> See POSNER, *supra* note 11, § 21.11, at 615-17.

<sup>38</sup> See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370-73 (1995) (discussing the problematic idea of reverse auctions). For one situation in which such a race to the bottom may have occurred, see *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997), *withdrawn and superseded by* 179 F.3d 641 (9th Cir. 1999).

<sup>39</sup> See Class Action Fairness Act of 2005 § 4, 28 U.S.C. § 1332(d)(2) (2012) (expanding subject matter jurisdiction to cover class actions that involve minimally diverse parties and an aggregate of more than \$5 million in controversy).

<sup>40</sup> See 28 U.S.C. § 1407 (2012) (providing for pretrial consolidation of related cases in different federal districts). Filing class actions in numerous federal districts will often lead to multidistrict pretrial consolidation of the cases. See, e.g., *In re Discover Card Payment Prot. Plan Mktg. & Sales Practices Litig.*, 764 F. Supp. 2d 1341, 1343 (J.P.M.L. 2011) (ordering multidistrict transfer of actions in part because the litigation involved "four overlapping class actions, three of which [we]re brought on behalf of putative nationwide classes").

junctions<sup>41</sup> can avoid the problems associated with the dispersal of class actions. No technique, however, is invariably effective in bringing all potential class actions before the same judge.<sup>42</sup> The availability of these techniques provides some incentive for counsel to design an optimal class action; if the class and claim structure are suboptimal and another counsel designs a better class action, the judge may choose the other structure. That incentive, though, is constrained by the scope of the judge's power to consolidate related class actions and by the barriers that prevent other putative counsel from entering the market with better-structured class actions. In any event, techniques such as consolidation and antisuit injunctions do nothing to resolve the informational difficulties that the optimality principle poses for judges. Therefore, although optimality is an important principle, it will remain an idea better in theory than in practice unless a solution to overcome these problems exists.

## II. CY PRES AS AN INADEQUATE SOLUTION FOR ACHIEVING OPTIMAL CLASS ACTIONS

At first blush, cy pres and optimal class size seem to have little to do with each other. Cy pres concerns a problem that arises late in the litigation day, when settlements are being negotiated and funds are being distributed among class members. Optimality is a consideration that arises at the outset, when a court must decide whether to certify a class.

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41 See, e.g., *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332 (5th Cir. Unit A Oct. 1981) (enjoining class members disappointed with a proposed federal class settlement from proceeding with a state court class action involving the same conduct but filed after the settlement was announced).

42 With multidistrict litigation, the Judicial Panel on Multidistrict Litigation can consolidate related class actions only within the federal system; it cannot reach into state courts and order the consolidation of state and federal class actions. See 28 U.S.C. § 1407(a) (permitting consolidation only of cases from "different districts"); cf. AM. LAW INST., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* §§ 3.01, 4.01, 5.01 (1994) [hereinafter *COMPLEX LITIGATION*] (recommending the creation of a Complex Litigation Panel with the power, under certain conditions, to consolidate all related state and federal proceedings in a single federal or state court). With antisuit injunctions, the power of state courts to enjoin proceedings in other courts is very limited. See JAY TIDMARSH & ROGER H. TRANGSRUD, *MODERN COMPLEX LITIGATION* 175-78, 180-82 (2d ed. 2010) (describing these limits). With federal courts, the antisuit injunctive power is broader, but still limited in important ways. See 28 U.S.C. § 2283 (2012) (denying federal courts the power to issue antisuit injunctions against state proceedings except in three circumstances); *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011) (holding that a federal court may not enjoin a state court from certifying a class action when the federal court had previously denied certification under the somewhat different standards of Rule 23); cf. *COMPLEX LITIGATION*, *supra*, § 5.04 (proposing a broader antisuit injunctive power for complex cases).

In fact, the two issues bear a close relationship. The most evident intersection occurs with the second type of cy pres relief, in which the cost of awarding individual relief exceeds the value of the relief itself. Seen through the lens of optimality, what cy pres relief does is to drop the variable per-claim cost by reducing the cost of administering the remedy. The immediate effect of that reduction is that the optimal class size becomes greater. In the hypotheticals in Part I, cy pres may cut per-claim costs by, say, \$3 per claim (to \$3 per claim in the first two hypotheticals and to \$4 per claim in the third). If the court grants cy pres relief for those claimants with \$5 claims (i.e., those claimants whose claims were not cost-effective to bring), the most social benefit now results from certifying the third class action rather than the second.<sup>43</sup>

The third form of cy pres, in which the settlement sets aside a portion of the funds for the benefit of third-party organizations, also intersects with the optimality principle. Here again, cy pres relief reduces the per-claim cost of administering the remedy. As a result, the class action yields more net social benefit than it would have yielded had the funds gone to the victims. That same rationale applies to the first form of cy pres relief when it is cheaper to give unclaimed funds to some third-party organization than it is to distribute the excess to existing claimants.

Put more generally, the basic argument for cy pres relief is to increase the net deterrent effect of a class action.<sup>44</sup> The basic argument for optimality is to choose the class action with the greatest expected net social benefit.<sup>45</sup> Therefore, despite the apparent dissimilarity of the two ideas, they share a common impulse. Indeed, cy pres relief theoretically seems to be a useful and important mechanism to advance the broader goal of optimally sized and optimally structured class actions.

Even though optimality and cy pres relief are compatible in theory, cy pres does not do an especially good job of advancing optimality in practice. One reason is that the terms “deterrence” and

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<sup>43</sup> As discussed previously, the second action pending before the judge generated the greatest net expected benefit: \$1,500,000. *See supra* note 32 and accompanying text. When cy pres relief is used for the 50,000 class members with the smallest claims, however, the third class action now yields \$1,625,000 in benefits: an expected gross benefit of \$2,750,000 ( $(\$33/\text{claim} \times 50,000 \text{ claims}) + (\$16.50/\text{claim} \times 50,000 \text{ claims}) + (\$5.50/\text{claim} \times 50,000 \text{ claims})$ ) less fixed costs of \$225,000 and per-claim costs of \$900,000 ( $(\$7/\text{claim} \times 100,000 \text{ claims}) + (\$4/\text{claim} \times 50,000 \text{ claims})$ ).

<sup>44</sup> *See supra* note 11 and accompanying text.

<sup>45</sup> *See supra* notes 26-30 and accompanying text.

“expected net social benefit” are not quite equivalent. In particular, there may be social benefit in delivering compensation to individual class members, and cy pres fails to realize that benefit.<sup>46</sup> Even assuming that the two terms are equivalent, the fundamental flaw in cy pres relief, from the viewpoint of the optimality principle, is that it provides no incentive to class counsel to negotiate the optimal class settlement—the settlement that maximizes the net social benefit to a class of optimal size and claim structure.<sup>47</sup>

More specifically, Part I described three practical impediments to achieving optimality: the difficulty of concentrating dispersed litigation, the lack of incentive on counsel to achieve an optimal claim and class structure, and the difficulty of measuring optimality.<sup>48</sup> These problems were made worse by the risk of a race to the bottom.<sup>49</sup> Cy pres relief does a poor job of responding to these concerns. Most significantly, cy pres relief does nothing to avoid a race to the bottom. Indeed, cy pres may provide an incentive for some rapacious putative class counsel to undercut efforts to achieve a settlement large enough to deliver individual relief to class members.<sup>50</sup> As a result, it encourages the filing of class actions in multiple courts—which is exactly the opposite result from the one the optimality principle aims to achieve. For the same reason, cy pres relief gives no incentive to putative class counsel to structure a class action in a way that yields the greatest expected net social benefit. Further, cy pres relief does not provide

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<sup>46</sup> See *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013) (“Cy pres distributions . . . 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.”); Redish et al., *supra* note 5, at 623 (noting that “[c]y pres creates the illusion of class compensation” but in fact fails to give effect to the preference of the substantive law for compensation).

<sup>47</sup> Cf. *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (noting that, in cases in which the defendant agrees to pay class counsel’s fees, “lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees”).

<sup>48</sup> See *supra* notes 35–36 and accompanying text.

<sup>49</sup> See *supra* note 38 and accompanying text.

<sup>50</sup> As the Third Circuit noted:

While aggregating these [small-value] claims in a class action may have an important deterrent value, there is a concern that those actions are brought primarily to benefit class counsel, and awarding disproportionate class counsel fees only incentivizes that behavior. Cy pres awards—by ensuring that a settlement fund is sufficiently large to command a substantial attorneys’ fee—can exacerbate this problem.

*Baby Products*, 708 F.3d at 179; see also *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (“Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and [the defendant] wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself?”).



any metric for knowing whether the class action is indeed optimal or is instead a suboptimal construction run more for the benefit of class counsel than the class.

Cy pres relief might be forgiven these last two transgressions, at least in cases in which class certification precedes settlement; after all, optimality is a matter that a judge must determine at the time of class certification, while cy pres relief does not come onto the horizon until settlement. That answer, however, is too facile. First, cy pres's counterproductive inducement to counsel to file undercutting class actions in other jurisdictions is itself a serious impediment to the doctrine's use. Second, the failure to establish a class of optimal size and structure infects everything that happens afterwards, and it is far better to develop doctrines that deal with the problem at the front end than to cobble together back-end solutions like cy pres, which try to rescue a poorly constructed class action from an avoidable morass. Third, in deciding whether to certify a class, a court inevitably must consider whether the class action can be brought to a successful conclusion. That consideration must include some thought as to the delivery of the remedy.<sup>51</sup> Remedial issues cannot be completely disaggregated from certification issues.

A fair response to these criticisms is that a doctrine (cy pres) should not be criticized for failing to advance an idea (optimality) that it was never intended to advance. Moreover, the fear that cy pres will cause routine races to the bottom or impose unacceptable agency costs has not necessarily been borne out in practice.<sup>52</sup> Although some

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<sup>51</sup> This fact may be most evident in settlement class actions, in which the terms of the settlement are known at the time of class certification. See *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 341 (3d Cir. 2010) (stating that "a district court 'may take the proposed settlement into consideration when examining the question of certification'" (quoting *In re The Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 308 (3d Cir. 1998))); Redish et al., *supra* note 5, at 649-50 (discussing how cy pres helps to foment the "pathology" of settlement class actions). It is also a relevant consideration, though, in class actions certified for litigation purposes. See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (reversing class certification when the class failed to meet Rule 23(b)(3)'s predominance requirement because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class"); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40-41 (1st Cir. 2003) (reversing a denial of class certification when the calculation of individual damage awards in a small-stakes consumer class action could be easily performed by a computer program).

<sup>52</sup> Empirical evidence about abusive cy pres awards is elusive. One investigation that searched online legal resources reported 120 class actions between 1974 and 2008 that provided for cy pres relief. Redish et al., *supra* note 5, at 652-61. Of that number, courts approved cy pres recovery in thirty cases between 1974 and 2000, and sixty-five cases between 2001 and 2008. *Id.* Attorneys' fees in cases involving cy pres were slightly higher than in other class actions. *Id.*

settlements involving cy pres relief have smelled fishy,<sup>53</sup> others have raised no concern.<sup>54</sup>

A balanced assessment is that, as a doctrine designed to further the goal of fostering optimal class actions, cy pres is neutral or perhaps slightly negative. In the right circumstances, it might enhance optimal class size and structure. In other circumstances, it might not—and might, in fact, even result in a deleterious race to the bottom. So the issue becomes whether an alternative doctrine can do more to advance the optimality principle, and what effect such a doctrine might have on the future of cy pres relief. Part III suggests an alternative—one that may effectively limit the use of cy pres recovery.

### III. USING ATTORNEYS' FEES TO CREATE OPTIMAL CLASS ACTIONS

Courts can foster the creation of optimal class actions with a simple idea: compensate class counsel by basing counsel's fee, in part, on the net recovery to the class. To explain the proposal, it is important to take a step back. In a class action, the court approves class counsel's fee.<sup>55</sup> In settled class actions, the settlement may state a fee that class counsel will ask the court to approve,<sup>56</sup> or it may state that coun-

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These data do not rule out the possibility of collusion or otherwise abusive cy pres practices, but they do not prove the existence of abuse either.

<sup>53</sup> See, e.g., *Baby Products*, 708 F.3d at 176 (noting "concern" about the limited amount of direct compensation going to class members); *Dennis v. Kellogg Co.*, 697 F.3d 858, 862–63, 869 (9th Cir. 2012) (disapproving a settlement in which at least two-thirds of the settlement award was set aside for cy pres relief); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 196 (5th Cir. 2010) (disapproving a settlement in which attorneys' fees and costs stood to consume the bulk of the award, leaving only a modest amount for possible cy pres distribution).

<sup>54</sup> *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21 (1st Cir. 2012) (permitting cy pres relief in favor of cancer research when some victims of overcharges for cancer drugs failed to assert claims for repayment).

<sup>55</sup> See FED. R. CIV. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or the parties' agreement."); cf. *In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d 4, 15–16 (1st Cir. 2012) (holding that, in diversity cases, "Rule 23(h) does not provide a free-floating grant of authority to apply federal law to award attorneys' fees," and that federal courts have no "inherent federal equitable powers to fashion an attorneys' fee award").

<sup>56</sup> Memorandum in Support of Joint Motion for Preliminary Approval of Settlement Ex. 1 at 10, *In re LivingSocial Mktg. & Sales Practices Litig.*, No. 11-mc-00472-ESH-AK (D.D.C. Oct. 19, 2012) ("Plaintiffs will petition the Court for no more than three million dollars (\$3,000,000), total, for attorneys' fees and costs."). Federal courts are not required to approve an agreed-upon fee. For instance, in *LivingSocial*, the court reduced the award for fees and costs to slightly less than \$1,400,000. *In re LivingSocial Mktg. & Sales Practice Litig.*, No. 11-mc-0472(ESH), 2013 WL 1181489, at \*21 (D.D.C. Mar. 22, 2013). Nor must a court approve the fee merely because the class representatives consented to the settlement agreement in which the fees were specified. See *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 123–24 (2d Cir. 2005) ("[W]e cannot

sel will move the court for an award of reasonable fees.<sup>57</sup> Accompanying the settlement may be an agreement by the defendant not to contest the request for fees.<sup>58</sup> The fees may be taken out of the award to the class, if there is one, or the defendant may agree to (or be required to, in the case of a fee-shifting statute<sup>59</sup>) pay the fees separately.<sup>60</sup>

In approving an award, courts have tended to adopt one of two methods: a “lodestar” approach or a “percentage-of-the-fund” approach.<sup>61</sup> The lodestar approach multiplies the hours that class counsel reasonably expended by the prevailing hourly market rate;<sup>62</sup> the court can then adjust this award upward or downward depending on the quality of representation, the degree of success, the risk associated with the litigation, the complexity of the case, and other factors.<sup>63</sup> The

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say that the district court abused its discretion merely because it chose not to heed the terms of an agreement purportedly reached between lead plaintiffs and their counsel . . .”).

<sup>57</sup> See, e.g., Amended Settlement Agreement and Release at 11, *Fraleigh v. Facebook, Inc.*, No. 11-CV-01726-RS (N.D. Cal. Oct. 5, 2012), available at <http://fraleighfacebooksettlement.com/docs/sa.pdf> (“Plaintiffs may file a motion with the Court seeking a portion of the Settlement Fund as payment of any reasonable attorneys’ fees, plus reimbursement of actual costs and expenses . . .”).

<sup>58</sup> This type of agreement is often called a “clear sailing” provision. See *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

<sup>59</sup> See, e.g., 42 U.S.C. § 1988(b) (2006) (permitting a court to award “a reasonable attorney’s fee” to a “prevailing party” in certain civil rights cases).

<sup>60</sup> See *Weinberger v. Great N. Nekooa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (“While the conflict between a class and its attorneys may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery, there is also a conflict inherent in cases like this one, where fees are paid by a quondam adversary from its own funds . . .”).

<sup>61</sup> See, e.g., *Wal-Mart*, 396 F.3d at 121 (adopting a percentage-of-the-fund approach); *Fischel v. Equitable Life Assurance Soc’y of the U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002) (“In a common fund case, the district court has discretion to apply either the lodestar method or the percentage-of-the-fund method in calculating a fee award.”).

In Massachusetts, courts can also award a fee based on a multi-factor approach that considers, among other things, the time spent, the complexity of the case, and the risks of the litigation. *Fontaine v. Ebtac Corp.*, 613 N.E.2d 881, 891 (Mass. 1993). Because it employs the same factors used in both the lodestar and percentage-of-the-fund approaches, see *infra* notes 63 & 65, this approach does not appear to differ markedly from the two principal approaches on offer. In any event, Massachusetts courts appear to have moved away from this approach to the greater certainty of the lodestar method. See *Fontaine*, 613 N.E.2d at 891 (noting “basic approval of the lodestar approach”).

<sup>62</sup> See *Blum v. Stenson*, 465 U.S. 886, 895 (1984) (holding that “‘reasonable fees’ under § 1988 are to be calculated according to the prevailing market rates in the relevant community”); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (“The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.”).

<sup>63</sup> See *Blum*, 465 U.S. at 896-902 (recognizing that courts can employ upward or downward adjustments of fees, but holding that the district court abused its discretion in awarding an en-

percentage-of-the-fund approach awards counsel a share of the overall settlement proceeds.<sup>64</sup> The court determines the appropriate percentage by examining essentially the same factors as a court considering a lodestar enhancement would consider: the quality of the representation, the risks of the litigation, and so on.<sup>65</sup> In the main, courts have trended toward the percentage-of-the-fund approach in cases involving the creation of a common fund for the class,<sup>66</sup> and some courts appear to require the exclusive use of this approach in common-fund cases.<sup>67</sup> Whichever approach a court uses, it may, and often does, cross-check the award by comparing it to the award that would have resulted from the other method.<sup>68</sup>

Both approaches have flaws that create the possibility of agency costs—in particular, the risk that counsel will work to advance their interest in a large fee rather than the class's interest in a large settlement. The lodestar approach creates an incentive for class counsel "to bill as many hours as possible, to do unnecessary work, and for these reasons also can create a disincentive to early settlement."<sup>69</sup> Thus, a standard argument for the percentage-of-the-fund approach is that it "align[s] the interests of plaintiffs and their attorneys more fully by allowing the latter to share in both the upside and downside risk of litigation."<sup>70</sup> It also is administratively "the most efficient means of

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hancement on the case's facts); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999) (describing relevant factors).

<sup>64</sup> See *Blum*, 465 U.S. at 900 n.16 (noting the availability of a percentage-of-the-fund method when counsel's efforts create a common fund); *Wal-Mart*, 396 F.3d at 121 (affirming the district court's use of a percentage-of-the-fund approach); cf. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 49 (2d Cir. 2000) (rejecting a "blanket prohibition . . . against percentage fees").

<sup>65</sup> See *In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009) (listing factors); *Wal-Mart*, 396 F.3d at 121-22 (same).

<sup>66</sup> See *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 177-78 (3d Cir. 2013) (noting that the percentage-of-the-fund approach "is 'generally favored in cases involving a common fund'" (quoting *In re The Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 333 (3d Cir. 1998))). But see *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010) (noting the trend toward the percentage-of-the-fund approach, but upholding the use of a lodestar approach).

<sup>67</sup> See *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (holding that "a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases"); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class."). But see *Goldberger*, 209 F.3d at 50-51 (holding that a district court has the discretion to employ the lodestar approach in a common-fund case).

<sup>68</sup> *Baby Products*, 708 F.3d at 176-77; *Goldberger*, 209 F.3d at 50.

<sup>69</sup> *McDaniel*, 595 F.3d at 418. The court in *McDaniel* also noted that, in some situations, the lodestar method provides the opposite incentive to settle the case too early. *Id.*

<sup>70</sup> *Id.* at 419; see also *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ.1262 RWS, 2002 WL

rewarding the work of” class counsel.<sup>71</sup> The percentage-of-the-fund approach, however, has its own issues; it may “yield too little for the client-class, and an unjustified golden harvest of fees for the lawyer.”<sup>72</sup> Also, “it can create perverse incentives of its own, potentially encouraging counsel to settle a case prematurely once their opportunity costs begin to rise.”<sup>73</sup>

A solution to this dilemma exists. In an insufficiently noticed article written over thirty-five years ago, Kevin Clermont and one of his students recommended that attorneys’ fees be based on a *combination* of an hourly rate and a percentage of the recovery, with the percentage of the recovery calculated on the gross amount of the recovery minus the hourly-rate portion of the fee.<sup>74</sup> As they demonstrate, this fee, which is payable only when there is a recovery,<sup>75</sup> puts the client’s and the lawyer’s incentives in perfect alignment. The point at which an additional dollar paid in fees will yield less than another dollar in benefit to the client (in other words, the point at which the client does not want the lawyer to proceed further) matches the point at which an additional hour spent on the case will also result in less profit for the lawyer (in other words, the point at which the lawyer has no interest in proceeding further).<sup>76</sup> Thus, the lawyer has the incentive neither to overwork the case nor to shirk the case or settle it too quickly.<sup>77</sup>

Professor Clermont and Mr. Currivan proposed this hybrid model for ordinary litigation. It never caught on, no doubt because courts are reluctant to police fee arrangements between a lawyer and an individual plaintiff, other than to ensure that the fee charged is not unreasonable.<sup>78</sup> Although the proposal was not developed specifically with

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31663577, at \*25 (S.D.N.Y. Nov. 26, 2002) (noting that this alignment of interests “provides a powerful incentive for the efficient prosecution and early resolution of litigation”), *quoted in Wal-Mart*, 396 F.3d at 121.

<sup>71</sup> *Lloyd’s American*, 2002 WL 31663577, at \*25.

<sup>72</sup> *Goldberger*, 209 F.3d at 48 (internal quotation marks omitted).

<sup>73</sup> *McDaniel*, 595 F.3d at 419.

<sup>74</sup> Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 546-47 (1978). If  $w$  represents the prevailing hourly rate,  $h$  the number of hours worked,  $s$  the amount of the recovery, and  $x$  the percentage of the fund given to the attorney, then the attorneys’ fee is calculated as  $wh + x(s - wh)$ .

<sup>75</sup> *Id.* at 598. In the event of a loss, the attorney receives nothing. *Id.* at 546-47 (noting that the fee would be “paid only in the event of recovery”).

<sup>76</sup> *Id.* at 549. The profit, which is the difference between the fee earned and the opportunity cost of being unable to do other legal work, is the contingency portion of the fee, or  $x(s - wh)$ . *Id.*

<sup>77</sup> *Id.* at 546-50.

<sup>78</sup> See *Kosydor v. Am. Express Centurion Servs. Corp.*, 979 N.E.2d 123, 131 (Ill. App. Ct. 2012) (stating that “an attorney who charges an excessive fee in violation of the court’s rules may

class actions in mind,<sup>79</sup> its applicability is immediately apparent. First, unlike ordinary litigation, courts have the power to approve the fee of class counsel<sup>80</sup> and thus establish the guidelines for appropriate fee structures.<sup>81</sup> Second, the Clermont-Currivan proposal blends the two major approaches—lodestar and percentage-of-the-fund—already in use in class litigation.<sup>82</sup>

I do not intend to debate here the wisdom of adopting this approach; Professor Clermont and Mr. Currivan have already cleared the path and shown how this fee structure aligns the incentives of the client (here, the class members) and the lawyer (here, the class counsel). In order to aid the formation of optimal class actions, however, the proposal requires three friendly amendments. First, in determining the hours worked, only hours spent working to generate compensation for class members should count. Second, in calculating the amount of the recovery on which the percentage is calculated, a court must include only the amount distributed to class members.<sup>83</sup> Third, when calculating the percentage-of-the-fund portion of the fee, the court must use the net recovery to the class, rather than the gross recovery, as the fund of which counsel may receive a percentage.<sup>84</sup> A court must determine this net recovery by starting with the gross amount actually distributed to class members, and then subtracting from that amount the costs of litigation—including the costs of delivering the remedy to individual class members.<sup>85</sup>

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be subjected to discipline”); MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2002) (“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee . . .”).

<sup>79</sup> Professor Clermont and Mr. Currivan recognized the applicability of their proposal for class actions. See Clermont & Currivan, *supra* note 74, at 584 n.185.

<sup>80</sup> See *supra* note 55 and accompanying text.

<sup>81</sup> See *supra* notes 66-67 and accompanying text (discussing the presumptive or required use of the percentage-of-the-fund method in common-fund cases).

<sup>82</sup> See *supra* note 64.

<sup>83</sup> Cf. 28 U.S.C. § 1712(a) (2012) (requiring that, in a settlement that “provides for a recovery of coupons to a class member,” any contingent fee for class counsel be calculated on the value of the coupons actually redeemed).

<sup>84</sup> In its original form, the Clermont-Currivan proposal ignored the effect of litigation costs and awarded counsel a percentage of the gross recovery. The authors later relaxed this assumption of no litigation costs. As they pointed out, deducting litigation costs and awarding a percentage of the net recovery does not affect their conclusion that this proposal aligns the interests of the lawyer and the client. See Clermont & Currivan, *supra* note 74, at 557-58.

<sup>85</sup> The effect of these three modifications is to change slightly the variables  $h$  and  $s$  in the formula discussed *supra* note 74. In particular, the first modification affects how  $h$  is calculated; the latter two affect how  $s$  is calculated. With these exceptions, the formula itself remains the same. Thus, if we allow  $h^*$  to represent the modified number of hours worked and  $s^*$  to represent the modified net recovery, the formula for determining class counsel’s fee is  $wh^* + x(s^* - wh^*)$ .

These modifications have two principal effects. First, they eliminate the incentive for class counsel to press for cy pres relief; the reason is that these distributions, as well as the time counsel spent obtaining or administering them, would not be compensable elements of class counsel's fee. Second, by using the net recovery to the class as the basis for the contingency portion of the fee, counsel has little incentive to add either claims or class members unless the value they add to the class action exceeds their cost.<sup>86</sup>

Thus, counsel has an incentive to achieve cost-effective joinder. Not only does this result align the interests of class and counsel, but it also aligns with society's interest in choosing the class action with the greatest expected net recovery. The goals of class, counsel, and society come into perfect agreement.

To take a concrete example, consider the five class actions of different size, claim structure, and fund distribution discussed in Parts I and II.<sup>87</sup> In each case, the benefits of the class action depend on the number of claims and number of claimants; more claims and claimants result in more recovery for the class. Certain costs (especially proof of liability) are independent of class size; they must be incurred regardless of the number of class members. Adding more claims adds to these costs, but the costs still do not vary according to the number of class members. There are also costs that vary according to the number of members, such as the cost of individual notice,<sup>88</sup> the cost of delivering an individual remedy, and so forth. If we take the five hypotheti-

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It should be noted that, akin to the Clermont-Currivan proposal, *see* Clermont & Currivan, *supra* note 74, at 546-47, the upper limit on the attorneys' fees is the net amount of the class recovery, exclusive of attorneys' fees.

<sup>86</sup> Because class counsel receives an hourly rate for all hours reasonably expended on the case, counsel has a modest incentive to include cost-ineffective claims when counsel can earn a fee for work specifically devoted to those cost-ineffective claims. For the most part, however, class counsel's work is done to benefit the entire class; counsel rarely does work on the individual cases of class members.

<sup>87</sup> *See supra* notes 31-34, 43 and accompanying text. In the first hypothetical ("Class 1"), a single claim was brought on behalf of 150,000 victims; there was no cy pres award. In the second hypothetical ("Class 2"), a single claim was brought on behalf of 100,000 victims; there was no cy pres award. In the third hypothetical ("Class 3"), two claims were brought on behalf of 150,000 victims; there was no cy pres award. In the fourth hypothetical ("Class 4"), two claims were brought on behalf of 100,000 victims; there was no cy pres award. In the final hypothetical ("Class 5"), two claims were brought on behalf of 150,000 victims; there was a cy pres award for the 50,000 victims with claims too small to make individual awards economically feasible.

<sup>88</sup> In some class actions, class members must be given notice of the right to opt out. *See* FED. R. CIV. P. 23(c)(2)(B). That notice must be reasonably calculated to apprise class members of their rights and must be given by first-class mail or an equivalent method for all class members who are identifiable. *See* *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). In addition, class members in all class actions may be given notice to permit them to have input on important

cal class configurations described before (four class and claim configurations that involve no cy pres relief and one that does) and add a few additional assumptions (such as a market hourly rate of \$200 for attorneys and a percentage recovery of five percent), we have the results shown in the following table.<sup>89</sup>

TABLE

	Class 1 One Claim and No Cy Pres	Class 2 One Claim and No Cy Pres	Class 3 Two Claims and No Cy Pres	Class 4 Two Claims and No Cy Pres	Class 5 Two Claims and Cy Pres
<b>Class Members</b>	150,000	100,000	150,000	100,000	150,000
<b>Gross Recovery</b>	\$2,500,000	\$2,250,000	\$2,750,000	\$2,475,000	\$2,750,000
<b>Non-Fee Fixed Costs</b>	\$50,000	\$50,000	\$75,000	\$75,000	\$75,000
<b>Non-Fee Variable (Per-Claim) Costs</b>	\$6	\$6	\$7	\$7	\$7 for 100,000; \$4 for 50,000
<b>Total Non-Fee Costs</b>	\$950,000	\$650,000	\$1,125,000	\$775,000	\$975,000
<b>Cy Pres Distribution</b>	\$0	\$0	\$0	\$0	\$275,000
<b>Adjusted Recovery (<math>s^*</math>)</b>	\$1,550,000	\$1,600,000	\$1,625,000	\$1,700,000	\$1,500,000
<b>Hours (<math>h^*</math>)</b>	500	500	750	750	750
<b>Rate (<math>w</math>)</b>	\$200	\$200	\$200	\$200	\$200
<b>Hourly Fee (<math>wh^*</math>)</b>	\$100,000	\$100,000	\$150,000	\$150,000	\$150,000
<b>Percentage (<math>x</math>)</b>	5%	5%	5%	5%	5%
<b>Attorneys' Fees (<math>wh^* + x(s^* - wh^*)</math>)</b>	\$172,500	\$175,000	\$223,750	\$227,500	\$217,500
<b>Attorney Profit (<math>x(s^* - wh^*)</math>)</b>	\$72,500	\$75,000	\$73,750	\$77,500	\$67,500
<b>Distribution to Class (<math>s^* - (wh^* + x(s^* - wh^*))</math>)</b>	\$1,377,500	\$1,425,000	\$1,401,250	\$1,472,500	\$1,282,500

developments in the case. See FED. R. CIV. P. 23(c)(2)(A), (d)(1)(B). Finally, class members must also be given notice of a settlement. See FED. R. CIV. P. 23(e)(1).

Some costs of notice may not vary. For instance, in the event that counsel may give substituted notice by newspaper, the cost of that notice is generally independent of the number of class members it reaches.

<sup>89</sup> Different assumptions would not change the result. If, for instance, the hourly rate were \$150 per hour and the contingency were ten percent, the outcome would be the same in terms of which class and claim structure maximizes the class recovery and the counsel's profit.



The table demonstrates how this approach to awarding attorneys' fees aligns the interests of class, counsel, and society. Of the five possible class and claim structures, the one that yields the most benefit to class members is Class 4, the class action that asserted two claims against the defendant on behalf of the smaller class whose claims exceeded the cost of administering them. Likewise, this class yields the greatest profit (the amount above the lost opportunity cost that counsel incurs by not working on other cases). Further, Class 4 is also the class that provides the highest net social value.

It is also apparent that class counsel has no reason to employ cy pres relief, even though Class 5 (the cy pres class) is tied with Class 3 for the highest gross recovery. On the assumptions made in the table, Class 5 yields the lowest recovery to the class and the lowest attorney profit. Its net social benefit is high (\$1,557,500 when the cy pres relief is factored in), but that is always true of cy pres relief. Because less money is spent administering a cy pres remedy than an individual-member remedy, cy pres will fare best in terms of net social benefit. Indeed, cy pres relief for the entire class, which denies even those with viable claims any individual recovery, would be best of all from the viewpoint of social welfare—assuming that the benefit of delivering a remedy to the actual victims is excluded as a social benefit.

A cy pres enthusiast may also complain that this approach to attorneys' fees cooks the books. If cy pres distributions are not deducted from the fund on which attorneys' fees are based, then the class counsel in Class 5 earns a greater fee (\$231,250) and profit (\$81,250) by bringing a cy pres action.<sup>90</sup> Thus, class counsel would have an incentive to bring the larger class action and to employ cy pres. Such a claim, however, merely proves the point. The class members fare the worst under cy pres, while class counsel fares the best. Under either Class 4 or Class 5, the 50,000 victims with cost-ineffective claims receive no remedy. In Class 5, though, the remaining 100,000 victims are required to absorb the cost of administering those unremedied claims, reducing the net value of their own claims. Thus develops the tension between the interests of the class (not to include claims that drag down their bottom line) and class counsel (to include claims that improve counsel's bottom line).

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<sup>90</sup> With a gross recovery of \$2,750,000 and non-fee costs of \$975,000, the attorney's fee in Class 5 would have been calculated on an adjusted recovery of \$1,775,000, thus yielding the fee and profit given in the text.

The idea that *cy pres* distributions should not be included in the calculation of attorneys' fees is not new.<sup>91</sup> A few courts have suggested that, in appropriate cases, such distributions could be excluded; but by far the preferred approach is to award fees on the basis of the entire fund created by class counsel's efforts and reduce the percentage awarded to account for potentially improper uses of *cy pres* relief.<sup>92</sup> Some, but not all, commentators have also recommended the exclusion of *cy pres* distributions in calculating the fee award.<sup>93</sup> No one, however, has joined that issue with the question of how to set an attorney's fee that best aligns the interests of class counsel and society. Excluding *cy pres* distributions from the calculation of proper attorneys' fees is a step in the right direction, but it is insufficient to set the right incentives for counsel. Equally critical is setting the right blend of lodestar and percentage-of-the-fund components for the fee itself.

This blended approach also solves many of the practical problems of the optimality principle that *cy pres* does not.<sup>94</sup> Most evidently, it provides the incentive to class counsel to create optimally sized and structured class actions. A lawyer who constructs a class that is too small or too large in terms of the number of members and claims is failing to maximize both personal and class profit; and class counsel, whether driven by self-interest or the desire to represent clients vigorously, now has no reason to leave that money on the table.

This approach also solves the metrics problem—the question of how a court can know when a class action is optimal. The solution is

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<sup>91</sup> See, e.g., *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997).

<sup>92</sup> See *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013) (“[O]ur approach is case by case, providing courts discretion to determine whether to decrease attorneys’ fees where a portion of a fund will be distributed *cy pres*.”); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436-37 (2d Cir. 2007) (holding that it was an error for the court to award fees based only on the claims made against the fund, rather than on the full value of the fund); *Williams*, 129 F.3d at 1027 (“[T]he district court abused its discretion by basing the fee on the class members’ claims against the fund rather than on a percentage of the entire fund or on the lodestar. . . . [O]ur benchmark for an attorneys’ fee award in a successful class action is twenty-five percent of the entire common fund. Of course, the percentage may be adjusted to account for any unusual circumstances.” (footnote omitted)).

<sup>93</sup> See *Redish et al.*, *supra* note 5, at 651 (discussing the due process problems that arise with “any measure of class attorneys’ fees that does not restrict those fees to a percentage of the amount *actually claimed*”); see also *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 21.71 (2004) (“Compensating counsel for the actual benefits conferred on the class members is the basis for awarding attorney fees.”). But see *LAW OF AGGREGATE LITIGATION*, *supra* note 5, § 3.13(a) (“Attorneys’ fees in class-action settlements should be based on both the actual value of the settlement to the class and the value of *cy pres* awards satisfying [certain criteria].”).

<sup>94</sup> For a discussion of these problems, see *supra* notes 35-38 and accompanying text. For the inadequacy of *cy pres* as a response to these problems, see *supra* notes 50-54 and accompanying text.

not to measure expected net social benefit directly, but to put the matter into the hands of class counsel, who possesses far better information about the strengths and weaknesses of the class's claims and the costs of their administration than the court does. This approach takes advantage of the well-developed economic insight to put decisions about the most efficient arrangements into the hands of those who are the cheapest cost avoiders—typically, those with the greatest access to information.<sup>95</sup> Once it establishes a fee structure that rewards those counsel who establish a class action of optimal size and structure, the court can presumptively leave the question of optimality in counsel's hands.

The proposed fee structure has other advantages. First, it ensures that counsel chooses cost-effective litigation tactics. Because the fee is based on the net recovery (gross recovery less non-fee costs), counsel has more incentive to control non-fee litigation costs than she would have if the recovery were based on the gross recovery. Second, this fee structure gives class counsel little incentive to leave money for class members on the table during negotiations. Instead, counsel has reason to work on the class's behalf until another dollar spent would not yield a dollar in benefit, because doing so also maximizes counsel's recovery. In particular, it gives counsel an incentive to negotiate terms in a settlement that are perceived by class members as advantageous enough that the class members want to participate in the settlement, and it gives counsel an incentive to use all available means to give class members actual notice of the settlement in order to broaden participation. Counsel who fail to do so put a portion of their own fees at risk.

Third, the approach works regardless of the percentage of the recovery that the court awards class counsel. One problem with the traditional percentage-of-the-fund approach is that it gives an incentive to counsel to settle the case quickly<sup>96</sup>—an incentive that grows as the percentage of the recovery that the court might award becomes larger. Under my proposal, the percentage that the court chooses<sup>97</sup> is irrelevant to counsel's incentive. Whether the percentage is one percent, five percent (as in the table), or even ten percent, counsel has

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<sup>95</sup> See, e.g., Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972) (arguing that a government institution can avoid making a cost-benefit analysis by instead determining which party to an accident “*is in the best position to make the cost-benefit analysis . . . . The question for the court reduces to a search for the cheapest cost avoider.*”).

<sup>96</sup> See *supra* note 73 and accompanying text.

<sup>97</sup> The percentage is represented by *x* in the formula described *supra* note 85.

the same incentive to structure the class in an optimal way. Of course, the different percentages put more or less money in the pockets of class counsel, but they do not affect counsel's behavior to create the best class action. Thus, the court is free to adjust the percentage upward or downward depending on its perception of the quality of the representation, the riskiness of the case, or the complexity of the issues<sup>98</sup> without worrying about how such an adjustment might influence the behavior of present or future class counsel.

Admittedly, the proposed fee structure does not perfectly resolve the problem of competing class actions and the race to the bottom. Even if one counsel proposes the optimal class action—here, Class 4—other counsel elsewhere might be willing to request that another court certify a different class action—perhaps Class 3 or Class 5—as a means of trying to “win” a reverse auction.<sup>99</sup> In most cases, however, once the fee structure that I have proposed is in place, the reason why a lawyer would choose any structure other than Class 4 is less than clear. From counsel's viewpoint, the reason to engage in a reverse auction is to garner fees that otherwise would have gone to a different lawyer. All counsel are therefore likely to want to choose the claim and member structure for the class action that will maximize these fees—in other words, Class 4.<sup>100</sup> A distinct issue is the race to the bottom: whether competing class counsel will undercut each other's settlement offers to garner the attorneys' fee. Here, the proposed fee structure tempers that problem. Because a large portion of the fee is tied to hours worked, there is a disincentive for other counsel to swoop in, start a new class action, and forge a quick settlement. The fee simply will not be very large if counsel has devoted little work to the case.

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<sup>98</sup> These factors often influence a court's decision on attorneys' fees under both the lode-star and the percentage-of-the-fund approaches. See *supra* notes 63, 65 and accompanying text.

<sup>99</sup> It may be a “win” for counsel, who otherwise would garner no fees, but a reverse auction is a clear loss for class members. In filing other class actions, there is little incentive for putative counsel to try to certify Class 2 because the gross recovery of that class action (\$2,250,000) is less than that of Class 4 (\$2,475,000); thus, counsel would have less negotiating room in trying to win the reverse auction. The analysis in the text, however, does not depend on the structure of the class action that a lawyer creates to try to undercut other class actions.

<sup>100</sup> This statement is not invariably true. In the hypotheticals above, assume that the first claim is based on state law, and the federal courts would have no subject matter jurisdiction over a class action raising only that claim. The second claim, however, invokes federal jurisdiction. If counsel believes that she can get a quick settlement approval in state court, she may forego asserting the second claim. Thus, in some cases, counsel seeking to engage in a race to the bottom may have reason to choose a claim or member structure that is suboptimal.

That said, the proposed fee structure does not prevent races to the bottom. It does far more to prevent reverse auctions than does cy pres relief, which has the potential to ignite such socially destructive behavior. In the end, however, the only solution to the reverse auction problem is to consolidate in one courtroom class actions filed in different courts.<sup>101</sup>

Proponents of cy pres might also argue that the proposal's prohibition against including the amount of cy pres recovery in setting the counsel's fee goes too far.<sup>102</sup> The reality is that the proposed fee structure fails to provide for as much deterrence as cy pres relief. Optimal deterrence arguably requires an award for each class member for whom an individual award is economically viable, plus a cy pres award for those whose claims are not (in essence, Class 5). The proposed fee structure creates a disincentive to achieve this optimal amount of deterrence.

In pursuing the goal of meaningful compensation to victims, the proposed fee structure can indeed lead to less than optimal deterrence in some situations. In assessing the bite of this criticism, however, it is important to step back and recall the three different forms of cy pres.<sup>103</sup> Failing to provide an incentive for cy pres relief seems especially problematic in the first two scenarios. In the first scenario, in which fewer class members assert claims against the fund than anticipated, it seems unfair to counsel who have worked hard and negotiated a settlement to subject their fees to the vagaries of class members who choose not to submit claims. Even if some funds remain unclaimed, shouldn't counsel's creation of the benefit matter in the fee awarded?

The answer is yes and no. If a substantial number of claimants refuse to assert claims, the problem may lie with the inadequacy of the settlement itself—class members with \$50 claims may not trifle with a \$1 settlement. My proposed fee structure creates an incentive for class counsel to negotiate the deserved recovery of \$50. Unclaimed funds may also indicate that the supposed harms were not as great as believed, and there is no reason to compensate counsel for ginning up nonexistent claims. Even if these circumstances do not arise, though, courts will inevitably face situations in which some funds remain un-

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<sup>101</sup> See *supra* notes 39-42 and accompanying text (discussing techniques to achieve the consolidation of class actions).

<sup>102</sup> As I indicated above, some courts and commentators share this view. See *supra* notes 92-93 and accompanying text.

<sup>103</sup> See *supra* notes 2-11 and accompanying text.

claimed. The presence of unclaimed funds may justify providing higher payments to class members who have filed claims.<sup>104</sup> Because these funds are distributed to the class, they can be included as part of the fee award. If this approach is not economically feasible, then the amount of the unclaimed funds is likely not high, and the loss to the attorney in fees is likely small.

In any event, my proposal does not forbid a court from awarding cy pres relief. Nor does it ban a court, in proper circumstances, from adjusting upward the percentage of the net recovery that counsel may claim.<sup>105</sup> Moreover, counsel will still receive some compensation for their work on behalf of the class; the portion of the fee tied to counsel's reasonably expended time does not depend on the number of claims asserted. The only effect of my proposal is to ban the compensation of counsel based on the value of cy pres relief; it does not ban cy pres relief itself.

The same response applies to the second form of cy pres—in which individual damages are too small to justify individual relief to the class members—and to the third form—in which cy pres relief is negotiated as part of the settlement. Counsel will still receive an hourly fee for the work they devote to obtaining relief for the class. This fee may be insufficient to induce some lawyers to take on such cases, for the hourly fee alone fails to compensate them for the risk of losing the case.<sup>106</sup> This reality, however, is not necessarily a problem.

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104 See *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) ("Where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so . . ."); LAW OF AGGREGATE LITIGATION, *supra* note 5, § 3.07(b) ("If the settlement involves individual distributions to class members and funds remain after distributions . . ., the settlement should presumptively provide for further distributions to participating class members . . .").

105 I do not raise this possibility as a wink-and-nod end-run around the ban on compensating class counsel for cy pres recovery. Obviously, any increase in the percentage of the fund that goes to class counsel results in a decrease in the funds going to deserving class members. I recognize, however, that in sufficiently extraordinary circumstances, the failure of class members to claim funds may not be a reflection of the quality of the settlement or the efforts of class counsel to obtain broad-based participation by class members. Especially when the cy pres relief goes to organizations that are likely to provide significant indirect benefit to class members, a court may legitimately find that an upward adjustment in the percentage of the fund to which counsel are entitled is warranted.

106 Indeed, the purpose of the percentage-of-the-fund portion of the fee is to compensate counsel for the risk of nonpayment of fees in the event of a loss. See *Clermont & Currihan*, *supra* note 74, at 547. The hourly fee alone, however, may be enough of an incentive to bring a class action for either a public interest organization or pro bono counsel. Under my proposal, even if counsel receives no percentage-of-the-fund enhancement for cy pres relief, counsel is still entitled to a fee based on the market hourly rate for any successful class action settlement. Such a fee would be insufficient to induce most lawyers to take on the responsibilities of class counsel

Many of these cases involve harms for which recompense is more costly than letting the victims suffer the loss. In other words, from a net-benefit perspective, society is not benefitted from such lawsuits, and there is no social reason to foster such claims. Indeed, doing so may violate the superiority principle. Another solution—perhaps a *parens patriae* action—may be able to resolve these low-value claims.<sup>107</sup> Otherwise, the hard-edged admonition of Oliver Wendell Holmes remains true: “The general principle of our law is that loss from accident must lie where it falls . . . .”<sup>108</sup> Deterrence of wrongful behavior is an important goal, but not so important as to justify extinguishing a victim’s claim in favor of compensating a third party.

### CONCLUSION

The correct starting point for thinking about cy pres relief in a class action is not the moment of settlement—when cy pres relief first becomes an option. The starting point must be the moment of the class action’s construction—when a court’s goal is to construct a superior and optimal class action. A court can create a powerful nudge<sup>109</sup> to create such a class action by establishing a rule for the award of attorneys’ fees that aligns the interests of class, counsel, and society. One effect of this rule is to weaken the incentive of class counsel to negotiate or advocate for cy pres relief. That is a small price to pay. Another, and far more important, effect is to strengthen the quality of class actions.

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because they would receive no compensation for the risk of losing the case, and they could therefore earn a better living by taking on nonrisky work that pays the market rate. Some public interest organizations, though, employ attorneys who work for substantially less than the market rate; thus, the prospect of market-rate compensation may be sufficient to induce these attorneys to act as class counsel. The same is true of a law firm willing to accept the class action on a pro bono basis, with the prospect of recovering market fees in the event of a successful outcome.

<sup>107</sup> See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012) (discussing *parens patriae* actions as a solution to small-claims aggregation).

<sup>108</sup> O.W. HOLMES, JR., *THE COMMON LAW* 94 (Boston, Little, Brown & Co. 1881).

<sup>109</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 238 (2008) (discussing how legal rules can create “nudges” or incentives for people to act optimally).