Cour
Pénale
Internationale

International
Criminal
Court

Original: **English** No.: **ICC-01/04-01/07**
Date: **15 May 2015**

TRIAL CHAMBER II

Before: **Judge Marc Pierre PERRIN DE BRICHAMBAUT, President**
Judge Olga HERRERA CARBUCCIA
Judge Péter KOVÁCS

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v GERMAIN KATANGA

Public

Redress Trust observations pursuant to Article 75 of the Statute
Annex 2 – US authorities

Source: **The Redress Trust**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Mr Eric MacDonald

Counsel for the Defence

Mr David Hooper

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Ms Fiona McKay

Other

Mr Pieter de Baan
The United Nations
Queen's University Belfast's Human Rights Centre and University of Ulster's Transitional Justice Institute

INDEX – US authorities

677 F.3d 21
United States Court of Appeals,
First Circuit.

In re LUPRON MARKETING AND SALES PRACTICES LITIGATION.
Audrey Rohn, individually and as executrix of the estate of Dennis Rohn; Barbara Sensing; Valerie Samsell, Plaintiffs, Appellants,
Milton Greene; Crossroads Acquisition Corp.; William M. Porter; Liberty National Life Insurance Company; United American Insurance Company; Cobalt Corporation; AETNA, Inc., Plaintiffs,
William M. Porter, Plaintiff, Appellee,
v.
TAP Pharmaceutical Products, Inc.; Abbott Laboratories; Takeda Pharmaceutical Company, Limited, Defendants,
Dana Farber/Harvard Cancer Center, Interested Party, Appellee.

Nos. 10–2494, 11–1329. | Heard Feb. 8, 2012. | Decided April 24, 2012.

Synopsis

Background: Small dissident group within a larger class of medical patient consumers in a case alleging fraud in overcharging for the medication. After approval of settlement, the United States District Court for the District of Massachusetts, Richard G. Stearns, J., 729 F.Supp.2d 492, ordered that unclaimed settlement monies in cy pres fund would be distributed to promote research into prostate cancer and other diseases treatable by drug for which consumers were overcharged, and dissident group appealed.

[Holding:] The Court of Appeals, Lynch, Chief Judge, held that court did not abuse its discretion in either the process utilized or in the decision to make cy pres award.

Affirmed as modified.

West Headnotes (11)

[1] Federal Courts
Commencement and running of time in general

If an order is not set forth on a separate document, it is not considered "entered" and is not itself appealable until 150 days after entry in the civil docket. F.R.A.P.Rule 4(a)(7)(A)(ii), 28 U.S.C.A.

1 Cases that cite this headnote

[2] Federal Courts
Persons Entitled to Seek Review or Assert Arguments; Parties; Standing

Only parties to a civil action may appeal from a final judgment.

Cases that cite this headnote

[3] Federal Courts
Intervention or addition of new parties on appeal

Those who intervene in the district court properly become parties and may appeal a final judgment.

Cases that cite this headnote

[4] Federal Courts
Class actions

A district court's approval of a proposed class action settlement is reviewed for abuse of discretion.

1 Cases that cite this headnote

[5] Federal Courts
Class actions

Ordinarily, an abuse of discretion in district court's approval of a proposed class action settlement will not be found unless the record provides strong evidence that the trial judge indulged a serious lapse in judgment, such as if the decision ignores a material factor deserving

significant weight, relies upon an improper factor, or assesses only the proper mix of factors but makes a serious mistake in evaluating them. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

Cases that cite this headnote

[6] Deposits in Court

Disposition under judgment or order of court

District court did not abuse its discretion, under the evolving law of cy pres distributions in class action settlement agreements, in either the process utilized or in the decision to make a cy pres award of the remaining $11.4 million in unclaimed consumer fraud settlement proceeds to promote research into prostate cancer and other diseases treatable by drug for which consumers were overcharged; there was no abuse of discretion in court's choice to forego a direct notice mailing given that the administrative burden of doing so appeared to outweigh the small potential for increased claims, and the 11,000 claimants had already received an enhanced payment beyond single damages, however, explicit requirement that the district court receive an annual audit at the expense of recipient, in addition to the annual and semi-annual accountings to be submitted by court would be added to ensure that the cy pres fund was distributed in a way that was both financially sound and comported with the interests of the class and that the auditing function would not fall on the district court. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

9 Cases that cite this headnote

[7] Deposits in Court

Disposition under judgment or order of court

Factors considered in determining whether distributions of unclaimed cy pres funds from class action settlement reasonably approximate the interests of the class members include the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reasons why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the cy pres recipient; failure to meet the reasonable approximation test can lead to reversal.

16 Cases that cite this headnote

[8] Judges

Bias and Prejudice

Recusal is only required by a state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings.

1 Cases that cite this headnote

[9] Judges

Relationship to party or person interested

Judge's service on the board of recipient of cy pres funds was not grounds for recusing himself from participation in the cy pres selection process for determining distribution of unclaimed monies from class action settlement. 28 U.S.C.A. § 455(a).

11 Cases that cite this headnote

[10] Judges

Time of making objection

Litigants must raise a claim for disqualification of a district court judge after learning of the grounds for disqualification, and certainly may not wait and see how the court rules before acting. 28 U.S.C.A. § 455(a).

1 Cases that cite this headnote

[11] Judges

Time of making objection

Objectors waived claim based on judge's participation in the cy pres selection process for determining distribution of unclaimed monies from class action settlement; objectors were aware of judge's service on the board of recipient

of cy pres funds and that recipient was a potential recipient, and yet never raised an objection until appeal. 28 U.S.C.A. § 455(a).

Cases that cite this headnote

Attorneys and Law Firms

***23** Donald E. Haviland, Jr., with whom Michael J. Lorusso and Haviland Hughes, LLC were on brief, for appellants.

Thomas M. Sobol, with whom Edward Notargiacomo, Hagens Berman Sobol Shapiro LLP, Jeffrey L. Kodroff, John A. Macoretta, Specter Roseman & Kodroff, P.C., David S. Stellings, Daniel R. Leathers, Lieff Cabraser Heimann & Bernstein, LLP, Lisa M. Mezzetti, and Cohen Milstein Sellers & Toll PLLC were on brief, for appellee William M. Porter.

Martin M. Fantozzi, with whom Mariana Korsunsky and Goulston & Storrs, P.C. were on brief, for appellee Dana Farber/Harvard Cancer Center.

Before LYNCH, Chief Judge, SOUTER, Associate Justice, [*] and LIPEZ, Circuit Judge.

[*] The Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

Opinion

LYNCH, Chief Judge.

Appellants, a small dissident group ("the Samsell plaintiffs"), are within a larger class of medical patient consumers in a case alleging fraud in overcharging for the medication Lupron. These plaintiffs, along with insurers and private ***24** health care providers, have achieved a major settlement agreement which was approved by the district court. The total amount of the settlement was $150 million, of which $40 million was allocated to consumers. That agreement provided that if there were unclaimed monies from the $40 million consumer settlement pool even after full recovery to consumer plaintiffs, all unclaimed funds would go into a cy pres fund to be distributed at the discretion of the trial judge.

The Samsell plaintiffs appeal from the district court's distribution of the $11.4 million cy pres fund to the Dana Farber/Harvard Cancer Center and the Prostate Cancer Foundation ("DF/HCC") for work on the treatment of the diseases for which Lupron is prescribed. The Samsell plaintiffs make a series of subordinate attacks, all designed to increase the sums paid to them, though they have already recovered more than 100% of their actual damages. The award is defended by the plaintiff class and, naturally, by the recipient DF/HCC. The defendant manufacturer of Lupron, having settled the case, has not filed a brief with us.

We address for the first time the procedural and substantive standards for distribution of cy pres funds; in doing so, we express our unease with federal judges being put in the role of distributing cy pres funds at their discretion.

Finding no error, we affirm.

I.

In 2001, the Department of Justice initiated criminal proceedings against TAP Pharmaceutical Products, Inc., ("TAP") [1] for violation of the Prescription Drug Marketing Act of 1987, Pub. L. No. 100–293, 102 Stat. 95. TAP admitted that from 1991 to 2001 it had encouraged doctors to improperly bill Medicare for free samples of its cancer drug Lupron so that they would continue to prescribe Lupron instead of less expensive, similarly effective drugs. Lupron is prescribed for prostate cancer in men, endometriosis and infertility in women, central precocious puberty in children, and preoperative treatment of patients with anemia caused by uterine fibroids. TAP encouraged physicians to bill Medicare for Lupron at an inflated Average Wholesale Price ("AWP") that TAP provided to an industry publication used by Medicare and insurance plans to establish reimbursement schedules for prescription drugs including Lupron. TAP pled guilty and paid a criminal fine of $290 million as well as civil restitution of nearly $600 million to Medicare and Medicaid and $25.5 million to the fifty states and the District of Columbia.

1 TAP is a wholly owned joint venture of defendants Abbott Laboratories and Takeda Pharmaceutical Company, Ltd.

On the heels of TAP's guilty plea, three groups—individual consumer purchasers of Lupron, private health care plans, and insurers—brought nine putative class action lawsuits against TAP to recover overpayment incurred as a result of TAP's practices. *See In re: Lupron Mktg. & Sales Practices Litig.,*

245 F.Supp.2d 280, 285 (D.Mass.2003). Private insurers and health care plans had used the inflated AWP, as had Medicare and Medicaid, to determine their reimbursement payments to doctors for Lupron. The inflated AWP also resulted in higher out-of-pocket payments for patients on any portions of Lupron payments that were not covered by their insurance.

The Multi–District Litigation Panel consolidated all nine actions in the District of Massachusetts for pretrial proceedings. ***25** *Id.* The consolidated class action was brought under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, as well as under state consumer protection statutes and theories of common-law fraud and unjust enrichment.

The district court dismissed the conspiracy claims involving physicians under RICO because the complaint neither named a single doctor as a defendant nor alleged that the doctors who benefitted from the discounted purchases or free samples of Lupron were even aware of one another's existence as participants in a purported scheme to defraud. That dismissal is important for reasons stated later. The district court allowed the remaining conspiracy claims under RICO to proceed.

On October 11, 2004, the MDL parties informed the district court that they had reached a settlement as to all groups of plaintiffs and moved for preliminary approval of the negotiated agreement. On November 4, 2004, appellant Valerie Samsell, a consumer, filed a motion to intervene. The district court allowed Samsell to intervene "for the purpose of participating in the process established by the court for the evaluation of the proposed settlement." *In re: Lupron Mktg. & Sales Practices Litig.*, No. 01–CV–10861 (D.Mass. Nov. 17, 2004). On November 24, 2004, the district court issued an order preliminarily approving the proposed settlement and settlement class. *In re: Lupron Mktg. & Sales Practices Litig.*, 345 F.Supp.2d 135, 138–39 (D.Mass.2004).

In April 2005, the district court held a three-day fairness hearing on the proposed settlement. *See In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 78 (D.Mass.2005). Samsell called witnesses to testify, submitted seven depositions of additional witnesses, and presented twenty-three exhibits. *Id.* at 83–84. In addition, Samsell filed several objections to the settlement, including an objection that the amount of the settlement allocated to the class of consumer purchasers of Lupron was inadequate. On May 12, 2005, having found that the settlement was fair, reasonable and adequate, the district court issued a memorandum and order approving the settlement and certifying the class. *Id.* at 78, 98.

The approved settlement agreement allocated $40 million of the $150 million total settlement to consumer purchasers of Lupron. *Id.* at 86. It allowed these consumers to recover 30% of their total out-of-pocket payments for Lupron, or $100, whichever sum was greater. *Id.* at 87. Although the district court could not determine the size of the consumer class with certainty, given the high mortality rate associated with prostate cancer and the extended class period of more than twenty years, the district court found that the class likely included tens if not hundreds of thousands of consumer purchasers of Lupron or their estates. *Id.* at 88.

The district court's decision to approve the settlement agreement rested in part on an analysis of the likely damages suffered by the class plaintiffs, as presented by expert witnesses. Plaintiffs' two experts, Dr. Hartman and Dr. Rosenthal, testified that the allocation of the settlement funds was deliberately weighted to favor the consumer members of the class. *Id.* at 87 & n. 26. Consumers were allocated approximately 27% of the total settlement, even though the consumer claims most likely accounted for 9% to 13% of the total overcharges. *Id.* at 87 n. 26. The experts also testified that approximately 30% of the consumers' out-of-pocket expenses for Lupron represented a reasonable estimate of the actual overcharge that consumers suffered as a result of the inflated AWP. ***26** *Id.* at 87 & n. 26. The settlement agreement was designed to pay consumers 100% of this estimated overcharge.

Significantly, the settlement agreement expressly anticipated the possibility of either a shortage or a surplus in the portion of the settlement funds allocated to consumers. In the case of a shortage, the settlement agreement provided that payments to consumers would be reduced on a pro rata basis. In the case of a surplus, the agreement provided:

> All unclaimed funds remaining in the Net Consumer Settlement Pool shall be distributed in the discretion of the Settlement Court as it deems appropriate. If all or part of any unclaimed funds is distributed to one or more charitable organizations, TAP reserves whatever right it may have to claim any appropriate tax deductions for any such charitable donation(s), and no member of the Consumer Class

> or the TPP [Third Party Payers] Class or the SHP [Settling Health Plans] Group shall have a claim to any such deductions.

Following the district court's approval of the settlement agreement, the Samsell plaintiffs said they would pursue appeals of the settlement agreement unless they received more. As a result, all of the parties, including the Samsell plaintiffs, negotiated and executed an "implementation agreement." The implementation agreement provided an increase in the payments to the consumer class from 30% to 50% of their out-of-pocket expenses for Lupron. This meant that consumers would receive *167%* of the damages the district court had found they had suffered. In return, the Samsell plaintiffs and other objectors agreed to withdraw their pending appeals and other objections to the settlement, to rescind their opt-out requests, to participate in the claims process, and to waive their right to appeal from the final judgment approving the settlement. The implementation agreement also awarded incentive payments to certain objectors, including Samsell, and permitted her attorneys to seek an award of their fees. On August 26, 2005, the district court entered its final order approving the settlement agreement as modified by the implementation agreement. *In re: Lupron Mktg. & Sales Practices Litig.*, No. 01–CV–10861 (D.Mass. Aug. 26, 2005).

The parties initiated a national notice campaign designed to expose 80% of the members of the consumer class on three or more occasions to notice of the proposed settlement and the procedure for submitting claims. Notice was published in 947 newspapers, as well as through public service announcements, Lupron-related websites, and media coverage of the settlement. An interactive claims information website and a toll-free telephone number to take questions from class members were established. Consumer Notice Packets were mailed to the attorneys general of the fifty states, Puerto Rico, and the Virgin Islands. Direct mail was not used because of privacy and practicality concerns.

Consumers were allowed more than four years to file their claims. Despite these efforts, only about 11,000 individuals —a fraction of the estimated tens or hundreds of thousands of members of the consumer class—filed claims, given the high mortality rate among members of the class. At the conclusion of the claims administration process, approximately $11.4 million remained unclaimed.

The plaintiffs requested that the district court determine a plan for distribution of the $11.4 million in unclaimed funds. On January 13, 2009, during a hearing regarding the proposed disposition of the unclaimed funds, the district court stated its intention to "ensure that any distribution, ***27** whatever is done, is done both with the highest benefit of the class, present and absent in mind; that the money is distributed and spent responsibly; and, that it serves the highest purpose that was intended by the litigation and the ultimate settlement." After hearing the plaintiffs' alternative proposals, the district court narrowed its choice to three options: (1) awarding the unclaimed funds as additional compensation to the members of the consumer class who had already made claims and been paid in full under the settlement agreement; (2) conducting a supplemental claims process with a goal of identifying absent class members; and (3) making a cy pres award of the unclaimed funds for research addressing the medical conditions treated by Lupron for the benefit of the present and future patients suffering from these afflictions.

In response to a proposal to distribute some of the residual funds to a program created by a group of four doctors affiliated with Brigham and Women's Hospital ("the Loughlin Group"), the district judge disclosed that for nearly twelve years he had served as an uncompensated trustee on the board of Vincent Memorial Hospital, which is affiliated with the Massachusetts General Hospital. The judge said he was considering whether this posed any issues. The Samsell plaintiffs, who were present at the hearing, did not, either then or later, raise any objection regarding the judge's position on the board at Vincent or his continued involvement in the proceedings.

On May 19, 2009, the district court issued a memorandum and order stating its intention to make a cy pres award and distribute the residual funds for the purpose of funding research into the causes and treatments of Lupron-related conditions. *In re: Lupron Mktg. & Sales Practices Litig.*, No. 01–CV–10861, 2009 WL 1395411 (D.Mass. May 19, 2009). The district court stated that it was inclined to distribute the funds to the Loughlin Group and invited the Loughlin Group to submit a formal proposal for the court's review. *Id.* at *2. The Samsell plaintiffs appealed this order to this court; we concluded that we lacked jurisdiction to review a non-final order and dismissed the appeal. *See Samsell v. TAP Pharm. Prods.*, No. 09–1887 (1st Cir. Jan. 7, 2010).

Having learned about the residual funds from the May 19, 2009 order, a different group, DF/HCC, petitioned the district

court to consider its proposal with respect to the unclaimed funds. The district court granted the request. On May 25, 2010, the district court invited the public to comment on the proposals advanced both by the Loughlin Group and by DF/HCC.

On August 6, 2010, the court issued a memorandum and order stating that it had decided to make a cy pres award of all of the unclaimed settlement funds to DF/HCC, to be made in three installments. *In re: Lupron Mktg. & Sales Practices Litig.*, 729 F.Supp.2d 492 (D.Mass.2010). The court explained that it had rejected the option of a supplemental claims process because it would be "exorbitantly expensive (estimated at upwards of $1.74 million), time-consuming, and would likely recruit few new claimants given the high mortality rate among members of the class." *Id.* at 494 n. 4. No attack is made on that finding in this appeal. The court further explained that its decision to award the funds to DF/HCC was influenced by four principal considerations. First, DF/HCC is an established organization "with experience in managing grant programs." *Id.* at 497. Second, its proposal "leverage[d] existing institutional infrastructure, funding mechanisms, and ... relationships," which would reduce start-up and administrative costs. *Id.* Third, ***28** the proposal was designed to have "a broad national outreach to attract large-scale research collaborations, innovative pilot projects, promising young investigators, and talented graduate students." *Id.* Finally, DF/HCC "propose[d] to dedicate an appropriate portion of the funds to research involving cures for ... Lupron-treated diseases and conditions" other than prostate cancer. *Id.*

The district court also crafted an oversight plan which required DF/HCC to submit regular reports to account for the grant awards and expenditures. *Id.* at 497–98. The award would be paid to DF/HCC in three installments as explicitly authorized by the district court. *Id.* at 498. The first installment was ordered disbursed to DF/HCC on November 16, 2010. The Samsell plaintiffs have not sought a stay of the disbursements.

On December 16, 2010, Valerie Samsell and Audrey Rohn filed a Notice of Appeal from the November 16, 2010 Order. On January 5, 2011, Samsell filed an Amended Notice of Appeal to add Barbara Sensing as an appellant.

II.

Procedural Objections

Appellees attempt to short stop this appeal on several procedural grounds. We dispose of these procedural objections quickly.

First, appellee William Porter, who represents the certified consumer class, argues that the appeals are untimely because they were not filed within 30 days of the August 6, 2010 order, which he asserts was a final decision. Appellee DF/HCC argues that appellants Rohn and Samsell timely filed their appeals within 30 days of the November 16, 2010 order disbursing initial payment to DF/HCC, which they consider the pertinent order. But they say that appellant Sensing's appeal is still untimely because it was not filed within 30 days of any order.

The relevant "order" which starts our analysis is the August 6, 2010 order awarding the cy pres distribution to DF/HCC. The later November 16, 2010 disbursement order was a mere ministerial order. *See, e.g.*, *Am. Ironworks & Erectors Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 898 (9th Cir.2001) ("A mere ministerial order, such as ... an order to disburse funds from the court registry, is not a final appealable order.").

[1] Not all orders qualify as appealable orders. A notice of appeal in a civil case "must be filed with the district clerk within 30 days after entry of the judgment or order appealed from." Fed. R.App. P. 4(a)(1)(A). A judgment or order is "entered" for Rule 4(a) purposes "when the judgment or order is entered in the civil docket ... [and] set forth on a separate document, or 150 days have run from entry of the judgment or order in the civil docket." Fed. R.App. P. 4(a)(7)(A)(ii). If an order is not set forth on a separate document, it is not considered "entered" and is not itself appealable until 150 days after entry in the civil docket. *Colón–Santiago v. Rosario*, 438 F.3d 101, 108 (1st Cir.2006).

Here, the August 6, 2010 order was not set forth on a separate document, but set forth on pages seven through nine of a nine-page memorandum containing the court's reasoning. It fails the "separate document" requirement. *See Nunez–Soto v. Alvarado*, 956 F.2d 1, 2 (1st Cir.1992) (explaining that the Federal Rules of Civil Procedure require "that a judgment be set forth on a separate document and not simply tacked on to a memorandum or opinion").

***29** The order was not "entered" for purposes of appeal until January 3, 2011, 150 days after August 6, 2010. The 30–day period for appealing from that order expired 30 days later, on February 2, 2011. Because all of the appellants filed before February 2, 2011, their appeals are timely.

[2] Next, appellees argue that the Samsell plaintiffs lack standing because they are unnamed, nonparty class members who have never objected to the settlement agreement under which they have accepted full payment for their losses. [2] Only parties to a civil action may appeal from a final judgment. *Devlin v. Scardelletti*, 536 U.S. 1, 7, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002). The Supreme Court has applied this rule strictly, and has generally rejected attempts to craft exceptions to the rule. *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 39–40 (1st Cir.2000).

2 This issue does not implicate the jurisdiction of the courts under Article III of the Constitution. The Samsell plaintiffs clearly have an interest in the residual funds that creates a "case or controversy" sufficient to satisfy the constitutional requirements of injury, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Rather, the question is whether the Samsell plaintiffs should be considered "parties" for the purposes of appealing the cy pres distribution.

[3] Those who intervene in the district court properly become parties and may appeal a final judgment. *Id.* at 39. Of course, a nonparty may appeal from the denial of a motion to intervene. *Id.* at 40. However, courts are generally "powerless to extend a right of appeal to a nonparty who abjures intervention." *Id.* The Supreme Court has recognized only one exception to this rule: that "nonnamed class members ... who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening." *Devlin*, 536 U.S. at 14, 122 S.Ct. 2005.

Appellant Valerie Samsell clearly has standing to appeal because she was allowed to intervene in the trial court. [3] *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375–76, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987).

3 Appellees argue that Valerie Samsell's intervenor status has expired. Samsell was granted intervenor status in 2004 "for the purpose of participating in the process established by the court for the evaluation of the proposed settlement." *In re: Lupron Mktg. & Sales Practices Litig.*, No. 01–CV–10861 (D.Mass. Nov. 17, 2004). However, the court continued to treat Samsell as an intervenor well after the settlement was approved, conferring her continued intervenor status. *See Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 39 (1st Cir.2000); *accord In re E. Sugar Antitrust Litig.*, 697 F.2d 524, 527–28 (3d Cir.1982). The district court referred to Samsell as an intervenor during the cy pres selection process, and most recently, did so again in its August 6, 2010 order.

The status of appellants Audrey Rohn and Barbara Sensing is less clear. Neither Rohn nor Sensing were named parties in the district court proceedings and neither moved to intervene. Nor did either object to the final settlement agreement. *See Devlin*, 536 U.S. at 14, 122 S.Ct. 2005. Both, however, appear to have objected to the court's cy pres distribution of unclaimed monies without first distributing additional funds to class claimants. Dennis Rohn, Audrey Rohn's deceased husband, appears to have advocated from the outset of the cy pres selection process that the court give any extra unclaimed funds to consumers who made claims. Barbara Sensing appears to have joined Samsell and Rohn in echoing that argument later on, when the court requested public comment on the proposal submitted by DF/HCC. The question then becomes whether ***30** *Devlin*, which created an exception for unnamed class members who have objected to settlement agreements, extends to this situation in which unnamed class members have objected to a cy pres distribution. For present purposes, we need not decide this question because Rohn's and Sensing's interests are represented on appeal by Samsell, who clearly has standing to appeal.

III.

Challenge to the Cy Pres Distribution

When class actions are resolved by settlement, unclaimed money may remain in the settlement fund after initial distributions to class members because some class members cannot be located, some decline to file a claim, or some have died. Settlement agreements often dispose of these unclaimed monies by providing for "cy pres" distributions. Cy pres is an equitable doctrine that has been imported into the very different class-action context from the field of trusts and estates law:

> In trusts and estates law, cy pres, taken from the Norman French expression *cy pres comme possible* ("as near

> as possible"), "save[s] testamentary gifts that otherwise would fail" because their intended use is no longer possible. Courts permit the gift to be used for another purpose as close as possible to the gift's intended purpose.... In class actions, courts have approved creating cy pres funds, to be used for a charitable purpose related to the class plaintiffs' injury, when it is difficult for all class members to receive individual shares of the recovery and, as a result, some or all of the recovery remains.

In re Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 33 (1st Cir.2009) (citations omitted) (quoting *In re: Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir.2002)).

In *In re Pharmaceutical Industry Average Wholesale Price Litigation*, we recognized for the first time in this circuit that settlement agreements may establish cy pres funds for the distribution of residual unclaimed funds. *Id.* at 33–36. There, this court affirmed the approval of a cy pres fund where it was part of a settlement agreement that was negotiated at arm's length by the parties; was not court mandated; some class members would not otherwise receive recovery; more than actual damages were paid out to class members; the creation of the cy pres fund facilitated the settlement of a hard-fought complex action; and the cy pres fund was meant to benefit absent and non-claimant class members. We rejected the argument that claimants are entitled to receive any unclaimed residual money, in preference to a cy pres distribution, regardless of whether they have already been compensated for their losses. *Id.* at 35. We held that the district court did not abuse its discretion in approving the cy pres part of the settlement because the settlement agreement met the American Law Institute's benchmark of "100 percent recovery" for all class members before any money would be distributed through cy pres. *Id.* at 35–36 (citing Am. Law Inst., Principles of the Law of Aggregate Litigation § 3.07 cmt. b (Apr. 1, 2009) (proposed final draft)). This case involves an agreement with these same characteristics. In our earlier case we did not address questions concerning the distributions from cy pres funds. We do so for the first time here.

[4] **[5]** We review a district court's approval of a proposed class action settlement for abuse of discretion. *Id.* at 32–33. The abuse of discretion standard is highly deferential and "not appellant-friendly." *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 875 (1st Cir.1995) ***31** (quoting *Lussier v. Runyon*, 50 F.3d 1103, 1111 (1st Cir.1995)) (internal quotation marks omitted). Of course, a material error of law is an abuse of discretion. *Spooner v. EEN, Inc.*, 644 F.3d 62, 66 (1st Cir.2011). Ordinarily, however, an abuse of discretion will not be found unless "the record provides strong evidence that the trial judge indulged a serious lapse in judgment," *Texaco P.R.*, 60 F.3d at 875, such as if the decision "ignores a material factor deserving significant weight, relies upon an improper factor, or assesses only the proper mix of factors but makes a serious mistake in evaluating them," *Downey v. Bob's Disc. Furniture Holdings, Inc.*, 633 F.3d 1, 5 (1st Cir.2011) (quoting *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 112 (1st Cir.2003)) (internal quotation mark omitted). We apply the same abuse of discretion standard to questions regarding a court's approval of distribution from a cy pres fund as part of a settlement agreement.

The Samsell plaintiffs frame some of their challenges as attacks on the underlying consent decree, but they gave up that challenge to the agreement when they executed the implementation agreement. They have waived any right to object to the agreement on appeal; indeed they received consideration for that waiver. After extended negotiations resulting in a 67% increase in their full damages awards, the Samsell plaintiffs entered into the implementation agreement in which they agreed to be bound by all terms and provisions of the settlement agreement and agreed not to appeal from a final judgment. They also agreed to accept the roughly 167% of their damages as "fair and reasonable" compensation. [4]

4 Those who sought treble damages were given an opportunity to opt out of the settlement. Many plaintiffs did opt out and filed their own individual claims in state court. *See, e.g., Walker v. TAP Pharm. Prods., Inc.*, No. CPM–L–682–01 (N.J.Super.Ct.); *Stetser v. TAP Pharm. Prods., Inc.*, No. 01–CVS–5268 (N.C.Super.Ct.).

The settlement agreement, which appellants are not free to attack, explicitly anticipated that there could be unclaimed funds after the distribution to claimants, and expressly granted the district court broad discretion to make awards from the cy pres fund. [5] The agreement anticipated that a distribution might be made to appropriate charitable institutions. It granted TAP tax deduction rights if "all or part of any unclaimed funds is distributed to one or more charitable organizations."

5 This is not a situation in which the primary purpose of the cy pres fund is to assure a settlement fund large enough to guarantee substantial attorney's fees or to make the bringing of the class action worthwhile, a danger pointed out by commentators. *See* Martin H. Redish, Peter Julian,

& Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis,* 62 Fla. L. Rev. 617 (2010).

[6] We turn to the issue of whether the district court abused its discretion, under the evolving law of cy pres distributions in class action settlement agreements, in either the process utilized or in the decision to make a cy pres award of the unclaimed consumer settlement proceeds to DF/HCC.

Here, the district court considered a supplemental consumer claims process designed to reach more consumers using previously unavailable patient data from the Centers for Medicare and Medicaid Services. The district court was concerned, however, that only 11,000 individuals out of the estimated tens or hundreds of thousands of class consumers filed claims despite extensive notice procedures. The ***32** district court appropriately decided that a supplemental consumer claims process would be prohibitively expensive, time-consuming, and, given the high mortality rate among members of the class, would likely recruit few new claimants.

The Samsell plaintiffs clarified at oral argument that they are no longer appealing the district court's choice to arrange a cy pres distribution rather than to recruit more claims by absent class members. In any event, there was no abuse of discretion in the district court's choice to forego a direct notice mailing given that the administrative burden of doing so appeared to outweigh the small potential for increased claims.

Instead, the Samsell plaintiffs make several categories of arguments, which are essentially these:

1. That they were entitled to greater distributions in preference to distributions for the benefit of absent class members because they have not received treble damages.

2. That the process used was flawed, including on the grounds that the judge should have recused himself.

3. That no award can be made to DF/HCC because:

a) its doctors are precluded from being recipients of awards by the terms of the agreement; and

b) the principles of cy pres are violated in that this is not a "next best" award to absent national class members because DF/HCC is located in Massachusetts and the research will be primarily focused on prostate cancer.

Many of these assertions are factually untrue.

We turn to the law on distribution of cy pres funds. To the extent the American Law Institute's Principles of the Law of Aggregate Litigation ("ALI Principles") provides guidance, it does not support a claim of abuse of discretion. The ALI Principles set forth proposed rules for the use of a cy pres distribution in class action settlements. *See* Am. Law Inst., Principles of the Law of Aggregate Litigation § 3.07 (2010) [hereinafter "ALI Principles"]. The ALI Principles express a policy preference [6] that unclaimed funds be redistributed to ensure class members recover their full losses. This policy preference was motivated by a concern that "few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery." *In re Pharm. Indus.,* 588 F.3d at 24 (quoting Am. Law Inst., Principles of the Law of Aggregate Litigation § 3.07 cmt. b (Apr. 1, 2009) (proposed final draft)). Where class members have been fully compensated for their losses, this presumption does not apply.

6 The ALI Principles state: "If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair." Am. Law Inst., Principles of the Law of Aggregate Litigation § 3.07(b) (2010) [hereinafter "ALI Principles"].

The ALI Principles also reject the presumption, suggested by a concurring opinion in *Klier v. Elf Atochem North America, Inc.,* 658 F.3d 468 (5th Cir.2011), that any residual funds must be returned to the defendant. *Id.* at 482 (Jones, J., concurring). The ALI Principles explain that returning unclaimed funds to the defendant ***33** "would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable." ALI Principles, § 3.07 cmt. b. Courts have generally agreed with the ALI Principles. *See* 3 Newberg on Class Actions § 10:17 (4th ed. 2011). The ALI Principles also reject escheat to the state as a more preferable option. *See* ALI Principles, § 3.07 cmt. b.

Instead, ALI Principles § 3.07(c) sets up an order of preference: when feasible, the recipients should be those

"whose interests reasonably approximate those being pursued by the class." *Id.* If no recipients "whose interests reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class." *Id.*

[7] Both case law and the ALI Principles support our adoption of the "reasonable approximation" test. As to whether distributions reasonably approximate the interests of the class members, we consider a number of factors, which are not exclusive. These include the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reasons why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the cy pres recipient. [7] Failure to meet the reasonable approximation test can lead to reversal. [8]

7 As Judge Posner has pointed out, the cy pres doctrine under the trust law "is based on the idea that the settlor would have preferred a modest alteration in the terms of the trust to having the corpus revert to his residuary legatees. So there is an indirect benefit to the settlor." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir.2004). He contrasts this with a different rationale in the class action context:

> [T]he reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement ... to the class members. There is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the 'cy pres' remedy [is] ... badly misnamed.

Id. That is another reason to require the cy pres fund to provide some benefit to class members, even if indirect.

8 One commentary has suggested that abandonment of "next best" relief intended to be an alternate means of indirectly compensating victims who could not feasibly be compensated directly would create issues of constitutional dimension. *See* Redish at 641–51.

For example, in *In re Airline Ticket Commission Antitrust Litigation*, 268 F.3d 619 (8th Cir.2001), a national antitrust class action against airlines concerning caps on ticket commissions earned by travel agencies, the Eighth Circuit held that a cy pres distribution of unclaimed funds to Minnesota law schools and charities was invalid. *Id.* at 625–26. On remand, the district court ordered the funds distributed to the National Association for Public Interest Law, "to support attorneys providing legal services to low income clients by paying the interest on grant recipients' outstanding student loans." *In re: Airline Ticket Comm'n*, 307 F.3d at 682. The Eighth Circuit reversed again, explaining that the "next best" recipients were not public interest organizations, but rather the travel agencies in Puerto Rico and the U.S. Virgin Islands who suffered from the same allegedly unlawful caps. *Id.* at 683–84. The court remanded the case, ordering that the cy pres fund be distributed on a proportional basis to those travel agencies. *Id.* at 684.

***34** Other courts have similarly applied the reasonable approximation test. *See, e.g.*, *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir.2011) (rejecting, in a nationwide privacy class action, a cy pres distribution to local Los Angeles charities because it did not "account for the broad geographic distribution of the class," did not "have anything to do with the objectives of the underlying statutes," and would not clearly "benefit the plaintiff class"); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311–12 (9th Cir.1990) (invalidating a cy pres distribution to the Inter–American Fund for "indirect distribution in Mexico," *id.* at 1304, in a class action brought by undocumented Mexican workers regarding violations of the Farm Labor Contractor Registration Act, because the distribution was "inadequate to serve the goals of the statute and protect the interests of the silent class members," *id.* at 1312); *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir.1989) (invalidating settlement agreement, in a national antitrust class action, that made a cy pres distribution to local law schools, and directing the district court to "consider to some degree a broader nationwide use of its *cy pres* discretion"); *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1253–54 (7th Cir.1984) (invalidating, in a national antitrust class action, a cy pres distribution that would establish a private antitrust research foundation on the basis that "[t]here has already been voluminous research" on the subject). As these cases make clear, the mere fact that a recipient is a charitable or public interest organization does not itself justify its receipt of a cy pres award.

Against these criteria we turn to the Samsell plaintiffs' arguments. They first argue that the residual funds should have been used first to pay the claimants their "full out-of-pocket expenses." That is not the measure of their damages. Only a portion of the sum charged for Lupron was an

overcharge. The Samsell plaintiffs have already received their full damages, and more. Their damages are not the full price they paid for Lupron; rather, their damages are the money they paid above the market value of the drug as a result of the inflated price. The district court found that 30% of the price the class paid for Lupron was a reasonable estimate of the class's full damages. The implementation agreement paid the class 50% of the price they paid for Lupron, which amounts to 167% of their damages.

The Samsell plaintiffs argue that even though they have received their full damages, the district court abused its discretion by choosing to make a cy pres distribution instead of using the residual funds to award treble damages to the claimants. [9] We disagree. The 11,000 claimants have already received an enhanced payment beyond single damages. Because the consumer fund was established for the benefit of all consumer purchasers of Lupron, not just the 11,000 who filed claims, the court appropriately determined that the "next best" relief would be a cy pres distribution which would benefit the potentially large number of absent class members. [10] Such ***35** relief may yield tangible benefits for class members in the form of lower prices for existing drugs, more effective or more cost-efficient versions of current drugs, or even new cures altogether. Such benefits would accrue both to the claimant class members and to the living absent class members, most of whom would enjoy the advantages of less expensive or more effective drugs that combat the multitude of conditions the class faces, which this research may produce. Moreover, the parties themselves contemplated such use of any unclaimed funds: the tax provisions of the settlement agreement clearly provided for the possibility that unclaimed funds would go to a charity to benefit silent class members.

9 At oral argument, the Samsell plaintiffs also argued that because this is a consumer fraud case, the cy pres funds should go to entities that would combat consumer fraud. This argument, made for the first time at oral argument, is waived. In any event, we reject the argument. RICO and the state consumer fraud statutes at issue in this case were meant to protect vulnerable consumers like the victims in this case. The cy pres distribution in this case honors that objective by distributing funds to benefit the absent class members who have not yet been compensated.

10 This is not a "fluid class recovery" case in which the court attempts to direct residual funds "to those who will be impacted by the defendant in the future, in an effort to roughly approximate the category of those who were injured in the past." *See* Redish at 620.

In *In re Pharmaceutical Industry Average Wholesale Price Litigation,* we voiced a concern about overcompensating claimant class members at the expense of absent class members. 588 F.3d at 34–36. There, we rejected the argument that claimants are entitled to receive a windfall of any unclaimed residual money regardless of whether they have already been compensated for their losses. *Id.* at 35. It is well accepted that protesting class members are not entitled to windfalls in preference to cy pres distributions. The Fifth Circuit, for example, has recently stated that "[w]here it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so, except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution." *Klier,* 658 F.3d at 475 (footnote omitted). [11]

11 In *Klier v. Elf Atochem North America, Inc.,* the court reversed a district court order imposing a cy pres fund for residual unspent monies which had not been provided for in the settlement agreement. 658 F.3d 468, 480 (5th Cir.2011). While the defendant had proposed seven cy pres beneficiaries, the plaintiff opposed and sought additional distributions to a subclass or alternatively to a different cy pres recipient. *Id.* at 473. The court found no support in the settlement documents for the creation of a cy pres fund, in contrast to our case. *Id.* at 476–78. It ordered the district court to reallocate the funds among the subclasses of the class that generated the settlement. *Id.* at 480.

Commentators have agreed that distributing residual funds to claimants who have already recovered their losses "necessarily results in an undeserved windfall for those plaintiffs, who have already been compensated for the harm they have suffered." Martin H. Redish, Peter Julian, & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis,* 62 Fla. L. Rev. 617, 639 (2010); *see also* 2 McLaughlin on Class Actions § 8:15 (8th ed. 2011); Susan Beth Farmer, *More Lessons From The Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought By State Attorneys General,* 68 Fordham L. Rev. 361, 393 (1999).

We agree that allowance of such windfalls "could create a perverse incentive among victims to bring suits where large numbers of absent class members were unlikely to make claims. It might also create an incentive for the represented

class members to keep information from the absent class members." Redish at 632; *see also Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir.2004); *Van Gemert v. Boeing Co.*, 553 F.2d 812, 816 (2d Cir.1977) (explaining that such windfalls may "encourage the bringing of class actions likely to result in large uncollected damage pools").

***36** The Samsell plaintiffs argue next that in any event DF/HCC is not a proper recipient for several reasons. The initial argument is that DF/HCC "profited from the fraudulent scheme and conspiracy alleged in this case" through its for-profit members. This claim has no basis in the record. DF/HCC is a not-for-profit corporation organized under Massachusetts law; it is not a defendant and the conspiracy claims under RICO against doctors were dismissed early on. Nor do the Samsell plaintiffs point to any DF/HCC employee or affiliate who participated in the fraudulent Lupron scheme. Further, during the cy pres selection process, Samsell herself recommended that half of the cy pres funds go to DF/HCC. [12]

12 Dennis Rohn joined Samsell in asking the court to give the other half of the cy pres funds, or at least some portion, to claimant consumers. Barbara Sensing was not yet involved in the cy pres selection process.

The Samsell plaintiffs lodge several attacks against the cy pres selection process itself. First, the Samsell plaintiffs argue that the "next best" requirement is not met because the cy pres recipient, DF/HCC, is in Boston while the injuries are to a national class. This objection fails. It is not the location of the recipient which is key; it is whether the projects funded will provide "next best" relief to the class. DF/HCC is required to do work which will have benefits well beyond Boston. The DF/HCC proposal uses a venture capital model to invest in high-impact, high-risk research projects across the globe, with the expectation that promising results will attract grants from more traditional funding sources. DF/HCC says it intends to be a catalyst for large-scale research collaboration by providing incentives to teams of researchers to join forces at the national and international levels. Moreover, the grants will be awarded by an Oversight Board composed of nationwide leaders in prostate cancer research.

Additionally, the claim that only prostate cancer research is being funded is false. The DF/HCC proposal is specific that "[t]he central and overarching goal of [the DF/HCC] program is to directly impact the treatment of prostate cancer and other Lupron-treatable diseases and conditions" including "endometriosis, uterine fibroids, and/or central precocious puberty." Indeed, Samsell recommended to the district court that half of the cy pres funds be distributed to DF/HCC precisely because it would "support [ ] research in the treatment of infertility, endometriosis, ovarian and breast cancer, and precocious puberty," unlike the alternative Loughlin proposal which focused only on prostate cancer.

The Samsell plaintiffs also argue that the district court judge erred by failing to recuse himself from participation in the cy pres distribution on account of his service as an uncompensated trustee on the board of the Vincent Memorial Hospital, which is affiliated with the Massachusetts General Hospital (MGH). MGH, in turn, is affiliated with both Brigham & Women's Hospital and Harvard Medical School. MGH, Brigham & Women's, and Harvard Medical School are all member institutions of DF/HCC.

[8] **[9]** This recusal claim is without merit. Recusal is only required by a state of mind "so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings." *In re United States*, 158 F.3d 26, 34 (1st Cir.1998). That test is not met here. More than that, no question is raised here that the selection of the recipients ***37** was made on any basis other than the merits. *See* ALI Principles § 3.07.

[10] This recusal claim has also been waived by being raised only on appeal, which is another indication of its invalidity. Litigants must raise a claim for disqualification of a district court judge after learning of the grounds for disqualification, and certainly may not wait and see how the court rules before acting. *Giannetta v. Boucher*, No. 92–1488, 1992 WL 379416, at *6 (1st Cir. Dec. 22, 1992) (per curiam) (holding that the appellant waived his claim of recusal under 28 U.S.C. § 455(a) because he failed to raise it in the district court); *In re Abijoe Realty Corp.*, 943 F.2d 121, 126 (1st Cir.1991) (holding that a party knowing of a ground for requesting disqualification may not wait to raise the issue until after the judge issues a ruling that the party dislikes).

[11] Samsell was aware of the judge's service on the board of Vincent; was aware of the indirect affiliation of Vincent through MGH to DF/HCC; was aware DF/HCC was a potential recipient; and yet never raised a word of concern. The district court judge disclosed his affiliation with Vincent Memorial Hospital at the January 13, 2009 hearing to discuss cy pres award proposals. [13] The Samsell plaintiffs were present at the hearing and did not object upon hearing the disclosure to the judge's continued participation in the case.

13 The judge stated:

> I am on the board at Vincent Memorial Hospital, which is a board at Mass. General Hospital. We are part of the Partners system. So the question is whether that is a conflict of interest.... I want everyone to understand that I am not, obviously, a compensated trustee, but I have been affiliated through Vincent with Mass. General for almost 12 years now and would not want anyone to think that I have favored, if this was the direction I would choose to go, a Mass. General or, for that matter, a Brigham-affiliated group because of my own personal involvement at the hospital.

There is a double waiver. In 2010, when the judge submitted the final candidate proposals for public comment, Samsell expressly acknowledged the judge's participation on the Vincent board, and yet nonetheless recommended that half of the funds be distributed to DF/HCC. It is only now, for the first time on appeal, that the Samsell plaintiffs have raised an objection to the judge's participation in the cy pres selection process.

In a related attack, the Samsell plaintiffs argue that the district court improperly appointed Dr. Jonathan L. Tilly, a Harvard Medical School professor, as the court's representative to a committee overseeing DF/HCC's use of the cy pres funds. As the district court disclosed in its August 6, 2010 order, Dr. Tilly "has served as a special law clerk to the court," and is Chief of the Division of Research at the Vincent Center for Reproductive Biology at MGH. Dr. Tilly is also Chair of the Trustee Committee at the Vincent Memorial Hospital. We reject this argument for the same reasons articulated above.

The Samsell plaintiffs also argue that the cy pres selection process was tainted because class counsel simultaneously represented one of the proposed, but not successful, cy pres recipients, Community Catalyst/PAL. This is a nonissue since class counsel's proposed cy pres recipient was not chosen by the district court. Nor was DF/HCC on the list of candidates selected by class counsel (in fact, class counsel objected to the court's consideration of DF/HCC).

There was no abuse of discretion in the process used or as to selection of the recipient.

***38** Although we find no abuse of discretion in this case, and indeed the process followed was admirable, we express our concerns that district courts are given discretion by parties to decide on the distribution of cy pres funds. Our concerns are also stated in the ALI Principles, which stress in § 3.07(c) that "the court, when feasible, should *require the parties to identify a recipient* whose interests reasonably approximate those being pursued by the class." (emphasis added). In the commentary, the ALI Principles also note that the court should give weight to the parties' choice of recipient as demonstrated by the settlement agreement. ALI Principles § 3.07 cmt. b.

It is true that the court attempted to compensate for the parties' failure to designate recipients in the agreement by taking proposals from the parties and fully involving them in the selection process. But the choice would have been better made by the parties initially and then tested by the court, against the principles we have identified.

It is one thing for the district court to exercise its traditional judicial function to approve class action settlement agreements. *See* Fed.R.Civ.P. 23(e). It is quite another for the parties to abandon the task of agreement over the assignment of residual funds and just hand that task to the court. The parties expressly contemplated that significant sums might remain here, and indeed $11.4 million out of $40 million remained. The amounts involved also raise concerns. We recognize, as class counsel candidly articulated, that there are imperfections in all methods of handling the issue of disposition of residual funds. But the adversary process is better suited to the parties making the decisions and leaving less to the discretion of the judges.

Distribution of funds at the discretion of the court is not a traditional Article III function, as many courts have recognized:

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

In re Compact Disc Minimum Advertised Price Antitrust Litig., 236 F.R.D. 48, 53 (D.Me.2006); *see also* Redish at 642.

Moreover, having judges decide how to distribute cy pres awards both taxes judicial resources and risks creating the appearance of judicial impropriety. A growing number of scholars and courts have observed that "the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety." *Nachshin,* 663 F.3d at 1039; *see also SEC v. Bear, Stearns & Co.,* 626 F.Supp.2d 402, 415 (S.D.N.Y.2009). These concerns have been noted in the media. *See* George Krueger & Judd Serotta, Op–Ed., *Our Class–Action System is Unconstitutional,* Wall St. J., Aug. 6, 2008, at A13; Editorial, *When Judges Get Generous,* Wash. Post, Dec. 17, 2007, at A20; Adam Liptak, *Doling out Other People's Money,* N.Y. Times, Nov. 26, 2007, at A14.

With that cautionary note, we affirm the cy pres distribution, with one adjustment to the August 6, 2010 order. We add an explicit requirement that the district court must receive an annual audit at the expense of DF/HCC, in addition to the annual and semi-annual accountings to be submitted by DF/HCC to the court. This will ***39** ensure that the cy pres fund is distributed in a way that is both financially sound and comports with the interests of the class and that the auditing function will not fall on the district court. We believe that was intended by the court and is implicit in its orders. The district court's November 16, 2010 order, in which it references a "required accounting of accrued expenditures," suggests it intended to include such an audit requirement in the August 6, 2010 order.

So ordered.

End of Document

658 F.3d 468
United States Court of Appeals,
Fifth Circuit.

Ralph KLIER, Appellant,
v.
ELF ATOCHEM NORTH AMERICA, INC., Defendant–Appellee.

No. 10–20305. | Filed Sept. 26, 2011. | Revised Sept. 27, 2011.

Synopsis

Background: Class action was brought in state court against owner of agrochemicals plant, seeking compensation for exposure to arsenic and other toxic chemicals allegedly emitted by the plant. Case was removed, and a settlement agreement was entered that allocated the settlement between three subclasses, including one class that could opt to participate in a medical monitoring program. After the medical monitoring program came to a close with approximately $830,000 unused, the United States District Court for the Southern District of Texas, Lynn N. Hughes, J., pursuant to Cy Pres doctrine, ordered that the unused funds be given to three charities suggested by the defendants and one selected by the Court. A member of the first subclass, whose members had lived or worked near the plant and had contracted cancer, suffered certain birth defects, or had a stillborn child, appealed.

[Holding:] The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that District Court abused its discretion by ordering a cy pres distribution of unused funds to charities, instead of distributing them to another subclass whose members had suffered cancer and other injuries from exposure.

Reversed and remanded.

Edith H. Jones, Chief Judge, filed a concurring opinion.

West Headnotes (13)

[1] Deposits in Court
Disposition under judgment or order of court

In the class action context, it may be appropriate for a court to use cy pres principles to distribute unclaimed funds; in such a case, the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated.

7 Cases that cite this headnote

[2] Deposits in Court
Disposition under judgment or order of court

In the class-action context, a cy pres distribution is designed to be a way for a court to put any unclaimed settlement funds to their next best compensation use, that is, for the aggregate, indirect, prospective benefit of the class.

12 Cases that cite this headnote

[3] Federal Courts
Class actions

Court of appeals reviews for an abuse of discretion a district court's decision to resort to the cy pres doctrine for the distribution of unclaimed class-action settlement funds.

15 Cases that cite this headnote

[4] Federal Courts
Questions of Law in General

Federal Courts
Abuse of discretion in general

A district court abuses its discretion when it makes an error of law or applies an incorrect legal standard; as to errors of the latter type, review by court of appeals is de novo.

2 Cases that cite this headnote

[5] Federal Courts
Compromise and Settlement

Court of appeals' review of the district court's interpretation of an unambiguous settlement agreement is de novo.

Cases that cite this headnote

[6] Federal Civil Procedure
Class Actions

Class action rule must be construed narrowly, and applied with the interests of absent class members in close view. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[7] Compromise and Settlement
Construction, operation, and effect; supervision
Constitutional Law
Compromise and settlement

A class action settlement generates property interests, and each class member has a constitutionally recognized property right in the claim or cause of action that the class action resolves; the settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members. U.S.C.A. Const.Amend. 14; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

4 Cases that cite this headnote

[8] Deposits in Court
Disposition under judgment or order of court

Because settlement funds in a class action settlement are the property of the class, a cy pres distribution to a third party of unclaimed settlement funds is permissible only when it is not feasible to make further distributions to class members; where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so, except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

10 Cases that cite this headnote

[9] Deposits in Court
Disposition under judgment or order of court

A cy pres distribution of class action settlement funds puts such funds to their next-best use by providing an indirect benefit to the class; that option arises only if it is not possible to put those funds to their very best use, which is benefiting the class members directly. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

6 Cases that cite this headnote

[10] Compromise and Settlement
Judicial Approval

Because a district court's authority to administer a class-action settlement derives from Federal Rules of Civil Procedure, the court cannot modify the bargained-for terms of the settlement agreement; that is, while the settlement agreement must gain the approval of the district judge, once approved its terms must be followed by the court and the parties alike. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

1 Cases that cite this headnote

[11] Compromise and Settlement
Factors, Standards and Considerations; Discretion Generally
Compromise and Settlement
Construction, operation, and effect; supervision

The district judge must abide the provisions of a class action settlement agreement, reading it to effectuate the goals of the litigation. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[12] Compromise and Settlement
Construction, operation, and effect; supervision

Deposits in Court
Disposition under judgment or order of court

The terms of a class action settlement agreement are always to be given controlling effect; the cy pres doctrine comes on stage only to rescue the objectives of the settlement when the agreement fails to do so, and even then, the court's discretion remains tethered to the interest of the class, the entity that generated the funds. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[13] Deposits in Court
Disposition under judgment or order of court

Where funds in class action settlement involving exposure to toxic chemicals from agrochemicals plant were allocated into three subclasses, and one subclass of members who had suffered no physical injury at time of agreement did not use $830,000 allocated for medical monitoring, court abused its discretion by ordering a cy pres distribution of unused funds to charities, instead of distributing them to another subclass whose members had suffered cancer and other injuries from exposure; although protocol for settlement distribution stated that money left over in any subclass fund should be distributed to claimants in that subclass, such distribution was not feasible, settlement documents did not authorize cy pres distribution, settlement administrator had previously petitioned to disburse unused funds to subclass whose members had suffered injury, and members of that subclass had not been fully compensated, as their distribution was pro rata. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

1 Cases that cite this headnote

Attorneys and Law Firms

***470** Brian Wolfman (argued), Georgetown University Law Ctr., Institute for Pub. Representation, Washington, DC, Allen Mark Stewart, Allen Stewart, P.C., Dallas, TX, for Appellant.

Lewis Cooper Sutherland (argued), Knox D. Nunnally, Vinson & Elkins, L.L.P., Houston, TX, Roger M. Milgrim, Paul Hastings, L.L.P., New York City, Kevin T. Van Wart, Kirkland & Ellis, ***471** L.L.P., Chicago, IL, for Defendant–Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, Chief Judge, and HIGGINBOTHAM and SOUTHWICK, Circuit Judges.

Opinion

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This appeal arises from the settlement of a class action. The defendant paid substantial sums for res judicata protection from the claims of persons assertedly injured by the toxic emissions of an industrial plant near Bryan, Texas. The monies were allocated among three subclasses, one of which was to receive medical monitoring. Upon the monitoring program's completion, substantial sums remained unused. The district court denied the settlement administrator's request to distribute the unused medical-monitoring funds to another subclass of persons suffering serious injuries. Instead, the court repaired to the doctrine of *cy pres* and ordered that the money be given to three charities suggested by the defendant and one selected by the court.

The gift of class funds to charity is attacked on two fronts: that the district court moved too quickly from the terms of the settlement agreement to a *cy pres* distribution, and alternatively that the district court neglected a prerequisite of the *cy pres* doctrine by not selecting charities with a sufficient nexus to the underlying substantive objectives of the class suit. Persuaded by the first contention, we do not reach the second. We hold that the district court abused its discretion by ordering a *cy pres* distribution in the teeth of the bargained-for terms of the settlement agreement, which required residual funds to be distributed within the class. We reverse the district court's order distributing the unused medical-monitoring funds to third-party charities and remand

with instructions that the district court order that the funds be distributed to the subclass comprising the most seriously injured class members.

I.

Lillian Hayden and five others instituted this action in April of 1992 by filing suit in state district court in Brazos County, Texas. Seeking to represent themselves and a class of others similarly situated, they sought compensation for exposure to arsenic and other toxic chemicals alleged to have been emitted into the air around Bryan, Texas, by an agrochemicals plant owned and operated by the defendant, Arkema, Inc. (formerly known as Elf Atochem North America, Inc.). The defendant removed the case to federal court supported by diversity jurisdiction.

Settlement of this aging suit had several iterations as it confronted the changing jurisprudence of federal class actions. The first settlement, confected three years after the filing of the state-court suit, proposed to terminate the suit with about $55 million in payments to a class certified under Federal Rule of Civil Procedure 23(b)(2) with no opt-out provisions. [1] This class was quickly undercut on appeal by our intervening decision in *Allison v. Citgo Petroleum Corp.* [2] There we made plain that where the predominant relief sought is an award of money damages, class certification must proceed through the (b)(3) gate, with its mandatory opt-out provisions. ***472** [3] On remand from this Court and now proceeding under Rule 23(b)(3), the parties entered into a new settlement agreement. The settlement was reduced to $41.4 million, a reduction reflecting the value of individual settlements reached with opting-out class members.

1 *See generally* FED.R.CIV.P. 23(c)(2)(B)(v).

2 151 F.3d 402 (5th Cir.1998), *adopted by Wal–Mart Stores, Inc. v. Dukes*, —— U.S. ——, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011).

3 *Id.* at 413.

The settlement agreement created three subclasses and allocated to each subclass a portion of the $41.4 million settlement. The agreement allocated $23.34 million to Subclass A, which was defined to include all persons who lived or worked near the plant between 1973 and 1995 and had contracted any form of cancer, endured a pregnancy that ended in stillbirth, or suffered from any of several enumerated birth defects. A settlement administrator appointed by the district court distributed the funds pro rata pursuant to an agreed-upon grid deployed to score illness, its onset, and its seriousness. Ralph Klier, our appellant here, was a member of Subclass A. Klier had lived close to the plant and suffered from peripheral neuropathy and leukemia, the treatments for which so weakened his heart that he required open-heart surgery in 2003. He received $6,500 in settlement proceeds.

The settlement agreement allocated approximately $6.46 million to Subclass B. Its members were not required to demonstrate physical injury; the district court referred to Subclass B as the "nuisance-exposure/future claims" subclass. If its members met proximity-to-plant and exposure standards, they could either recover a small compensation sum or elect to participate in a medical-monitoring program, which was funded by $2 million of the proceeds allocated to the subclass. The remaining $4.46 million funded payments to the more than 12,000 subclass members who elected not to participate in the program. Responsive to the risk of latent illness, the settlement also gave members of Subclass B—who by definition had suffered no injury or illness as a result of their arsenic exposure as of the signing of the agreement—back-end opt-out rights. Any member of Subclass B who later developed an arsenic-related cancer or birth defect for which they could meet standards of general causation retained the right to file a new lawsuit against Arkema.

Finally, $10.6 million was allocated to Subclass C, which included all class members who, during the class time frame, owned property that was located within the portion of the class area that was exposed to the highest levels of arsenic emissions. The funds were to compensate members of Subclass C for property damage and diminution in property value.

At issue on this appeal is the district court's use of the *cy pres* doctrine to dispose of approximately $830,000 that went unused during the administration of the medical-monitoring program created for the benefit of Subclass B. The program allowed members of Subclass B to forego receipt of a small cash payment and instead enroll in a program through which they would receive regular checkups and physician visits over a five-year period. The aim was to assist members of the subclass in monitoring their health for any indication that they were developing an arsenic-related illness. Two primary factors contributed to the program's not exhausting its allocated funds. First, the initial participation rate was

low. Some 329 members of Subclass B—less than three percent of the total subclass membership—opted to receive medical monitoring in lieu of a cash payment; just 221 attended their first monitoring examination. Second, in the course of this monitoring, no significant health problems were ***473** found. Among those who initially chose to participate, demand for monitoring greatly diminished, yielding a high dropout rate. Only 46 class members participated in all three rounds of screening as scheduled.

As activity in the case subsided, the settlement administrator filed a status report in which he stated that the medical-monitoring program had come to a close and that approximately $830,000 had gone unused and needed to be distributed by the district court. The parties were in agreement that an additional distribution to the members of Subclass B was not economically feasible. The district court asked the parties for proposals for distribution of remaining funds. Taking an inexplicably narrow view of their duty to the class, class counsel did not respond. The defendant proposed seven entities as potential beneficiaries of a *cy pres* distribution: five local charities, the Bryan Independent School District, and the city of Bryan.

Klier opposed the proposal. He urged that the monies set aside but not drawn down for medical monitoring be distributed pro rata to members of Subclass A. Klier argued that an additional distribution to the members of Subclass A was economically feasible and would be equitable since the members of Subclass A had been found to suffer from arsenic poisoning, related cancers, and birth defects that are compensable under the settlement. In the alternative, Klier argued that the defendant's proposed charities were not proper recipients under the doctrine of *cy pres*, lacking a sufficient nexus to the injuries of the class or the principles the class action sought to vindicate. Klier proposed that the money instead be used to fund arsenic-pollution research at Texas A & M University.

In April of 2010, some eighteen years after this litigation commenced and fourteen years after the closing of the plant, the district court ordered distribution of the remaining funds to three of the charities proposed by the defendant: a scholarship program called Arkema New Horizons Scholarships and two museums. The court then added a charity of its own, a local history and genealogy library. The money was to be distributed in four equal shares. Despite having pledged several years before to consider a proposal to reallocate the medical-monitoring funds to other members of the class,[4] the court never addressed Klier's primary request that the monies be distributed to the members of Subclass A, denying it only implicitly. Instead, the district court proceeded directly to Klier's alternative proposal that the money be donated to Texas A&M, which it rejected because it would not benefit the Bryan community. The district court expressed its view that the distributions it ordered would provide benefits "perhaps to friends and relatives of the claimants, perhaps to total strangers who happen to live in Bryan."

4 The content of and reasons for this earlier pledge are detailed *infra*, op. at 477.

II.

[1] **[2]** When modern, large-scale class actions are resolved via settlement, money often remains in the settlement fund even after initial distributions to class members have been made because some class members either cannot be located or decline to file a claim. Federal district courts often dispose of these unclaimed finds by making what are known as *cy pres* distributions. *Cy pres* is an equitable doctrine that has been imported into the class-action context from the field of trust law:

> The *cy pres* doctrine takes its name from the Norman French expression, *cy* ***474** *pres comme possible*, which means "as near as possible." The doctrine originated to save testamentary charitable gifts that would otherwise fail. Under *cy pres*, if the testator had a general charitable intent, the court will look for an alternate recipient that will best serve the gift's original purpose. In the class action context, it may be appropriate for a court to use *cy pres* principles to distribute unclaimed funds. In such a case, the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated.[5]

5 *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir.2002) (internal citations and quotation marks omitted).

In the class-action context, a *cy pres* distribution is designed to be a way for a court to put any unclaimed settlement funds to their " 'next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.' " [6]

6 *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir.2007) (quoting 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 10.17 (4th ed. 2002) (emphasis omitted)).

[3] **[4]** **[5]** We review for an abuse of discretion a district court's decision to resort to the *cy pres* doctrine for the distribution of unclaimed class-action settlement funds. [7] By definition, a district court abuses its discretion when it makes an error of law or applies an incorrect legal standard. [8] As to errors of this latter type, our review is de novo, [9] as is our review of the district court's interpretation of an unambiguous settlement agreement. [10]

7 *See Wilson v. Sw. Airlines, Inc.*, 880 F.2d 807, 811 (5th Cir.1989); *see also In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 185 (2d Cir.2005) (per curiam); *Powell v. Ga.–Pac. Corp.*, 119 F.3d 703, 706 (8th Cir.1997).

8 *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

9 *Benavides v. Chi. Title Ins. Co.*, 636 F.3d 699, 701 (5th Cir.2011).

10 *Guidry v. Halliburton Geophysical Servs., Inc.*, 976 F.2d 938, 940 (5th Cir.1992).

A.

[6] **[7]** We begin our analysis with a return to basic principles. As we will explain, these core principles control and decide this appeal. First there is the ever-antecedent and overarching limitation on class-action litigation, the Rules Enabling Act. The Federal Rules of Civil Procedure cannot work as substantive law. [11] This core stricture demands a narrow construction of Rule 23, which must be "applied with the interests of absent class members in close view." [12] Second, a class settlement generates property interests. Each class member has a constitutionally recognized property right in the claim or cause of action that the class action resolves. [13] The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members. [14]

11 28 U.S.C. § 2072.

12 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

13 *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807–08 & 812–13, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428–30, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

14 *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (hereinafter, "ALI PRINCIPLES") § 3.07 cmt. b (2010) ("[F]unds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members ....").

***475** **[8]** **[9]** These precepts define the first—and often the last—arena of analysis, imposing foundational limitations on a district court's discretion as it administers a class-action settlement. Because the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible "only when it is not feasible to make further distributions to class members." [15] Where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so, [16] except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution. [17] A *cy pres* distribution puts settlement funds to their next-best use by providing an indirect benefit to the class. That option arises only if it is not possible to put those funds to their very best use: benefitting the class members directly.

15 *Id.* § 3.07 cmt. a; *see also* 3 WILLIAM B. RUBENSTEIN ET AL., NEWBURG ON CLASS ACTIONS § 10.17 (4th ed. 2002, Westlaw updated through June 2011) ("When all or part of the common fund is not able to be fairly distributed to class members, the court may determine to distribute the unclaimed funds with a *cy pres* ... approach."). In large class actions, substantial administrative costs attend the distribution of settlement funds. As the settlement funds are disbursed and the amount still available for distribution to the class declines, there comes a point at which the marginal

cost of making an additional pro rata distribution to the class members exceeds the amount available for distribution. *See, e.g., In re Am. Tower Corp. Secs. Litig.*, 648 F.Supp.2d 223, 224 n. 1 (D.Mass.2009). It is only at this point that a district court has discretion to order a *cy pres* distribution. *See* ALI PRINCIPLES § 3.07 cmt. b (explaining that *cy pres* awards are appropriate "only when direct distributions to class members are not feasible—either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable").

16 *See* ALI PRINCIPLES § 3.07 cmt. b ("[A]ssuming that further distributions to the previously identified class members would be economically viable, that approach is preferable to cy pres distributions."); *cf.* EDWIN S. NEWMAN, LAW OF PHILANTHROPY 27 (1955) ("*Cy pres* is only a last resort, to be invoked where it is totally impossible for a trustee to realize the objectives of the trust's creator through reasonable interpretation of the trust agreement."), *quoted in* Danshera Cords, *Charitable Contributions for Disaster Relief: Rationalizing Tax Consequences and Victim Benefits*, 57 CATH. U.L.REV. 427, 461 n. 240 (2008).

17 *See Wilson*, 880 F.2d at 812–13 (noting that the class members could not assert an equitable claim to the unclaimed settlement funds because all class members who came forward had been paid the full amount of their liquidated back-pay damages); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34–35 (1st Cir.2009) (affirming a *cy pres* distribution as part of a settlement agreement in an antitrust class action where the settlement paid all class members treble damages). This limitation is an important component of the decision principle in *Wilson:* a *cy pres* distribution of unclaimed settlement funds is appropriate only when it is not feasible to distribute those funds to any party to the class action who has a persuasive equitable claim to those funds. *See infra* note 21 and accompanying text. A party whose liquidated-damages claim has been fully satisfied cannot make a persuasive equitable claim to any residual settlement funds.

[10] **[11]** **[12]** Because a district court's authority to administer a class-action settlement derives from Rule 23, the court cannot modify the bargained-for terms of the settlement agreement. [18] That is, while the settlement agreement must gain the approval of the district judge, [19] once approved its terms must be followed by the court and the parties alike. The district ***476** judge must abide the provisions of the settlement agreement, reading it to effectuate the goals of the litigation. This is not a free exercise of *cy pres*, but a determination of how the settlement agreement's many provisions define the class's property interests and allocate those interests once created. [20] The terms of the settlement agreement are always to be given controlling effect. [21] *Cy pres* comes on stage only to rescue the objectives of the settlement when the agreement fails to do so. Even then, the court's discretion remains tethered to the interest of the class, the entity that generated the funds.

18 *Evans v. Jeff D.*, 475 U.S. 717, 726–27, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986).

19 *See* FED.R.CIV.P. 23(e).

20 The concurrence usefully recites important concerns now being voiced regarding the use of *cy pres* by district courts managing class settlements. The concurrence's focus is on the problems attending the unfettered use of *cy pres.* When a court looks beyond or must resolve uncertainty in the terms of the settlement agreement, complications will arise. But as long as courts attend to the fact that they are allocating the class members' property, there should be little occasion to sail near those shoals.

21 Of course, the district court has inherent equitable authority to resolve any issues that are not covered by the terms of the settlement agreement. *See* MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.66, at 334 (Federal Judicial Center 2004).

B.

[13] It is apparent from its structure that the settlement contract between Arkema and the class contemplated that each subclass would first draw upon the sums allocated to it. The parties memorialized their settlement in two documents: the Class Action Settlement Agreement ("the Agreement") and the Protocol for Distribution of Settlement Fund ("the Protocol"). As relevant here, the Agreement created and defined the three subclasses and allocated a designated portion of the total settlement proceeds to the three subclass funds. Class members were eligible for payments from the subclass funds pursuant to the procedures and processes set forth in the Protocol. The Agreement specifies that each subclass fund shall be used to fund payments to the members of its assigned subclass. Arkema points out that paragraph 27 of the Protocol directs that any money left over in any subclass

fund "shall be distributed pro rata to all Claimants in that subclass." Arkema argues that this ends the matter: Abiding the contract, the district court had no authority to allocate funds not drawn down by one subclass to the members of another subclass, even Subclass A, whose members were the most grievously injured and had not been fully compensated.

Arkema's argument is flawed at several junctures. To begin with, Arkema concedes that paragraph 27's directive could not have been followed here: the leftover funds were allocated to Subclass B, and it is not economically viable to distribute those funds pro rata to the 12,657 members of Subclass B. Arkema accepts the precept that even an explicit directive of the settlement contract need not be followed if it is not feasible to do so.

Even if the Protocol stopped here, and it did not, the contention that want of feasibility freed the district court to donate the residual property interest of the class to charity is mistaken. This is not a case where the settlement agreement itself provides that residual funds shall be distributed via *cy pres*.[22] Quite the opposite: the ***477** district court's decision to distribute the unused funds via *cy pres* finds no support in the text of the settlement documents. Indeed, Arkema itself would appear to have a greater claim to the funds than a charity, however worthwhile the charity, absent a contrary directive from the property-interest-defining settlement agreement.[23]

22 *See, e.g., Gates v. Rohm & Haas Co.*, No. 06–1743, 2011 WL 1103683, at *1 (E.D.Pa. Mar. 24, 2011) (unpublished) (making a *cy pres* distribution where the settlement agreement provided that the district court was to pay over any "excess undistributed Medical Monitoring Settlement Class funds" to "a local Section 501(c)(3) charity for the benefit of" the village that encompassed the class area).

23 *See Wilson*, 880 F.2d at 816 (holding that it is an abuse of discretion for a district court to order a *cy pres* distribution when any party to or participant in a class action—including the defendant and class counsel—has a valid equitable interest in the unclaimed settlement funds).

But the Protocol is not so silent as the defendant would have it. Paragraph 28 provides: "The District Court may make changes to the terms of this protocol as necessary for the benefit of the Settlement Class Members."[24] This provision is but a limited grant of authority to the district court. Importantly, the limitation imposed is that the district court must act for the benefit of the class as a whole. Neither its authority nor its duty[25] is cabined off on a subclass-by-subclass basis. If it is not feasible to distribute the funds under paragraph 27, paragraph 28 controls, and it authorizes the district court to provide a benefit to the settlement-class members. "There is no indirect benefit to the class from the defendant's giving the money to someone else,"[26] and Arkema falls silent on the reality that it was feasible to allocate the funds to Subclass A.

24 The Agreement defines the term "Settlement Class Members" to include the members of all three subclasses.

25 *See In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 194 (3d Cir.2000) ("In a class action settlement, a court retains special responsibility to see to the administration of justice.").

26 *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir.2004).

This is enough, but there is more in this Protocol. Paragraph 29 further provides, "The Settlement Administrator may petition the District Court for reallocation of available funds among the [subclasses] on a showing of good cause if ... he determines that considerations of equity and fairness require reallocation." About a year after medical monitoring began, the settlement administrator did exactly that, seeking leave to disburse any unused funds to other class members, "particularly those who are most seriously affected by exposure to chemicals." The district court denied this request, stating instead that it would "decide later what to do with the remainder of the medical monitoring fund." When that later date arrived, the court made no attempt to reconcile its decision to distribute the residue of the fund to third-party charities with the settlement administrator's prior request under paragraph 29.

The Protocol did more than merely empower the district court to allocate medical-monitoring funds unused by members of Subclass B to members of other subclasses—it required the court to do so for as long as further distributions were feasible and equitable. That it was not feasible to distribute these funds to members of Subclass B is not disputed. The feasibility of a further distribution to members of Subclass A is likewise conceded. And equity strongly favors an additional distribution to Subclass A. The members of Subclass B suffered no injuries or illnesses; those in Subclass A suffered serious personal injuries.[27] Claimants in Subclass A ***478**

have already received some measure of compensation for their injuries, but it is far from full. The appellant here endured cancer, nerve damage, and a heart transplant and received $6,500 for his trouble. Subclass A's damages claims were non-liquidated and included claims for both actual and exemplary damages.

27 The members of Subclass C suffered economic injury: damage to and loss of the value of property. These liquidated claims were fully compensated under the terms of settlement. Accordingly, none contends that the claimants in Subclass C have a persuasive equitable claim to the unused medical-monitoring funds. *See supra* note 16 and accompanying text.

The very structure of Subclass B supports the entitlement of Subclass A. As we have explained, Subclass B was created to address the fears of latent disease harbored by persons who lived or worked within a defined proximity to the plant but who were asymptomatic. Access to medical monitoring, coupled with a back-end opt-out right to sue should injury later arrive, were the relief afforded. Both Subclass A and Subclass B addressed injury to the person. Members of the former had already incurred physical injury. Members of the latter were asymptomatic persons with a risk that injury of the type compensated in Subclass A might be later suffered. Addressing the risk of latent injury by definition meant dividing settlement monies between the two subclasses. The risk of Subclass B members was never realized. When significant injuries did not manifest themselves among members of Subclass B, the already light use of medical monitoring by its members declined even further, leaving the funds now at issue unspent. By the agreement, these monies were to provide a service to Subclass B members, not to compensate them for a later-arriving disease. In that event, they could sue, not having released their claims in the settlement. Members of Subclass A, by contrast, were prohibited from later opting out of the agreement. Res judicata protection against their claims was the most valuable consideration Arkema received in exchange for agreeing to the settlement.

Read, as they must be, with our core precepts at hand, the relevant provisions of the Protocol shape the property interest created by the Agreement and thereby constrain the district court's discretion in disposing of that property. The Protocol is an affirmation that funds initially allocated to a particular subclass are to be used, in the end, for the interests of the entire settlement class. We hold that the settlement agreement did not authorize the district court to make a charitable gift of the unused medical-monitoring funds and that the district court erred when it rejected the settlement administrator's request that the funds be reallocated to the members of Subclass A.

Our decision lies comfortably with prior decisions of this Court and our sister circuits,[28] which have necessarily taken case-specific approaches to the role of the federal district judge in the distribution of monies left unclaimed after administration of a class settlement. As we turn to the fit of the present case within the broader decisional line, we remind of the case's dimension. Here we treat a distinct category of such cases, in which funds have gone unused by a particular subclass.[29] ***479** Subclass B's failure to fully draw down the medical-monitoring fund did not constitute an abandonment or relinquishment by the class of its property interest in the settlement.[30] The funds were unused by Subclass B, not unclaimed by the class as a whole.[31] Proceeding from the premise that the settlement of damage claims in a class action both creates contractual obligations and defines property, we have emphasized the terms of the settlement agreement as approved by the district court. That agreement preserved for the class something akin to a reversionary interest in funds unused by a particular subclass. Where the terms of a settlement agreement are sufficiently clear, or, more accurately, insufficient to overcome the presumption that the settlement provides for further distribution to class members,[32] there is no occasion for charitable gifts, and *cy pres* must remain offstage.

28 *E.g.*, *Masters*, 473 F.3d at 436 (holding that the district court abused its discretion by ordering a *cy pres* distribution where neither side contended that "each class member's recovery would be so small as to make an individual distribution economically impracticable").

29 Thus, this is not a case where it was not feasible to make further distributions to any of the class members. *See, e.g.*, *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619, 621 (8th Cir.2001); *Powell*, 119 F.3d at 706–07; *see also Masters*, *supra* note 15. Nor does this case implicate the line of authority giving careful scrutiny to class settlement agreements in which the parties agree to a *cy pres* distribution. *See, e.g.*, *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 363 (3d Cir.2010) (Weis, J., concurring in part and dissenting in part); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 30–32, 34–36; *Six (6) Mexican Workers v. Az. Citrus Growers*, 904 F.2d 1301, 1304 & 1307 (9th Cir.1990).

30 *Accord In re Holocaust Victim Assets Litig.*, 424 F.3d 158, 166–69 (2d Cir.2005) (affirming the district court's decision to reallocate settlement funds so as to directly benefit the neediest class members instead of making a *cy pres* distribution to charity).

31 Put differently, while the funds were *allocated* to Subclass B, they *belonged* to the entire class. It follows that there is no unclaimed or abandoned by property available to be claimed by the state or others via escheat or otherwise. *See generally All Plaintiffs v. All Defendants (In re Lease Oil Antitrust Litig.)*, 645 F.3d 329 (5th Cir.2011). On some golf courses there are signs reminding those who walk or jog the cart trails that a golf ball is not lost until it stops rolling. This ball is still rolling.

32 *See* ALI PRINCIPLES § 3.07(b).

C.

Arkema pushes back with three counter-arguments. None is sufficient to carry the day. First, Arkema argues that paragraph 28 of the Protocol authorizes the district court to make changes to the terms of the Protocol, not the Agreement, and that it is the Agreement that fixes the amount of money to be allocated to each subclass. It was the Agreement that made the initial allocation of money among the three subclasses. But it is paragraph 27 of the Protocol that controls the allocation of any monies remaining after the initial distribution. In addition, Arkema's argument turns a blind eye to the language of paragraph 29, which expressly authorizes the district court, upon a request from the settlement administrator, to reallocate funds one subclass to another. Deciding to reallocate funds from the subclass with nuisance-exposure claims to the subclass with serious personal-injury claims was not beyond the scope of the authority that the Protocol conferred on the district court.

Next, Arkema argues that the members of Subclass A have already been fully compensated because they were paid in full according to the terms of the Agreement. Not so. The fact that the members of Subclass A have received the payment authorized by the settlement agreement does not mean that they have been fully compensated. As a general matter, "few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery for those class members." [33] Moreover, the Agreement does not even purport to provide full, individualized ***480** compensation. It authorized pro rata distributions that were dictated by a formula that was designed to ensure, within the limits of the fund, that each claimant obtained some relief. It valued each injury in relative terms, not absolute terms.

33 *Id.* § 3.07 cmt. b.

Finally, Arkema argues that equity weighs in favor of a *cy pres* distribution because distributing the unclaimed funds to members of Subclass A would deprive Subclass B of its settlement benefits. This argument is a straw man. All agree that additional distributions to the members of Subclass B were not economically viable. No proposal before the district court would have allowed Subclass B to receive the full value allocated to it by the original agreement. The choice was not between a distribution to Subclass A and a distribution to Subclass B; the choice was between a distribution to Subclass A and a distribution to charity. Although it is generally true that additional "distributions to class members better approximate the goals of the substantive laws than distributions to third parties that were not directly injured by the defendant's conduct," [34] the district court had no need for that principle. The settlement agreement required the court to reallocate the funds among the subclasses of the class that generated the settlement fund.

34 *Id.*

III.

The district court abused its discretion by ordering a *cy pres* distribution instead of distributing the unused medical-monitoring funds to the members of Subclass A. We reverse the district court's *cy pres* order and remand with instructions that the residual funds be distributed to the members of Subclass A consistently with the terms of the settlement agreement.

REVERSED and REMANDED.

EDITH H. JONES, Chief Judge, concurring:

I concur in Judge Higginbotham's able opinion and in the conclusion that the invocation of *cy pres* here was an abuse of discretion remediable, under these particular facts, only by a pro rata distribution to subclass A. I write separately, however, to suggest that if the defendant had not waived its

right to request a refund, it would have been entitled to the excess.

As Judge Higginbotham explains, the *cy pres* doctrine originated in the field of trust law "to save testamentary charitable gifts that would otherwise fail." *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir.2002). It has been imported into the class action context to distribute unclaimed funds "for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *Id.* at 682–83. It is inherently dubious to apply a doctrine associated with the voluntary distribution of a gift to the entirely unrelated context of a class action settlement, which a defendant no doubt agrees to as the lesser of various harms confronting it in litigation. *See* Martin H. Redish et al., *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L.Rev. 617, 621 (2010). *See also Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir.2004) (Posner, J., describing *cy pres* in this connection as "badly misnamed.").

The opportunities for abuse have been repeatedly noted. *See, e.g.*, *Securities & Exchange Comm'n v. Bear, Stearns & Co., Inc.*, 626 F.Supp.2d 402 (S.D.N.Y.2009) ("While courts and the parties may act with the best intentions, the specter of ***481** judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety."). *See In re Pharm. Indust. Average Wholesale Price Liti.*, 588 F.3d 24 at 34 (1st Cir.2009) (*cy pres* distributions are controversial); Adam Liptak, *Doling Out Other People's Money*, N.Y. Times Nov. 26, 2007, at A14 *available at* http://www.nytimes.com/2007/11/26/washington/26bar.html (describing particular distributions, "giving the money away to favorite charities with little or no relation to the underlying litigation is inappropriate and borders on distasteful"); Editorial, *When Judges Get Generous*, Wash. Post, Dec. 17, 2007, at A20, *available at* http://www. washingtonpost.com/wp-dyn/content/article/2007/12/16/AR2007121601433.html; George G. Krueger & Judd A. Serotta, *Money For Nothing*, Legal Times, June 2, 2008; Sam Yospe, Note, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L.Rev. 1014, 1027–41 (2009); Goutam U. Jois, *The Cy Pres Problem and the Role of Damages in Tort Law*, 16 Va. J. Soc. Pol'y & L. 258, 259 (2008). Whatever the superficial appeal of *cy pres* in the class action context may have been, the reality of the practice has undermined it. It is time for courts to rethink the justifications of the practice.

The panel opinion holds that the Rules Enabling Act places an "overarching limitation on class-action litigation" and demands "a narrow construction of Rule 23." Professor Redish has put the point more bluntly:

> Use of *cy pres* simultaneously violates the constitutional dictates of separation of powers by employing a Federal Rule of Civil Procedure to alter the compensatory enforcement mechanism dictated by the applicable substantive law being enforced in the class action proceeding. It has somehow become common practice among many courts, scholars, and members of the public to view the modern class action as a free-standing device, designed to do justice and police corporate evildoers. As nothing more than a Federal Rule of Civil Procedure, however, the class action device may do no more than enforce existing substantive law as promulgated either by Congress or, in diversity suits, by applicable state statutory or common law. Yet in no instance of which we are aware does the underlying substantive law sought to be enforced in a federal class action direct a violator to pay damages to an uninjured charity.

Redish et al., *supra*, at 623 (footnote omitted). *Cy pres* distributions arguably violate the Rules Enabling Act by using a wholly procedural device—the class-action mechanism as prescribed in Rule 23—to transform substantive law "from a compensatory remedial structure to the equivalent of a civil fine." *Id.* They present an Article III problem by transforming "the judicial process from a bilateral private rights adjudicatory model into a trilateral process." *Id.* at 641. In addition, such distributions likely violate Article III's standing requirements. Courts should be troubled that a *cy pres* distribution to an outsider uninvolved in the original litigation may confer standing to intervene in the subsequent proceedings should the distribution somehow go awry.

Whether *cy pres* distributions violate the Constitution or Rules Enabling Act has not, to my knowledge, been fully litigated in any court, [1] and these questions are neither briefed

nor presented for review here. ***482** Hence, I refrain from a more rigorous analysis and suggest instead that district courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations.

1 At least one court has concluded that "fluid recovery" judgments—which differ materially from *cy pres* distributions—do not violate the Rules Enabling Act. *See Schwab v. Philip Morris USA, Inc.*, No. CV 04–1945, 2005 WL 3032556 (E.D.N.Y. Nov. 14, 2005).

The preferable alternative, illustrated partially in *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir.1989), is to return any excess funds to the defendant.[2] The class action settlement fund in *Southwest Airlines* retained a balance of over $500,000 after all claimants had been reimbursed in full. *Id.* at 810. Claims were made against the balance by class counsel for additional claims administration fees and by Southwest for a return of the excess. *Id.* The district court rejected both claims and ordered a *cy pres* distribution to a local charity. Shortly thereafter, Southwest and class counsel entered a settlement that would divide the remaining funds between Southwest and the class counsel. *Id.* at 811. This court reversed the district court's judgment and approved the settlement. The opinion noted that Southwest "clearly renounced its legal claim to any residual funds" in the settlement agreement and therefore had no "legal right" to the balance. *Id.* at 812. Neither the plaintiffs nor counsel had a legal right to the balance either. As a result, this court ordered that the fund should be distributed to the party with the stronger equitable claim. *Id.* That party was the defendant:

2 This approach, of course, was not available in today's case for reasons explained in the panel opinion.

> Southwest's equitable claim is premised on the fact that all the money in the fund originally belonged to it. Southwest turned over the money for the specific and limited purpose of compensating the class. It did so in the expectation that compensating the class would exhaust the fund. The record of the fairness hearing reveals that Southwest and class counsel both wrongly assumed that claims alone would amount to $900,000 or more of the fund, exclusive of expenses. Since Southwest turned over its money in the clear and reasonable expectation that the money was required for the specific purpose of compensating the class, its equitable claim to any money remaining after the accomplishment of that purpose is compelling.
>
> *Id.* at 813.

In the ordinary case, to the extent that something must be done with unclaimed funds, the superior approach is to return leftover settlement funds to the defendant. This corrects the parties' mutual mistake as to the amount required to satisfy class members' claims. Other uses of the funds—a pro rata distribution to other class members, an escheat to the government, a bonus to class counsel, and a *cy pres* distribution—all result in charging the defendant an amount greater than the harm it bargained to settle. Our adversarial system should not effectuate transfers of funds from defendants beyond what they owe *to the parties* in judgments or settlements.

302 F.Supp.2d 89
United States District Court,
E.D. New York.

In re HOLOCAUST VICTIM ASSETS LITIGATION.

Nos. CV–96–4849(ERK)(MDG), CV–99–5161, CV–97–461. | March 9, 2004.

Synopsis

Background: Following judicial approval of settlement of consolidated class actions brought by Holocaust victims against two leading Swiss banks, 105 F.Supp.2d 139, objections were made to Special Master's recommendations regarding allocation of settlement funds.

Holdings: The District Court, Korman, Chief Judge, held that:

[1] it would not immediately distribute $200 million to committee of Holocaust survivors to decide how it should be spent;

[2] District Court would not distribute funds pro rata among different countries for benefit of needy survivors within the country;

[3] umbrella organization of Holocaust survivors and survivor groups lacked standing to object on behalf of its purported members; and

[4] attorney who filed objections purportedly on behalf of umbrella organization's members was not entitled to $3 million fee for his services.

Ordered accordingly.

West Headnotes (4)

[1] Compromise and Settlement

Construction, operation, and effect; supervision

On objections to Special Master's recommendation that $60 million of proceeds of settlement of consolidated class actions brought by Holocaust victims against two Swiss banks be distributed immediately to certain class members, District Court would not immediately distribute $200 million to committee of Holocaust survivors to decide how it should be spent; such a distribution would cause court to relinquish its requisite control over distribution process.

6 Cases that cite this headnote

[2] Deposits in Court

Disposition under judgment or order of court

On objections to Special Master's recommendation that $60 million of proceeds of settlement of consolidated class actions brought by Holocaust victims against two Swiss banks be allocated for cy pres distribution to neediest victims whose assets were looted by Nazis, District Court would not distribute funds pro rata among different countries for benefit of needy survivors within the country; pro rata distribution would unfairly benefit victims who were part of small group of needy survivors within large nationwide survivor population, such as the United States, while desperately poor survivors in countries with larger concentration of needy survivors, such as former Soviet Union countries, would receive next to nothing.

10 Cases that cite this headnote

[3] Corporations and Business Organizations

Persons entitled to sue; standing

Umbrella organization of Holocaust survivors and survivor groups was not a membership corporation, and thus, it lacked standing to object on behalf of its members to Special Master's recommendations regarding allocation of settlement funds in consolidated class actions brought by Holocaust victims against Swiss banks; even if survivors and survivor groups had been elected to membership in organization, there was no proof that members consented to representation by organization, or that members individually had standing to object.

4 Cases that cite this headnote

[4] Attorney and Client

Allowance and payment from funds in court

Attorney who filed objections to Special Master's recommendations regarding allocation of settlement funds in consolidated class actions brought by Holocaust victims against Swiss banks, purportedly on behalf of members of umbrella organization of Holocaust survivors and survivor groups, was not entitled to $3 million fee for his services, where attorney had accomplished nothing in relation to his efforts to correct alleged imbalance in allocation of funds, given that his objections were rejected; settlement fund was not set up to pay legal or other expenses of survivor groups.

8 Cases that cite this headnote

Attorneys and Law Firms

***90** Burt Neuborne, New York University Law School, New York, NY, lead class counsel.

Robert A. Swift, Kohn, Swift & Graf, P.C., Philadelphia, PA, one of plaintiffs' class counsel.

Samuel J. Dubbin, Dubbin & Kravetz, LLP, Coral Gables, FL, for Holocaust Survivors Foundation–USA, Inc.

Roger M. Witten and Christopher P. Simkins, Wilmer Cutler Pickering, LLP, Washington, DC, for defendants Credit Suisse and Union Bank of Switzerland.

MEMORANDUM & ORDER

KORMAN, Chief Judge.

I address here yet another issue that has arisen with respect to the $1.25 billion settlement of the class action against the largest Swiss banks, Credit Suisse, Union Bank of Switzerland and the Swiss Bank Corporation (the latter two of which merged during the course of litigation). The background of the case and settlement is set out in *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d. 139 (E.D.N.Y.2000), and a discussion of some of the post-settlement issues may be found at *In re* ***91** *Holocaust Victim Assets Litigation*, No. CV-96-4849, 302 F.Supp.2d 59, 2004 WL 318468 (E.D.N.Y. February 19, 2004), *In re Holocaust Victim Assets Litigation*, 270 F.Supp.2d 313 (E.D.N.Y.2002), and at *In re Holocaust Victim Assets Litigation*, No. 96 Civ. 4849ERK MDG, 2000 WL 33241660 (E.D.N.Y. November 22, 2000).

The specific issue here involves a dispute relating to the allocation of part of the proceeds of the settlement. Briefly, one of the classes benefitting from the settlement was comprised of victims of Nazi persecution from whom assets were looted by the Nazis and the plunder of which was aided by Swiss banks. Special Master Judah Gribetz recommended initially that $100 million be allocated to this Looted Assets Class and that the money be distributed to its neediest members. *See* Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds 110–142 (hereafter "Plan of Allocation"). I discuss later the reasons underlying that recommendation, which I adopted on November 22, 2000, *see In re Holocaust Victim Assets Litig.*, 2000 WL 33241660, and which the Second Circuit affirmed on July 26, 2001. *See In re Holocaust Victim Assets Litig.*, 14 Fed.Appx. 132, 134 (2d Cir.2001). On September 25, 2002, I adopted another recommendation of the Special Master that an additional $45 million in "excess" funds be allocated to that class. Finally, on November 17, 2003, I adopted the recommendation of the Special Master that $60 million in "excess" funds be allocated to the Looted Assets Class and be distributed in accordance with the *cy pres* principles that have successfully governed the administration of the initial allocation and distribution of $100 million to the Looted Assets Class in 2001, and the first supplemental allocation and distribution of $45 million in 2002.

I also adopted the Special Master's recommendations made in response to my request seeking his view on the appropriateness of allocation of money, if any, that may remain undistributed from the $800 million allocated to the Deposited Assets Class, which is composed largely of heirs of victims of Nazi persecution who deposited funds in Swiss banks. The Special Master recommended that, "as with the excess funds, residual unclaimed funds, if any, should likewise be re-allocated to the Looted Assets Class for distribution to needy Nazi victims in accordance with the *cy pres* principles governing the administration of that class." Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess and Possible

Unclaimed Residual Funds, at 7 (hereafter "Special Master's Interim Report"). Because any such distribution would involve residual unclaimed funds, "the disposition of which has not yet been the subject of discussion by class members, the Special Master recommend[ed] that the Court solicit proposals from a broad array of interested persons and organizations as to how best to identify and to benefit the neediest survivors." *Id.* He further urged that, "depending upon the amount of residual, if any, the Court may wish to consider a modest distribution to communal, remembrance and/or educational programs." *Id.* at 13 n. 14.

The Special Master observed that, by the end of the proposed filing and comment period in connection with proposals submitted by interested persons and organizations, a reasonably firm Deposited Assets Class distribution assessment should be available, rendering it possible to estimate the amount of unclaimed funds, if any, available for *cy pres* distribution. At that point, after considering such proposals, the Special Master will issue a final recommendation as to how to distribute unclaimed funds. The date provided in my ***92** November 17, 2003 order for the submission of the final recommendation of the Special Master was March 15, 2004. I subsequently received numerous requests for additional time to submit proposals, and I extended the date for the Special Master's final recommendation to April 16, 2004. After a public hearing to be held on April 29, 2004, I will make a final determination as to the distribution of any residual funds.

My order of November 17, 2003 also explicitly rejected objections that had been filed by Samuel Dubbin on behalf of the Holocaust Survivors Foundation–USA, Inc., (HSF–USA), and those filed by Robert Swift. I indicated then that an opinion would follow, and I now provide that opinion. The Special Master's Interim Report, the Declaration of Burt Neuborne in Support of the Interim Report of the Special Master (hereafter "Neuborne Declaration"), and the Supplemental Declaration of Burt Neuborne in Response to Objections to the Special Master's Interim Report and Recommendation Filed by Samuel Dubbin, Esq. (hereafter "Supplemental Neuborne Declaration") provide a compelling case for the adoption of the recommendation of the Special Master. The principal purpose of this memorandum is to more specifically address the objections filed by Mr. Dubbin on behalf of HSF–USA.

Mr. Dubbin has been filing objections for several years, all premised on the same flawed reasoning. *See* Motion for Immediate Interim Distribution of Swiss Settlement Proceeds, filed September 11, 2003 (hereafter "Motion for Immediate Distribution"); Response of Holocaust Survivors Foundation–USA, Inc. to Special Master's Interim Recommendation (hereafter "HSF Response"); Objections of U.S. Survivor Groups to Special Master's Recommendations Concerning Allocation of Accumulated Interest on Settlement Funds, filed September 27, 2002 (hereafter "HSF Objection to Allocation of Interest"). While the HSF–USA has never demonstrated that it has any legal standing to raise these objections (a point I will discuss later), it is important to address them on the merits. Professor Neuborne has done so in a characteristically comprehensive and thoughtful affidavit. *See* Supplemental Neuborne Declaration. I do so here.

Part I: The Merits of HSF–USA's Objections

As Professor Neuborne observed, HSF–USA's objections can be divided into three categories. First is Mr. Dubbin's demand that I make a larger amount available for "immediate distribution" to members of the Looted Assets Class. Second is his objection to the allocation formula that has thus far governed the distribution of money to the Looted Assets Class. And third is his challenge to my continued use of the American Jewish Joint Distribution Committee, Inc., for distribution of settlement funds. As to the third objection, I adopt Professor Neuborne's response without repeating it. *See* Supplemental Neuborne Declaration, at ¶ 22; *see also* Letter from Steven Schwager to Professor Neuborne, dated October 29, 2003. I address the first and second objections below.

A. Mr. Dubbin's demand for a larger "immediate distribution"

[1] The Special Master proposed, and I ordered, that the $60 million in excess funds that have accrued through interest on the settlement fund be made available for immediate distribution to members of the Looted Assets Class. Instead of this distribution of $60 million, Mr. Dubbin would have me allocate to the Looted Assets Class $200 million of the $650 million that remains set aside for possible distribution to claimants to accounts in Swiss ***93** banks that were either unpaid or transferred improperly to the Nazis. *See* Motion for Immediate Distribution. Of the $200 million, Mr. Dubbin demands that a minimum of $50 million be set aside for "immediate distribution" to survivors in the United States. *Id.* I reject Mr. Dubbin's objection.

First and foremost, Mr. Dubbin's proposal does not call for the "immediate distribution" of any funds to survivors, as the title of his motion and its introduction misleadingly suggest. Rather, Mr. Dubbin proposes that $50 million be "set aside in trust to be spent in accordance with the decisions of a committee of HSF survivors," representatives of other organizations, and "the Court." Motion for Immediate Distribution, at 1 n. 1. This "Dubbin Committee," of which he proposes to make me a member, would make decisions on "[t]he use of such funds ... guided by an assessment of current need, and the likelihood and timing of funds from other sources such as the Claims Conference (Successor Organization Funds), the International Commission for Holocaust Era Insurance Claims (ICHEIC) 'humanitarian funds,' and the Final Secondary Distribution in this case." *Id.* The "Dubbin Committee" proposal foreshadows a drawn-out process rife with potential for disagreement among its members. Indeed, disagreement leading to the resignation of several founding members of HSF–USA has already occurred. *See* Nacha Cattan, *Survivors' Group Leaders Split Over Aid*, The Forward, January 16, 2004; *see also* Israel J. Sachs et al., Letter to the Editor, The Forward, January 23, 2004 ("It is our belief that our goals should be pursued through discussion and negotiation, not by fights that pit one Jew against another."). Such a committee (which may or may not be able to distribute money faster than the procedures currently employed) is not necessary. Nor is it consistent with the control—not a seat on a committee—that the law requires that I exercise over the distribution process.

More importantly, the time is simply not ripe for a larger "immediate distribution" of residual funds to members of the Looted Assets Class. Mr. Dubbin claims that, "[t]here is over $670 million dollars under the Court's control right now, sitting in the bank, helping no one other than the bankers." HSF Response, at 2. He continues, "[t]his money is, legally and morally, *the Survivors' money*." Motion for Immediate Distribution, at 10. These statements reveal Mr. Dubbin's basic misunderstanding of the settlement. The $800 million that was set aside for individuals with claims against the Swiss Banks for deposited assets (of which approximately $650 million now remains) belongs to *those* survivors or their heirs. It was not set aside for, nor does it belong to, the survivor community as whole. This large sum was set aside in part because, of all the claims asserted against the Swiss Banks, only the claims of the Deposited Assets Class have any legal merit. The other claims could not have withstood a motion to dismiss. As the Second Circuit explained in affirming my decision:

> [The Deposited Assets Class] claims are based on well-established legal principles, have the ability of being proved with concrete documentation, and are readily valuated in terms of time and inflation. By contrast, the claims of the other four classes are based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately valuate.

In re Holocaust Victim Assets Litig., 14 Fed.Appx. 132, 134 (2d Cir.2001).

Under these circumstances, I have a legal and moral obligation to the Deposited ***94** Assets Class not to use the funds that belong to it for a *cy pres* distribution until I am *certain* that the claims to those funds will not exceed the amount set aside. The $800 million set aside already takes into account the certainty that, due to the passage of time, the destruction of documents and the slaughter of millions, claims awarded will not equal the current value of accounts identified by the Volcker Committee as probably or possibly belonging to survivors. Indeed, it is a half billion dollars less than the present value of such accounts. Moreover, as I explained in my order of February 19, 2004, *see In re Holocaust Victim Assets Litig.*, No. CV-96-4849, 302 F.Supp.2d 59, 2004 WL 318468 (E.D.N.Y. February 19, 2004), the accounts identified by the Volcker Committee as probably or possibly belonging to Nazi survivors understate significantly the number of accounts once belonging to survivors.

Nevertheless, Mr. Dubbin argues that "$200 million is a sum that no reasonable person would argue is too high of a minimum estimate of the amount that will remain from the $800 million set aside for Deposited Assets such that the allocation of the amount today would interfere with the payment of meritorious pending claims." Motion for Immediate Distribution, at 3. I disagree. Whether $200 million will remain from the $800 million set aside for the Deposited Assets Class is not yet knowable. The Special Master has indicated that several things must happen before he can accurately estimate the amount of residual funds, if any, that will remain from money allocated to the Deposited Assets Class. Of primary importance, additional accounts should be published in order to help identify any remaining

claimants; the Claims Resolution Tribunal ("CRT") must complete an experimental trial of matching names against accounts in the Total Accounts Databases ("TAD"); the CRT must then be given broader access to the TAD if the experimental matching so demands; and the CRT must be given time to use a newly improved computer system in an effort to match claimants' names against accounts that might have belonged to Nazi victims. Of course, several of these steps have yet to be completed. *See In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 59, 2004 WL 318468.

The order I have signed directs the Special Master to provide an accurate estimate of the amount set aside for the Deposited Assets Class that will not be distributed to the members of that class, if any, by April 16, 2004. Because of ongoing concerns described in the paragraph above, it appears that more time may be required. Nevertheless, whether or not it is possible for him to provide an accurate estimate by April 16, 2004, he will by that date provide a recommendation for the *cy pres* distribution of any residual funds. After hearing proposals from interested parties, I will decide on a plan of allocation. Because of my obligations to the Deposited Assets Class, I reject Mr. Dubbin's objection that this delay is unreasonable. In advance of hearing all proposals and the Special Master's recommendation, I will not allocate $50 million "in trust" to a committee to decide how it should be spent. Nor will I set aside an additional $150 million that belongs to bank account holders or their heirs for distribution among the survivor community as a whole.

B. Mr. Dubbin's challenge to the allocation formula used in distributing funds

[2] Mr. Dubbin also objects to the allocation formula that governs the distribution of the additional $60 million that is now being allocated. This objection is consistent with his prior appeal from the initial allocation of $100 million to needy ***95** members of the Looted Assets Class and his objection to the $45 million allocated to needy victims of Nazi persecution in the first allocation of excess funds. Mr. Dubbin withdrew his appeal from the initial allocation, and I denied his objection to the first allocation of excess funds as untimely. Mr. Dubbin has filed a motion for reconsideration of that order and he has filed a motion for reconsideration in reference to the most recent denial, both of which are still pending. I have never specifically addressed his objections on the merits.

Mr. Dubbin's objections can be summarized as follows: He agrees that funds allocated to the Looted Assets Class should be distributed through a *cy pres* distribution to the neediest survivors, but only after distributing the funds *pro rata* among countries. Put differently, he argues that a survivor community in a given country should be allocated (for the benefit of its neediest survivors only) a percentage of the Looted Assets Class funds equal to whatever percentage of the world survivor community it represents. This proposal is tailored to benefit individuals who are a part of a small group of needy survivors within a large nationwide survivor population. Not surprisingly, needy survivors in the United States—whose interests Mr. Dubbin claims to represent—are just such a group. This proposed distribution scheme is wholly inconsistent with law, morality, and most importantly, the settlement of this lawsuit. In sum, these objections are frivolous. Several are also likely precluded by the withdrawal of Mr. Dubbin's initial appeal. But because the objections have been recurring, I address them now in the hope that they can be put to rest.

1. The rationale for my distribution plan

The reasons underlying the distribution plan that I have overseen for the Looted Assets Class are described comprehensively in the Special Master's Plan of Allocation. Nevertheless, because of Mr. Dubbin's apparent misunderstanding of these reasons, I take this opportunity to explain, once again, how we are distributing the money.

The Looted Assets Class is incredibly large. It consists of:

> Victims or Targets of Nazi Persecution and their heirs, successors, administrators, executors, affiliates, and assigns who have or at any time have asserted, assert, or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from Looted Assets or Cloaked Assets or any effort to recover Looted Assets or Cloaked Assets.

Settlement Agreement, Section 8.2(b). As the Special Master correctly reasoned, "[t]here is scarcely a victim of the Nazis who was not looted, and on nearly an incomprehensible scale." Plan of Allocation, at 111. After all, "it is well accepted by historians, including those representing Switzerland, that a primary purpose of the Nazi plunder

was to transform loot (especially, but not only gold) into foreign currency by marketing these items in neutral nations, including Switzerland." *Id.* at 114. "With only limited exceptions, however, the current historical record simply does not permit precise determinations even as to the material losses in total, much less the nature and value of the loot traceable to Switzerland or Swiss entities." *Id.* at 112. To prevent the expenditure of incredible sums on administration, the Special Master recommended that for allocation purposes, I assume that all survivors of the Holocaust and their heirs were valid members of this class, even if they could not prove an injury directly tied to a Swiss entity. I agreed.

***96** I then was faced with two obvious and unsatisfactory possibilities for how to govern the distribution of money to this enormous class. I could have used a claims resolution facility to determine the validity and value of claims on a case-by-case basis, or I could have ordered a *pro rata* distribution to every member of the class. The first option, given the complete lack of adequate records, would have resulted in "an unwieldy and enormously expensive apparatus to adjudicate hundreds of thousands of claims, for losses which can barely be measured and hardly be documented, and whose connection to Switzerland, or a Swiss entity, if ever it existed, probably no longer can be proven." *Id.* at 114–15. The second option, which is apparently what Mr. Swift—whose objections I rejected in my November 17, 2003 order—would prefer, was equally problematic. Mr. Swift continues to argue that there should be a *pro rata* distribution to the approximately 500,000 Looted Assets Class members who filled out "detailed claim forms." Declaration of Robert A. Swift in Opposition to the Interim Report of the Special Master, ¶ 3. These "detailed claim forms" were non-binding questionnaires that explicitly stated that an individual could later make a claim without having filled out such a questionnaire. The class, therefore, is not limited to these 500,000 individuals. Rather, for allocation purposes, the class includes all those who were victims of the Holocaust *and their heirs.* A *pro rata* distribution would have resulted in the payment of literally pennies to each of the millions of individuals who would fall into this class. Such a distribution scheme is not uncommon in class action cases where members of the class get pennies or coupons, the cumulative total of which is used to justify awarding millions of dollars in legal fees. But such a plan is wholly unsatisfactory here because it promises almost no benefit to members of the class. Indeed, if Mr. Swift's proposal were the only alternative, I would ask the Special Master to suggest a *cy pres* distribution of the excess funds for a purpose other than providing assistance to members of the Looted Assets Class.

Fortunately, there is a more reasonable alternative. The Special Master recommended excluding heirs from any *pro rata* distribution, as was done with the Refugee and Slave Labor classes. While this would have increased the *pro rata* share of survivors, it would still have resulted in one-time individual awards that would not have been enough to provide any assistance to needy survivors and would have been insignificant to those who are not needy. Consequently, I adopted the accompanying recommendation of the Special Master and ordered a *cy pres* remedy targeting the neediest survivors in the Looted Assets Class. *See* Special Master's Interim Report, at 3 n. 3. The Special Master reasoned that these individuals "perhaps would be less in need today had their assets not been looted and their lives nearly destroyed" during the Nazi era. Plan of Allocation, at 117. I agreed that using the funds to provide relief to these neediest survivors over the course of ten years would be the way to most benefit the class as a whole. In order to reduce administrative costs, these funds were funneled through organizations that were already providing relief to survivor communities and could quickly provide aid. I reserved the right to grant other *cy pres* remedies as worthwhile proposals are presented, but my principal decision was consistent with Second Circuit law. *See In re Agent Orange Product Liability Litig.*, 818 F.2d 145, 158 (2d Cir.1987) (explicitly authorizing a district court to "give as much help as possible to individuals who, in general, are most in need of assistance" because it is "equitable to limit payments to those ***97** with the most severe injuries"). Indeed, the Second Circuit agreed. *See In re Holocaust Victim Assets Litig.*, 14 Fed.Appx. 132 (2d Cir.2001) (finding that appellants' challenge to my decision to apply the *cy pres* doctrine to the Looted Assets Class "lack[ed] merit").

The next step, which is apparently the only step at which Mr. Dubbin and I diverge, was the determination of who are the neediest survivors of the Holocaust. A comparison of needy survivors is by definition an odious process. All individuals who survived the Holocaust bear scars, and all merit relief. Nevertheless, left with limited funds to distribute, I had to render a judgment as to whose need was the greatest. I decided that 90% of the funds should be awarded to Jewish survivors, and 10% should be awarded to other victims of the Holocaust, including surviving Roma, Jehovah's Witness, homosexual and disabled victims of Nazi persecution. This decision was consistent with restitution agreements dating back to the end of the war and with current assessments of

demographics. *See* Plan of Allocation, at 118–19 and Annex C ("Demographics of 'Victim or Target' Groups"). Of the 90% awarded to Jewish survivors, I determined that 75% should be allocated to needy survivors living in the Former Soviet Union ("FSU"), and 25% should be allocated to needy survivors living in Israel, North America, Europe, and the rest of the world. Ultimately, approximately 4% of the funds from the Looted Assets Class has been allocated to needy survivors in the United States. The decision to allocate 75% of the money awarded to Jewish members of the Looted Assets Class to needy survivors in the FSU while allocating only 4% of the money to needy survivors in the United States was not arrived at lightly. It was based on what I perceived to be the number of impoverished survivors in each country, their relative need, and their other available sources of support. However, it is this decision that caused Mr. Dubbin to object. Thus, it is this division, 75% as compared to 4%, on which I focus.

2. Identifying the neediest survivors

According to the most comprehensive demographic studies available, there are between 832,000 and 960,000 Jewish survivors of Nazi persecution. *See generally* Plan of Allocation, Annex C (explaining the demographic data). Of these, approximately 19%–27% live in the FSU, and 14%–19% live in the United States. *See id.* at 11. Although debate continues over the precise percentages, there is a general consensus that this is the approximate distribution. Indeed, these numbers were confirmed by the recent report of independent researchers from Brandeis University. *See* Jewish Elderly Nazi Victims: A Synthesis of Comparative Information on Hardship and Need in the United States, Israel, and the Former Soviet Union (January 20, 2004) (Report prepared for the JDC) (hereafter "Brandeis Report"). The Brandeis Report was an effort to compare the communities of Jewish survivors in the United States, Israel and the FSU in terms of size, and in terms of need. It relied on prior surveys of the Nazi victim population in each region, and documented only one survey that deviated from the figures provided above—a survey that used a different definition of "survivor" and found that only 13% lived in the FSU and 16% lived in the United States, with a greater majority living in Israel. *Id.* at 21. The rest of the surveys considered by the Brandeis Report found that approximately 22%–23% of Jewish survivors of Nazi persecution live in the FSU, and 15%–17% live in the United States. *Id.* The Brandeis Report made no recommendations, but it drew many conclusions. Published ***98** several years after the Special Master filed his Plan of Allocation, the Brandeis Report confirmed the assessment of the Special Master that the population of *needy* survivors is distributed quite differently than the population of survivors. Before turning to an examination of this differential distribution, I attempt to briefly explain why it exists.

With the onset of the Cold War, survivors in the FSU were essentially cut off from the West. Since then, survivors in the United States have shared in various distributions that began with the end of the Nazi era and have continued until today, while survivors behind the Iron Curtain have received next to nothing. The Special Master exhaustively and impressively chronicled the course of Holocaust compensation in Annex E of his Plan of Allocation. Here, it suffices to restate its conclusions. Including the multiple class awards in this case, there have been ten major compensation efforts since the end of the war. The principle efforts, preceding this one, have been the Federal German Indemnification Program ("BEG Pensions"), payments by the Israeli Ministry of Finance, the Hardship Fund, the Article 2 Fund, the Central and Eastern European Fund, and the German Slave Labor Fund. *These efforts and others, together with this lawsuit, have resulted in distributions of over $53 billion to individual survivors and programs serving individual survivors. See* Chart on Holocaust Compensation prepared by Special Master in consultation with the Claims Conference and other available sources (Draft, dated March 5, 2004). *Of this, approximately $14.8 billion, or just shy of 28% of all restitution funds has gone to survivors in the United States. Id. Comparatively, just under $444 million, or 0.8% of all restitution funds has gone to survivors in the FSU. Id.*

The primary reason for this imbalance is Germany's decades-long refusal to negotiate with those behind the Iron Curtain. In the BEG Pension distributions, which have for decades provided hundreds of thousands of survivors worldwide with monthly pensions, Germany excluded "all the survivors of Eastern Europe who did not emigrate to a non-Communist country." Plan of Allocation, Annex E, at 35. It did the same with the Article 2 Fund and with the Hardship Fund. In 1998, almost a decade after the end of the Cold War, Germany took a *small* step to rectify the imbalance by instituting the Central and Eastern European Fund ("CEEF").

The CEEF was set up "to compensate directly, for the first time, Holocaust victims who still remain in the former Soviet Union and Central and Eastern Europe." Plan of Allocation, Annex E, at 55. But this program was woefully inadequate. It defines "survivor" restrictively, thus continuing

to ignore many victims of Nazi persecution who have never been compensated for their suffering with even a dime. To qualify for payments, a survivor must show that he or she was "confined or restricted" for at least six months in a concentration camp, prison camp, or forced labor battalion, or "confined or restricted" for at least 18 months in a ghetto, hiding in inhuman conditions, or as a child living under a false identity. *See id.* at 49–50. Jews who survived five months in a concentration camp do not qualify for payments. Nor do the many Jews who fled their homes as the Nazis approached, losing property of incalculable value. In 1999, before the distribution of settlement funds from this case had begun, Dovid Katz, a Professor of Yiddish language, literature and culture at the University of Vilnius in Lithuania, movingly explained the situation for these poor survivors:

> ***99** The last elderly Jews of Eastern Europe, whose lives were ruined by the Holocaust, and who choose to live out their days in the towns of their ancestors, are suffering acutely from malnutrition, poverty and lack of medicine, while the millions (or billions) from Germany, Switzerland and the great American Jewish organizations pass them by.

Dovid Katz, *How to Help the Holocaust's Last Victims*, The Forward, September 24, 1999 (cited in Plan of Allocation, at 124).

Survivors in the FSU also had to suffer through decades of Communism. This is why they are often referred to as "double victims." Stuart Eizenstat, the former Deputy Secretary of the Treasury who was instrumental in the efforts of the United States to bring about Holocaust restitution agreements, explained that he coined the term "double victims" after coming "face-to-face with the Holocaust survivor community of Eastern Europe." Stuart E. Eizenstat, Imperfect Justice, at 28 (2003). The individuals "had lived through both the Nazi massacre and the Communist repression that followed," and their faces reflected "the brutality of our time." *Id.* As brutal as life was under Communism, however, the situation for many elderly pensioners has become even worse with its collapse. *See* Plan of Allocation, Annex F ("Social Safety Nets"), at 2. "It is well known, for example, that the personal savings of many individuals in the FSU were wiped out by hyperinflation after the collapse of the Soviet Union." Brandeis Report, at 42. As a result, approximately 60% of all elderly now living in the FSU are impoverished, and the situation for survivors is particularly bad. Plan of Allocation, Annex F, at 2.

The survivor community in the FSU is currently served by a network of 177 Hesed service centers developed by the American Jewish Joint Distribution Committee ("JDC") beginning in 1992. Hesed is a Hebrew word meaning "acts of loving kindness," and these centers have lived up to their name. By 2001, the centers provided assistance to over 225,000 needy elderly Jews, approximately 135,000 of whom are Nazi victims. Because of their experience in serving this community, I have relied on the JDC, and in turn, these Hesed centers, to effectively distribute funds from the Looted Assets Class to survivors in the FSU. The centers provide hunger relief programs, home care, winter relief, and basic medical services. They have also been able to collect detailed information about the FSU's survivor population and provide accurate assessments of the community's level of need. Not surprisingly, the researchers preparing the Brandeis Report relied heavily on the Hesed network's database of each person assisted, including 135,000 registered survivors, in developing a comprehensive comparison of survivors' levels of need in the United States, Israel, and the FSU. *See* Brandeis Report, at 22–24. Put simply, survivors in the FSU are barely surviving.

The Brandeis Report recognizes that the 135,000 survivors served by Hesed centers are "by definition impoverished," and begins to explain how this destitution compares to the experience of survivors in the United States. Brandeis Report, at 39. For information on survivors in the United States, the Brandeis Report draws primarily on the National Jewish Population Survey (NJPS), one of the surveys that Mr. Dubbin now claims support his request for reconsideration of my decision denying his motion. *See id.* at 26–29; Request for Rehearing or Clarification of Court's November 17, 2003 Memorandum and Order, filed December 2, 2003. The NJPS was administered by the United Jewish Communities in 2000–2001 via telephone to approximately 4,500 Jews living ***100** in the United States. *See* United Jewish Communities Report, Nazi Victims Now Residing in the United States: Findings from the National Jewish Population Survey 2000–01, Draft, dated December 18, 2003 (hereafter "NJPS Draft, dated December 18, 2003"). The survey included over 300 questions on a range of topics, including questions designed to ascertain whether a person was a Nazi victim. Of the 4,500 people surveyed, 146 were identified as Nazi victims. Thus, the information gleaned from the NJPS regarding the condition of survivors living in the United States (which

it estimated to be a population of approximately 122,000) is based on questions posed to these 146 individuals. The Brandeis Report, "[f]aced with the task of describing the characteristics and the living conditions of the Jewish Nazi victim population in the USA," turned to other surveys to flesh out the conclusions of the NJPS. Brandeis Report, at 26. But because the other surveys often involved extremely small samples, the researchers were "forced to rely primarily on the NJPS even though it, too, is based on a small sample." *Id.* at 29. Despite the lack of better data describing the plight of the United States survivor population, the researchers were able to draw informative comparisons and conclusions.

The survivor community in the FSU constitutes between 32% and 40% of the total Jewish population in the FSU. Brandeis Report, at 36. The survivor community in the United States, on the other hand, makes up only 2.5% of the Jewish population. *Id.* While at first blush this statistic may appear insignificant, the Brandeis Report correctly points out that "[t]he high percentages [of survivors] in the FSU mean that there is a comparatively small Jewish community available to support victims." *Id.* This problem is exacerbated by the fact that while 56% of survivors in the United States are married and 96% have children, only 41% of survivors in the FSU are married and only 44% have children. *Id.* In sum, family and community support networks are stretched thin in the FSU.

The absence of a support network, in conjunction with the lack of prior restitution and a host of other factors, has resulted in a financial situation of individual survivors in the FSU that is woeful in comparison to that of survivors in the United States. In 2000, the JDC explained the problem as follows:

> The fall of the Soviet Union struck the final blow to the economies and weak welfare systems of the successor states to the Soviet Union.... Jewish older persons are among those most affected by the economic decline. Governments do not have the capacity to maintain social safety nets to meet this population's needs. For example, prior to the ruble crisis in the summer of 1998, average pensions were as low as $9 per month in the Asian republics and $55 per month in Russia. By all accounts, these were extremely small amounts upon which to survive. Furthermore, in many cases, the governments had fallen behind in making these meager payments. The new crisis eroded the value of pensions even further and delayed payment of pensions, resulting in increasing hardships. Average pensions now do not exceed $20 [to $30] in any of the countries of the former Soviet Union. Indeed, most pensions are considerably less.
>
> The social and health care situation similarly reflects this deterioration. Lack of even the most basic supplies in hospitals is common. Patients must bring their own supplies, including medicine, bedding, and food in order to receive care. In addition, the overwhelming demand for services far exceeds the current governmental ***101** capabilities. Services, moreover, are usually no longer provided for free and are often too expensive for an older person receiving a pension. These changes are reflected in the low ratings received by the countries of the FSU on the United Nations' Human Development Index. Out of 174 countries, Ukraine, for example, is ranked 102nd and Georgia 108th. Ukraine fell from 80th in 1995. This puts them in league with poor, developing nations.

Plan of Allocation, Annex F, at 4–5 (quoting *2000 Worldwide Program*, The American Jewish Joint Distribution Committee, Inc., at 66).

The circumstances have not changed since the Special Master filed his Plan of Allocation. Rather, they continue to confirm the recommendations of the Special Master. In January, 2004, the President of the United Jewish Communities traveled to the FSU to see firsthand the conditions of the Jewish community. He wrote:

> I have seen severe non-Jewish poverty in my travels, but I had never seen Jewish poverty like this before. After visiting Jewish families living in small two room shacks, sheltering seven to eight people each and heated with coal stoves, I found myself profoundly grateful that we as Jews, through our federations and JDC, have a way to help. Like many of you who have visited the FSU, I had often visited more familiar scenes of shut-ins—older people who are assisted by our hunger relief programs. But here in Kharkov, the total poverty picture was striking, and the thought that we might lessen our efforts and allocations, well its just unacceptable.

Letter from Steven Schwager to Special Master Judah Gribetz, dated March 4, 2004 (enclosing e-mail from Stephen H. Hoffman, dated January 23, 2004). Dr. Spencer Foreman, the President of Montefiore Hospital and a member of the

Board of Directors of the JDC, wrote the Special Master to the same effect after his annual field visit to the FSU. Specifically, he again confirmed that the issue of medical care is a particular problem.

> Diagnostic testing, specialties services and all but the most urgent hospital care are unavailable to those unable to pay for them, a group that includes virtually all of the Jewish elderly, and even when admitted to a hospital as an emergency out of pocket payment must be made for pharmaceuticals and medical equipment used during the hospitalization! Prescription medications are either unavailable or unaffordable for the average pensioner. Effective care is further strictured by the primitiveness of hospital and polyclinic facilities and by the scarcity of medical equipment, even the most basic items. While limited hospital care is available for trauma and acute medical problems, elderly patients with serious conditions such as stroke are often just sent home to linger bedridden or to die. A patient with a fractured hip, who in the West would be treated with a surgically inserted hip prosthesis and sent home in three days, is treated with traction for weeks then sent home, often with a non-union of the fracture, never to walk again. With the exception of a few major centers in Moscow and St. Petersburg and selected places available only to those who can pay, the services most people receive are at best comparable to those available in the U.S. in the 1950s, and they are in striking contrast to the high-quality care and advanced technologies to which elderly patients in the U.S. and Israel have access on a routine basis and for which, with a few exceptions, governmental or private payment is available.

***102** Letter from Spencer Foreman to Special Master Judah Gribetz, dated January 15, 2004.

The International Organization for Migration, which oversees the distribution of Swiss Bank settlement funds to Roma, Jehovah's Witness, homosexual and disabled victims of Nazi persecution—and which has already distributed $6 million to over 50,000 needy survivors, especially Roma, *see* Special Master's Interim Plan, at 102—also reported on the current situation in the region:

> Eastern and Central Europe is a region where many persons, regardless of age or ethnic[ity], now endure daily living conditions which have worsened considerably since the end of communism. The elderly, and persons 'living on the edge' such as the Roma, have been hardest hit by the universal collapse of state services which once sought, however imperfectly, to meet some of their most basic material, social and medical needs.

Letter from Delbert H. Field, Jr., to Judge Korman, dated December 4, 2003. In other words, the "poverty [that] is nearly universal within these victim populations," Brandeis Report, at 44, is almost beyond comprehension.

The economic plight of survivors in the FSU is further revealed by examining the impact of the settlement funds already allocated to the Hesed network through the JDC. The settlement of this case, and in particular the allocation of funds from the Looted Assets Class, has been of tremendous aid. Contrary to Mr. Dubbin's unsupported and absurd suggestions that the Hesed centers did not need additional funding because "no such funds had been requested," *see* HSF Response, at 4, the settlement funds have in some sense saved the Hesed network. As private and international grants expired, funding to the Hesed centers was disappearing. *See* The American Jewish Joint Distribution Committee, Report on the First Eighteen Months of Welfare Programs in the Former Soviet Union, submitted to Judge Korman, July 31, 2003, at 7 (hereafter "JDC Interim Report"). The settlement funds "helped meet the shortfall." *Id.* The funds are allocated in such a way that spending is to be spread out over a ten-year period to insure that survivors will continue to receive support for the remainder of their projected life span, and in each year the money has gone a long way.

In the first 18 months after distribution began, 55% of the JDC's settlement funds budget of $10.875 million was spent on hunger relief programs, "a recognition that the relief of starvation and hunger is the core life sustaining program that Hesed programs must provide and remains the service needed by the most Nazi victims in the FSU." *Id.* at 13. As the Special Master wrote in his Interim Report, "[f]or these Nazi victims, funds from the Swiss Banks Settlement for many people have meant the difference between subsistence and hunger." Special Master's Interim Report, at 88. Specifically, the Hesed network used the money to provide food packages to 40,352 needy survivors and to serve over 2.2 million hot meals to 5,558 needy survivors. The food packages, which consist of non-perishable staples such as flour, pasta, rice, beans, sugar, oil and a protein source such as canned fish, are intended to be given to survivors eight times per year. JDC Interim Report, at 14. Because of a lack of funds, many survivors only received them on Rosh Hashanah and Passover. The hot meals were served only once a day, an average of four times per week, also because of a lack of funds. *Id.* at 16. Indeed, although hunger relief programs have been at the heart of the JDC's relief efforts and have by all accounts been a great help, these programs ***103** have still only benefitted 40% of the survivors served by the Hesed network. Approximately 60% of survivors identified as impoverished in the FSU have received no hunger relief benefit from settlement funds, despite desperate need.

Using the other 45% of its 18–month budget, the Hesed centers provided an average of four hours per week of home care assistance to 4,258 needy survivors; winter relief packages to 3,688 needy survivors; medical services to 19,118 needy survivors; and emergency grants worth approximately $50 each to 60,359 needy survivors. *See* JDC Interim Report, at 9, 19. These programs, like the hunger relief efforts, have been targeted at providing people with the barest necessities. The winter relief packages include basics such as fuel, blankets, and coats. And the home care assistance—which for these survivors is not available from any other source—is even more revealing. When Hesed workers visit survivors' homes they can assist in anything from meal preparation and supervision of medications to pumping well water and chopping wood. *Id.* at 18, 20. Without these services, which have only been made possible by the allocation of settlement funds, many in the FSU would not be able to survive the winter. But again, because of still limited funds, only a small fraction of the needy survivors served by the Hesed network (all 135,000 of whom are in desperate need) have received such a benefit.

While the overall level of destitution is explained by the statistics, examples may paint a clearer picture of the degree of suffering experienced by survivors in the FSU.

> Rosa Zaitseva was 26 and pregnant when the Nazis first arrested her. Between 1941, when she attempted to flee Kiev ahead of advancing German forces, and 1944, when she was liberated by the Soviets, Zaitseva hid with her husband's relatives, languished in a ghetto, and fled to the forest, where soldiers shot at her from the trees. Her husband joined the partisans and disappeared, she gave birth to their daughter in a barn, and briefly changed her name to Nina to sound less Jewish.
>
> After the war, she returned to Kiev to find her apartment destroyed, and married a cousin who was injured during the war and died in 1968. Their only son died 17 years ago, and Zaitseva's daughter, who lives in Russia, has been ill since birth.
>
> Today, Zaitseva, 88, lives alone on the sixth floor of a rickety, Soviet-era building with pitch black elevators and unkempt hallways. Her pension is $30 per month. She is not recognized by the German government as a Holocaust survivor; in August 2000, the [Claims Conference, applying rules imposed by Germany,] turned down her request for assistance because she hadn't been imprisoned for at least six months in a concentration camp, prison camp, or forced labor battalion, and didn't spend at least 18 months in a ghetto, in hiding, or as a child under a false identity.
>
> Zaitseva, it seems, had fallen through the cracks.

Melissa Radler, *Acts of Kindness*, Jerusalem Post, October 19, 2003. Rena Zaitseva is not alone.

> Take Meirke Stoler, now 87, of Radin (Soviet-occupied Poland at the time of the Nazi invasion of 1941, now in Belarus). He was incarcerated ... in the ghetto there, until May 10, 1942, when some 2,000 Jews, including his wife, his child and his mother were shot and buried in a big pit at the old Jewish cemetery. Mr. Stoler, then a blacksmith, was one of 50 young Jews taken at dawn to dig the pit. He escaped by hitting his ***104** German guard over the head with a shovel and running into the forest.....
>
> [In 1999], Mr. Stoler had to send away the annual truckload of fuel to heat his wooden house over the winter, because it is now too expensive for him. His monthly pension comes

> to around $24 at the going rate. Things have gotten a lot worse since last year's collapse of the ruble in neighboring Russia, and like everyone else in these parts, his life's savings became worthless overnight back in 1991, when the USSR collapsed.
>
> Mr. Stoler had no idea that Holocaust compensation has become a hot topic in the West. He never received a penny in compensation and reacted with his usual jovial smile, in deep local Yiddish: "what am I going to do, find a big international lawyer here in Radin, ah?"

Dovid Katz, *How to Help the Holocaust's Last Victims*, The Forward, September 24, 1999 (cited in Plan of Allocation, at 124). These are just two of the 135,000 impoverished survivors, the overwhelming majority of whom have not benefitted from Germany's reparation plans (including the CEEF, which specifically targets a narrowly defined group of victims in the FSU), but who now might be saved from the brink of starvation and death by the Hesed network. Not all were reached in time.

> In 1943, [Yudel Nitzberg] and his family were deported from the local ghetto [in the FSU] to Auschwitz, where his father, mother, sister and brother were cremated alive. 'I always wear short sleeves,' he explained, pointing to the tattooed number 98987 on his arm, 'to make sure I never forget them for a minute. For better or worse, I have chosen to live and die right here, where my family lived for hundreds of years.' When asked what he needed to live well, his eyes lit up. The answer came without hesitation. 'We pensioners need an income of 100 American dollars per month per family. With that, we could live like Rothschild!' ... Nitzberg won't benefit from any such program. He died last year. Neighbors report that he was no longer able to afford the medicine that kept him going.

Id.

Serving these needy survivors has cost money, and will continue to cost money. Stuart Eizenstat correctly summarized the situation in reference to this case as follows:

> You have previously allocated 75 percent of looted asset money in the Swiss settlement (initially $100 million, increased by an initial interest amount of $45 million and then a second tranche of interest of $60 million, for a total of some $205 million) to victims in the former Soviet Union ... This has permitted the critically important distribution of food packages to some 135,000 survivors [actually only 40,000] in need in the CEE/FSU who have registered with the Hesed program of the American Joint Distribution Committee. **Nothing should be done to diminish this important program.**

Letter from Stuart E. Eizenstat to Judge Korman and Special Master Judah Gribetz, dated December 30, 2003 (emphasis added).

While the economic plight of survivors in the United States is less well documented, it is also clearly less pressing. Again, the best documentation we have for the economic position of United States survivors is the Brandeis Report, which consolidated findings from various studies. As support for his request for reconsideration, Mr. Dubbin, however, relies primarily on two of the principal surveys that informed the Brandeis Report's assessment of need in the United States. First is the NJPS, and ***105** second is a study commissioned in 2002 to assess the level of need among survivors in the New York area, entitled "Nazi Victims in the New York Area." *See* Ukeles Associates, Special Report, Nazi Victims in the New York Area: Selected Topics, November 2003 (hereafter, "Ukeles New York Report"). I turn first to the NJPS.

The NJPS estimated that of approximately 122,000 survivors living in the United States, 53,200 live in households making less than $35,000 per year. It also estimated that 29,700 survivors (or nearly a quarter of United States survivors) are living in households that fall below the federal poverty line, which is an annual income of approximately $9,000 for a single person household, $12,000 for a two-person household, and $15,000 for a three-person household. *See* NJPS Draft, dated December 18, 2003, at 13; Poverty Thresholds, available at *www.census.gov*. Again, the NJPS figures are based on a telephone survey where 146 survivors were requested to tell a complete stranger their income over the phone. Under these circumstances, a more trustworthy and revealing finding almost certainly came in response to the question: How would you evaluate your household's financial situation? Of the survivors who responded to the NJPS questions, under 2% (or an estimated 2,100 survivors out of the entire survivor population in the United States) reported that they "can't make ends meet." NJPS Draft, dated December 18, 2003, at 13. Another 35% of those surveyed

stated that they were "just managing," and 63% responded that they were either "comfortable," "very comfortable," or "wealthy." *Id.*

Part of the reason that all but a fraction of United States survivors who are ostensibly below or near the poverty line respond that they can make ends meet is that they have a social safety net on which to fall back. The researchers who prepared the Brandeis report "learned repeatedly that the lack of an adequate and effective social safety net in the FSU countries results in extreme hardship among Nazi victims." Brandeis Report, at 41. In the United States, however, should survivors find themselves in need, they can rely on the guarantees that living in America provides them. *See generally* Plan of Allocation, Annex F. The Special Master explained:

> In the United States, government entitlements generally assure a minimum income provided through the Social Security Administration. There also is an adequate level of health care provided through Medicare, a program designed to aid the elderly, and Medicaid, which supplements Medicare for needy elderly persons. These programs are intended to ensure that the majority of elderly residents maintain a sustainable, although hardly lavish, standard of living.

Id. at 8–9. Or, as the Brandeis Report concluded, while there is poverty among United States survivors, "[t]he undeniable fact ... is that the public and private social and economic protection systems to assist these groups and the normal process of adjustment reflecting the immigrant experience serve as buffers." Brandeis Report, at 46. Indeed, Joe Sachs, one of the founding members of HSF–USA and formerly Chairman of its Board of Directors, acknowledged that because of these buffers, poverty among United States survivors is less dire than Mr. Dubbin may claim. This is why he wrote: "As a Survivor and Board member of the Jewish Community Services of South Florida I am unable and unwilling to tolerate the inflated numbers of poverty stricken bandied about in the press." Letter from Israel J. Sachs to Judge Korman, dated January 15, 2004 (internal brackets omitted).

In 2000, according to the NJPS, 93% of survivors in the United States received ***106** Social Security payments, including 99% of all survivors who immigrated before 1965 and 84% of all survivors who immigrated after 1965. NJPS Draft, dated December 18, 2003, at 9. The average monthly Social Security payment that year was $749 for an elderly widow living alone and $1,348 for a retired couple. *See* Plan of Allocation, Annex F, at 9. Medicaid is often paid to survivors on top of this sum, and it is significant. For example, New York state, where half of all United States survivors live, paid approximately $29.2 billion for Medicaid in 2002. *See* New York State Department of Health, statistics, available at *www.health.state.ny.us.* The average amount awarded to each beneficiary was over $13,080, and it often included home health care. *Id.* Indeed, over 75,000 individuals in New York received Medicaid assistance for home health services, and another 105,000 received assistance with transportation in 2000. *Id.* Notably, these Medicaid payments, along with non-cash benefits such as food stamps and housing subsidies, are not considered when measuring a family's income for determining whether they fall below the United States poverty line. *See* United States Census Bureau, How the Census Measures Poverty, available at *www.census.gov.*

Mr. Dubbin also argues that the Ukeles Associates' report on survivors in the New York area vindicates his objections because it bolsters the NJPS's conclusion that a large number of survivors in the United States are poor. In preparing the Ukeles Report, over 4,500 interviews were conducted with individuals in the New York area, revealing 412 Nazi victims. Ukeles New York Report, at 2. From this, the researchers estimated that over 55,000 Jewish Nazi victims live in the New York area, and that half live in households with incomes below 150% of the federal poverty line. *Id.* at 3, 5.

While the Ukeles study paints a distressing picture of Nazi victims in New York, one must bear in mind that these survivors have available an exceptionally strong social safety net that will generally prevent the kind of destitution faced by almost all of the survivors in the FSU. Because of this social safety net, the federal poverty line is simply not the correct measurement of whether a survivor can or cannot make ends meet. Indeed, this is why the NJPS estimate that only 2,100 survivors in the entire United States cannot make ends meet seems consistent with the Ukeles study. Again, I do not wish to make light of the need in the United States survivor community, but the need faced here is of a different kind than that faced by survivors in the FSU. A recent article in the Jewish Week that describes the plight of survivors who immigrate to the United States from the FSU highlights this fact, notwithstanding that the article was apparently intended

to emphasize the economic difficulties faced by survivors. *See* Walter Ruby, *Victims Twice Over*, The Jewish Week, 1 (February 27, 2004). One of the survivors it focused on is named Faina Zaslavskaya:

> She and her husband live in Section 8 [subsidized] housing in Seagate, Brooklyn, not far from her children and grandchildren. Zaslavskaya says she and her husband receive a combined income from SSI of $950 a month—adequate for their modest needs because, unlike ex-Soviet refugees who arrived after them, they receive Section 8 assistance from the U.S. government that limits the amount of rent money they must pay to $180 a month. "Certainly we are grateful for the help we get, which affords us a better lifestyle than we would have in Russia." Zaslavskaya says. "Still, it hurts that many Americans think we take advantage of the system. They say things like, 'Look, ***107** that woman is wearing a fur coat and gets food stamps,' not realizing that she brought the coat from Russia and it is likely the only one she has. They don't understand how difficult it is for us."

Id. at 16. Another of the survivors it focused on was a man named Felix Straschnov, "an evacuee who endured typhus and starvation in Kazakhstan during the war" and fought for the Soviet army. *Id.*

> Today, Straschnov lives in Brooklyn and is active in the American Association of Invalids and Veterans from the Former Soviet Union.... Straschnov and his wife scrape by on $950 a month in combined SSI, of which they have about $400 a month left after paying rent. 'I am grateful for what America has done for us, but it is sad that we will never be able to accumulate enough money to go back to Russia one last time to see the graves of our late parents,' he says. 'Many of us worry, too, that when we pass on, our wives will not have the means to provide us with a decent funeral.'

Id. And a third survivor was a woman named Fira Stukelman, who explained her plight as follows:

> Thank God none of us are hungry or homeless ... Still, life is very hard for most ex-Soviet survivors of Nazism. Those of us over 65 receive a check from SSI [Supplemental Security Insurance] for $651 a month, but how does a person make do on such an amount when the rent of even a studio apartment has risen to $900 a month or more? Yes, many get food stamps of $100 plus a month and Medicare and Medicaid, which helps a lot. Still, it is very sad people who endured such terrible things in their lives still face such a daily struggle to survive in old age in wonderful America.

Id. at 14. Each of these survivors almost certainly lives in a household whose income falls below the federal poverty line, and each endures hardship, but each may report that he or she can make ends meet because of the various benefits provided by the social safety net. These services are wholly unavailable to survivors still in the FSU—survivors who are therefore in no position to "thank God none of [them] are hungry or homeless." On the contrary, "relief of starvation and hunger is the core life sustaining program that Hesed programs must provide and remains the service needed by the most Nazi victims in the FSU." JDC Interim Report, at 13.

3. My allocation decision

When dealing with a finite sum of money, any allocation decision must be concerned with relative needs. I was compelled with the first distribution of $100 million, and the subsequent distributions of "excess" funds of $45 million and $60 million, to give 75% of the money to the source of the greatest need—survivors living in the FSU—and 4% of the money to survivors in the United States. Mr. Dubbin claims that my decision was based on a "seat of the pants" assessment by the Special Master that bears no relation to demographic data. HSF Response, at 12. Anyone who takes the time to read the Special Master's studied and comprehensive Plan of Allocation will know that this was as thoughtful and careful an allocation as could have been made. It was a concerted effort to quantify conditions that inherently resist a numerical assessment. Indeed, the fact that Mr. Dubbin calls it a standardless "seat of the pants" assessment leads me to wonder whether he has ever read the Plan of Allocation. Because of the extensive justification provided in the Plan of Allocation, I need not enter into a strict numerical debate defending the specific distribution of Looted Assets ***108** Class funds. However, because Mr. Dubbin is apparently so concerned with numerical standards, I will briefly address the debate on Mr. Dubbin's terms.

Of the Looted Assets and excess funds, I have thus far allocated to needy survivors in the FSU 18.75 times the amount I have allocated to needy survivors in the United

States. If I were to assume that every needy survivor deserved the same amount of money, that would mean that there should be 18.75 times more needy survivors in the FSU than there are in the United States. There are at least that many. The JDC has clearly documented at least 135,000 survivors in the FSU who are in desperate need, more than the entire survivor population in the United States. Thus, even in Mr. Dubbin's terms, the 18.75 number would be subject to challenge only if there were more than 7,200 survivors in the United States who are in comparable distress. The empirical evidence that has been produced has not identified 7,200 such people.

Mr. Dubbin, recognizing that not all survivors at or near the poverty line are experiencing a level of distress sufficient to warrant payment, only claims to have identified 4,000 needy survivors in the United States—equating "need" with home care and related services. He claims (with no support) that up to 8,000 more will be identified through outreach. But if I rely on the NJPS Draft study, the number may be as low as 2,100 people, as this is the estimated number of people who "can't make ends meet." NJPS Draft, dated December 18, 2003, at 13. Even if I accept the affidavits Mr. Dubbin submits in support of his argument, the number of total needy survivors in the United States may only be between 2,800 and 5,600. This estimate would be consistent with the declaration of David Paikin, Senior Vice President of the United Jewish Community of Broward County, Florida, who wrote in support of the HSF–USA proposal. *See* Motion for Immediate Distribution, at Tab 5. Mr. Paikin explained that there are between 5,000 and 10,000 survivors living in Broward County, up to 230 of whom may need additional home health care (Mr. Dubbin's apparent proxy for need in the United States). *Id.* This still represents only 2.3% to 4.6% of the survivors in Broward County, Florida, a state with one of the least extensive social safety nets in the country. Taking this level of need as representative—in fact, it is probably higher than average given the low level of public assistance provided by the state of Florida—one would expect to find between 2,800 and 5,600 survivors nationwide requiring home health care.

In sum, Mr. Dubbin has produced no evidence to undermine the percentage allocation reached by the Special Master, and adopted by me. Instead, the empirical evidence supports my decision. Notwithstanding this, I now turn directly to Mr. Dubbin's objection and proposal, as he questions not merely my identification of needy survivors, but my method of identification.

4. Mr. Dubbin's objection and proposal

Mr. Dubbin concedes that the *cy pres* allocation to the Looted Assets Class should not be distributed *pro rata* among each of the members of the Class (a class which includes all survivors and their heirs). Indeed, he apparently agrees that the money should be given to the neediest survivors. But he objects to my decision to give only 4% of the funds to needy survivors in the United States. Given the distribution of need outlined above and described more extensively in the Special Master's Plan of Allocation, and given the total lack of contradictory demographic ***109** data produced by Mr. Dubbin, this objection is frivolous.

Instead of trying to determine a way to equally distribute a finite sum of money to the neediest of *all* survivors, Mr. Dubbin's objection proceeds from the premise that geography should be the controlling factor. He argues that needy survivors in the United States should be awarded 25% of the funds because approximately 25% of survivors live in the United States. Mr. Dubbin provides no demographic support for his claim that 25% of all survivors live in the United States. This figure is inconsistent with prior surveys and Mr. Dubbin has apparently abandoned in favor of 20% in his most recent proposal for the distribution of residual funds. *See* Plan for Providing Assistance for Needy Nazi Victims in the United States Submitted by HSF–USA, dated January 30, 2004, at ¶ 27, available at *www.swissbankclaims.com.* I will not waste time addressing its veracity. The precise percentage of survivors living in the United States is irrelevant for the purpose of dealing with Mr. Dubbin's objection. Mr. Dubbin's objection is frivolous because there is no Looted Assets Class sub-class composed of United States survivors. The relevant sub-class is the Looted Assets Class itself, and it is composed of *all* victims of Nazi persecution *and* their heirs whose assets were looted by the Nazis. It is not subdivided geographically. There is no "U.S. Survivors' share." HSF Response, at 15. To the contrary, the only way survivors in the United States would be entitled to 25% of the funds from the Looted Assets Class would be if they showed that 25% of the most pressing need among Jewish survivors globally was in the United States.

Mr. Dubbin even argues that, "if the present allocation scheme is not corrected, the settlement would violate Rule 23, because it would compromise the Looted Assets claims of the U.S. Survivor community for virtually no consideration." *Id.* at 18. He continues: "[N]o goal, not even the increase in the total settlement fund can justify a settlement that eliminates *the rights of one sub-class of plaintiffs* in order to confer a

benefit on another sub-class." *Id* (emphasis added). Again, because there is no sub-class of United States survivors, this claim is baseless. The percentage of survivors who live in the United States is irrelevant for my distribution decision because all survivors are members of the same sub-class—the Looted Assets Class. There are no further divisions, by geography or otherwise. As Professor Neuborne has written: "Mr. Dubbin's effort to drive legal wedges between and among Holocaust survivors based on where they live is therefore simply wrong as a matter of law and policy." Supplemental Neuborne Declaration, at ¶ 38.

The only relevant question is what percentage of the *need* among all survivors can be found in the United States. According to demographic data set forth above, data that Mr. Dubbin has yet to refute, only a small fraction of the neediest survivors live in the United States. Mr. Dubbin would provide these relatively few needy survivors with a disproportionate benefit solely because of the overall size of the survivor community in the United States. Such an allocation is arbitrary and unreasonable. Its flaws are better understood by a detailed look at Mr. Dubbin's proposal.

Mr. Dubbin has put forth only one "concrete" proposal, first presented in connection with his objections to the Special Master's recommendation on how to distribute the first allocation of excess funds, and resubmitted now. *See* HSF Objection to Allocation of Interest; Motion for Immediate Distribution, Tab 4. The proposal, entitled ***110** "Proposal for Improved Services for Holocaust Survivors in the United States," was prepared by Bert Goldberg, President of the Association of Jewish Family & Children's Agencies (AJFCA). While Mr. Dubbin continues to refer to this HSF–AJFCA Proposal, he apparently recognizes its own shortcomings. Indeed, if this proposal were ready to be implemented, there would be no need, when calling for the "immediate distribution" of funds, for him to demand that the funds be placed "in trust to be spent in accordance with the decisions of a committee of HSF survivors," representatives of other organizations, and "the Court." Motion for Immediate Distribution, at 1 n. 1. Regardless, I consider the proposal as a part of Mr. Dubbin's objection and as evidence of its flaws.

The HSF–AJFCA proposal is riddled with vague assertions and unsupported estimates, but at core, it is a proposal that would give 25% of the funds allocated to the Looted Assets Class to, *at most*, 12,000 survivors in the United States for supplemental home health services. Mr. Goldberg claims that approximately 4,000 identified survivors are already receiving considerable but insufficient aid from Jewish human services agencies, and 8,000 more could be identified by an outreach program. He would like to provide more complete home health services to this group. To implement this proposal, Mr. Dubbin demands $30 million annually, of which he claims $10.5 million is needed for home care services for the already identified needy survivors; $3 million is needed for emergency services; $3 million is needed for transportation services; $3 million is needed for outreach; and $10.5 million is needed for services to those survivors who would be newly discovered as needy through the outreach. Motion for Immediate Distribution, Tab 4, at 7.

First, Mr. Dubbin's $30 million per year budget cannot be reconciled with the limited funds available for distribution. As explained earlier, Mr. Dubbin has demanded that out of $200 million he has proposed be reallocated to the Looted Assets Class, $50 million be set aside for "immediate distribution" to survivors in the United States. This $50 million sum is based on the premise that 25% of all survivors reside in the United States—an estimate that he has already reduced to 20%. Even if I were to grant this "immediate distribution" of $50 million it would only be sufficient to pay for less than two years of his proposal (and a still shorter span if the sum were reduced to $40 million to correspond with the concession that closer to 20% of survivors reside in the United States). Under his proposal, there would be no money for assistance programs necessary to provide needy survivors with assistance over time. As the Special Master wrote in his Plan of Allocation: "Social services needs that appear imperative today may diminish in a few years' time, while other demands not yet anticipated—especially with an aging population—may later arise." Plan of Allocation, at 136. Indeed, this is why he advised that, "there should be a presumption that funding of these recommended social services programs will be maintained for a period of up to ten years." *Id.* Mr. Dubbin apparently sees no need for such continuity.

Second, Mr. Dubbin's identification of need is unreasonably vague. Specifically, Mr. Dubbin proposes allocating these funds to the HSF in conjunction with the AJFCA for the benefit of the approximately 4,000 survivors in the United States whom Mr. Goldberg claims have been identified as being in poor health and in need of home care and related services. *See* Motion for Immediate Distribution, Tab 4. The problem with relying on the estimate of 4,000 individuals is that by his ***111** own admission, Mr. Goldberg does not

know whether they all actually need more assistance than they are already receiving. Indeed, Mr. Goldberg describes the 4,000 individuals he has "identified" as follows:

> Approximately 4,000 individuals currently receive in-home services provided either directly by the Jewish human service agency in their community or by referral and paid for by the local agency. It should be noted that, in addition to services made available by funds supplied from Jewish communal resources, home care for the elderly is provided (or not provided, depending on the state) with funds provided by Medicaid and/or Medicare. It bears note that, in some cases, these services are purchased on the 'gray market,' from non-licensed and unsupervised providers, or from agencies that are not part of the Jewish communal network. In addition, frequently, family members provide some or all of the services needed. **All of these factors make it extremely difficult to obtain a definitive estimate of the home care needs.**

Motion for Immediate Distribution, Tab 4, at 3 (emphasis added).

Thus, it seems clear that at least some number of the 4,000 identified individuals receiving home care and related services from the Jewish human services agency in their community are also receiving services from other sources. Nevertheless, this soft and speculative number becomes the basis for Mr. Goldberg's estimate of how many survivors are in need of settlement funds. Specifically, Mr. Goldberg claims that these 4,000 individuals are only "half" of the needy survivors in the United States. Mr. Dubbin then demands that I fund an outreach program through which Mr. Goldberg claims his Foundation could find 8,000 more. *Id.*, at 7. Either Mr. Goldberg is careless with his words or poor with his math, because this makes no sense. It is also irrelevant. Neither Mr. Dubbin nor Mr. Goldberg has produced any concrete evidence to substantiate the estimate that their agencies could locate 4,000 or 8,000 such survivors. Indeed, the only support for the proposed outreach program is the following conclusory statement: "Agencies further report their belief that they currently know of only half the survivors in need of services in their community." *Id.* This unsupported "belief" is hardly enough to warrant an allocation of $13.5 million annually, Mr. Dubbin's estimated cost of the outreach program and services to the newly identified survivors. While not all studies are infallible, Mr. Dubbin has yet to present a single one to substantiate his projected outreach estimates.

A more revealing estimate of the likely success of Mr. Dubbin's outreach program is provided by Mr. Paikin, who submitted a declaration in support of Mr. Dubbin's proposal, which I discussed earlier. *See* Motion for Immediate Distribution, at Tab 5. To reiterate, Mr. Paikin explained that there are between 5,000 and 10,000 survivors living in Broward County and that in June 2003, 106 were receiving (not merely in need of) home health care. *Id.* He estimated that given recent trends of needy survivors coming forward, that number could increase to 230 with additional funding and outreach. *Id.* Assuming that this percentage of survivors needing home care is representative of the nationwide survivor population, between 2,800 and 5,600 survivors nationwide require home health care. Many of these survivors, of course, may be able to pay for their required services without resort to settlement funds, and many —particularly those not living in Florida—will be able to receive public assistance. Mr. Paikin's estimate, along with the surveys set out earlier, thus suggest that Mr. Goldberg, faced ***112** with what he acknowledges are "factors [that] make it extremely difficult to obtain a definitive estimate of the home care needs," has submitted a proposal based on mere guesswork—not the kind of proposal that justifies the expenditures sought.

Mr. Dubbin's objections to the assistance of desperately needy survivors in the FSU may be rooted in the apparently differential views as to survivors of the Holocaust held by those who make up HSF–USA. As I stated at the outset, comparing different populations of survivors is by definition an odious process. Some of the groups that claim to be members of HSF–USA have made the process no easier by repeatedly suggesting that the survivors living in the FSU (or by the same logic, former FSU survivors who have immigrated to Israel and the United States) are not "true survivors." For example, Leo Rechter, one of the founding members of HSF–USA and now its Secretary, wrote:

> Most Jews currently residing in the FSU never saw a Nazi uniform. As you know, by the time the Nazis invaded Russia, they used 'Einsatzgruppen' to kill most of the unfortunate Jews they captured. In the communist FSU,

> most of those that fled eastward were able to take their most precious belongings along and did not own the real-estate they left behind. The destitute elderly Jews in the FSU are victims of the ravages of WWII (like many non-Jews in the civilian population) and of the failed communist economic system and they ought to get as much charitable assistance as possible. But by no stretch of the imagination can they be considered to be legitimate members of the 'Looted Assets' Class or any other Class.

Letter from Leo Rechter to Professor Neuborne, dated July 22, 2002.

I have already refuted this claim by providing Mr. Rechter with a study, entitled "Plunder of Jewish Property in the Nazi Occupied Areas of the Soviet Union," by Yitzhak Arad, a researcher on the Holocaust for the International Center for Holocaust Studies at Yad Vashem. *See* Letter from Judge Korman to Leo Rechter, dated September 23, 2002 (enclosing study, available at 29 Yad Vashem Studies 109–48 (2001)). Indeed, in proposing his recommendations for the Looted Assets Class, the Special Master explained in considerable detail that as was "true for Nazi victims across Europe, Jews in the former Soviet Union who lived in, owned property in, or fled from areas under Nazi occupation lost virtually all of their material possessions to the Third Reich's plunder, which in Eastern Europe was led by the notorious *Einsatzgruppen*, often assisted by the local population." Plan of Allocation, at 123. The "Looted Assets Class" annex to the Plan of Allocation (Annex G) made it clear that "Nazi victims' assets, and particularly those of Jews, were plundered with abandon and without precedent across all nations, all economic classes, and without regard to the ultimate fate of the victim—whether that victim was murdered in an extermination camp or work camp, or fled abroad to the East." Plan of Allocation, Annex G, at 3. The Annex provided numerous historical examples demonstrating that those living in the former Soviet Union and other Eastern European countries were no less exempt than Western Europeans from Nazi plunder. *See id.*, at 15 (describing recent research by United States Holocaust Memorial Museum scholar Dr. Martin Dean, documenting transfer to the Reichsbank of assets from Belarus, Ukraine, Lithuania and elsewhere; Dr. Dean's research paper tellingly is entitled "Co-operation and Rivalry: Civil and Police Authorities and the Confiscation of ***113** Jewish Assets in the Reich and the Occupied Soviet Territories").

Despite the Plan of Allocation and my letter enclosing the Arad study (research which was published after the Plan of Allocation was adopted), HSF–USA apparently remained unconvinced. When Mr. Dubbin initially submitted his $30 million per year proposal, he wrote, in deference to the views of the groups making up HSF–USA:

> The HSF Survivors assume for purpose of this Objection the correctness of the Special Master's conclusion that the Victims of Nazi Persecution in the Former Soviet Union [are] qualified members of the Looted Assets Class. *See, e.g.*, Special Master's Report at 23–6, and Annex G, at G–6 and G–7. The Court understands that differences of opinion exist on this question, but that they are not discussed in this request.

Objections, dated September 27, 2002, at 11 n. 11. This sort of backhanded suggestion has no place in the distribution process. Or, in the words of The Forward: "Some in the group [HSF–USA] reportedly have had the effrontery to suggest that Holocaust survivors in the former Soviet Union aren't necessarily Holocaust survivors, since many avoided the Nazis by fleeing to Siberia. That's outrageous." Editorial, *Justice Delayed, Peevishly*, The Forward, September 13, 2002. All who suffered and lost assets are equal members of the Looted Assets Class. The only difference relevant to the distribution process is their current level of need.

Mr. Dubbin's hesitation in acknowledging that survivors in the FSU are true survivors is also inconsistent with his current position and raises serious questions regarding the claim of HSF–USA that it represents all needy survivors in the United States. The overwhelming majority of the most needy survivors in the United States are recent immigrants from the FSU. And Mr. Dubbin must surely recognize that the survivors still in the FSU are the same as the survivors who he inevitably embraces as "true survivors" once they immigrate to the United States and who, by consistently being among the neediest survivors in America, bolster his claim that the survivor community in the United States is in desperate need. Indeed, as the Brandeis Report concluded, in "the United States, poverty rates are especially noteworthy among recent immigrant victims from the FSU." Brandeis Report, at 44. Or in the words of the Ukeles study, "Nazi victims in Russian-speaking households are much more likely to be poor [81% as compared to 21%] than Nazi victims in non-Russian-speaking households." Ukeles New York Study, at 6. This is not because individuals living in Russian-speaking households

cannot succeed in New York; it is because 67% of those in Russian-speaking households have arrived in the United States since 1990. *Id. Essentially, the fact of being a recent immigrant from the FSU is the best predictor of poverty for survivors in the United States.*

Finally, Mr. Dubbin makes two more outlandish claims on this score that warrant additional comment. First, Mr. Dubbin has argued that the allocation formula I have employed thus far "constitutes, in the eyes of the American Survivor community, a de facto exercise of charity using their money." Letter from Samuel Dubbin to Judge Korman, dated October 29, 2002, at 4. Setting aside the fact that, as I explained earlier, the money is not "their money," Mr. Dubbin must recognize that this objection is inconsistent with his own proposal. Mr. Dubbin would take money that he claims belongs to the American Survivor community and give it to *at most* 12,000 individuals, or less than 10% of its estimated 122,000 members. Indeed, although the number of survivors in the ***114** United States living below the poverty level has been estimated at 30,000, the overwhelming majority of them would not benefit from Mr. Dubbin's proposal. It is hard to see how this proposal would survive Mr. Dubbin's own objection to the Special Master's Plan of Allocation as coercing charity.

Second, Mr. Dubbin argues that "had the Special Master's Initial Allocation Plan [to give United States survivors only 4% of the money] been published *prior to* the time the Class members had an opportunity to opt out, there would have been a massive opt out by Looted Assets Class members from the United States—over 100,000 members of the Settlement Class," which he maintains "would undoubtedly have threatened if not destroyed the settlement itself, as the Swiss Banks would likely not have tolerated the exodus of one-fifth of the settlement class despite the supposed 'weakness' of the looted assets claims." HSF Response, at 19–20.

The "mass opt-out" argument, like the "charity" argument, could apply with equal—or greater—force to Mr. Dubbin's proposed plan of allocation, a plan that would exclude 90% of the survivors in the United States from any share in the *cy pres* distribution to the Looted Assets Class. The basic fact is that each of the legal objections Mr. Dubbin makes to the Special Master's plan of allocation applies equally to his own proposal, because both plans accept the premise that the limited funds available for distribution should go to the neediest members of the Class. This premise is legally sound and morally justified. Mr. Dubbin's proposed application of it is not.

More significantly, Mr. Dubbin's "mass opt-out" claim ignores the fact that the United States survivor members of the Looted Assets Class are very often members of each of the other sub-classes as well (except for the relatively small Slave Labor II Class). The benefits directly paid to over 151,000 Jewish survivors worldwide (or, in the case of bank accounts, heirs) from these three *other* classes—Deposited Assets, Slave Labor Class I and Refugees—total over $358 million to date. Nearly 37,000 survivors living in the United States have received over $107 million of that sum. In other words, U.S. survivors have received approximately 29.9% of all settlement funds distributed to date. Had they opted out and pursued the novel legal theories underlying the case on an individual basis, they likely would have received nothing.

By contrast, the desperately poor survivors in the FSU, who lack the bare necessities of life and who were victims of Nazi persecution, receive next to nothing from their membership in the Deposited Assets Class, Slave Labor I Class or Refugee Class. They were living under communism and most did not have access to Swiss Banks, most did not seek refuge in Switzerland, and many were not Slave Laborers. Even though they suffered terribly as a consequence of the Nazi onslaught and lost whatever they had, the only significant benefit they receive from the Settlement Agreement is from the *cy pres* allocation for members of the Looted Assets Class. One could easily argue that without such an allocation, they would have had much more of an incentive to opt-out than survivors in the United States. Mr. Dubbin apparently overlooked this fact (along with seemingly all of the other facts relating to the survivors in the FSU) when making his argument.

Mr. Dubbin has written: "If continued into the future at [the current allocation formula] with an additional $500 million likely to come available, the FSU would receive a total of $528 million, Israel would receive a total of $87.5 million, and the ***115** U.S. would receive $28.3 million for the needs of Survivors here. Though such an outcome seems fantastical, the U.S. Survivors have seen nothing in this case to suggest it is not a distinct possibility." HSF Response, at 11 n. 8. I do not address here the issue of how future funds will be distributed. This is partly because I specifically gave the public the opportunity to submit sound, *concrete* proposals to guide my decision. First the Special Master will review the proposals and make a recommendation. Then I will hold a hearing and make a decision. If, after reviewing the

many proposals submitted, the "fantastical" outcome that Mr. Dubbin fears proves to be how the needs of the class are best satisfied, there would be nothing fantastic about it. It would be an honest and tragic reflection of current levels of need.

Part II: The Standing of HSF–USA to object

[3] I turn now to the question of whether HSF–USA even has standing to bring these objections. HSF–USA relies on the principle that a membership corporation has standing to litigate on behalf of its members. While HSF–USA does not number any needy victims of Nazi persecution among its own members, it argues that some of its constituent entities have such victims among their membership and that this confers standing on HSF–USA to litigate on behalf of these individuals. I have reviewed the Certificate of Incorporation of the HSF–USA and its by-laws. My reading of these documents suggests that HSF–USA is not a membership corporation even though Article 4 of the Certificate provides that "[t]he Corporation may have members if the Board of Directors determines that it would be in the best interest of the Corporation to do so." The Bylaws of HSF–USA state in relevant part: "The Corporation should have a special class of members referred to as 'Founding Members.' The Founding Members should consist of the initial Board of Directors of the Corporation, and Thomas Weiss, M.D."

While the Memorandum of Law submitted by HSF–USA alleges that it is "comprised of Survivors and Survivor groups that are membership organizations which function in many capacities for Survivors today," Response of Holocaust Survivors Foundation–USA, Inc. on Standing Issues at 3 (hereafter "HSF Standing Response"), and that "there *are* a large number of Survivors who are part of HSF and its member organizations," *id.* at 6, not a single affidavit or corporate document has been submitted that establishes that any organization has been elected to membership in HSF–USA by the Board of Directors. Under these circumstances, HSF–USA cannot invoke the principal that, under certain circumstances, "an association has standing to invoke the court's remedial powers on behalf of its members." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (quoting *Warth v. Seldin*, 422 U.S. 490, 505, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

Moreover, even if some of the groups that are said to "comprise" HSF–USA had been elected to membership and might individually have standing to object on behalf of their members, HSF–USA would lack such standing. As Professor Neuborne wrote:

> I question ... whether in the circumstances of this case, Rule 23 or the prudential aspects of Article III standing authorize such a self-described umbrella organization to purport to act on behalf of unnamed individuals who are allegedly members of one or more of 50 constituent organizations, without producing any evidence that the individuals are aware of the action, and have authorized ***116** its prosecution. Allowing counsel for such a self-appointed umbrella group with no members of its own to purport to assert the legal rights of alleged members of constituent organizations without producing proof that individuals with standing actually exist who wish the action to proceed virtually invites entrepreneurial lawyers to claim to represent individuals who may not exist, who have never heard of the lawyer, and who, in fact, disagree with the position asserted.
>
> Moreover, whatever the general rule concerning the role under Rule 23(e) of organizations purporting to represent categories of class members without their explicit assent, the particular circumstances of this case argue strongly against recognizing the status of HSF as a self-appointed legal proxy for unnamed members of its constituent groups. Where, as here, the interests of the alleged beneficiaries of the HSF challenge are already adequately protected by careful submissions to the Court by established organizations such as United Jewish Communities and New York City Federation, organizations that actually provide services to the individuals in question, I question whether it is appropriate to accept a legal challenge from such a self-designated group in the absence of explicit authorizations from the alleged individuals whom HSF claims to represent, especially when HSF is represented by an attorney who has already sought to exploit the settlement by unsuccessfully seeking unreasonably large legal fees for providing alleged services to the plaintiff-class on behalf of another client, and whose pursuit of a meritless and ultimately abandoned appeal on behalf of that client actually delayed the distribution of funds to the Looted Assets class for at least six months.

Affirmation of Burt Neuborne, dated February 20, 2004.

Finally, HSF–USA would lack standing because it cannot be presumed that any of the organizations which HSF claims as "members" would themselves have standing. I have thus

far assumed, for the purpose of addressing the standing issue, the validity of the premise the Special Master used in formulating the plan of allocation—namely, that all survivors are members of the Looted Assets class. The Special Master adopted this presumption for allocation purposes because it would be impossible for any survivor to satisfy the necessary criteria for membership in the class. But as the Special Master explained in his original proposed plan of allocation:

> The Settlement Agreement indicates that only those who have asserted or may assert claims against a Releasee can claim membership in the "Looted Assets Class," i.e., that only those "Victims or Targets of Nazi Persecution" who were looted, and whose stolen property actually or allegedly was sent to or through Switzerland or Swiss entities, are entitled to participate in this Settlement.

Plan of Allocation, at 111.

As I explained in Part I above, the Special Master correctly observed that while it is well accepted by historians, including those representing Switzerland, that a primary purpose of the Nazi plunder was to transform loot (especially, but not only gold) into foreign currency by marketing these items in neutral nations, including Switzerland, determining "[w]hich particular looted item may have ended up in Switzerland ... is a far different matter." *Id.* at 114–15. "Were the Special Master to recommend that each [looted assets] claim be assessed individually ... the result would be an unwieldy ***117** and enormously expensive apparatus to adjudicate hundreds of thousands of claims, for losses which can barely be measured and hardly documented, *and whose connection to Switzerland, or a Swiss entity, if it ever existed, probably no longer can be proven.*" *Id.* at 115 (emphasis added).

While these and other considerations led the Special Master to treat all survivors as Looted Assets Class members for the purpose of devising a rational plan of allocation, it does not follow that every survivor should be treated as a member of the Looted Assets Class for all purposes. Simply stated, a survivor who seeks to assert objections to the Special Master's Plan of Allocation must still show that he or she has standing as a result of a direct injury that brings him or her within the true definition of the Looted Assets Class. Of course, the same showing must be made by a membership corporation seeking to litigate on behalf of such a survivor.

In sum, I find the HSF–USA has no standing in this case. Nevertheless, I would not lightly ignore objections that have compelling merit, even if made by an *amicus curiae*. The HSF–USA objections have no merit.

Part III: Mr. Dubbin's Fee

[4] Finally, because I have ruled on Mr. Dubbin's various proposals, motions and objections, it is appropriate here to dispose of Mr. Dubbin's outstanding fee application. Two years ago, Mr. Dubbin submitted a fee application that was almost equal to the total amount of legal fees awarded to those counsel who were compensated for their role in obtaining the $1.25 billion settlement with the Swiss banks. Specifically, Mr. Dubbin requested $3.6 million in fees and compensation for himself and an additional award of $2,315,250 for Dr. Thomas Weiss, a founding member of HSF–USA. *See* Verified Motion for Attorney's Fees and Expenses, dated March 15, 2002 (hereafter "Motion for Mr. Dubbin's Fees"); Declaration of Thomas Weiss, M.D., dated May 16, 2002. Mr. Dubbin also sought expenses in the amount of $70,260.87. *Id.* Of the total $5.9 million that Mr. Dubbin seeks, approximately $3 million is for his efforts on behalf of HSF–USA and its predecessor, the South Florida Holocaust Survivors Coalition, with respect to his objective described in the earlier parts of this opinion—namely, his effort to rectify the allegedly disproportionate sum allocated to survivors in the United States. The remaining $2.9 million, of which Mr. Dubbin seeks $600,000 for himself and $2.3 million for Dr. Weiss, who was Mr. Dubbin's client, is for services rendered in connection with Dr. Weiss's objection to the releases granted to Swiss insurance carriers as part of the global settlement of all claims against Swiss business entities. I will address the latter request for counsel fees in a separate opinion, to follow shortly. Here, I reject outright Mr. Dubbin's request for $3 million as it relates to the subject matter of this opinion.

I begin by observing that this fee request is for services rendered as of March 15, 2002—before the submission of the various proposals, objections and motions discussed above. Because I have rejected each of Mr. Dubbin's claims, it seems obvious that since that date, he has accomplished nothing in relation to his efforts to correct the supposed imbalance in the allocation of funds to the Looted Assets Class. This allows me to briefly deal with Mr. Dubbin's $3 million fee request for his work prior to the filing of his fee application.

I read carefully Mr. Dubbin's affidavit in support of his fee application. While I am prepared to accept for present

purposes that he may have expended time and effort ***118** to obtain assistance from various sources for his clients, the Settlement Fund was not set up to pay legal or other expenses of survivor groups. If Mr. Dubbin is entitled to compensation from the common fund, it must be for benefits conferred on members of the Looted Assets Class, and more specifically, benefits associated with his professed goal of achieving a different distribution of funds allocated to the Looted Assets Class. After all, "[t]hose who receive no benefit from the lawyer's work should not be required to pay for it." *Van Gemert v. Boeing, Co.*, 573 F.2d 733, 736 (2d Cir.1978).

The following is a brief summary of what Mr. Dubbin in fact did before filing his fee application with reference to the issues discussed in this opinion. After I approved the Settlement Agreement on August 9, 2000, Mr. Dubbin filed a notice of appeal on behalf of Dr. Weiss. Prior to the filing of Dr. Weiss's notice of appeal from the judgment approving the settlement, I had a telephone conference with Dr. Weiss, Mr. Dubbin, and Professor Neuborne in which I attempted to dissuade Dr. Weiss from filing the notice of appeal. This conference is pertinent to Dr. Weiss's and Mr. Dubbin's effort to rip off an additional $2.9 million for the objections to certain releases granted to Swiss insurance carriers, which I will address in depth in a separate opinion. Now, I add only that Dr. Weiss demanded that I provide money to fund private research for a separate litigation in exchange for his not filing a notice of appeal. I refused.

Subsequently, Mr. Dubbin filed a notice of appeal on behalf of Dr. Weiss and others from my approval of the Plan of Allocation. After months of delay arising from Mr. Dubbin's difficulties in perfecting the appeals, Professor Neuborne and I met with Mr. Dubbin and Dr. Weiss. We pointed out that both appeals were without merit, but because distribution could not begin until all appeals from the order approving the Settlement Agreement were resolved, the presence of the first appeal could further delay the commencement of distribution. Approximately one week before Mr. Dubbin's appellate brief was due, Mr. Dubbin withdrew both appeals with prejudice having never filed a brief. Nevertheless, several other appeals from my order approving the Settlement Agreement remained, and the Court of Appeals did not affirm the judgment approving the Settlement Agreement and the Plan of Allocation until July 26, 2001. *See In re Holocaust Victim Assets Litig.*, 14 Fed.Appx. 132 (2d Cir.2001).

Mr. Dubbin claims that despite the withdrawal of his appeals, his efforts created a tangible benefit to American members of the Looted Assets Class that warrants $3 million in legal fees. Specifically, he points to a two-page letter that Professor Neuborne wrote after Mr. Dubbin withdrew his appeal. Mr. Dubbin describes this letter as follows:

> The compromise of the Appeals resulted in the valuable benefit to the American Survivors of the Lead Plaintiffs' Class Counsel's commitment to support an allocation to the American Survivor community from funds remaining after the initial allocation (estimated by Professor Neuborne to be between $100 and $400 million) in their fair proportion of the world Holocaust Survivors population, and with due regard for the fact that they have not received significant allocations up to this point (less than 1%). This represents a potential additional value of between $25 million and $100 million or more....
>
> Although the Court has not ruled on any secondary distribution, the Lead Plaintiffs' Class Counsel's commitment, in a matter where the Defendants have *no* ***119** stake in how the remaining funds will be allocated, as enormous tangible value to the American Survivors, and was a direct result of the work Counsel did on their behalf up to and through the resolution of the Appeals.

Motion for Mr. Dubbin's Fees, at 62–63.

While Mr. Dubbin cites other benefits that he claims derive from Professor Neuborne's letter, *see id.* at 63–64, I can now state with certainty that those potential or intangible "benefits" amounted to nothing in terms of a direct benefit to the members of the Looted Assets Class. This is due in part to the flawed premise that needy survivors in the United States were not treated fairly, and in part to Mr. Dubbin's failure to submit a viable home and health care program or other proposal for Mr. Neuborne to support. Mr. Dubbin never undertook any serious effort to provide empirical evidence to support his claim that needy members of the Looted Assets Class who reside in the United States were being treated unfairly. In the end, he never impacted any distribution decisions. By contrast, the lawyers who sought compensation for obtaining the $1.25 billion settlement personally risked some $432,500 for litigation expenses, a substantial portion of which went toward original research that ultimately had a major impact on the success of their clients' settlement negotiations. One of these attorneys, Robert Swift, alone contributed over $100,000 to this effort. He was awarded a fee of $1.25 million. *See In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313 (E.D.N.Y.2002). This is how class action

lawyers who know what they are doing litigate, and this is how they win their fee.

In any event, I now turn to Professor Neuborne's letter, which Mr. Dubbin argues is worth $3 million in legal fees. The principal problem with this letter as the basis for Mr. Dubbin's fee application is that it only obligated Professor Neuborne to support certain proposals. It would have provided a benefit to members of the Looted Assets Class whom Mr. Dubbin claims to represent *only* if it achieved in some tangible way the objective of rectifying the alleged unfairness in the Plan of Allocation. This did not occur. Specifically, Professor Neuborne wrote:

> In connection with the [expected] secondary distribution, I have a great deal of sympathy with the argument that **the needs of poor survivors in the United States should be carefully considered.** I will support thoughtful plans designed to assure that the needs of the American survivor community are addressed, with resources in a fair proportion to their overall numbers, and with due regard for the fact that they have not received significant allocations up to this point. I would be delighted to support a serious, realistic plan for providing home and health care to needy survivors in the United States.

Letter from Professor Neuborne to Samuel Dubbin, Esq., dated May 15, 2001 (emphasis added). Read closely and in context, Professor Neuborne pledged to support plans designed to address the *needs* of the American survivor community in proportion to their overall numbers. Indeed, this is what he has done.

This pledge was simply a statement of Professor Neuborne's commitment to fairly represent the class as a whole, and is consistent with the policies underlying the *cy pres* distribution outlined in the Plan of Allocation. As Professor Neuborne explained, in writing to Mr. Dubbin:

> You were repeatedly informed by me and by Judge Korman that the letter carried absolutely no legal consequences. I accepted the anodyne language because I agreed with it. I stand by it today. In connection with any ***120** distribution of unclaimed funds, I support a careful consideration of the needs of poor survivors in the United States. I support allocations that correspond fairly to the number and plight of the poorest survivors in the United States. I support plans to provide the necessities of life to needy survivors in accordance with numbers and need.

Letter from Professor Neuborne to Samuel Dubbin, Esq., dated October 2, 2003. Under these circumstances, I cannot conclude that the May 15, 2001 letter was by itself worth between $25 million and $100 million to the Looted Assets Class. Instead, I look at the letter in the context of this case as a whole.

The only arguably tangible benefit I recognize as resulting from Professor Neuborne's May 15, 2001 letter was Professor Neuborne's pledge to support a "serious, realistic plan for providing home and health care to needy survivors in the United States." But this pledge, of course, has not created any actual benefit to survivors due to Mr. Dubbin's continued failure to put forth such a plan. Again, the letter itself is not something worth compensation—only what benefits may have actually accrued to Mr. Dubbin's clients as a result of the letter could be worth compensation. Because of Mr. Dubbin's inaction, there have been none.

CONCLUSION

This memorandum and order sets forth the reasons for my order of November 17, 2003, adopting the Special Master's Interim Report. It also specifically serves to (1) deny Mr. Dubbin's October 9, 2002 motion for reconsideration of my September 25, 2002 order regarding the distribution of excess funds, (2) deny Mr. Dubbin's December 2, 2003 motion for rehearing on my November 17, 2003 order, and (3) deny Mr. Dubbin's March 15, 2002 motion for fees to the extent that it related to his efforts to reallocate a larger sum of money from the Looted Assets Class to survivors living in the United States.

SO ORDERED.

End of Document

311 F.Supp.2d 407
United States District Court,
E.D. New York.

In re HOLOCAUST VICTIM ASSETS LITIGATION.
This Document Relates to: All Cases.

Nos. CV-96-4849(ERK)(MDG),
CV-99-5161, CV-07-461. | April 2, 2004.

Synopsis

Background: Following judicial approval of settlement of consolidated class actions brought by Holocaust victims against Swiss banks, 105 F.Supp.2d 139 and 2000 WL 33241660, homosexual rights advocacy group objected to proposed allocation of excess and possibly unclaimed residual funds to the Looted Assets Class, and proposed an alternative cy pres distribution, and disability rights advocacy group proposed an alternative cy pres distribution.

Holding: The District Court, Korman, Chief Judge, held that in light of the level of need experienced by individual members of the Looted Asset Class, suggestions that a portion of residual funds be allocated to research and educational programs regarding the plight of homosexuals in the Nazi era and its aftermath, and to disability oriented organizations, were not more consistent with original purpose of the Class than direct distribution to needy survivors.

Ordered accordingly.

West Headnotes (1)

[1] Compromise and Settlement
Construction, Operation, and Effect; Supervision

In light of the level of need experienced by individual members of the Looted Asset Class, suggestions that a portion of excess and possibly unclaimed residual funds, resulting from settlement of a class action brought by Holocaust victims, be allocated to research and educational programs regarding the plight of homosexuals in the Nazi era and its aftermath, and to disability oriented organizations, were not more consistent with original purpose of the Class than direct distribution to needy survivors.

2 Cases that cite this headnote

Attorneys and Law Firms

***407** Burt Neuborne, New York University Law School, New York City, lead class counsel.

Susan Sommer, LAMBDA Legal Defense and Education Fund, New York City, for the Pink Triangle Coalition.

Sid Wolinsky, Oakland, CA, for the Disability Rights Advocates.

Roger M. Witten, Christopher P. Simkins, Wilmer Cutler Pickering, LLP, Washington, DC, for defendants Credit Suisse and Union Bank of Switzerland.

MEMORANDUM & ORDER

KORMAN, District Judge.

I write here to address another allocation issue that has arisen in connection with the settlement of this class action, the background of which is set forth at *In re* ***408** *Holocaust Victim Assets Litigation*, 105 F.Supp.2d 139 (E.D.N.Y.2000). In an order dated November 17, 2003 I adopted the Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess and Possible Unclaimed Residual Funds (hereafter "Interim Report"), and I explained my reasons for that decision at *In re Holocaust Victim Assets Litigation*, 302 F.Supp.2d 89 (E.D.N.Y.2004). In my memorandum and order of March 9, 2004, I also responded to several types of objections to the allocation scheme that has governed the distribution of excess funds in this case. Now I respond to one more-this time the objectors argue that not all unclaimed funds should be distributed to needy survivors of the Holocaust.

The Pink Triangle Coalition, an international coalition formed to advocate for homosexual victims of the Nazis, filed a joint objection and proposal for the distribution of residual funds. Briefly, the Coalition "objects to the Special Master's Recommendation to the extent it inadequately accounts for the tragic historical record of Nazi persecution

and post-war repression of homosexual class members," and proposes an alternative *cy pres* distribution. Memorandum in Support of Joint Objection and Proposal of the Pink Triangle Coalition in Response to the Special Master's October 2, 2003 Recommendation, at 27 (hereafter "Pink Triangle Memorandum"). The Special Master's recommendation was that $60 million in excess funds be reallocated to the Looted Assets Class for distribution to the neediest survivors of Nazi persecution and that I solicit proposals for the distribution of any possible unclaimed residual funds. The Pink Triangle Coalition claims that this recommendation fails to adequately account for homosexual victims because homosexual victims are nearly impossible to identify and thus have not often been among the needy survivors receiving settlement funds. It requests that in order to adequately account for homosexual victims, 1% of excess funds be allocated not to needy survivors, but to programs devoted to research and education regarding the plight of homosexuals in the Nazi era and its aftermath.

Similarly, the Disability Rights Advocates (DRA), a non-profit law center founded to represent individuals with disabilities, has filed a Proposal for *Cy Pres* Award For the Class of "People who are Physically or Mentally Disabled or Handicapped" From the Allocation of Residual Unclaimed Funds. (Hereafter "DRA Proposal"). The DRA claims that although "[m]en, women and children with physical, mental, and emotional disabilities were subject to appalling acts of persecution during the Holocaust," these victims have been cut off from society and have thus not adequately benefitted from compensation programs. It contends that without a separate *cy pres* distribution, "the disabled victim class are at risk of failing to fairly benefit from the distribution of this extraordinary settlement." DRA Proposal, at 4. As a solution, the DRA requests that between 2% and 3% of all residual funds be allocated not to needy survivors, but to a "short term Trust that will provide grants to disability oriented, non-profit, non-governmental organizations." *Id.* at 6. While victims of Nazi persecution who were targeted because of a disability could be among the beneficiaries of this "trust," so too could any other disabled individual or disability rights organization. Though the DRA's proposal relates only to residual funds that will not be identified until the Special Master issues a recommendation on April 16, 2004, I address it now because it rests on logic similar to the Pink Triangle Coalition's objection and because my response may provide guidance to the Special Master in formulating his recommendation.

***409** I reject the Pink Triangle Coalition's joint objection and proposal and the DRA's proposal. I have already documented the tremendous need that currently exists among survivors. *See In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89. Needs exist among all survivor groups in all regions. For Jewish survivors in the Former Soviet Union, the President of the United Jewish Communities has described the nature of the poverty they face:

> I have seen severe non-Jewish poverty in my travels, but I had never seen Jewish poverty like this before. After visiting Jewish families living in small two room shacks, sheltering seven to eight people each and heated with coal stoves, I found myself profoundly grateful that we as Jews, through our federations and JDC, have a way to help. Like many of you who have visited the FSU, I had often visited more familiar scenes of shut-ins-older people who are assisted by our hunger relief programs. But here in Kharkov, [in the Ukraine,] the total poverty picture was striking, and the thought that we might lessen our efforts and allocations, well its just unacceptable.

Letter from Steven Schwager to Special Master Judah Gribetz, dated March 4, 2004 (enclosing e-mail from Stephen H. Hoffman, dated January 23, 2004). Dr. Spencer Foreman, the President of Montefiore Hospital and a member of the Board of Directors of the JDC, wrote the Special Master to the same effect after his annual field visit to the FSU. Specifically, he confirmed that adequate medical care is a particular problem.

> Diagnostic testing, specialties services and all but the most urgent hospital care are unavailable to those unable to pay for them, a group that includes virtually all of the Jewish elderly, and even when admitted to a hospital as an emergency out of pocket payment must be made for pharmaceuticals and medical equipment used during the hospitalization! Prescription medications are either unavailable or unaffordable for the average pensioner. Effective care is further

> strictured by the primitiveness of hospital and polyclinic facilities and by the scarcity of medical equipment, even the most basic items. While limited hospital care is available for trauma and acute medical problems, elderly patients with serious conditions such as stroke are often just sent home to linger bedridden or to die. A patient with a fractured hip, who in the West would be treated with a surgically inserted hip prosthesis and sent home in three days, is treated with traction for weeks then sent home, often with a non-union of the fracture, never to walk again. With the exception of a few major centers in Moscow and St. Petersburg and selected places available only to those who can pay, the services most people receive are at best comparable to those available in the U.S. in the 1950s, and they are in striking contrast to the high-quality care and advanced technologies to which elderly patients in the U.S. and Israel have access on a routine basis and for which, with a few exceptions, governmental or private payment is available.

Letter from Spencer Foreman to Special Master Judah Gribetz, dated January 15, 2004. According to the International Organization of Migration (IOM), for Romani and others living in Central and Eastern Europe, the situation is often the same.

> Eastern and Central Europe is a region where many persons, regardless of age or ethnic[ity], now endure daily living conditions which have worsened considerably since the end of communism. The elderly, and persons 'living on the edge' such as the Roma, have been hardest hit by the universal collapse of state services which once sought, however imperfectly, ***410** to meet some of their most basic material, social and medical needs.

Letter from Delbert H. Field, Jr., to Judge Korman, dated December 4, 2003. The needs of survivors elsewhere, while perhaps not as great, also cannot be ignored. Indeed, considering the level of desperate need among actual survivors of the Holocaust that can be alleviated through distribution of settlement funds, I cannot currently order a *cy pres* distribution aimed more generally at education, research or advocacy.

The Pink Triangle Coalition's Joint Objection and Proposal

The Pink Triangle Coalition's objection involves the distribution of $60 million in excess funds now reallocated to the Looted Assets Class, and its proposal involves the distribution of any residual funds that may remain after distributions to the Deposited Assets Class. While the final allocation of any residual funds has yet to be determined, the $60 million in excess funds is being distributed by the same principles that governed the initial allocation and distribution of $100 million to the Looted Assets Class in 2001 and the first supplemental allocation and distribution of $45 million to the Looted Assets Class in 2002. In my March 9, 2004 memorandum, I explained at length the distribution scheme that has governed the distribution of these excess funds allocated to the Looted Assets Class. *See In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89. I repeat a portion of that explanation here:

The Looted Assets Class is incredibly large. It consists of:

> Victims or Targets of Nazi Persecution and their heirs, successors, administrators, executors, affiliates, and assigns who have or at any time have asserted, assert, or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from Looted Assets or Cloaked Assets or any effort to recover Looted Assets or Cloaked Assets.

Settlement Agreement, Section 8.2(b). As the Special Master correctly reasoned, "[t]here is scarcely a victim of the Nazis who was not looted, and on nearly an incomprehensible scale." Plan of Allocation, at 111. After all, "it is well accepted by historians, including those representing Switzerland, that a primary purpose of the Nazi plunder was to transform loot (especially, but not only gold) into foreign currency by marketing these items in neutral nations, including Switzerland." *Id.* at 114. "With

only limited exceptions, however, the current historical record simply does not permit precise determinations even as to the material losses in total, much less the nature and value of the loot traceable to Switzerland or Swiss entities." *Id.* at 112. To prevent the expenditure of incredible sums on administration, the Special Master recommended that for allocation purposes, I assume that all survivors of the Holocaust and their heirs were valid members of this class, even if they could not prove an injury directly tied to a Swiss entity. I agreed.

I then was faced with two obvious and unsatisfactory possibilities for how to govern the distribution of money to this enormous class. I could have used a claims resolution facility to determine the validity and value of claims on a case-by-case basis, or I could have ordered a *pro rata* distribution to every member of the class. The first option, given the complete lack of adequate records, would have resulted in "an unwieldy and enormously expensive apparatus to adjudicate hundreds of thousands of claims, for losses which can barely be measured and hardly be documented, and whose connection to Switzerland, or ***411** a Swiss entity, if ever it existed, probably no longer can be proven." *Id.* at 114-15. The second option ... was equally problematic.... [F]or allocation purposes, the class includes all those who were victims of the Holocaust *and their heirs.* A *pro rata* distribution would have resulted in the payment of literally pennies to each of the millions of individuals who would fall into this class....

Fortunately, there [was] a more reasonable alternative. The Special Master recommended excluding heirs from any *pro rata* distribution, as was done with the Refugee and Slave Labor classes. While this would have increased the *pro rata* share of survivors, it would still have resulted in one-time individual awards that would not have been enough to provide any assistance to needy survivors and would have been insignificant to those who are not needy. Consequently, I adopted the accompanying recommendation of the Special Master and ordered a *cy pres* remedy targeting the neediest survivors in the Looted Assets Class. *See* Special Master's Interim Report, at 3 n. 3. The Special Master reasoned that these individuals "perhaps would be less in need today had their assets not been looted and their lives nearly destroyed" during the Nazi era. Plan of Allocation, at 117. I agreed that using the funds to provide relief to these neediest survivors over the course of ten years would be the way to most benefit the class as a whole. In order to reduce administrative costs, these funds were funneled through organizations that were already providing relief to survivor communities and could quickly provide aid. I reserved the right to grant other *cy pres* remedies as worthwhile proposals are presented, but my principal decision was consistent with Second Circuit law. *See In re Agent Orange Product Liability Litig.*, 818 F.2d 145, 158 (2d Cir.1987) (explicitly authorizing a district court to "give as much help as possible to individuals who, in general, are most in need of assistance" because it is "equitable to limit payments to those with the most severe injuries"). Indeed, the Second Circuit agreed. *See In re Holocaust Victim Assets Litig.*, 14 Fed. Appx. 132 (2d Cir.2001) (finding that appellants' challenge to my decision to apply the *cy pres* doctrine to the Looted Assets Class "lack[ed] merit").

In re Holocaust Victim Assets Litig., 302 F.Supp.2d at 95-96.

Initially, $100 million was set aside for the neediest survivors of Nazi persecution. Later, that sum was augmented by $105 million from excess funds that had accumulated on the settlement fund. *See id.*, at 90-91. Any further distribution to the neediest survivors will come from the residual funds, if any, that remain unclaimed from the amount set aside for the Deposited Assets Class.

In order to facilitate a speedy and equitable distribution, I ordered that 90% of the funds allocated to the Looted Assets Class be distributed to needy Jewish victims, and 10% be distributed to needy victims who were Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped. The International Organization of Migration (IOM) has handled the distribution of money allocated to needy survivors in the latter categories, and by the time of the Special Master's Interim Report, the IOM had reached over 50,000 such survivors. Interim Report, at 102. Most have been Roma. The IOM has had far less success identifying homosexual targets of Nazi Persecution.

The lack of success in identifying homosexual victims has not been for want of effort. The Special Master reported, "the IOM continues to consult with experts and non-governmental organizations as to how ***412** best to locate and serve needy disabled and homosexual Nazi victims." *Id.* at 105. He continued:

> IOM has been in contact with an interlocutor for homosexual survivors regarding a needs assessment for the provision of HSP [humanitarian] assistance. IOM still awaits a response

> from this interlocutor, which should include a list of potential beneficiaries, before making additional enquiries in this regard. Since submitting the Supplemental Proposal [of June 10, 2002; approved by Court order dated June 24, 2002], in an effort to reach survivors, IOM has also contacted a further fifty (50) homosexual NGOs, foundations and organizations which work in support of this community throughout Europe. To date the response has been extremely limited.

Id., at 105 n. 147 (citing "Humanitarian and Social Programmes (HSP) Quarterly Report for the Period July-September 2002," dated October 11, 2002, at 12). It has simply been extremely difficult to identify survivors of Nazi persecution who were targeted for victimization because they were homosexual.

The Pink Triangle Coalition readily admits that survivors targeted for being homosexual are hard to find. Indeed, the Coalition itself has only identified seven living needy survivors who were targeted by the Nazis on account of their sexual orientation. *See* Pink Triangle Memorandum, at 16 ("Extensive efforts to locate remaining gay survivors of Nazi persecution have yielded a total of seven needy survivors who remain alive and are willing to come forward."). The Coalition contends only that providing assistance to these seven individuals inadequately represents the amount of suffering inflicted on homosexuals by the Nazis.

The Pink Triangle Coalition Proposal for a *Cy Pres* Allocation for Homosexual Victims of the Nazis extensively chronicles the history of Nazi persecution of homosexuals. The following is a brief summary:

> One goal of the Nazi regime was to suppress all private same-sex sexual activity and all public expression of gay and lesbian culture and community in Germany and the annexed territories. The persecution was far more extreme in its range and severity than that experienced by gay men and lesbians in the pre- and post-Nazi periods in Germany or in other Western European counties.
>
> The facts known about the targeting of gay men and lesbians under the Third Reich reveal a pattern of effective and merciless repression. The Nazi regime's campaign to eradicate homosexuality began in 1933 with the deliberate destruction of research centers, cultural resources, businesses, communications media, and social organizations that formed the backbone of the gay community throughout Germany. Historians have estimated that under the Nazi regime as many as 100,000 homosexuals may have been arrested or tracked on the basis of section 175 of the Reich Penal Code, which outlawed not only sexual activity, but even touching, 'looking,' and hugging between men, and of section 179 of the Austrian Penal Code, which criminalized both male and female same-sex intimacy.
>
> As many as 15,000 gay men were deported as such to concentration camps and compelled to perform slave labor for corporations or for entities owned or controlled by the Nazi regime. A small number of lesbian women also were deported to camps specifically because of their sexual orientation, and some were forced into prostitution in camp brothels. Those interned for their homosexuality were among the most abused in the camps, which abuse, for some, included subjection to heinous medical experimentation, ***413** including forcible castration. As many as 9,000 men interned as gay were killed in the camps.
>
> In addition to persecuting individuals, the Nazi regime plundered gay community organizations, meeting places, and centers of political and scholarly activity, and destroyed or stole their assets. Members were arrested, enslaved, tortured and murdered. The Nazis laundered a significant portion of their illegal gains through Swiss banks, likely connecting the spoils with the assets involved in this lawsuit.

Pink Triangle Memorandum, at 7-8. Without question, this is a terrible history, and without question, this history places homosexual survivors squarely within the definition of the Looted Assets Class for allocation purposes. But that alone could be said of all survivors of Nazi persecution.

According to the Pink Triangle Coalition, what makes homosexual victims of Nazi persecution different, and what makes them worthy of a distinct *cy pres* allocation in this case, is their post-war experience. Homosexual victims were systematically excluded from compensation efforts after the Holocaust, and "[i]t was not until 1985 that the first German politician-Federal Republic President Richard Von Weizsäcker-publicly acknowledged that homosexuals were victims of the Nazis and should be remembered as such." Pink Triangle Proposal, at 29. This, of course, is

also true of survivors in the Former Soviet Union-who were described by former Deputy Secretary of the Treasury Stuart Eizenstat as double victims who suffered under the Nazis and communism-and a large segment of the Romani survivors. *See In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d at 94-109. But more specifically, the Pink Triangle Coalition wrote:

> After 1945, the circumstances encountered by homosexual survivors of Nazi persecution are unique because homosexual men continued to be singularly and intensively pursued, imprisoned, and persecuted in West Germany until 1969 and Austria until 1971 under the same laws used by the Nazis. Survivors were publicly stigmatized, harassed, silenced, and re-imprisoned; they were excluded from compensation and ignored by elected officials for more than forty years. Similarly, in France, the government failed to recognize homosexual victims from annexed French territory as deportees under the formal support programs put in place after the Liberation.
>
> As a consequence, very few homosexual victims have come forward to seek compensation or claim assets. Moreover, due to the fear of being re-imprisoned, many of the German and Austrian victims did not disclose their homosexuality to their families or the state. Given the post-1945 climate for homosexual victims, it is more than reasonable to presume that many did not inform their families about their sexual orientation and many more did not or were not able to have families of their own. Similar to many of the victims with disabilities, the majority of homosexual victims in all likelihood did not have heirs, successors, administrators, executors, or other affiliates who could act on their behalf to press claims for compensation.

Pink Triangle Proposal, at 32. In sum, because of the precise form of Nazi era and post-war persecution of homosexuals, it is no surprise that the IOM has been unable to find more than a handful of needy homosexual survivors.

As a way to compensate for the IOM's inability to identify individual needy survivors who were targeted because of their homosexuality, the Pink Triangle Coalition asks that 1% of excess and common funds be distributed for a separate *cy pres* remedy ***414** encouraging the remembrance of homosexual victims of Nazi persecution as a group. Specifically, the Coalition seeks to advance four initiatives with its proposed *cy pres* allocation:

> First, to provide material assistance in the form of a modest monthly pension to the few identified needy gay Nazi survivors still living and to any who may yet come forward.
>
> Second, to support scholarly research into the anti-gay crimes committed by the Nazi regime aimed at locating additional survivors of the persecution and documenting their experience.
>
> Third, to promote the education of students and the general public about the Nazi persecution of gay people.
>
> Fourth, to advance efforts to prevent anti-gay persecution throughout the world today by supporting educational, outreach, and humanitarian programs, in order to prevent repetition of the horrors of the Nazi regime.

Pink Triangle Memorandum, at 2-3.

The Disability Rights Advocates' Proposal

The DRA's proposal rests on similar doctrinal grounds. It claims that the distributions thus far have not adequately accounted for the suffering of Nazi victims who were specifically targeted because of physical and mental disabilities.

As with homosexual victims of the Nazis, it is undisputed that the Nazis committed unspeakable atrocities against people solely because they were disabled. The DRA summarizes a fraction of the suffering as follows:

> Most scholars estimate that a minimum of 275,000 were killed solely because of their disability in the formal euthanasia program in Germany alone (Aktion T-4).... In addition ... the Nazis conducted gruesome 'medical research' on disabled children and implemented a massive forced sterilization program that effected approximately 400,000 persons with disabilities. The sterilization program was one of the first acts of the Nazi Government which furthered its preoccupation with the ideology of racial hygiene.

DRA Proposal, at 15. Again, this put individuals targeted by the Nazis on account of disability squarely within the definition of the Looted Assets Class for allocation purposes.

As with homosexual victims, however, the IOM has had difficulty identifying these individuals. Some identifications of survivors targeted because of their disabilities are being made. For example, "[t]he IOM recently has advised the Special Master that it is preparing Slave Labor Class I payment recommendations for approximately 45 disabled Nazi victims from Austria and elsewhere, and will analyze these survivors' needs for possible Looted Assets Class humanitarian assistance." Interim Report, at 105 n. 147. But overall, the IOM recounted its lack of success as follows:

> [I]n respect of disabled beneficiaries, IOM has contacted twenty three (23) disabled NGOs, foundations and organizations since the submission of the Supplemental Proposal that work in support of this community throughout Western and Eastern & Central Europe in an effort to reach survivors in these categories. The response to date has been equivalent to that in respect of the above outreach in respect of homosexual organizations.

Id., at 105 n. 147.

The DRA acknowledges that victims who were targeted because of disability are difficult to locate. It claims that this is largely because decades of stigmatization have prevented disabled survivors from making their voices heard. The DRA Proposal explains:

> ***415** This group is extremely difficult to locate, identify or notify not only because they are widely scattered and elderly, but because they tend to be isolated, living in poverty, and institutionalized. The experience thus far in this litigation reflects these factors. The lack of response by men and women with disabilities to the initial Notice of Settlement and the difficulties encountered by the IOM in its effort to locate and identify potential beneficiaries, reflects distressing characteristics of the disabled victim class that have repeatedly resurfaced throughout this litigation: persons with disabilities continue to be segregated from society at large, suffer from social stigma, fail to enjoy the most basic access to their own societies, and continue to suffer from unwarranted prejudice and discrimination.

DRA Proposal at 9. Nevertheless, the DRA contends that the fact that disabled victims are difficult to identify does not relieve me of any duty to compensate them as a group.

The DRA's proposed solution is to place between 2% and 3% of all residual unclaimed funds into a "[t]rust that will provide grants to disability oriented, non-profit, non-governmental organizations" with a goal of "advanc [ing] the human rights of people with disabilities." *Id.* at 6, 43. The DRA would have a significant role in determining the composition of a Disability Holocaust Class Advisory Board, which in turn would administer the trust. *See* Proposed Order for Distribution of Settlement Funds to Establish *Cy Pres* Remedy for Physically or Mentally Disabled or Handicapped, at ¶ 8 (hereafter "DRA Proposed Order"). The DRA argues that such a distribution could "ensure that this settlement addresses the root causes that led to the victimization of persons with disabilities during the Holocaust ... [T]he remedy will help eradicate the conditions that made the Holocaust possible for people with disabilities, while at the same time, help educate the world about this neglected corner of history." DRA Proposal, at 7-8.

The DRA recommends that up to 10% of the proposed reallocation of 2%-3% be devoted specifically to grants devoted to disability commemorative, remembrance, and memorial purposes. *See* DRA Proposed Order, at ¶ 17. The funds would go primarily to countries where needy Holocaust survivors reside, but they would in no way be limited to providing direct (or indirect) relief for survivors. Instead, the principal goal would apparently be to improve the social standing of people with disabilities in the countries where they are most marginalized. There would be no explicit connection to the Holocaust required.

Discussion

I am sympathetic to the fact that homosexual and disabled victims of Nazi persecution, like survivors in the Former Soviet Union and Romani survivors, have not been sufficiently recognized in the decades since the Holocaust. Both groups continue to face unwarranted prejudice and challenges to this day. However, I do not agree that under current circumstances, a *cy pres* distribution for the purpose of education, research, or a general advocacy program to right these wrongs is the appropriate use of excess or residual funds in this lawsuit.

The words "*cy pres* " come from the French expression, "*cy pres comme possible*," which means "as near as possible." *See Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002) (citation omitted). Originally, the *cy pres* doctrine developed in the context of testamentary charitable trusts. Where a trust would otherwise fail, a court would attempt to fulfill the testator's charitable intent "as near as possible" rather than let the trust fail entirely. The same basic ***416** notion is now employed in class action settlements such as this one. *See* Newberg on Class Actions, § 10.17 (4th ed.).

> When a litigated or settled aggregate class recovery cannot feasibly be distributed to individual class members or when a balance of a class recovery remains following individual distribution ... the court may direct that such undistributed funds be applied prospectively to the indirect benefit of the class ... The cy pres approach, then, puts the unclaimed fund to its next best compensation use.

Id. Put differently, where straightforward distribution would fail to effectuate the remedial purpose of a lawsuit, courts can employ a *cy pres* distribution to effectuate the "next best" distribution. *See Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir.1990) ("Even where *cy pres* is considered, it will be rejected when the proposed distribution fails to provide the 'next best' distribution").

There were several original purposes of this lawsuit. For members of the Deposited Assets Class, it was to recover property once held in Swiss banks that was either improperly transferred to the Nazis or never paid to the account holder. For members of the Refugee Class, it was to achieve some degree of restitution for being refused entry to Switzerland or otherwise harmed by Swiss immigration policies during the Nazi era. For members of the Slave Labor Classes, it was to achieve some degree of restitution for being forced to work for companies that were using Swiss financial institutions to flourish. And for members of the Looted Assets Class, it was to recover the value of assets that were looted by the Nazis and passed through Swiss banks. The original purposes of the first four classes have been roughly achieved, albeit with limited sums of money. But as I explained in my March 9, 2004 memorandum and order, *see In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89, 94-96, trying to precisely fulfill the original purpose in connection with the Looted Assets Class was impracticable.

I decided that distributing funds to the neediest survivors of Nazi persecution would be "next best" distribution solution for the Looted Assets Class. Such a distribution is "as near as possible" to the original purpose of the Looted Assets Class as a court with limited funds can achieve. While the strategy I employed will by no means provide restitution to every member of the plaintiff class, it provides meaningful restitution to those "most in need of assistance." *See In re Agent Orange Product Liability Litig.*, 818 F.2d 145, 158 (2d Cir.1987). I left open the possibility that other *cy pres* distributions could become the "next best" remedy at a later stage in the distribution, *see id.*, but at this point, neither the Pink Triangle Coalition's proposal nor the DRA's proposal warrants deviating from my basic distribution strategy. The Pink Triangle Coalition argues that the solution that would come "as near as possible" to the original purpose of the lawsuit would be to distribute 99% percent of the funds as I have while reserving 1% for a separate distribution to remembrance and education programs dedicated to homosexual victims of the Nazis. The DRA, for its part, argues that the solution is to reserve 2%-3% for a separate distribution for the betterment of people with disabilities. I disagree. Neither of these suggestions is more consistent with the original purpose of the Looted Assets Class than is direct distribution to needy survivors; neither is the "next best" solution.

First, there is a conceptual flaw in both the Pink Triangle Coalition's joint objection and proposal and the DRA's proposal. Both groups recognize (correctly) that homosexual ***417** and disabled targets of Nazi persecution are entitled to distributions through the Looted Assets Class and each of the other classes. But these victims are only entitled to such distributions as individuals-not as a group. There are no sub-classes within the Looted Assets Class or any other class. As I explained in my memorandum of March 9, 2004, there is no United States survivors' share. *See In re Holocaust Victim*

Assets Litig., 302 F.Supp.2d at 108-09. Similarly, there is no homosexual victims' share and there is no disabled victims' share. All victims of the Nazis were presumed looted, and all had an equal right to allocation through the Looted Assets Class. Put differently, the original purpose was to provide restitution to each individual victim, irrespective of why he or she was targeted by the Nazis; thus, the allocation to the Looted Assets Class will be successful or unsuccessful based on how much meaningful restitution it can provide to members of the class, regardless of whether it perfectly reflects the target group breakdown of Nazi victims.

Second, and more importantly, I simply cannot justify either proposed *cy pres* distribution given the current level of need experienced by individual members of the Looted Assets Class. If the settlement fund had unlimited resources, or if the needs of individual survivors were slight, I would agree that remembrance programs such as the one requested by the Pink Triangle Coalition or the advocacy efforts sought by the DRA are an appropriate use of funds. But that is not the reality. In fact, the needs of individual survivors are overwhelming, and the settlement fund is nowhere near sufficient to address them all. As I explained in my decision of March 9, 2004, there are 135,000 identified destitute Jewish survivors in the Former Soviet Union alone, many of whom are in danger of starving without continued assistance. *See In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d at 97-107. The needs of survivors elsewhere, while perhaps not as great, also cannot be ignored. While the numbers are lower, Romani survivors face the same basic plight. The settlement fund has only begun to alleviate this need.

Third, I have no reason to assume that overall, homosexuals and disabled survivors have not received a proportionate share of the total distributions in this case. If a claimant in the Looted Assets Class can successfully show membership in any of the five classes, an award is made; claimants are not required to state what target group they represented or whether they might be in multiple groups. Surely some proportion of the Jewish, Romani, and Jehovah's Witness victims have been homosexual, even if not explicitly identified or targeted by the Nazis as such. While they may not have identified themselves as homosexuals, these survivors had no need to do so when making claims to which they were entitled because they were Jewish, Romani, or Jehovah's Witnesses. Among Deposited Assets claimants, there is a clear record of awards being made based on accounts once held by homosexual victims of Nazi persecution. *See e.g. In re Account of Israel Nagler In re Account of Fritz von Fischer-Ankern; In re Account of Erika Krickton; In re Account of Dimitri Alimantestianu; In re Account of Serafina Meier,* available at *www.crt-ii.org.* In addition, I have taken the step of recognizing homosexual partners as heirs to insure that they would be fairly represented. *See e.g. In re Accounts of Dr. Rafael Dallet,* available at *www.crt-ii.org* (providing an award to a claimant who submitted "documents and specific biographical information, demonstrating that the Account Owner was her godfather and life partner of her great-uncle" even though CRT-I had rejected her claim on the grounds that she was not a proper heir).

***418** Meanwhile, not only some, but a vast majority of survivors receiving funds from the settlement have been disabled. The DRA itself concedes that "it is reasonable to assume that well over 90% of all Holocaust survivors are also now persons with disabilities." DRA Proposal at 19. While most of these disabled survivors may not have been originally targeted by the Nazis because of a disability, by the DRA's own admission, these people now "all likely suffer[ ] from the same root cause of prejudice and discrimination experienced by those persons who had disabilities during the Nazi era." *Id.* It is therefore hard to see how this sort of distribution ignores disabled victims of the Nazis. To the contrary, they have been the primary recipients of relief. Indeed it hardly seems debatable that when giving money to people who had assets looted by the Nazis because they were then disabled becomes impossible, the "next best" solution is to give the money to people who had assets looted by the Nazis and are now disabled and suffer the same prejudice.

Finally, I find unpersuasive the argument that homosexual and disabled victims deserve a separate *cy pres* distribution because by virtue of being homosexual or disabled, they were "highly unlikely to have surviving children." Declaration of Burt Neuborne, dated April 1, 2004, at ¶ 7. While it is suggested that this accounts for the fact that "few claims have been filed on behalf of gays and disabled victims by surviving family members," *id.*, it is difficult to accept this premise as a basis for the *cy pres* distribution sought here. As an initial matter, four of the five classes of plaintiffs exclude heirs from any distribution, making the question of whether or not a victim of Nazi persecution had children wholly irrelevant. Heirs are only entitled to distributions from the Deposited Assets Class. More to the point, however, it is simply incorrect to say that homosexual or disabled victims were unlikely to have had heirs because they were unlikely to have had surviving children. Heirs are not limited to direct descendants, and in distributing funds to the Deposited Assets

Class, the Claims Resolution Tribunal has been instructed to use a broad definition of heirs. Indeed, as noted earlier, in a case where a claimant was an heir of the homosexual partner of the owner of an account, she was awarded the proceeds. *See In re Accounts of Dr. Rafael Dallet*, available at *www.crt-ii.org*. Last, to the extent that homosexual and disabled victims of Nazi persecution did in fact die without heirs, that was a tragically commonplace event in the context of the Holocaust, where so many people-including a third of the Jewish population-and entire families were slaughtered. Dr. Norman Lamm, President of Yeshiva University, explained:

> Our case is so rare, so unimaginable to previous generations for whom the principle of the ubiquity of Jewish kinsmen was self-evident, that we are indeed in a position to say that in our days, tragically, history has confounded the assumption of the Talmud: vast numbers of Jews did indeed die without heirs.

Norman Lamm, Holocaust Compensation from the Vantage of Jewish Law and Morality, Tradition 35:2, at 9 (Rabbinical Council of America, 2002).

CONCLUSION

The goals of remembrance, education, and advocacy are important, particularly for groups such as homosexuals and disabled victims whose place in the Holocaust is often improperly overlooked. That is why I was willing to consider concrete proposals such as the Pink Triangle Coalition's and the DRA's. But these goals-while explicitly targeted by well-funded foundations such as the German Foundation "Future Fund" and the French Fund-were not the focus of this lawsuit. ***419** They can only come after I am satisfied that life sustaining needs of the neediest victims of Nazi persecution are met. Because so many survivors continue to face life-threatening needs on a daily basis, I cannot now justify ordering the separate *cy pres* distribution requested by either the Pink Triangle Coalition or the DRA. I must continue to give money to needy survivors.

Accordingly, I reject the Pink Triangle Coalition's Joint Objection and Proposal in Response to the Special Master's Interim Report and Recommendation, and I reject the Disability Rights Advocates' Proposal for *Cy Pre* Awards for the Class of "people who are Physically or Mentally Disabled or Handicapped" from the Allocation of Residual Unclaimed Funds. Fundamentally, both primarily seek to advance goals of research, education, and advocacy. While these are worthy goals, they are not goals that can be currently funded by the ever-diminishing settlement fund that resulted from this class action.

SO ORDERED.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Crabill v. Trans Union, L.L.C., 7th Cir.(Ill.), July 30, 2001

109 F.3d 338
United States Court of Appeals,
Seventh Circuit.

Stella B. MACE f/k/a Stella B. Servera,
on behalf of herself and all others
similarly situated, Plaintiff–Appellant,
v.
VAN RU CREDIT CORPORATION, Roger J. Rubin,
and Albert G. Rubin, Defendants–Appellees.

No. 96–1206. | Argued Sept. 13, 1996. | Decided March 17, 1997.

Consumer moved for class action certification of action brought under Fair Debt Collection Practices Act (FDCPA) and under Wisconsin Consumer Act (WCA). The United States District Court for the Northern District of Illinois, Eastern Division, John A. Nordberg, J., denied motion, and certified interlocutory appeal, to which Court of Appeals assented. The Court of Appeals, Cudahy, Circuit Judge, held that: (1) consumer did not have to certify nationwide class, and (2) WCA action could proceed in federal court even if consumer did not give debt collectors 30 days' notice.

Vacated and remanded.

West Headnotes (19)

[1] Federal Courts
Class actions

Denials of class certification are generally not independently appealable. 28 U.S.C.A. § 1291.

4 Cases that cite this headnote

[2] Federal Courts
Class actions

Ordinarily, denial of class certification is reviewable for abuse of discretion. 28 U.S.C.A. § 1292(b).

4 Cases that cite this headnote

[3] Antitrust and Trade Regulation
Persons and transactions covered

Antitrust and Trade Regulation
Practices prohibited or required in general

Fair Debt Collection Practices Act (FDCPA) is designed to protect consumers from unscrupulous collectors, regardless of validity of debt. Consumer Credit Protection Act, § 802 et seq., as amended, 15 U.S.C.A. § 1692 et seq.

23 Cases that cite this headnote

[4] Federal Civil Procedure
Class Actions

Class requirements found in Federal Rules of Civil Procedure encourage rather specific and limited classes. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[5] Federal Civil Procedure
Representation of class; typicality; standing in general

Federal Civil Procedure
Common interest in subject matter, questions and relief; damages issues

Typicality and commonality requirements of class action rules ensure that only those plaintiffs or defendants who can advance same factual and legal arguments may be grouped together as class. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

44 Cases that cite this headnote

[6] Federal Civil Procedure
Discretion of court

Class certification is ordinarily matter for discretion of district court. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

2 Cases that cite this headnote

[7] Statutes

Plain Language; Plain, Ordinary, or Common Meaning

Statutes

Absent terms; silence; omissions

Divining congressional intent from absence of expression is quagmire that courts must try to avoid; plain language of statute ordinarily controls.

4 Cases that cite this headnote

[8] Consumer Credit

Truth in lending, in general

Consumer Credit Cost Disclosure framework, which includes Truth-In-Lending Act (TILA) was designed (1) to foster competition among creditors, and (2) to ensure that consumers were adequately informed about credit terms in agreement. Consumer Credit Protection Act, § 102 et seq., as amended, 15 U.S.C.A. § 1601 et seq.

1 Cases that cite this headnote

[9] Antitrust and Trade Regulation

Harassment and abuse

Fair Debt Collection Practices Act (FDCPA) was designed to protect against abusive debt collection practices likely to disrupt debtor's life. Consumer Credit Protection Act, § 802 et seq., as amended, 15 U.S.C.A. § 1692 et seq.

21 Cases that cite this headnote

[10] Federal Civil Procedure

Consumers, purchasers, borrowers, and debtors

There was no persuasive reason to require nation-wide class in Fair Debt Collection Practices Act (FDCPA) lawsuit, thereby contravening language of statute, which limited class-action recovery to $500,000 in any one lawsuit but did not address series of lawsuits, especially considering that there were not yet other, related, class-action lawsuits pending against debt collectors. Consumer Credit Protection Act, § 813, as amended, 15 U.S.C.A. § 1692k; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

23 Cases that cite this headnote

[11] Federal Civil Procedure

Consumers, purchasers, borrowers, and debtors

Even if requiring nation-wide class in Fair Debt Collection Practices Act (FDCPA) lawsuit were appropriate, de minimis recovery (in monetary terms) should not automatically bar class action. Consumer Credit Protection Act, § 813(a)(3), as amended, 15 U.S.C.A. § 1692k(a)(3); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

30 Cases that cite this headnote

[12] Federal Civil Procedure

Factors, grounds, objections, and considerations in general

Policy at very core of class action mechanism is to overcome problem that small recoveries do not provide incentive for any individual to bring solo action prosecuting his or her rights. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

162 Cases that cite this headnote

[13] Federal Civil Procedure

Options; withdrawal

When individual class members are offered right and opportunity to opt out of class action under Fair Debt Collection Practices Act (FDCPA), statutory language "without regard to minimum individual recovery" generally controls. Consumer Credit Protection Act, § 813(a)(2)(B), as amended, 15 U.S.C.A. § 1692k(a)(2)(B).

22 Cases that cite this headnote

[14] Deposits in Court

Disposition under judgment or order of court

Cy pres recovery should be reserved for unusual circumstances, and is used where individuals

injured are not likely to come forward and prove their claims or cannot be given notice of case.

6 Cases that cite this headnote

[15] Deposits in Court

Disposition under judgment or order of court

"Cy pres," or fluid, recovery is procedural device that distributes money damages either through market system (by reducing charges that were previously excessive), or through project funding (project being designed to benefit members of class), and is used where individuals injured are not likely to come forward and prove their claims or cannot be given notice of case.

38 Cases that cite this headnote

[16] Deposits in Court

Disposition under judgment or order of court

There is no reason, when injured parties can be identified, to deny them even small recovery in favor of disbursement through some other means, such as cy pres.

3 Cases that cite this headnote

[17] Federal Courts

Substance or procedure; determinativeness

Federal courts in diversity actions apply state substantive law and federal procedural law.

6 Cases that cite this headnote

[18] Federal Civil Procedure

State statutes and Rules superseded

When there is conflict between one of Federal Rules of Civil Procedure and state rule, court must apply federal rule unless Rule in question transgresses either terms of Enabling Act or constitutional restrictions. 28 U.S.C.A. § 2072.

1 Cases that cite this headnote

[19] Antitrust and Trade Regulation

Notice and demand requirements; opportunity to cure

Federal Civil Procedure

State statutes and Rules superseded

Wisconsin Consumer Act (WCA) class action could proceed, even though plaintiff did not give 30 days' notice; 30–day notice requirement was procedural, not substantive, and thus, federal rule applied. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.; W.S.A. 426.110(4)(a) 2, (4)(c); 28 U.S.C.A. § 2072.

6 Cases that cite this headnote

Attorneys and Law Firms

***340** Daniel A. Edelman, Cathleen M. Combs, Michelle A. Weinberg (argued), Edelman & Combs, Chicago, IL, for plaintiff–appellant.

George W. Spellmire, Bruce L. Carmen (argued), D. Kendall Griffith, David M. Schultz, Hinshaw & Culbertson, Daniel P. Shapiro, Michael J. Small, Steven A. Levy (argued), Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Chicago, IL, for defendants–appellees.

Before CUDAHY, KANNE, and ROVNER, Circuit Judges.

Opinion

CUDAHY, Circuit Judge.

The question before us is whether the existence of a damage limitation or cap in the Fair Debt Collection Practices Act (FDCPA) has a bearing on the sort of class action that may be brought under that statute. Specifically at issue is whether the district court correctly found an implicit qualification to the statute's plain language, requiring the class to be nation-wide.

[1] We review the district court's denial of class action certification under the FDCPA and under the Wisconsin Consumer Act. 15 U.S.C. § 1692 et seq.; Wis. Stat. § 427.104(*l*). The district court had jurisdiction under 15 U.S.C. § 1692k(d), 28 U.S.C. § 1331 and 28 U.S.C. § 1367. Although denials of class certification are generally not independently appealable, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978) ("orders relating to class certification are not independently appealable under [28 U.S.C.] § 1291 prior to

judgment"), the district court has certified an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), to which we have assented. *See Hewitt v. Joyce Beverages,* 721 F.2d 625 (7th Cir.1983); *Susman v. Lincoln Am. Corp.,* 561 F.2d 86, 87 n. 1 (7th Cir.1977).

[2] Ordinarily a denial of class certification is reviewable for abuse of discretion. 28 U.S.C. § 1292(b); *Hewitt,* 721 F.2d at 627; *Susman,* 561 F.2d at 90. But here the district court has determined that the FDCPA bars serial class action suits. This determination is purely legal, and we review de novo.

***341** Because we have not yet been presented with a series of class actions and the central determination of the district court is therefore at best premature, we find no reason to go beyond the plain language of the statute. We therefore vacate and remand.

I. Factual Background

Stella B. Mace brought this action on behalf of herself and all others residing in Wisconsin who received certain collection letters from Van Ru Credit Corporation, Roger J. Rubin or Albert G. Rubin (collectively "Van Ru"). Van Ru is one of several business entities owned in whole or in major part by Roger Rubin. The intertwined nature of these debt collection businesses and attorney Roger Rubin's law firm is fully described in *Avila v. Rubin,* 84 F.3d 222 (7th Cir.1996).

Mace alleges that Van Ru mailed eleven different collection letters that violated the FDCPA. 15 U.S.C. § 1692. The alleged violations include (1) collection letters mailed over the printed signature of an attorney when no attorney was involved in sending the letters or in verifying the creditor's claim; (2) collection letters demanding payment within the thirty day validation period upon the threat of "additional proceedings" or a "civil suit"; (3) collection letters containing language that overshadowed and contradicted the statutorily required thirty day notice of the consumer's right to verification of the debt; and (4) collection letters that threatened action that Van Ru and Rubin did not intend to take and could not have taken legally.

This is not Van Ru's first encounter with the FDCPA. *See Avila,* 84 F.3d 222; *Drennan v. Van Ru Credit Corp.,* 950 F.Supp. 858 (N.D.Ill.1996); *Sower v. Van Ru Fin. Servs., Inc.,* 1995 WL 870853 (D.Minn.1995); *Woolfolk v. Van Ru Credit Corp.,* 783 F.Supp. 724 (D.Conn.1990); *Bitume v. Van Ru Credit Corp.,* 1990 WL 129580 (N.D.Ill.1990). We recently upheld a state-limited (to Connecticut) class action under the FDCPA against Van Ru and Roger Rubin (Van Ru's principal owner). *Avila,* 84 F.3d 222. In the *Avila* proceedings, we affirmed a district court finding that Rubin and Van Ru had violated the FDCPA by using certain form collection letters. *Id.* at 229. Despite losing the *Avila* litigation, Rubin and Van Ru allegedly maintained their debt collection practices unchanged for at least some period of time, giving rise to some of the claims at issue in this lawsuit. Other claims in the present suit derive from letters mailed at about the same time as in *Avila*, but in Wisconsin rather than in Connecticut. [1]

1 Form letters different from those sent to the plaintiffs in Mace were mailed to the plaintiffs in *Avila*. Some of the same provisions of the FDCPA were violated by each set of letters.

II. Availability of a Class Action Under the FDCPA

[3] The FDCPA was enacted in part "to eliminate abusive debt collection practices by debt collectors...." 15 U.S.C. § 1692(e). The statute is designed to protect consumers from unscrupulous collectors, regardless of the validity of the debt. *Baker v. G.C. Servs. Corp.,* 677 F.2d 775, 777 (9th Cir.1982). The FDCPA defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). "Any person" includes attorneys who regularly collect debts. *Jenkins v. Heintz,* 25 F.3d 536 (7th Cir.1994), aff'd. 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995). If Mace's allegations are correct, Van Ru has violated the FDCPA.

[4] **[5]** Given that proposition, our only task on appeal is to determine whether the FDCPA authorizes state-wide (in contrast to nation-wide) class actions. We note first that we know of no authority requiring the participation of the broadest possible class. On the contrary, the class requirements found in the Federal Rules of Civil Procedure encourage rather specific and limited classes. Fed.R.Civ.P. 23. The typicality and commonality requirements of the Federal Rules ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class.

***342** **[6]** Class certification, involving as it does a variety of factors, is ordinarily a matter for the discretion of the district court. Here, however, the district court decided to deny certification, not based on a factual problem raised

by the class definition,[2] but on the legal ground that the FDCPA's limitation of damages impliedly precludes certification limited to a state. The court reasoned that the damage cap was intended to place a limit on total liability, and that allowing state-by-state suits to proceed would nullify the damage cap. Thus, to make the damage limitation meaningful a nation-wide class was required. In addition, because the cap amount was relatively small the members of a large nation-wide class would receive only a de minimis recovery. The de minimis nature of the recovery, in turn, indicated that the class action mechanism was "not a superior method of adjudication." This conclusion depended on a finding that the recovery of the "individual class members would be smaller than the amount recoverable in individual actions and the administrative costs of a class action would be significant." Memo. Or. at 28.

2 In fact, the district court also denied certification on class definition grounds, including lack of typicality, lack of commonality and inadequacy of the class representative (due to an inability to finance the costs of providing notice to the class). Memo. Or. at 5–16. The plaintiff filed a motion to amend that was dismissed without prejudice; thus these other issues are not on appeal. For purposes of this appeal, we assume that these problems can be corrected.

A. Damage Caps in the Fair Debt Collection Practices Act and in the Truth In Lending Act

The FDCPA provides that:

> (a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of such failure;
>
> (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
>
> (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and
>
> (3) ... the costs of the action, together with a reasonable attorney's fee ...

15 U.S.C. § 1692k (emphasis added).

Statutes like the Truth In Lending Act (TILA) include similar language, but with one crucial difference. TILA provides that "the total recovery ... in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor." Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (emphasis added); see also Electronic Fund Transfer Act, 15 U.S.C. § 1693m(a)(2)(B) (substituting "person" for "creditor"); Consumer Leasing Act, 15 U.S.C. § 1667d (incorporating 15 U.S.C. § 1640). TILA's reference to a "series of class actions" is conspicuously absent from the FDCPA.

The defendants argue that we should read the FDCPA as if the "series of class actions" language were part of the statute. This contention is based first on the circumstance that, prior to the Truth in Lending Simplification and Reform Act of 1980 (Reform Act), the damage cap provisions of TILA and the FDCPA contained identical language; neither included the "series of class actions" language. Pub.L. No. 96–221, tit. VI, Mar. 31, 1980, 94 Stat. 168. The Reform Act added the "series of class actions" language to TILA but not to the FDCPA. The defendants then argue that this amendment to TILA did not change the law; rather it clarified it. The amendment made explicit what was formerly implied. Citing *Herrera v. First N. Sav. & Loan Ass'n,* 805 F.2d 896, 901 (10th Cir.1986), the defendants point to the absence of any indication in the legislative history of a congressional intent to change TILA in 1980; this absence of comment ***343** from the legislative history, they argue, suggests that the Reform Act amendment only clarified the law. The defendants then infer that Congress' original intent in enacting TILA was to apply the cap to a "series of class actions." *Id.* (citing *Brown v. Marquette Sav. & Loan Ass'n,* 686 F.2d 608, 615 (7th Cir.1982)). From these premises, the defendants conclude that, since the language of TILA and the FDCPA was identical before the Reform Act, Congress' intent in both these two acts was the same—to apply the cap to a "series of class actions." Thus the application of the damage cap to a "series of class actions," which appears only in the amended version of TILA, should be read back into the original version of TILA as well as (importantly for the present decision) into the original version of the FDCPA (which is still unmodified).

[7] But divining congressional intent from an absence of expression is a quagmire that we must try to avoid. The plain language of the statute ordinarily controls. *Jenkins v. Heintz*, 25 F.3d 536, 539 (7th Cir.1994), aff'd. 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) ("We must faithfully apply the law as Congress drafted it."). The defendants argue, and the district court agrees, that the FDCPA is one of those " 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982)). We disagree.

[8] **[9]** The Truth In Lending Act and the Fair Debt Collection Practices Act are related statutes. Both appear under the capacious umbrella of the Consumer Credit Protection Act. 15 U.S.C. § 1601 et seq. Yet they are different. TILA is found in the Consumer Credit Cost Disclosure subchapter; the FDCPA is found in the Debt Collection Practices subchapter. The Congressional intent in enacting each subchapter is somewhat different. The Consumer Credit Cost Disclosure framework was designed (1) to foster competition among creditors, and (2) to ensure that consumers were adequately informed about the credit terms in an agreement. Thus the relevant statement of Congressional purpose provides:

> (a) ... economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit.... It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit,....

15 U.S.C. § 1601(a). The FDCPA, on the other hand, was designed to protect against the abusive debt collection practices likely to disrupt a debtor's life. Here the statement of purpose provides:

> (a) ... Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.
>
> ....
>
> (e) It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors,
>
> ....

15 U.S.C. § 1692(a), (e). This objective of curbing abusive debt collection practices therefore distinguishes the FDCPA from TILA. Although we do not believe the matter need be decided at this point (since multiple or serial class actions are not before us), the reference in 15 U.S.C. § 1692(e) to abusive practices does not necessarily suggest that Congress, by failing to amend the FDCPA, intended that the damage caps in that statute should apply to a series of actions. Actually, Congress' choice not to revise the FDCPA might indicate, if anything, an intent not to modify or clarify the FDCPA (in the way that TILA was modified). Although we refrain from deciding the matter, we believe that construing the FDCPA in accordance with its plain language may best honor its drafters' intent.

[10] The defendants, however, advance a policy argument, from which the district court constructed a requirement for a nation- ***344** wide class. The district court reasoned that, if the damage cap of $500,000 can be applied anew to a series of state-wide (or otherwise limited) class actions, the damage limitation would become meaningless. This contention may be correct as far as it goes, although there is, of course, no way of telling whether such repeated class actions are possible or likely, here or generally. The other side of the coin is that to require a nation-wide class as the district court did here brings with it other problems that will be discussed later. There are other possible problems with the district court's reasoning. The FDCPA has a short, one-year statute of limitations making multiple lawsuits more difficult. Further, if a debt collector is sued in one state, but continues to violate the statute in another, it ought to be possible to challenge such continuing violations. Given the uncertainty of those policy considerations, there is no compelling reason to ignore the plain words of the statute. In any event, the case before us does not now present multiple or serial class actions to recover for the same misconduct. Hence, it would be premature to require a nation-wide class at this juncture. If and when multiple serial class actions are presented, it will be time enough to

rule on such a pattern. At this point, there is no persuasive reason to require a nation-wide class.

B. De Minimis Recovery

After prematurely reading a nation-wide class requirement into the FDCPA, the district court calculated the possible recovery. Because the most recent financial statements of the defendants (provided to the court in *Avila*) suggest a net worth of approximately $11 million, the damage cap (of one percent) would limit the class's recovery to a little over $100,000. The Wisconsin class was estimated to comprise 8,340 members. Extrapolating from this number, the district court posited a nation-wide class as large as 400,000. Such a class would result in a recovery per class member of only 28 cents, Memo. Or. at 27, as opposed to the projected $12 for each Wisconsin-only class member. The district court held that where "the recovery per class member would be de minimis and ... the administrative costs would be unduly burdensome ... [A] class action is not superior to other possible methods of fair and efficient adjudication." Memo. Or. at 29.

[11] **[12]** Since we have not decided that the FDCPA requires a nation-wide class, the district court's concerns about a de minimis recovery are currently moot. But even if a nation-wide class were appropriate, we believe that a de minimis recovery (in monetary terms) should not automatically bar a class action. The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

True, the FDCPA allows for individual recoveries of up to $1000. But this assumes that the plaintiff will be aware of her rights, willing to subject herself to all the burdens of suing and able to find an attorney willing to take her case. These are considerations that cannot be dismissed lightly in assessing whether a class action or a series of individual lawsuits would be more appropriate for pursuing the FDCPA's objectives.

[13] The attorney's fees provision of the FDCPA[3] is another factor that must be considered in connection with a de minimis bar. An attorney would presumably not take a contingency fee case where the projected recovery was $3.00 (leaving the attorney with a $1.00 fee). This, of course, is why some statutes allow for attorney's fees even when the plaintiff's monetary award is nominal. See 15 U.S.C. § 1692k(a)(3). The attorney's fee provision makes the class action more likely to proceed, thereby helping to deter future violations. When individual class members are offered the right and opportunity ***345** to opt out of the class action, the statutory language "without regard to a minimum individual recovery" generally controls. 15 U.S.C. § 1692k(a)(2)(B).[4] In the present posture of the case, the de minimis issue is not before us, but it might arise in some form on remand.

3 We have previously held that the language of the FDCPA makes an award of attorney's fees mandatory. *Tolentino v. Friedman*, 46 F.3d 645, 651 (7th Cir.1995) ("Because the FDCPA was violated ... the statute requires the award of costs and a reasonable attorney's fee ...."') (quoting *Pipiles v. Credit Bureau of Lockport*, 886 F.2d 22, 28 (2d Cir.1989)).

4 As part of its de minimis argument, *Van Ru* also attempts to rely on *Johnson v. Eaton.* That case discouraged FDCPA actions for which only a de minimis recovery is available. Van Ru Br. at 24; 80 F.3d 148 (5th Cir.1996). But *Johnson* concerns the availability of attorney's fees when the plaintiff proves a violation of the FDCPA but with no showing of actual damages. Because it apparently conflicts with Seventh Circuit authority on attorney's fees, *Johnson* is inapplicable. See *Tolentino v. Friedman*, 46 F.3d 645, 651 (7th Cir.1995).

III. Cy Pres

[14] Mace offers the availability of cy pres recovery as an alternative ground for class certification. Given that we have already found that a state-wide class action is sustainable and that a de minimis recovery does not bar certification, the issue of cy pres availability is no longer of concern. Nevertheless, because it is important to stress that cy pres recovery should be reserved for unusual circumstances, we briefly address Mace's arguments.

[15] **[16]** Cy pres, or fluid, recovery is a procedural device that distributes money damages either through a market system (e.g., by reducing charges that were previously excessive), or through project funding (the project being designed to benefit the members of the class). *Simer v. Rios*, 661 F.2d 655, 675 (7th Cir.1981). Cy pres recovery "is used where the individuals injured are not likely to come forward and prove their claims or cannot be given notice of the case." *Id.* at 675. Cy pres recovery is thus ideal for circumstances in which it is difficult or impossible to identify the persons

to whom damages should be assigned or distributed. Here, damages, though small, would not be either difficult to assign or difficult to distribute. Further, there is no reason, when the injured parties can be identified, to deny them even a small recovery in favor of disbursement through some other means. [5]

5 Mace relies on *Gammon v. GC Servs. Ltd. Partnership,* 162 F.R.D. 313 (N.D.Ill.1995), in support of cy pres recovery under the FDCPA. This reliance is misplaced. The only discussion of cy pres recovery in *Gammon* is supposititious only:

> Gammon suggests that cy pres distribution of any damage award to the class would be appropriate should he prevail on the merits. GC Services has not disputed the appropriateness of this remedy. Therefore, we decline to address this issue at this stage of the litigation, but merely assume for purposes of this opinion that cy pres distribution of any damage award would provide a suitable remedy should Gammon prevail.

Id. at 321 n. 9. *Gammon* provides no support for a cy pres recovery here. And to the extent that it provides for a cy pres recovery under the FDCPA in any circumstances, it is limited to its own unique facts.

IV. Wisconsin Consumer Act

Mace has also attempted to sue under the Wisconsin counterpart to the FDCPA, the Wisconsin Consumer Act, § 427.104(WCA). The WCA requires thirty days' notice prior to commencement of an action. [6] Mace has not offered proof that she complied with the notice provision, [7] and the defendants claim to have no record of receipt of notice. Van Ru argues that the notice requirement of the WCA is substantive and that the class cannot be certified under the WCA because the plaintiff failed to comply. The plaintiff argues that the notice requirement is merely procedural and thus is without effect. The district court found that the notice provision ***346** was an "integral part of [the] state substantive statute" barring the certification of a class action where the plaintiff has failed to provide the proper notice, and reasoned that failure to comply means that the would-be plaintiff "does not have a substantive right to bring a class action suit for damages." Memo Or. at 5, 4.

6 The provision reads:

> (4)(a) At least 30 days or more prior to the commencement of a class action for damages pursuant to the provisions of this section, any party must:
>
> 1. Notify the person against whom an alleged cause of action is asserted of the particular alleged claim or violation; and
>
> 2. Demand that such person correct, or otherwise remedy the basis for the alleged claim.
>
> (b) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to such person at the place where the transaction occurred, such person's principal place of business within this state, or, if neither will affect actual notice, the department of financial institutions.

W.S.A. § 426.110.

7 In her amended complaint, which was dismissed without prejudice by the trial court, Mace alleged compliance with the notice provision.

[17] Federal courts in diversity actions apply state substantive law and federal procedural law. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). An exception was crafted for those cases in which the choice between a state and a federal procedural rule was outcome-determinative; then the state procedural rule was to be applied even in federal court. *Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). *Hanna v. Plumer* limited the "outcome-determination" test of Guaranty Trust by distinguishing choice of law questions that involve the Federal Rules of Civil Procedure from those that do not. 380 U.S. 460, 467–68, 471–72, 85 S.Ct. 1136, 1143–45, 14 L.Ed.2d 8 (1965). The Federal Rules of Civil Procedure are governed by The Rules Enabling Act, 28 U.S.C. § 2072. The Enabling Act controls the choice between the Federal Rules and state law. The Enabling Act provides in pertinent part:

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions....
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury....

The Court in *Hanna* recognized that the "Erie rule is rooted in part in a realization that it would be unfair for the character of the result of a litigation materially to differ because the suit had been brought in federal court." *Hanna,* 380 U.S. at 467, 85 S.Ct. at 1141. The outcome-determination test was

sharpened in *Hanna* in order to better "reference the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 468, 85 S.Ct. at 1142. As in *Hanna*, where the federal rule allowed the litigation to continue but the state rule compelled dismissal, in the case before us the "choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, [but] the difference between the two rules would be of scant, if any, relevance to the choice of a forum." *Id.* at 469, 85 S.Ct. at 1142–43.

[18] The Court in *Hanna* went further and held that, when the conflict was between one of the Federal Rules of Civil Procedure and a state rule, as we have indicated, the Enabling Act was to govern the question of which to apply. The court must apply the federal rule,

> and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Hanna, 380 U.S. at 471, 85 S.Ct. at 1144.

[19] Mace argues that the notice provision of the WCA is inapplicable in this diversity action because Rule 23 governs, and Rule 23 contains no notice requirement. But, more fundamentally, the notice provision of the WCA does not grant or deny a substantive right (the right to sue under the WCA), as the district court found. Rather, it affects the period within which that right can be exercised. If the purpose of the WCA's notice requirement is, as argued by the defendants, to prevent a suit from ever being filed (by encouraging the parties to reach an agreement extra-judicially), such a notice requirement is not substantive. See W.S.A. 426.110(4)(a)2.(c) ("no action for damages may be maintained under this section if an appropriate remedy ... is given, or agreed to be given ... within 30 days after receipt of such notice."). Whether the start of Mace's lawsuit was delayed by thirty days (under the WCA) or not at all (under Rule 23) is a matter of procedure, not substance. The application of Rule 23 does not abridge, enlarge or modify any substantive right. Therefore, Mace's WCA class action should be allowed to proceed.

***347 V. Conclusion**

At least on the facts before us, the FDCPA does not require a nation-wide class. Nor does the FDCPA or Rule 23 necessarily require that the recovery per class member be more than de minimis for the lawsuit to go forward. The attorney's fees provision is designed in part to correct the disincentive created by the possibility of a small recovery. Cy pres recovery is reserved only for those unusual situations where victims are unidentifiable, disbursement would be impossible or, for some other reason, the disbursement of damages to victims would be impossible or inappropriate. By contrast, the FDCPA specifically requires that damages (that may consist of more than actual monetary loss) be paid.

We also find that the notice requirement of the Wisconsin Consumer Act is procedural, not substantive. Therefore Rule 23, with no notice provision, applies.

We therefore VACATE the district court's order with respect both to the FDCPA and with respect to the WCA and REMAND for further proceedings not inconsistent with this opinion.

Parallel Citations

65 USLW 2618

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by In re AOL Time Warner, Inc. Securities, S.D.N.Y., October 25, 2006

904 F.2d 1301
United States Court of Appeals,
Ninth Circuit.

SIX (6) MEXICAN WORKERS, et al., Plaintiffs–Appellees,
v.
ARIZONA CITRUS GROWERS; Bodine Produce Company, Inc.; Robert Fletcher, d/b/a Fletcher Farms, Defendants–Appellants.

Nos. 89–15269, 89–15622. | Argued and Submitted March 15, 1990. | Decided May 18, 1990.

On appeal from judgment of the United States District Court for the District of Arizona, C.A. Muecke, J., 641 F.Supp. 259, finding citrus growers' marketing cooperative and two of its members liable for violations of Farm Labor Contractor Registration Act and determining methods and procedures to be followed for distribution of damages in class action, the Court of Appeals, Farris, Circuit Judge, held that: (1) case was properly certified for class action treatment; (2) although use of "cy pres" method to distribute unclaimed funds was permissible, district court's application thereof was inadequate to serve goals of statute and protect interests of silent class members and remand was warranted for formulation of distribution method upon expiration of claims; (3) damage award was disproportionately punitive and would be modified as indicated; and (4) award of attorney fees in amount of 25% of recovery was not abuse of discretion.

Remanded.

Sneed, Circuit Judge, concurred specially and filed opinion.

Fernandez, Circuit Judge, concurred in result and filed opinion.

West Headnotes (15)

[1] Federal Courts
Class actions

District court's certification of class action and award of attorney fees is reviewed for abuse of discretion.

7 Cases that cite this headnote

[2] Federal Civil Procedure
Superiority, manageability, and need in general

"Manageability" requirement of class action includes consideration of potential difficulties in notifying class members of suit, calculation of individual damages, and distribution of damages. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

35 Cases that cite this headnote

[3] Federal Civil Procedure
Common interest in subject matter, questions and relief; damages issues

Statutory damages under Farm Labor Contractor Registration Act are not dependent on proof of actual injury; thus, in class action against farm labor contractors, district court is not obligated to require individual proof of injury from each class member. Farm Labor Contractor Registration Act of 1963, § 2 et seq., as amended, 7 U.S.C. (1976 Ed.) § 2041 et seq.

14 Cases that cite this headnote

[4] Federal Courts
Labor and Employment

Issue of manageability of class action against farm labor contractors was not ripe for review, to extent that detailed notification procedure ordered by district court might yield substantial distribution of funds. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

[5] Federal Civil Procedure
Superiority, manageability, and need in general

Existence of large unclaimed damage fund, while relevant to manageability determination, does not necessarily make class action "unmanageable." Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

2 Cases that cite this headnote

[6] Federal Civil Procedure

Employees

Suit against citrus growers' marketing cooperative and two of its members for failure to comply with Farm Labor Contractor Registration Act was suitable for class action treatment, given strong deterrence function of Act's statutory damages provision and fact that potential for numerous unlocated class members stemmed largely from cooperative's own failure to record and retain addresses of its workers as required by Act. Farm Labor Contractor Registration Act of 1963, § 2 et seq., as amended, 7 U.S.C.(1976 Ed.) § 2041 et seq.

2 Cases that cite this headnote

[7] Deposits in Court

Disposition under judgment or order of court

District court's choice among options for distributing unclaimed class action funds should be guided by objectives of underlying statute and interests of silent class members.

41 Cases that cite this headnote

[8] Deposits in Court

Disposition under judgment or order of court

Federal Courts

Determination of damages, costs, or interest; remittitur

Although "cy pres" or fluid recovery method could be used to distribute unclaimed class action funds, district court's application of that method in class action against citrus growers' marketing cooperative and two of its members was inadequate to serve goals of Farm Labor Contractor Registration Act and protect interests of silent class members, and remand was warranted for reformulation of distribution method upon expiration of claims period; however, reversion of funds to defendants was not available option in light of Act's deterrence objective. Farm Labor Contractor Registration Act of 1963, § 2 et seq., as amended, 7 U.S.C.(1976 Ed.) § 2041 et seq.

79 Cases that cite this headnote

[9] Labor and Employment

Relief; penalties, damages and costs

In action under Farm Labor Contractor Registration Act against citrus growers' marketing cooperative and two of its members on behalf of class of 1,349 undocumented Mexican farm workers, aggregate award of $1,846,500 in damages was excessive and abuse of discretion; individual awards of between $400 and $1,600 exceeded what was necessary to compensate any potential injury from violations, and aggregate award exceeded that necessary to enforce Act or deter future violations and was disproportionately punitive. Farm Labor Contractor Registration Act of 1963, § 2 et seq., as amended, 7 U.S.C.(1976 Ed.) § 2041 et seq.

12 Cases that cite this headnote

[10] Federal Civil Procedure

Remittitur

When class size is large, individual award will be reduced so that total award is not disproportionate.

5 Cases that cite this headnote

[11] Federal Courts

Modification

Rather than remanding class action to district court for recalculation of damages upon finding that original award was excessive, Court of Appeals would exercise its authority to reduce award prior to remand in the interest of justice and to preserve judicial resources.

1 Cases that cite this headnote

[12] Federal Courts
Particular persons

Unsuccessful party in class action had standing to raise issue of propriety of district court's award of attorney fees in amount of 25% of recovery under common fund doctrine, as that issue was ancillary to main dispute.

8 Cases that cite this headnote

[13] Attorney and Client
Allowance and payment from funds in court

District court did not abuse its discretion by calculating attorney fees in class action as percentage of total fund.

120 Cases that cite this headnote

[14] Attorney and Client
Allowance and payment from funds in court

Award of 25% attorney fees from common settlement fund in class action was proper, where litigation lasted more than 13 years, obtained substantial success, and involved complicated legal and factual issues.

65 Cases that cite this headnote

[15] Attorney and Client
Allowance and payment from funds in court

District court was not required to specify what share of common fund award in class action that each attorney could receive, where no conflict of interest was alleged and no settlement was involved.

12 Cases that cite this headnote

Attorneys and Law Firms

***1303** Thomas N. Crowe, Crowe & Scott, Phoenix, Ariz., for defendants-appellants.

Garry B. Bryant, Tucson, Ariz., for plaintiffs-appellees.

Appeal from the United States District Court for the District of Arizona.

Before SNEED, FARRIS and FERNANDEZ, Circuit Judges.

Opinion

FARRIS, Circuit Judge:

This is an appeal from the district court's judgment finding Arizona Citrus Growers and two of its member growers liable for $1,846,500 in statutory damages for violation of the Farm Labor Contractor Registration Act. A prior appeal on several interlocutory rulings was consolidated with this appeal of the final judgment.

FACTS

ACG is a nonprofit corporation operated as a cooperative for marketing the fruit produced by its 52 members. Appellants Bodine Produce Company and Fletcher Farms were the two largest members, controlling 60% of the total acreage harvested by ACG. A class action suit was filed on April 21, 1977 against these parties for failure to comply with requirements of FLCRA. The class consists of 1349 undocumented Mexican workers who were employed by ACG during the 1976–77 picking season. After a bench trial in 1984, the district court issued a finding that ACG was liable for the following violations of the Act: [1]

1 FLCRA, 7 U.S.C. § 2041 *et seq.*, was repealed and replaced by the Migrant and Seasonal Agricultural Worker Protection Act, Pub.L. 97–470, 96 Stat. 2583 (codified as 29 U.S.C. § 1801 *et seq.*). Section 2050a(b) of the prior act provided that the court may award "up to and including ... actual damages, or $500 for each violation, or other equitable relief."

***1304** 1. Failure to register under the Act, 7 U.S.C. § 2043(a) ($0 award)

2. Failure to make written disclosure of terms of employment, 7 U.S.C. §§ 2045(b), (c) ($150 award per plaintiff)

3. Transportation violations, 7 U.S.C. §§ 2044(a)(4), (b)(12) ($250 award per plaintiff)

4. Record keeping violations, 7 U.S.C. § 2045(e) ($250 award per plaintiff)

5. Housing violations, 7 U.S.C. §§ 2044(a)(4), (b)(12) ($500 award per plaintiff)

Defendants Bodine and Fletcher were found liable as follows:

1. Engaging unregistered farm labor contractor, 7 U.S.C. § 2043(c) ($100 award per plaintiff)

2. Failure to obtain records, 7 U.S.C. § 2050c ($125 award per plaintiff)

After the trial, the district court issued orders concerning the identification of eligible class members. On March 31, 1989, the court issued a judgment for statutory damages against the defendants in the amount of $1,846,500 based on the identified class members. The court specified the method for distributing and verifying claims of members who could be located and ordered that any unclaimed funds be distributed through a *cy pres* award to the Inter–American Fund for indirect distribution in Mexico. *See Six (6) Mexican Workers v. Arizona Citrus Growers*, 641 F.Supp. 259 (D.Ariz.1986). The court also awarded attorneys fees in the amount of 25 percent of the damages, recoverable from the plaintiff's award under the common fund doctrine.

ACG argues that the number of unlocated class members makes the class unmanageable, and that the cy pres doctrine may not be used to rectify this problem. ACG also appeals the magnitude of the district court's award as an abuse of discretion. Finally, ACG claims that the district court's award of attorney's fees was an abuse of discretion.

STANDARD OF REVIEW

[1] We review for an abuse of discretion a district court's certification of a class action, *Fentron Industries v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir.1982), the award of statutory damages, *see Alvarez v. Longboy*, 697 F.2d 1333, 1339–40 (9th Cir.1983), and the award of attorneys' fees. *Quesada v. Thomason*, 850 F.2d 537, 538 (9th Cir.1988).

DISCUSSION

I. CLASS MANAGEABILITY AND FLUID RECOVERY

ACG argues that the inability to locate most of the plaintiffs makes this case unmanageable as a class action. The difficulty surrounds the distribution of damages for the class members not located. ACG further contends that a "cy pres" or "fluid recovery" system may not be used to resolve the problem of distributing unclaimed funds.

A. *Class Manageability*

[2] Among other requirements, a class action filed under Fed.R.Civ.P. 23(b)(3) must be "superior to other available methods" of adjudication in light of any "difficulties likely to be encountered in the management of a class action." Fed.R.Civ.P. 23(b)(3). This "manageability" requirement includes consideration of the potential difficulties in notifying class members of the suit, calculation of individual damages, and distribution of damages. 3B *Moore's Federal Practice*, § 23.45[4.–4] (1987). ACG does not argue that notification was inadequate,[2] but contends that the ***1305** district court improperly used "fluid recovery" to avoid the "unmanageable" difficulties associated with individual proof and distribution of damages.

2 Rule 23 requires the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed.R.Civ.P. 23(c)(2). Initial class notification was achieved by mailing notice to those persons for which accurate addresses existed, publication and radio announcements in relevant U.S. and Mexican newspapers, and posting. The district court adopted this method for notice of damages distribution as well. Other courts have found this method of notice to satisfy Rule 23 and due process in migrant worker cases. *Eg., Montelongo v. Meese*, 803 F.2d 1341, 1351 (5th Cir.1986), *cert. denied*, 481 U.S. 1048, 107 S.Ct. 2179, 95 L.Ed.2d 835 (1987).

When a class action involves a large number of class members but only a small individual recovery, the cost of separately proving and distributing each class member's damages may so outweigh the potential recovery that the class action becomes unfeasible. Fluid recovery or "cy pres" distribution avoids these difficulties by permitting aggregate calculation

of damages, the use of summary claim procedures, and distribution of unclaimed funds to indirectly benefit the entire class. *See Developments in the Law—Class Actions*, 89 Harv.L.Rev. 1318, 1517 (1976). Federal courts have frequently approved this remedy in the settlement of class actions where the proof of individual claims would be burdensome or distribution of damages costly. *In re Agent Orange Product Liability Litigation*, 818 F.2d 179, 184–85 (2d Cir.1987); *2 Newberg on Class Actions*, § 11.20 (2d Ed.1985). *Cf. Bebchick v. Public Utilities Commission*, 318 F.2d 187 (D.C.Cir.) (fluid recovery ordered in non-class action), *cert. denied*, 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963). Moreover, numerous state courts have utilized cy pres or fluid recovery procedures to ensure that wrongdoers do not "retain ill gotten gains" simply because of the administrative difficulties traditionally associated with small per individual damages. *E.g.*, *State v. Levi Strauss & Co.*, 41 Cal.3d 460, 224 Cal.Rptr. 605, 612, 715 P.2d 564, 571 (1986) (en banc); *see Newberg on Class Actions* at § 10.25.

Nevertheless, several federal courts have rejected fluid recovery as a "solution of the manageability problems of class actions." *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir.1973), *vacated on other grounds*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *In re Hotel Telephone Charges*, 500 F.2d 86, 89–90 (9th Cir.1974); *Windham v. American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir.1977), *cert. denied*, 435 U.S. 968, 98 S.Ct. 1605, 56 L.Ed.2d 58 (1978). *But see Simer v. Rios*, 661 F.2d 655 (7th Cir.1981) (rejecting *Eisen* and accepting fluid recovery on ad hoc basis).

In *Eisen*, suit was brought on behalf of approximately six million traders in odd lot stock alleging antitrust and securities violations. The court rejected the plaintiff's attempt to use fluid recovery where it avoided constitutionally required notice to each class member, dispensed with individual calculation of damages, and distributed the damages to future traders who were not necessarily members of the class. *See* 479 F.2d at 1017–18.

In *In re Hotel* we relied on *Eisen* in rejecting a fluid recovery argument. *In re Hotel* involved a class action under the Sherman Antitrust Act brought by a class consisting of several million individuals. The plaintiffs sought to use fluid recovery to avoid the difficulty of proving each class members' specific injury. Relying on *Eisen*, we rejected the attempt and stated that "allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes." 500 F.2d at 90. We held that neither Rule 23 nor the antitrust laws permitted dispensing with individual proof of damages. *Id.* at 90, 92. *Cf. Windham v. American Brands, Inc.*, 565 F.2d at 72 ("Nor ... can the difficulties inherent in proving individual damages be avoided by the use of a form of 'fluid recovery.' ").

1) Aggregate Proof of Damages

The rejection of fluid recovery as it permits the aggregation of damages has caused some confusion and has received considerable criticism. *See Simer v. Rios*, 661 F.2d 655, 676 (7th Cir.1981) (adopting use of fluid recovery on ad hoc basis); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1190 (8th Cir.1982) (Heaney, J., dissenting) (permissibility of aggregation depends on policy of underlying cause of action); *2 Newberg on Class Actions* at § 10.05. We need not address this controversy, however, because this case does not raise the concerns addressed by our decision in *In re Hotel*, or the decisions in *Eisen* and *Windham*. The district court did not use fluid recovery to avoid individual proof of damages, but adopted a cy pres procedure only ***1306** for the limited purpose of distributing unclaimed damages.

[3] The plaintiff class sought statutory not actual damages. Statutory damages under FLCRA, unlike damages under the antitrust laws addressed in *In re Hotel*, are not dependent on proof of actual injury. *Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir.1982). Congress intended these damages to promote enforcement of FLCRA and deter future violations. *See* S.Rep. No. 1295, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Ad. News 6441. Therefore, the district court was not obligated to require individual proof of injury from each class member. *Montelongo v. Meese*, 803 F.2d at 1351 (FLCRA damages obviated need for individual proof); *see Haywood v. Barnes*, 109 F.R.D. 568, 583–84 (E.D.N.C.1986) (holding that an "across the board" class award of liquidated damages under FLCRA's successor provision was not an attempt to use "fluid recovery"). The concerns in *Eisen* and *In re Hotel* about the impermissible circumvention of individual proof requirements are not at issue where the underlying statute permits awards without a showing of actual damage.[3] *See Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir.1977) (where damages can be assessed mechanically, individualized claims for damages are no barrier to class certification). The district court's use of cy pres involved only the "distribution of damages" aspect of class action manageability.

[3] Of course, there still must be a showing that each person awarded damages was a member of the class. In the present case, the award of individual damages was dependent upon proof that the claimant was qualified as a member of the class and was affected by the particular violation. ACG's records were used to determine which members of the class were employed by the defendant growers, and who were transported or housed by the defendants. Where ACG's records were absent or inaccurate, specific employees were rebuttably presumed to qualify for the relevant statutory damages. ACG does not dispute that class member eligibility may be proven by this procedure.

2) Size of Potential Unclaimed Funds

[4] ACG also contends that the class action was unmanageable because a substantial number of class members would never be located for distribution of the damage award. It is unclear how many class members will be located by the detailed notification procedure ordered by the district court. To the extent that the procedure may yield a substantial distribution of the funds, the manageability issue is not yet ripe.

[5] **[6]** In a majority of class actions at least some unclaimed damages or unlocated class members remain. *See* 2 *Newberg on Class Actions* § 10.14 (2d ed. 1985). The existence of a large unclaimed damage fund, while relevant to the manageability determination, does not necessarily make a class action "unmanageable." Class actions have been found manageable even where there exists the prospect of substantial unclaimed funds. *Perry v. Beneficial Finance Co. of New York*, 81 F.R.D. 490, 497 (W.D.N.Y.1979) (class is manageable even though up to 75% of members are not readily identifiable). Settlements of large class action suits have been approved even where less than five percent of the class files claims. *See* 2 *Newberg on Class Actions* at Appendix 8–2, §§ 8.44–45. Where the goals of the underlying statute are strictly compensatory, a class action resulting in substantial unclaimed funds will not further that goal. But where the statutory objectives include enforcement, deterrence or disgorgement, the class action may be the "superior" and only viable method to achieve those objectives, even despite the prospect of unclaimed funds. *See* 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1780 at 584 (1986) (consideration of policies of underlying statutes relevant to determining superiority of class action). Given the strong deterrence function of FLCRA's statutory damages provision, the district court properly found that this case was suitable for class action treatment.

Further, the potential for numerous unlocated class members stems largely from ACG's own failure to record and retain the addresses of its workers as required by ***1307** FLCRA. Having intentionally violated statutory recording requirements, the defendants may not attempt to "avoid a class suit merely because their own actions have made the class more difficult to identify [or locate]." *Appleton Electric Co. v. Advance–United Expressways*, 494 F.2d 126, 135–39 (7th Cir.1974) (defendants' failure to keep records necessary to refund overpayments does not make class unmanageable). Irrespective of the method used for distributing the unclaimed funds, the district court did not abuse its discretion in maintaining the suit as a class action.

B. *Distribution of Unclaimed Damages*

We next review the district court's adoption of a cy pres procedure for distributing the unclaimed funds. The court's order states that all unclaimed funds over $50,000 are to be given to the Inter–American Foundation for distribution in Mexico. The IAF apparently operates human assistance projects in areas where many of the plaintiffs are believed to reside. The funds have not been earmarked for any specific projects, and the court established no procedure for ensuring the proper distribution of the donated funds.

ACG challenges this distribution plan as directly contravening our rejection of fluid recovery. *See In re Hotel Telephone Charges*, 500 F.2d 86, 89–90 (9th Cir.1974); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 235 (9th Cir.1974), *cert. denied* 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975). These cases rejected fluid recovery because it circumvented individual proof of damages required by the antitrust laws. We have found no Ninth Circuit precedent rejecting the use of cy pres or fluid distribution solely as a method of allocating unclaimed damages.

[7] Most class actions result in some unclaimed funds. Having properly found that certification of the class action was appropriate, the district court was required to formulate a procedure for distributing unclaimed funds. The court's alternatives included: 1) cy pres or fluid distribution, 2) escheat to the government, and 3) reversion to defendants. [4] 2 *Newberg on Class Actions* § 10.17 at 373–74. Federal courts

have broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds. *Van Gemert v. Boeing Co.*, 739 F.2d 730, 737 (2d Cir.1984). The district court's choice among distribution options should be guided by the objectives of the underlying statute and the interests of the silent class members. *Cf. State v. Levi Strauss & Co.*, 41 Cal.3d 460, 224 Cal.Rptr. 605, 612, 715 P.2d 564, 571 (1986) (four-part test for choosing distribution option).

4 A fourth option is the pro rata distribution of the funds to located class members. *See Van Gemert*, 739 F.2d at 736 (rejecting pro rata as a form of fluid recovery). We express no view as to the propriety of this distribution method.

1) Cy pres distribution

[8] The use of cy pres or fluid recovery to distribute unclaimed funds may be considered only after a valid judgment for damages has been rendered against the defendant. Unlike in *Eisen* and *In re Hotel*, where fluid recovery would eliminate statutorily required individual proof of damages, cy pres distribution of unclaimed funds does not subject defendants to greater liability or alter their substantive rights. Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members.

In *Nelson v. Greater Gadsden Housing Authority*, 802 F.2d 405, 409 (11th Cir.1986), the Eleventh Circuit expressly approved the use of fluid recovery to distribute unclaimed class action funds. The court stated that the objection to fluid recovery derives from its use in aggregating damages or circumventing class action manageability requirements. The court found no obstacle to fluid distribution where those issues were not present. *Id.* We agree. We hold that the district court properly considered cy pres distribution for the limited purpose of distributing the unclaimed funds.

***1308 2) Reversion to federal government**

A second option available to the district court was to permit the funds to "escheat" to the government pursuant to 28 U.S.C. §§ 2041, 2042 [5] (unclaimed money deposited with court reverts to government after five years). We have distributed funds in this manner when it served the deterrence and enforcement goals of the substantive federal statute. *Hodgson v. YB Quezada*, 498 F.2d 5, 6 (9th Cir.1974) (reversion of unclaimed settlement funds to Treasury authorized by enforcement goals of the FSLA); *see Hodgson v. Wheaton Glass Co.*, 446 F.2d 527 (3d Cir.1971) (unclaimed FLSA wage damages escheat to federal government). Section 2042 has also been used where a cy pres award was inappropriate but reversion of the funds to the defendant was contrary to the goals of the underlying statute. *See In re Folding Carton Litigation*, 744 F.2d 1252, 1254 (7th Cir.1984) (rejecting cy pres under circumstances and requiring escheat of settlement funds to federal government). When, as with FLCRA, a statute's objectives include deterrence or disgorgement, it would contradict these goals to permit the defendant to retain unclaimed funds. *Simer v. Rios*, 661 F.2d at 676; *See* 2 *Newberg on Class Actions* at § 10.24. Because section § 2042 permits recovery even after the funds revert to the United States, the interests of the silent class members are fully protected. *In re Folding Carton Litigation*, 744 F.2d at 1255; *see* 28 U.S.C. § 2042.

5 The statute provides:

§ 2041. Deposit of moneys in pending or adjudicated cases

All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court. This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the direction of the court.

§ 2042. Withdrawal

No money deposited under section 2041 of this title shall be withdrawn except by order of court.

In every case in which the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

3) Reversion to the defendants

In *Van Gemert v. Boeing*, 739 F.2d 730, 736–37 (2d Cir.1984), the court upheld a decision reverting unclaimed funds to the defendant. The court rejected reversion to the government because the defendant had followed the letter of the law and could not have anticipated its liability. *Id.* Thus, reversion to the defendant may be appropriate when deterrence is not a goal of the statute or is not required by the circumstances.

Although we do not generally disapprove of cy pres, we cannot affirm the district court's application in this case. The district court's proposal benefits a group far too remote from the plaintiff class. Even where cy pres is considered, it will be rejected when the proposed distribution fails to provide the "next best" distribution. *See City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45, 72 (D.N.J.1971) (rejecting price reduction because benefited consumers were too remote from injured class members). The district court's plan permits distribution to areas where the class members may live, but there is no reasonable certainty that any member will be benefited.

The tool for distribution, the IAF, is not an organization with a substantial record of service nor is it limited in its choice of projects. Under such circumstances, any distribution plan should be supervised by the court or a court appointed master to ensure that the funds are distributed in accordance with the goals of the remedy. *In re Agent Orange Product Liability Litigation*, 818 F.2d at 185 ("we believe that the district court must ... designate and supervise, perhaps through a special master, the specific programs that will consume ***1309** the settlement proceeds."). The plan does not adequately target the plaintiff class and fails to provide adequate supervision over distribution. We therefore set aside the court's cy pres application as an abuse of discretion.

After the claims period has expired and the amount of the unclaimed fund is known, the district court will be in a better position to determine what remedy will best effectuate the goals of FLCRA and the interests of the silent class members. If the district court is unable to develop an appropriate cy pres distribution, or finds cy pres no longer appropriate, it should consider escheating the funds pursuant to 28 U.S.C. § 2042. In light of the deterrence objective of FLCRA and the nature of the violations, we find that reversion of the funds to the defendants is not an available option.

II. MAGNITUDE OF THE DAMAGE AWARD

[9] ACG contends that the district court's award of $1,846,500 in damages was an abuse of discretion. FLCRA authorized awards of statutory damages of up to $500 per plaintiff per violation. *See Alvarez v. Longboy*, 697 F.2d 1333, 1339–40 (9th Cir.1983). Although the statute is "remedial," the liquidated damages provision permits an award without a showing of actual injury. *See id.* at 1338; *Montelongo v. Meese*, 803 F.2d 1341, 1350 (5th Cir.1986). The civil remedy was provided not only to compensate injuries, but also to promote enforcement of the Act and deter violations. *Longboy*, 697 F.2d at 1339, 1340. Although some courts have stated that one purpose of these damages is punitive in nature, *Salazar–Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1346 (5th Cir.1985), *cert. denied*, 475 U.S. 1035, 106 S.Ct. 1245, 89 L.Ed.2d 353 (1986), we have refrained from interpreting FLCRA to permit imposition of a "penalty disproportionate to the offense." *Longboy*, 697 F.2d at 1340.

In *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir.1985), the Fifth Circuit established the seminal test for determining the size of liquidated damages awards. Relying upon *Beliz*, we conclude that in determining whether a particular award serves FLCRA's deterrence and compensation objectives, the court should consider:

> 1) the amount of award to each plaintiff, 2) the total award, 3) the nature and persistence of the violations, 4) the extent of the defendant's culpability, 5) damage awards in similar cases, 6) the substantive or technical nature of the violations, and 7) the circumstances of each case.

See id.

The individual liquidated damage awards for each of the statutory violations ranged from $100 to $500 per violation but did not exceed that given in other cases. *See Longboy*, 697 F.2d at 1340 (recovery of $150 per plaintiff for written notice violations); *Rivera v. Adams Packing Association, Inc.*, 707 F.2d 1278, 1283 (11th Cir.1983) ($500 for each of two recording violations to 7 plaintiffs); *See Washington v. Miller*, 721 F.2d 797, 803 (11th Cir.1983) ($500 award to 7 plaintiffs for housing violations). The district court's finding of health and safety deficiencies justified the higher awards for the transportation and housing violations. The intentional and non-technical nature of each of the violations also supports a high statutory damage award.

Despite the aggravating nature of the defendant's violations, we find that the award was excessive and an abuse of discretion. The individual awards exceeded what was necessary to compensate any potential injury from the violations. Each class member was awarded between $400 and $1600, even though some class members worked only a few hours. It is unlikely that a plaintiff who worked only a few hours or days could show an injury that approaches $400.

[10] The award also exceeds that necessary to enforce the Act or deter future violations. When the class size is large, the individual award will be reduced so that the total award is not disproportionate. *Longboy,* 697 F.2d at 1340. The aggregate ***1310** amount of this award was unprecedented even considering the large number plaintiffs and violations. Cases involving a large number of plaintiffs and violations have achieved deterrence objectives with substantially lower aggregate awards. *See Montelongo v. Meese,* 803 F.2d 1341, 1357 n. 1 (159 workers awarded $238,500 damages); *De La Fuente v. Stokely–Van Camp, Inc.,* 514 F.Supp. 68, 80 n. 5 (C.D.Ill.1981), *aff'd* 713 F.2d 225 (7th Cir.1983) (1500 workers awarded [estimated almost $200,000] statutory damages in addition to compensatory damages); *Alvarez v. Joan of Arc, Inc.,* 658 F.2d 1217 (7th Cir.1981) (300 workers and total award of $30,000); *Alvarez v. Longboy,* 697 F.2d at 1340 (92 workers awarded $13,000 damages); *Salazar–Calderon v. Presidio Valley Farmers Ass'n,* 765 F.2d 1334, 1347 (5th Cir.1985) ($15 damages for each of 5 violations awarded to "over 150" workers). We find that the aggregate award of $1,846,500 was disproportionately punitive and an abuse of the district court's discretion.

[11] Although we would ordinarily remand to the district court for a recalculation of damages, we will exercise our authority to reduce the award prior to remand in the interest of justice and to preserve judicial resources. *Felder v. United States,* 543 F.2d 657, 671 (9th Cir.1976); *Buckley v. Littell,* 539 F.2d 882, 897 (2d Cir.1976), *cert. denied,* 429 U.S. 1062, 97 S.Ct. 785, 50 L.Ed.2d 777 (1977). Our exercise of this discretion is particularly appropriate where recalculation involves issues that we are equally situated to decide. *See Dale Benz, Inc. v. American Casualty Co.,* 303 F.2d 80, 82 (9th Cir.1962). This litigation has already consumed 13 years of judicial resources, and not a single plaintiff has received any recovery. Because the plaintiff class has sought statutory damages only, the district court's damage assessment did not involve fact specific calculations of actual injury. As we are adequately situated to make our own assessment of the proper level of statutory damages, we direct the district court to modify its judgment for damages as follows:

1. Failure to register under the Act, 7 U.S.C. § 2043(a) ($0 award)

2. Failure to make written disclosure of terms of employment, 7 U.S.C. §§ 2045(a), (b) ($50 award per plaintiff)

3. Transportation violations, 7 U.S.C. §§ 2044(a)(4), (b)(12) ($100 award per plaintiff)

4. Record keeping violations, 7 U.S.C. § 2045(e) ($100 award per plaintiff)

5. Housing violation, 7 U.S.C. §§ 2044(a)(4), (b)(12) ($200 award per plaintiff)

Defendants Bodine and Fletcher are liable as follows:

1. Engaging an unregistered farm labor contractor, 7 U.S.C. § 2043(c); Failure to obtain records, 7 U.S.C. § 2050c: (total of $75 award per plaintiff for both violations)

As modified, the judgment will provide between $150–$600 per plaintiff before attorneys fees. The minimum recovery is consistent with other large class actions cases involving few violations. *See Longboy,* 697 F.2d at 1340 ($150 to each of 92 plaintiffs for single violation); *De La Fuente v. Stokely–Van Camp, Inc.,* 514 F.Supp. 68, 80 (C.D.Ill.1981) (1500 workers awarded $100 for several violations plus $90 actual damages), *aff'd* 713 F.2d 225 (7th Cir.1983); *Salazar–Calderon v. Presidio Valley Farmers Ass'n,* 765 F.2d 1334, 1347 (5th Cir.1985) ($75 damages for 5 violations awarded to "over 150" workers). Yet, the aggregate award, approximately $850,000, is not disproportionately punitive considering the size of the class and the nature of the violations.[6] Although the aggregate award is still larger than any other FLCRA award, this is primarily due to the large number of plaintiffs. Further reducing the award, however, would reward the defendants for violating the rights of a greater number of workers. Our modified award adequately balances the need for deterrence ***1311** with the inequity of disproportionate punishment.

6 On remand the district court can determine the exact aggregate award after modifying the original individual violations in accord with this opinion.

III. ATTORNEYS FEES

[12] ACG argues that the district court's award of attorneys' fees in the amount of 25 percent of the recovery was improper. The district court awarded attorneys' fees under the common fund doctrine, the common-law rule which permits recovery of fees from the damage award obtained. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). ACG has standing to raise this issue as it is "ancillary" to the main dispute. *See Jackson v. United States*, 881 F.2d 707, 709 (9th Cir.1989).

[13] The district court did not abuse its discretion by calculating attorneys' fees as a percentage of the total fund. The Supreme Court has stated that attorneys' fees sought under a common fund theory should be assessed against every class members' share, not just the claiming members. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480, 100 S.Ct. 745, 750, 62 L.Ed.2d 676 (1980). Although statutory awards of attorneys' fees are subject to "lodestar" calculation procedures, a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery. *Blum v. Stenson*, 465 U.S. 886, 900 n. 16, 104 S.Ct. 1541, 1550 n. 16, 79 L.Ed.2d 891 (1984). The Second Circuit has required use of the lodestar method in common fund as well as statutory awards of attorneys' fees. *See In re Agent Orange Product Liability Litigation*, 818 F.2d 226, 232 (2d Cir.1987). We, however, have determined that the choice between lodestar and percentage calculation depends on the circumstances, but that "either method may ... have its place in determining what would be reasonable compensation for creating a common fund." *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir.1989). In *Graulty*, we established 25 percent of the fund as the "benchmark" award that should be given in common fund cases. The benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors.

[14] Nothing in this case requires departure from the 25 percent standard award. The district court's fee award was well within the range for recoveries of this size. *See* 3 *Newberg on Class Actions*, § 14.03 (20–30 percent is usual common fund award); *In re GNC Shareholder Litigation: All Actions*, 668 F.Supp. 450, 452 (W.D.Penn.1987) (awarding 25 percent attorneys' fees from common settlement fund of over two million dollars). Here the litigation lasted more than 13 years, obtained substantial success, and involved complicated legal and factual issues.

[15] Finally, ACG contends that the fee award was improper because the identity of the attorneys to share in the award was not properly disclosed to the trial judge. ACG cites the Second Circuit's requirement that the district court must be notified prior to awarding fees of any fee-splitting arrangement. *In re Agent Orange*, 818 F.2d 216, 226 (1987). The concern in that case was a fee-splitting agreement that awarded certain "investing" attorneys threefold their investment from any fee recovery. The Second Circuit's opinion relied, in part, on their requirement that each attorney receive fees based on the lodestar method—a fee agreement could distort that distribution. *Id.* at 225. Here there is no conflict of interest alleged, nor was this a settlement, where there is great concern that attorneys may sacrifice the interests of the class. *Id.* at 222. Under such circumstances, some courts have granted lump sum attorney fees, permitting the attorneys to split the sum as they see appropriate. *See In re Ampicillin Antitrust Litigation*, 81 F.R.D. 395, 400 (D.D.C.1978). The district court was not required to specify what share of the common fund award that each attorney could receive.

CONCLUSION

This case was properly certified for class action treatment. Although the use of cy ***1312** pres to distribute unclaimed funds is permissible, the district court's application was inadequate to serve the goals of the statute and protect the interests of the silent class members. We remand for a reformulation of a distribution method upon expiration of the claims period. The damage award was disproportionately punitive and is modified as indicated. The award of attorneys' fees was not an abuse of discretion.

REMANDED

SNEED, Circuit Judge, concurring specially:

I concur in the court's opinion. My purpose in writing a special concurrence is to indicate that the court's opinion does not endorse a percentage recovery in common fund cases in all instances. Lodestar calculations may be required under circumstances in which a percentage recovery would be either too small or too large in light of the hours devoted to the case. Moreover, trial judges will find it useful, I suggest, to inquire early in the proceedings what mode of recovery of fees the attorneys of the plaintiff class anticipate utilizing. The responses to this inquiry no doubt will facilitate case

management by the trial judge as well as the final resolution of the fee calculation issue.

FERNANDEZ, Circuit Judge, concurring:
I concur in the decision to remand this case for further proceedings. I also concur in most of Judge Farris' cogent opinion. I cannot, however, agree with what amounts to a direction to the district court to apply cy pres or to escheat any excess funds to the government. Nor can I agree with the further direction that return of the funds to the defendants "is not an available option." While those dicta may not cause difficulty in future cases, they are unfair to the defendants in this one.

Cy pres is a fine concept in its proper place. Thus, it has commonly been used when a trustor has given funds for a specific charitable purpose, and that purpose has now been accomplished. Courts then undertake the risky task of divining what new purposes the trustor would have intended, and they try to approximate that intent as closely as possible. It is also a fine concept when parties have agreed that cy pres shall be used if money is left over at the end of a class action settlement. The individuals with a right to the funds have then committed themselves to that regime, just as a trustor may be said to have done so.

However, in this case it is proposed that the doctrine be used in the absence of any expression of purpose or intent by any of those who have any right to the funds. Its use may well amount to little more than an exercise in social engineering by a judge, who finds it offensive that defendants have profited by some wrongdoing, but who has no legitimate plaintiff to give the money to. It is a very troublesome doctrine, which runs the risk of being a vehicle to punish defendants in the name of social policy, without conferring any particular benefit upon any particular wronged person. This difficulty has, in part, motivated the courts which have rejected the notion. *See, e.g.*, *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir.1974), and *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1013 (2nd Cir.1973), *vacated on other grounds*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

In fact, even the case that is relied upon in the main opinion, *Nelson v. Greater Gadsden Housing Auth.*, 802 F.2d 405, 409 (11th Cir.1986), appears to be a very unusual use of the cy pres doctrine. There the money was to be spent by defendants on the Authority's own property. It may not have been defendants' preferred way to use that capital, but the improvements would still belong to the Authority. Also, it is worth noting that the Authority appears to be a public entity which is committed to supplying affordable housing to those who could not otherwise afford it. Thus, it appears that the funds may have already been committed to a public use, and only the nature of that use changed and that only slightly.

Here it is said that a judge can use a liquidated damage provision to mulct the defendants for an enormous sum of money. ***1313** [1] Then, if the judge cannot find plaintiffs to give it to, he can do good by distributing that money to someone who has no claim whatever upon it. [2] In my opinion, that is fundamentally wrong.

1 Of course, the sum we have allowed is less than the even greater fund the district court was creating.

2 The district judge does not have complete power. As here, some appellate judges will have to agree. See also *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494 (7th Cir.1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1471, 108 L.Ed.2d 609 (1990) and *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252 (7th Cir.1984), *cert. dismissed*, 471 U.S. 1113, 106 S.Ct. 11, 86 L.Ed.2d 269 (1985), in which two attempts by a district court to apply cy pres failed.

Moreover, I find the notion of escheat little better, especially where, as here, the United States Government has already had an opportunity to pursue the defendants, has in fact done so, and has collected an amount that satisfied it.

The outcome of this litigation establishes that the defendants' rights to their own money are not superior to the rights of the plaintiffs. However, defendants' rights remain superior to those of anyone else.

Last, but not least, I do not believe that we need to specify the remedies that may or may not be appropriate, if, somehow, the funds are not distributed to the intended plaintiffs. Were it necessary for us to do so, other possibilities could be considered, such as a pro tanto distribution to the plaintiffs who are found. Still, it seems to me that we have done enough if we do no more at this time than strike down the distribution ordered by the district court, since, even under cy pres doctrine, that distribution is improper. The district court could then assess the situation after an attempt to locate the class members has been made and the amount remaining, if any, has been ascertained. Indeed, it is possible that virtually all of the funds will be distributed to those entitled to them. Throughout this litigation, plaintiffs said that

was a reasonable possibility. If so, the cy pres issue may become moot.

Therefore, I concur in the result, but, respectfully, must disassociate myself from some of the reasoning.

Parallel Citations

107 A.L.R. Fed. 779, 116 Lab.Cas. P 35,375

End of Document

1974 WL 350
United States District Court; S.D. New York.

Miller
v.
Steinbach, et al.

No. 66 Civ. 356 | January 3, 1974

Opinion

KNAPP, District Judge.

***1** The Court is called upon to approve a somewhat unorthodox settlement proposed to dispose of the aboveentitled stockholders' derivative suit. A hearing on the settlement was duly noticed and held on September 18, 1973. Written objections were received by the Court and/or counsel from three stockholders, and a fourth was present at the hearing. Of the four objections, two focus specifically on the terms of the proposed settlement and the other two more generally (and irrelevantly) on the terms of a merger in 1965 from which this case arose.

Before turning to the terms of the proposal, it is helpful briefly to describe the litigation that led up to it.

In 1965 Baldwin-Lima-Hamilton Corp. (BLH) merged with Armour & Co. The following year Irving Miller commenced this action on behalf of BLH, himself, and the owners of some 4,167,302 shares of BLH stock against Armour and others including one BLH stockholder. The complaint originally alleged as its first count that the terms of the merger had been unfair, and that the securities laws had been violated in connection with its consummation. Its second count alleged that defendant Evans, the BLH stockholder referred to above, had breached the fiduciary duty he owed to his fellow shareholders by agreeing in return for a settlement of his personal claim against Armour, to discontinue a derivative and representative action *he* had earlier commenced against Armour.

At the hands of Judges Tenney, Bonsal and Mansfield the complaint was gradually whittled down and the question of the merger's fairness almost completely eliminated. In addition, the question of whether plaintiff would be entitled to a trial of his claims by jury was vigorously litigated, with the result that in February 1973 the Court held the securities claims but not the fiduciary claim triable to a jury. Some months thereafter, the parties advised the Court that a settlement had been reached.

The proposal now before the Court provides that defendant Armour will contribute $75,000 and defendant Evans $20,000 to the settlement. From that $95,000 is to be deducted $5,000 to cover the cost of mailing and printing notice of the settlement hearing, and $32,000 for plaintiff's attorneys fees and disbursements, leaving approximately $58,000 to be distributed. The cost of the distribution–which would also be deducted–has been estimated by counsel for defendant Armour at $8,000. In view of the very modest size of the settlement fund and the vast number of shares among which it would have to be divided, the parties have agreed instead–subject to the Court's approval–to pay the fund to the Trustee of the BLH Retirement Plan, applying a variant of the cy pres doctrine at common law.

The record shows that on the date relevant for the purpose of determining the participants in any settlement, there were outstanding 4,167,302 shares of BLH common stock. Thus division of the approximately $50,000 estimated to remain would yield approximately $.012 per shares.

***2** One of the stockholders objecting to the proposal owned individually and jointly with his spouse 2100 common shares on the record date. Were the fund distributed on a per share basis, he would accordingly be entitled to approximately $25.00. The other objector owned no shares but his wife owned 50 shares on the record date. His wife would thus receive about $.60.

The first question presented is whether the amount of the fund should be approved as fair and reasonable. The Court recognizes that the viability of the lawsuit has been drastically reduced, and, without pondering its merits as we would at trial, is unable to find the small recovery unfair.

The next question is whether the aggregate recovery of the two objectors is sufficiently substantial a distribution to warrant the spending of $8,000 in order to effect it. The Court does not believe that it is. The question remaining then is whether there is any reason why the fund (which would now be $58,000) should not be paid to the BLH retirement plan in accordance with the wishes of counsel for the parties.

As to any legal prohibition, while neither counsel nor the Court has discovered precedent for the proposal–at least in a case such as this where distribution to the class of plaintiffs

was theoretically possible if not in a practical sense feasible–nor have we been made aware of any precedent that would prohibit it. In a sense, it must be observed, the result of approval will be to benefit plaintiff's counsel and perhaps several BLH employees who will draw pensions from the fund, but certainly not to benefit those on whose behalf the action was brought. On the other hand, individual recoveries would be de minimus by almost any standard. The Court is troubled by the prospect of either conclusion to what has been a protracted and undoubtedly expensive lawsuit. But in view of the fact that plaintiff's chance of prevailing at trial became less and less likely as the defense pressed on, no alternative is realistically possible.

The Court approves the proposed settlement, having deemed it fair and reasonable. The award of $30,000 as attorneys fees is also approved, on the basis of the magnitude of the effort expended by counsel in the case (see copy of docket sheet and Kaufman affidavit attached) and the reasonable percentage of the settlement that it represents.

So Ordered.

Parallel Citations

Fed. Sec. L. Rep. P 94,350