IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 04-C-296-2
(Judge Thomas A. Bedell)

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation doing business in West Virginia, et al.,

Defendants.

DUPONT'S PROPOSAL FOR THE DISTRIBUTION OF THE SURPLUS IN THE PROPERTY REMEDIATION FUND AND ITS OBJECTIONS TO THE OTHER SUBMITTED PROPOSALS

At the January 31, 2017 hearing, the Claims Administrator verbally advised the Court that he projected a surplus of approximately $600,000 in the Property Remediation Fund at the completion of the Settlement's Property Remediation Program. By letter dated February 10, 2017, the Claims Administrator confirmed the amount of the projected surplus and sought the Court's direction on how the remainder of the Property Remediation Fund should be distributed.

On February 22, 2017, the Court took evidence and heard the positions of the interested parties on the distribution of the surplus. The Court subsequently issued the "Scheduling Order Respecting a Possible Health Study and the Use of Residual Remediation Funds" on March 9, 2017, which directed the interested parties to more fully detail and develop their proposals for submission to the Court on the specified schedule. DuPont's proposal and its objections to certain aspects of the other two proposals submitted to the Court pursuant to the March 9, 2017 Order follow.

1. **The Projected Surplus of the Property Remediation Fund Should be Distributed to the Members of the Property Class.**

In late 2010, DuPont settled this litigation with Plaintiffs who comprise two classes of claimants – the "Property Class" and the "Medical Monitoring Class." Final Order Approving Settlement at 9 (Jan. 4, 2011) [hereinafter "Jan. 4, 2011 Order"]. As the components of the Settlement were implemented, the definitions of the "Property Class" and the "Medical Monitoring Class" were refined. The present operative class definitions are as follows:

> Members of the Property Class are current owners of eligible Class Area Properties, as previously identified by Class Counsel within the Class area boundary. A current owner is defined as the owner of the property on the date that this Order is entered. If property is sold between the date of entry of this Order and the date of execution of the Property Remediation Program as to that specific property, *i.e.*, the testing and clearing, if necessary, of that property, the benefits conferred by the Settlement and the Program inure to the new owner, not the old owner, thereby running with the land. Further, the properties identified in Court documents and fully described as the "thirty-two tracts" or the "Grasselli Properties" are excluded from the Property Remediation Program, by Order of this Court and by the ruling of the West Virginia Supreme Court of Appeals.

Final Order Establishing Property Remediation (Clean-Up) Program at 7-8 (June 27, 2011) [hereinafter "June 27, 2011 Order"].

On the other hand, the Medical Monitoring Class is made up of those persons "who currently or at any time in the past since 1966 have resided on private real property in the Class Area for at least the minimum total residency time[s]. . . ." assigned to the designated zones of the geographic Class Area. Jan. 4, 2011 Order at 9. Those persons who met the definition of the Medical Monitoring Class and complied with the enrollment provision contained in the Final Order Setting Forth the Scope and Operation of the Medical Monitoring Plan [hereinafter the "Jan. 18, 2011 Order"] became eligible participants in the Medical Monitoring Program [hereinafter "MMP"] and entitled to all the benefits of the MMP. *See* Jan. 18, 2011 Order at 6-7.

Upon Court approval of the Settlement, DuPont was ordered to pay $70 million into the "two separate and distinct Qualified Settlement Funds" established by a previous Order. Jan. 4, 2011 Order at 13. This Court set aside $66 million for remediation of the real property of the Property Class and for the "attorneys' fees and expenses of Plaintiffs' Counsel." Jan. 11, 2011 Order at 14. After the deduction of the award of attorneys' fees and expenses, $34 million remained in the "Property Remediation Settlement Fund" for the remediation of the real property of the Property Class. *See* the June 27, 2011 Order at 1.

Four million dollars of the $70 million settlement amount was dedicated for the use and "sole benefit" of the eligible Medical Monitoring Class members who also received access to the MMP for thirty (30) years at DuPont's expense on a "pay-as-you-go" basis. Jan 4, 2011 Order at 14.

As the Orders and the conduct of the Claims Administrator and the parties implementing the Settlement make clear, the Property Remediation Fund is and has been solely for the use and benefit of the Property Class. The Claims Administrator regularly requests Court approval for any amounts paid out of the Property Remediation Fund; reports the Fund's payments and balances to both the Court and the Finance Committee; and submits annual financial fiduciary reports on the Fund to the Court. From the creation of the Property Remediation Fund to date, all Fund monies spent have gone either for the direct or indirect benefit of the Property Class members.

The Property Remediation Fund, including the $600,000 surplus at issue, belongs to the Property Class. *See Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 475 (5th Cir. 2011). The *Klier* court enunciated the principle that "settlement funds are the property of the class" by relying on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807-08 and 812-813, 105 S. Ct. 2965,

86 L.Ed.2d 628 (1985) ("Each class member has a constitutionally recognized property right in the claim or cause of action that the class action resolved.") and on the American Law Institute's Principles of the Law of Aggregate Litigation, § 3.07 cmt. b. ("The settlement-fund proceeds, having been generated by the value of the class members' claims, *belong solely to the class members.*") (emphasis supplied), 658 F.3d at 474.

The only appropriate disposition of the estimated $600,000 surplus in the Property Remediation Fund is a distribution of the surplus directly to the individual members of the Property Class because those class members have a constitutionally recognized property interest in the Fund and its surplus. The Claims Administrator, Plaintiffs' Counsel and the Guardian ad Litem expressly accept the propriety of a distribution of the surplus to the individual Property Class members because they all propose a distribution of a portion of the surplus in the same manner.

During the January 31, 2017 hearing, the Court implicitly raised the question of whether the distribution of the surplus of the Property Remediation Fund involved the principles of *cy pres* awards, particularly under the then-proposed Rule 23(f) of the West Virginia Rules of Civil Procedure.[1] It appears that no interested party contends that *cy pres* principles apply here because the Proposals of the Claims Administrator and the Guardian ad Litem and Class Counsel do not mention the issue and call for at least some portion of the surplus to be distributed to the Property Class.

A *cy pres* award cannot be made of the surplus under the existing facts because:

> . . . If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members. . . .

[1] Rule 23(f) of the West Virginia Rules of Civil Procedure became effective on March 8, 2017.

Am. Law. Inst., Principles of Law of Aggregate Litigation § 307(a) (2010).

The foregoing demonstrates that Rule 23(f) does not apply to the disposition of the Property Remediation surplus and that those monies must be distributed directly to the Property Class.

2. The Proposals of Both the Claims Administrator/Medical Advisory Panel and Guardian ad Litem/Class Counsel are Similarly Objectionable.

Before the Court are the April 24, 2017 "Report Respecting Use of Remediation Program Second Surplus" submitted by the Claims Administrator and joined in by the Medical Advisory Panel ("the Claims Administrator's Proposal") and the "Submission of Guardian ad Litem in Response to Settlement Administrator's Proposals for Remediation Program Surplus" joined in by Plaintiffs' Counsel and filed on May 24, 2017 ("the GAL/Plaintiffs' Counsel Proposal"). DuPont's objections to these Proposals are addressed in turn below.

a. The proposals identify no basis for distributing any portion of the surplus to the Medical Monitoring Class.

The Claims Administrator's Proposal suggests "that half of the surplus go to the Claimants in the form of a dividend and half the surplus to help the Medical Monitoring Program to the benefit of the Claimants." Claims Administrator's Proposal at 1. This recommendation appears to blur the distinction between the Property Class and Medical Monitoring Class and lump the two groups together as "Claimants."

The GAL/Plaintiffs' Counsel Proposal more clearly advocates for a portion of the surplus to be distributed to the Medical Monitoring Class, to the detriment of the Property Class, by mistakenly arguing that the Medical Monitoring Class has an interest in the surplus in the Property Remediation Fund (GAL/Plaintiffs' Counsel Proposal at 1-2) and that distributing 50% of the surplus to "all claimants" was equitable. *Id.*, at 2-3.

The GAL/Plaintiffs' Counsel Proposal attempts to justify the recommendation that a portion of the Remediation Fund surplus be used to benefit the Medical Monitoring Class by interpreting general language in the Memorandum of Understanding ["MOU"] which generally outlines the Settlement.[2] This Proposal overlooks the fact that by the time the Fairness Hearing on the Settlement was concluded and the Court approved the Settlement, the language evolved and "medical monitoring" was not mentioned in reference to the purposes of the $66 million of the Settlement from which arose the Property Remediation Fund. As part of the consideration and approval of the Settlement, the Court ordered the implementation of Paragraph 2.b of the MOU in the following language:

> 11. The Court **FINDS** in view of all of the circumstances that the proposal settlement is fair, just, reasonable, equitable, and in the best interest of the Parties.
>
> Accordingly, the Court **ORDERS** that:
>
> * * *
>
> 3. Sixty-six million ($66,000,000.00) of the total seventy million ($70,000,000.00) payment shall be available to the Plaintiffs as directed by the Court, or it's designee, for the purposes of paying for remediation services and attorneys' fees and expenses for Plaintiffs' Counsel.

Jan. 4, 2011 Order at 13-14.

Further, the GAL/Plaintiffs' Counsel Proposal also overlooks the specific finding in the Final Order Setting Forth the Scope and Operation of the Medical Monitoring Plan ("the Jan. 18, 2011 Order") that no part of the $66 million should be used for the medical monitoring program. ". . . The Court finds that the most equitable solution to funding the start-up costs of the medical

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[2] The Proposal focuses specifically on the following language:

> $66,000,000.00 of the total $70,000,000.00 payment shall be available to the Plaintiffs as directed by the Court for the purposes of paying for remediation services, medical monitoring costs and expenses, and attorney fees and expenses.

MOU, ¶ 2.b., which is a portion of Exhibit A submitted during the February 22, 2017 hearing.

monitoring program is to have only those individuals who are members of the medical monitoring class shoulder the burden. Distribution of start-up expenses from the sixty-six million dollar fund would negatively impact those property class members who do not participate, or are not eligible to participate in the medical monitoring program." Jan. 18, 2011 Order at 10-11.

Neither Proposal presents any appropriate justification for rejecting the Claimants' overwhelming support for the distribution of the surplus to the Property Class as expressed in both the Mail Survey Results from class members and their votes at three town hall meetings. *See* the Feb. 21, 2017 Report Respecting Use of Remediation Program Second Surplus Written Claimant Survey and Town Hall Meetings, Exhibit C, Feb. 22, 2017 Hearing and attached hereto as "Proposal Exhibit 1." Just as troublesome is the failure of either Proposal to address the property interest of the Property Class to the surplus. The process that is due the Property Class cannot be satisfied by the February 22, 2017 hearing because the Proposals, and therefore notice of the recommended disposition of the surplus, have not been made known until after that hearing. For the reasons above, the recommendations that a distribution of only 50% of the surplus must be declined.

b. The Proposals recommend spending by the Medical Monitoring Program which is not authorized either by the law or the Settlement.

Both Proposals suggest that 25% of the surplus be paid to the participants in the Medical Monitoring Program in the form of Walmart gift cards as an incentive to continue with future rounds of medical testing and that the remaining 25% of the surplus be used as a "seed scientific research grant" to study the MMP and related data. The Claims Administrator's Proposal at 2-3; the GAL/Plaintiffs' Counsel Proposal at 3-5. Neither of the suggestions is an appropriate use of the surplus funds for medical monitoring purposes under the law and the terms of the Settlement.

In support of their suggestion of dedicating seed money for a scientific research grant, the Medical Advisory Panel and the Claims Administrator concede that the Medical Monitoring Program's current available data is "underpowered"; that an epidemiology study is "unlikely to be informative"; and that a "cross sectional retrospective study" such as that proposed by Translational Technologies International "would not necessarily be informative. . . ." The Claims Administrator's Proposal at 3-4. Yet, they propose using 25% of the Remediation Fund surplus as "a seed scientific research grant" for third parties to review "Claimant and related data." *Id.* at 3. Were this suggestion to be adopted, further proceedings for the consideration of the specific nature and purposes of any proposed research project would be necessary once those details become known, and inquiry into the viability of the proposed research project would have to be made. However, the present uncertainty and the necessary future implementation steps can be disregarded because the proposal seed scientific research grant is not an appropriate medical monitoring expense.

In West Virginia, a claimant may seek "the recovery of medical monitoring costs, where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant's tortious conduct." Syl. Pt. 2, *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999). Plaintiffs and DuPont reached a post-trial and post-appeal settlement of Plaintiffs' medical monitoring claims. The Settlement basically adopted the March 30, 2007 medical monitoring recommendations of Charles L. Werntz III, D.O., MPH with exceptions which are not relevant to the issues presently before the Court. Pursuant to the Settlement, the MMP was established utilizing a Court supervised Medical Monitoring Fund to deliver medical monitoring services to eligible Medical Monitoring Class members consistent with the parameters of the *Bower* decision. That is, the MMP is designed to

provide the relevant periodic diagnostic examinations and testing and to cover the expenses therefor which are "necessary and reasonably certain to be incurred" by the participants in the MMP. *Bower*, 522 S.E.2d at 430.

Incentive payments in the form of Walmart gift cards or even cash to participants in the MMP are neither necessary nor reasonable expenses that would have been recoverable at trial under the principles of the *Bower* decision, and the Settlement certainly does not provide for incentive payments which "might increase the claimant participation rate." Claims Administrator's Proposal at 2; *see also*, GAL/Plaintiffs' Counsel Proposal ("[T]he utilization of an incentive . . . may boost program participation."). The participant in a medical monitoring program is entitled to the value of the reasonable and necessary expenses for undergoing long-term diagnostic testing, but she/he is not entitled to be compensated for merely going to the examination or test.

The recommendation in both Proposals that 25% of the surplus be set aside as a "seed scientific research grant in order to review claimant and related data for scientific trends and findings . . ." (Claims Administrator's Proposal at 3) is not an appropriate use of medical monitoring funds. Although the propriety of expenditures for health studies has yet to be addressed in West Virginia, one court has ruled on the issue and found that the costs of generalized scientific studies cannot be recovered as part of a medical monitoring claim. *Cook v. Rockwell Intern. Corp.*, 755 F.Supp. 1468, 1478 (D. Colo. 1991). Similar to the *Bower* court, the *Cook* court reasoned that medical monitoring is meant to compensate a plaintiff for the diagnostic examination and testing necessitated by a defendant's tortious conduct, and the relief is "akin to future medical damages." *Id.* The *Cook* court went on to explain that medical

monitoring should not compensate a plaintiff for testing or studying other persons citing authorities also relied upon in *Bower*.

Nothing in the MOU or the Orders subsequently entered implementing the Settlement broadens the Settlement parameters to include either the funding of incentive payments to pay class members to participate in medical surveillance or the funding of unspecified studies or research by unknown third persons for very generalized descriptions of purpose.

In conclusion, DuPont respectfully urges the Court to reject the Claims Administrator's Proposal and the GAL/Plaintiffs' Counsel Proposal and direct that the projected surplus in the Property Remediation Fund be distributed to the individual members of the Property Class.

Dated June 22, 2017

E.I. DU PONT DE NEMOURS AND COMPANY,

Defendant,

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February 21, 2017

VIA HAND DELIVERY

The Honorable Thomas A. Bedell
Circuit Judge of Harrison County
301 West Main Street, Room 321
Clarksburg, West Virginia 26301

Re: The Perrine DuPont Settlement Remediation Program (the "Remediation Program") - Report Respecting Use of Remediation Program Second Surplus Written Claimant Survey and Town Hall Meetings; Our File No. 4609-1 {DD-89}

Dear Judge Bedell:

I hope this letter finds the Court well.

The purpose of this Report is to supplement our February 10, 2017 Report to the Court, following our recent mail survey of Claimants and town hall meetings asking for their input on the use of the approximately $600,000 Remediation Program surplus. We mailed the 1,472 Claimants that received the first dividend a written survey on the use of this second surplus amountwith a February 17, 2017 due date. We also held Town Hall Meetings on the use of the second surplus amount at the Spelter Volunteer Fire Department on February 17, 2017.

Of the 1,472 Claimants that received the first dividend, 903 signed up for Medical Monitoring, 282 said "no" to Medical Monitoring but registered, 244 did not register for Medical Monitoring, and 43 are deceased. There is therefore a large overlap of Remediation and Medical Monitoring Claimants.

A. Mail Survey Results

As you will recall from our previous February 10, 2017, Report, in the written survey, Claimants were given three options for input on the use of the second surplus amount, and 744 timely responded by mail. Their responses were as follows: (1) 683 (92%) thought all the surplus should be paid to the Remediation Claimants as a dividend; (2) 35 (5%) thought half of the surplus should be paid to the Remediation Claimants as a dividend and half should be used for the Medical Monitoring Program; and (3) 8 (1%) thought all the surplus should be used for the Medical

EXHIBIT 1

Monitoring Program. Another 2% had other answers.

B. Town Hall Meeting Results

59 Claimants attended the February 17, 2017 Town Hall meetings. They voted as follows: (1) 55 (100%) thought all the surplus should be paid to the Remediation Claimants as a dividend; (2) 0 (0%) thought half of the surplus should be paid to the Remediation Claimants as a dividend and half should be used for the Medical Monitoring Program; and (3) 0 (0%) thought all the surplus should be used for the Medical Monitoring Program. 4 abstained.

At the Town Hall meetings, a popular question was whether (A) to pay the second dividend in the same fractions as the first dividend; or (B) to pay the second dividend to all Claimants equally. About 10 (22%) people voted to pay it only to Zone 1A Claimants. 8 (18%) voted to pay it in the same fractions and 27 (60%) voted to pay it equally. 14 abstained.

50 Claimants have indicated they plan to attend the February 22, 2017, 12:00 p.m. hearing on the use of the second surplus payment.

As the Court may recall, 313 out of 1,716 (18%) Claimants answering the previous survey on the first dividend voted to use part of it for Spelter road repairs, which were subsequently approved by the Court.

Please let me know if you have any questions regarding this matter.

Thank you for the Court's consideration.

Yours very truly,

Ed Gentle, III
Claims Administrator

ECGIII/jcs

cc: (confidential)(via email)
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CERTIFICATE OF SERVICE

I, JAMES S. ARNOLD, counsel for defendant E.I. du Pont de Nemours and Company, hereby certify that service of **"DuPont's Proposal for the Distribution of the Surplus in the Property Remediation Fund and Its Objections to the Other Submitted Proposals"** has been made on the parties herein by electronic and regular U.S. mail, this 22nd day of June, 2017, addressed as follows:

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APPENDIX TO
DUPONT'S PROPOSAL FOR THE DISTRIBUTION OF THE SURPLUS IN THE PROPERTY REMEDIATION FUND AND ITS OBJECTIONS TO THE OTHER SUBMITTED PROPOSALS

1. American Law Institute's Principles of the Law of Aggregate Litigation, § 3.07 (2010)

2. *Cook v. Rockwell Intern. Corp.*, 755 F.Supp. 1468 (D. Colo. 1991)

3. *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011)

APPENDIX NO. 1

Principles of the Law of Aggregate Litigation § 3.07 (2010)

Principles of the Law - Aggregate Litigation June 2017 Update
Principles of the Law of Aggregate Litigation
Chapter 3. Aggregate Settlements
Topic 2. Class Settlements

§ 3.07 Cy Pres Settlements

Comment:
Reporters' Notes
Case Citations - by Jurisdiction

A court may approve a settlement that proposes a cy pres remedy even if such a remedy could not be ordered in a contested case. The court must apply the following criteria in determining whether a cy pres award is appropriate:

(a) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members.

(b) 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.

(c) If the court finds that individual distributions are not viable based upon the criteria set forth in subsections (a) and (b), the settlement may utilize a cy pres approach. The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class. If, and only if, no recipient 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.

Comment:

a. Purposes of the cy pres remedy. The cy pres remedy originated in the context of charitable trusts. The concept was that, if the testator's precise terms could not be carried out (for example, because a specific charitable organization no longer existed), the court could modify the trust in a manner that would best carry out the testator's intent (for example, by selecting a similar charity).

A related remedy, known as fluid recovery, provides relief to future consumers to reasonably approximate the interests being pursued by the aggrieved class when class members cannot reasonably be identified. This Section uses the term cy pres broadly to refer to both remedies.

Courts have approved the cy pres remedy in settlements in two situations. First, many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied. Subject to a narrow exception in subsection (c), this Section approves of that type of cy pres only when it is not feasible to make further distributions to class members and the third party's interests approximate those of the class members. Second, some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members. A fluid-recovery remedy fits into this second category. This Section approves of the latter type of cy

pres remedy only when distribution of the funds directly to class members is not feasible and the third party's interests approximate those of the class members.

b. Circumstances in which the cy pres remedy is appropriate. This Section begins from the premise that funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members (and that the settlement has not been structured so that any funds remaining revert to the defendant). Starting from this vantage point, this Section generally permits cy pres awards 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. In such circumstances, there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests.

Assuming that class members can be reasonably identified and that direct distributions make economic sense, funds may remain because some class members could not be identified or chose not to file claims. Under this Section, assuming that further distributions to the previously identified class members would be economically viable, that approach is preferable to cy pres distributions. This Section rejects the position urged by a few commentators that a cy pres remedy is preferable to further distributions to class members. Those commentators reason that further direct distributions would constitute a windfall to those class members. However, 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. In any event, this Section takes the view that in most circumstances 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.

Cy pres is preferable to other options available to a court when direct distributions are not viable. One option is to return the remaining funds to the defendant even when the settlement does not contain a provision for reversion to the defendant. That option, however, would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable. Another option, escheat to the state, would benefit all citizens equally, even those who were not harmed by the defendant's alleged conduct. A cy pres award to a recipient whose interests closely approximate those of the class is preferable to either of these options.

Section 3.07(c) provides that if an award to a recipient whose interests reasonably approximate the interests of the class is not practicable, the court may designate an alternative recipient. On the issues of practicability, the extent of effort that the court and parties must undertake to identify a recipient whose interests reasonably approximate those of the class will necessarily vary depending upon the facts of the case, most notably the amount of the distribution at stake. For small amounts, a court may be more inclined to approve an organization as a recipient without an extensive search of available entities, whereas a more exacting search will be required when more money is at stake.

A cy pres remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits.

Under subsection (c), before a court approves a recipient whose interests do not approximate the interests of the class, it must find that further distributions directly to class members are infeasible, and that despite thorough investigation and analysis, no recipient can be found that approximates the interests of the class. Once it has made these findings and is in the process of selecting an appropriate recipient, the court should give weight to the parties' choice of recipient, as demonstrated by the settlement agreement. If the settlement agreement does not designate a recipient, the court shall designate an appropriate recipient after soliciting input from the parties. Unless the court makes the specific findings required by subsection (c), cy pres may not be used when there is no close nexus between the proposed recipient and the class, regardless of how "worthy" the court and the parties consider the proposed recipient to be.

Nothing in this Section would require that a settlement actually recover money for class members, so long as the class is apprised of that fact in a properly constructed settlement notice. For instance, nothing in this Section prohibits a settlement that is limited entirely to injunctive relief. Likewise, nothing in this Section limits the ability of legislatures to designate appropriate recipients of remaining funds in particular circumstances, including pro bono legal-services providers.

Illustrations:

1. A taxicab company allegedly overcharged for taxi services during the four-year period before the filing of the lawsuit. The specific injured class members cannot be identified, and even if they could be, the award to a typical class member would likely be very small. The parties propose a settlement whereby the company will reduce taxi fares for a period of time to compensate for the overcharges. Although the beneficiaries of the settlement (future passengers) are not identical to the members of the injured class, the remedy is an effort, as near as possible, to compensate the victims. Such a settlement is a proper way of distributing the class-wide relief (leaving to the side whether it may unfairly disadvantage competing taxi companies).

2. In an employment-discrimination suit in which 100 individual African-American class members seek in excess of $50,000 each, the parties propose a settlement involving a payment of $5 million to the NAACP Legal Defense Fund. The settlement is improper; the employer has contact information for all or most class members, and the amounts involved are sufficient to expect most class members to make claims. On the other hand, if a settlement calls for individual payments to class members, and funds remain out of a $5 million fund at the end of the claims period, the donation of the balance to an entity that indirectly benefits class members and other victims of race discrimination, such as the NAACP Legal Defense Fund, would be appropriate if additional payments to identified class members would not be economically viable.

Reporters' Notes

Comment a. This Section addresses settlements in which the parties agree to a cy pres remedy, as opposed to the situation in which a court orders a cy pres distribution as a remedy in a contested class action.

For commentary discussing the difference between traditional cy pres and fluid recovery, see Martin H. Redish, Peter Julian, & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis* at 59-60 (unpublished manuscript, available at http://www.law.northwestern.edu/searlecenter/uploads/CyPresClassActions.pdf (last visited Jan. 28, 2010)).

For authority discussing the history of the cy pres remedy and its application to class actions, see, e.g., Mirfasihi v. Fleet Mortgage Corp., 356 F.3d 781, 784-785 (7th Cir. 2004) (Posner, J.); In re Lupron Marketing and Sales Practices Litig., No. 01-CV-10861-RGS, 2009 WL 1395411, at *1-*2 (D. Mass. May 19, 2009) (citing to a previous draft of these Principles of Aggregate Litigation); S.E.C. v. Bear Stearns & Co., 626 F.Supp.2d 402, 414 (S.D.N.Y. 2009) (same); Schwab v. Philip Morris U.S.A., Inc., 449 F.Supp.2d 992, 1251-1271 (E.D.N.Y. 2006), rev'd, McLaughlin v. Philip Morris, 522 F.3d 215 (2d Cir. 2008); 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, 391-399 (1999). See also Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 Tul. L. Rev. 1695, 1704-1705 (2006) (arguing that "cy pres should ... be available ... where portions of a settlement fund are likely to go unclaimed").

For examples of a court using the cy pres doctrine to disburse excess settlement funds after all plaintiffs have been satisfied, see In re Publication Paper Antitrust Litigation, Nos. 3:04 MD 1631(SRU) et al., 2009 WL 2351724, at *1-

*2 (D. Conn. July 30, 2009) (" 'With respect to the approval of settlements providing for a cy pres remedy, [a previous draft of these Principles of Aggregate Litigation] propose[d] a rule limiting Cy Pres "to circumstances in which direct distribution to individual class members is not economically feasible, or where funds remain after class members are given a full opportunity to make a claim." ' ") (quoting Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007)); In re Tyco Intern., Ltd. Multidistrict Litig., 535 F.Supp.2d 249, 262 (D.N.H. 2007) (similarly citing to a previous draft of these Principles as consonant with the court's decision to apply the cy pres doctrine once pro rata disbursement of funds to class members is not "economically viable").

For authority holding that a cy pres remedy may not be used in a contested class action to avoid manageability problems, see, e.g., McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 231-233 (2d Cir. 2008); Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990). Numerous courts, however, have indicated that cy pres remedies may be permissible in class settlements. See, e.g., *Masters*, 473 F.3d at 435-436; *Six Mexican Workers*, 904 F.2d at 1305. But even on this point, the courts are divided. For instance, the Ninth Circuit has stated that, even in the settlement context, a cy pres remedy may "circumvent individualized proof requirements and alter the substantive rights at issue." Molski v. Gleich, 318 F.3d 937, 954 (9th Cir. 2003).

For an example of the use of cy pres in the settlement context because of the infeasibility of direct distributions to class members, see Block v. McDonald's Corp., No. 00 CH 9137 (Cir. Ct. of Cook County, Ill. Oct. 30, 2002), available at http://www.edcombs.com/CM/Notices/Notices233.asp (last visited Jan. 28, 2010) (approving settlement of class suit alleging that McDonald's used beef tallow or beef extract in preparing french fries and hash-brown potatoes despite representing that those foods were cooked in vegetable oil; McDonald's agreed to pay $10 million to various vegetarian and nutrition organizations). For other examples, see Bruno v. Superior Court, 179 Cal.Rptr. 342 (Cal. Ct. App. 1981) (case alleging unlawful fixing of milk prices and seeking, inter alia, lowering of milk prices in affected area); Kerry Barnett, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 Yale L.J. 1591 (1987) (giving case examples). For an example of a court's creative use of cy pres in a complex settlement involving millions of class members, see In re Holocaust Victim Assets Litig., 424 F.3d 132 (2d Cir. 2005) (one of several Second Circuit opinions affirming trial court's use of cy pres to distribute part of $1.25 billion class-action settlement to the neediest victims of Nazi looting).

On the importance of ensuring that recovery goes to class members, if possible, in the context of employment-discrimination cases, see Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 Tex. L. Rev. 1249, 1249-1252 (2003) (urging increased court participation to ensure "increased monetary damages for the plaintiffs and monitoring of the settlement"); see also Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976).

In exceptional circumstances, courts may use their discretion in the disbursement of funds after all claims by the class have been satisfied. For example, in In re Pharmaceutical Industry Average Wholesale Price Litigation, 588 F.3d 24 (1st Cir. 2009), the court relied on an earlier draft of these ALI Principles in finding that a cy pres distribution was appropriate in litigation over the price of drugs used in part for the treatment of prostate cancer. The court found that the creation of a cy pres fund was appropriate where all class members were to receive treble actual damages before distribution of any funds, thereby insuring complete statutory compensation to the class, and residual amounts would be used to fund prostate- or cancer-related research or treatment. Id. at *9.

Comment b. For authority holding that cy pres remedies should be used only where class members are difficult to identify, when the funds involved are too small to distribute economically to individual class members, or when unclaimed funds exist, see *Masters*, 473 F.3d at 435-436. For a discussion of the need to designate a recipient "as near as possible" to the class, see id.

For commentary urging cy pres awards over additional distributions to class members, see, e.g., Farmer, *More Lessons*, 68 Fordham L. Rev. at 393 (distributing funds remaining after initial distribution to class members who submitted claims

"is inequitable because class members who have already been fully compensated for their injury have no legitimate claim on any remainder").

For examples of cy pres awards that are not within the contemplation of this Section because they do not involve a nexus to the class, do not contain specific findings that further distributions to class members are infeasible, and do not contain specific findings that no recipient can be found that approximates the interests of the class, see, e.g., Superior Beverage Co. v. Owens-Illinois, Inc., 827 F.Supp. 477 (N.D. Ill. 1993) (in alleged price-fixing case involving glass containers, court distributed unclaimed funds to, inter alia, an art museum and various legal-services organizations); Jones v. Nat'l Distillers, 56 F.Supp.2d 355 (S.D.N.Y. 1999) (undistributed funds in securities-fraud case awarded to legal-aid society).

For legislative enactments permitting residual funds to be distributed to legal-services organizations and certain other charitable organizations, see, e.g., Cal. Civ. Proc. Code § 384 (West 2004); 735 Ill. Comp. Stat. 5/2-807 (2008).

Illustration 1 is based on Daar v. Yellow Cab Co., 433 P.2d 732 (Cal. 1967). See Blue Chip Stamps v. Superior Court, 556 P.2d 755, 760 n.1 (Cal. 1976) (Tobriner, J., concurring) (discussing *Daar* settlement).

Effect on current law. Case law has taken various approaches in terms of the types of cy pres remedies, if any, that are permissible. In some jurisdictions, a rule change may be necessary to establish the precise circumstances in which cy pres awards may be allowed.

Case Citations - by Jurisdiction

C.A.1
C.A.2
C.A.3,
C.A.3
C.A.5
C.A.7,
C.A.8,
C.A.8
C.A.9
S.D.Fla.
D.N.H.
E.D.N.Y.
S.D.N.Y.
N.D.Ohio.
S.D.Tex.
Tex.

C.A.1

C.A.1, 2012. Cit. in sup., subsec. (b) quot. in ftn., subsec. (c) quot. in sup., com. (b) cit. and quot. in sup., com. (b) cit. in cases cit. and quot. in disc. and sup. (citing § 3.07 of Prop. Final Draft, 2009. § 3.07 has since been revised; see Official Text). Small dissident group within a larger class of medical-patient consumers in a case alleging fraud in overcharging for a prescription medication for the treatment of prostate cancer, endometriosis, and other diseases appealed from the district court's cy pres distribution of unclaimed settlement monies to a cancer hospital and prostate-cancer foundation. Affirming, this court held that the district court did not abuse its discretion in either the process utilized or in the decision to make a cy pres award to the organizations chosen. The court adopted the "reasonable approximation" test, and stated

a number of factors to be considered in determining whether a cy pres distribution reasonably approximated the class members' interests, including the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, and the characteristics and interests of the class members. In re Lupron Marketing and Sales Practices Litigation, 677 F.3d 21, 30, 32, 33, 37, 38.

C.A.1, 2009. Cit. in disc., cit. in ftn., com. (b) quot. in disc. (citing § 3.07 of Prop. Final Draft, 2009. § 3.07 has since been revised; see Official Text). Consumers brought a class action against pharmaceutical company, claiming that they overpaid on Medicare copayments because defendant inflated the price of one of its prescription drugs. The district court approved the settlement; one class representative appealed on grounds that the settlement created a cy pres fund of up to $10 million rather than distributing all recovery to class members. Affirming, this court held, as a matter of first impression, that the district court did not abuse its discretion by finding that the settlement provision, which provided that class members receive treble damages before any money was distributed to charity through cy pres, was fair, adequate, and reasonable, and that this result was entirely congruent with the approach of the Principles of Aggregate Litigation. In re Pharmaceutical Industry Average Wholesale Price Litigation, 588 F.3d 24, 35.

C.A.2

C.A.2, 2007. Quot. in sup. (citing § 3.08, Preliminary Draft No. 4, 2006, which is now § 3.07 of the Official Text). Plaintiffs, members of a class of present and former professional models, appealed the district court's orders approving settlements in a class action brought against defendant modeling agencies for conspiracy to fix commissions charged to members of the class, in violation of the Sherman Act. Vacating in part, this court held that, while the district court did not abuse its discretion in allocating to charities, under the cy pres doctrine, excess funds that remained after all class members were fully compensated for their actual losses, it failed to recognize that allocating excess funds to class members as treble damages lay within its discretion, and thus a treble-damages award should be considered on remand. The court noted that a draft of the Principles of the Law of Aggregate Litigation proposed limiting application of cy pres to circumstances where direct distributions to class members were not feasible, and that, here, neither side contended that it would be onerous or impossible to locate class members, or that each member's recovery would be so small as to make individual distribution impracticable. Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436.

C.A.3,

C.A.3, 2013. Cit. in sup., quot. in ftn., subsec. (b) and com. (a) quot. in sup., subsec. (c) quot. in ftn. In consolidated antitrust actions by consumers against baby product retailers and manufacturers, an unnamed class member objected to a settlement approved by the district court, alleging that, although the parties contemplated that excess settlement funds would be distributed to charity after the bulk of the funds were distributed to class members, it appeared that the actual allocation would be just the opposite. This court vacated the settlement on the ground that the district court was apparently unaware of the amount of the funds that would be distributed to cy pres beneficiaries rather than directly to the class, and remanded for consideration of whether the approved settlement, or any alternative settlement, would provide sufficient direct benefit to the class. While inclusion of a cy pres provision by itself did not render a settlement unfair, unreasonable, or inadequate, direct distributions to the class were preferred over cy pres distributions, which were most appropriate where further individual distributions were economically infeasible. In re Baby Products Antitrust Litigation, 708 F.3d 163, 171-173, 180, 181.

C.A.3

C.A.3, 2010. Quot. in ftn. to conc. and diss. op. In consolidated class actions, consumers sued pet food manufacturers, alleging that they purchased, used, or obtained, or their pets consumed, pet food that was contaminated with melamine and cyanuric acid. The district court certified a settlement-only class and granted approval of a settlement. This court,

among other things, affirmed a provision in the settlement providing that any funds remaining after administration of the settlement and payment of all valid claims would be distributed to animal-welfare related organizations. The concurring and dissenting opinion argued that any remaining funds should escheat to the government, maintaining that application of the cy pres doctrine was not appropriate in these actions, because they were not charitable, and noting that the Principles of the Law of Aggregate Litigation recommended that courts make numerous inquiries as to the viability of additional payments to the class before considering a cy pres remedy. In re Pet Food Products Liability Litigation, 629 F.3d 333, 363.

C.A.5

C.A.5, 2011. Subsec. (b) cit. in ftn., com. (a) quot. in sup. and cit. in ftn., com. (b) quot. in sup. and cit. and quot. in ftn. Plaintiffs, who lived or worked near agrochemical plant, filed a class action against plant's owner, seeking compensation for exposure to toxic chemicals allegedly emitted into the air by the plant. After the parties entered into a settlement that created three subclasses, one of which was to receive medical monitoring, and the monitoring program was completed, the district court ordered that unused medical-monitoring funds be distributed to nonparty charities. This court reversed and remanded with instructions that the funds be distributed to another subclass of persons suffering serious injuries, holding that the district court abused its discretion by ordering a cy pres distribution in the teeth of the bargained-for terms of the settlement, which required residual funds to be distributed within the class. Klier v. Elf Atochem North America, Inc., 658 F.3d 468, 474, 475, 478.

C.A.5, 2010. Com. (b) quot. in sup. In consolidated actions, residents sued public and private entities, alleging that they were harmed by catastrophic flooding caused by levee and floodwall failures during hurricanes. The district court certified a limited fund mandatory settlement class and approved the settlement over the objections of two groups of dissenting class members. Reversing, this court held, among other things, that the district court did not direct reasonable notice of the settlement to the class; among other things, the settlement notice did not provide interested parties with knowledge critical to an informed decision as to whether to object to class certification and settlement, because it did not inform class members of the possibility that they would not receive any direct benefit from the settlement if there were a cy pres distribution in lieu of any direct distribution of funds to class members. In re Katrina Canal Breaches Litigation, 628 F.3d 185, 198.

C.A.7,

C.A.7, 2013. Cit. in sup. Certified public accountant (CPA) firm filed a class action under the Telephone Consumer Protection Act against attorney, alleging that attorney sent unsolicited fax advertisements to firm and other CPAs in violation of the Act. The district court ordered attorney to pay $500 in statutory damages for each of 8,430 faxes sent, or $4,215,000, allocated specified amounts to the named plaintiff and to class counsel, and ordered that any residue, after payments to class members, be paid to a charitable organization that provided free legal services. This court affirmed on the merits but vacated the remedial order and remanded with instructions to enter a judgment requiring attorney to remit damages to the court's registry or to a third-party administrator. The court held that it had been premature for the district court to have directed that any remainder be turned over to a particular charity, especially given that, as a general rule, money not claimed by class members was to be used for the class's benefit to the extent possible, and, here, the charity selected did not directly or indirectly benefit CPAs. Ira Holtzman, C.P.A. v. Turza, 728 F.3d 682, 689-690.

C.A.8,

C.A.8, 2015. Cit. and quot. in sup., cit. in diss. op., cit. and quot. in cases cit. and quot. in sup.; subsecs. (a) and (c) quot. in sup.; com. (b) cit. and quot. in sup. Shareholders filed multiple class actions around the country alleging violations of federal and state securities laws in connection with a merger between two banks. After the parties reached a global

settlement and two distributions were made, the district court granted class counsel's motion to distribute remaining settlement funds cy pres to a charitable organization that provided legal services to residents of eastern Missouri. This court vacated and remanded, holding that, under § 3.07 of the Principles of the Law of Aggregate Litigation, the district court erred in ordering a cy pres distribution, because a further distribution was feasible, and, in any event, the selected charity was unrelated to the classes or the litigation and was therefore an inappropriate "next best" cy pres recipient. The dissent argued in favor of affirmance, noting that the Eighth Circuit had not yet adopted the Principles of Aggregate Litigation. In re BankAmerica Corp. Securities Litigation, 775 F.3d 1060, 1063-1068, 1071, 1072.

C.A.8

C.A.8, 2015. Cit. and quot. in case quot. in conc. op.; com. (a) quot. in case quot. in sup. Former professional-football players filed a putative class action against national-football league, alleging that defendant used plaintiffs' names, images, likenesses, and identities to generate revenue and promote defendant. The district court approved a class-action settlement, which required, among other things, that defendant pay $42 million to an entity that would disburse the money to charitable organizations or health and welfare organizations for the benefits of class members. This court affirmed, holding that the settlement agreement did not fail as a matter of law. The court pointed out that, under Principles of the Law of Aggregate Litigation § 3.07, a settlement agreement did not have to provide a direct financial payment to each class member, and explained that, here, the settlement agreement provided direct benefits to the class members. Citing § 3.07, the concurring opinion argued that the settlement agreement was not a cy pres distribution. Marshall v. National Football League, 787 F.3d 502, 509, 521, 522.

C.A.9

C.A.9, 2011. Subsec. (c) quot. in ftn. in sup. Paid subscribers, on behalf of a nationwide class of more than 66 million, sued Internet service provider for allegedly violating federal and California law by inserting footers containing promotional messages into emails sent by subscribers. The district court approved a settlement reached by the parties, in which provider agreed to make a series of charitable donations in lieu of distributing the maximum potential recovery—three cents—to each class member. Reversing in part and remanding, this court held that the charities selected by the parties were not suitable cy pres beneficiaries, because a distribution to those charities would fail to account for the nature of plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members, including their geographic diversity. The court indicated that nonprofit organizations working to protect Internet users from fraud, predation, and other forms of online misfeasance would make suitable beneficiaries. Nachshin v. AOL, LLC, 663 F.3d 1034, 1040.

S.D.Fla.

S.D.Fla.2011. Com. (b) quot. in sup. Account holders brought a class action against bank, alleging, among other things, that bank violated its contractual and good-faith duties owed to plaintiffs by resequencing plaintiffs' debit-card transactions for the sole purpose of maximizing its overdraft fee revenue. This court granted plaintiffs' motion for final approval of the settlement agreement, overruling certain class members' objections to the cy pres provision of the agreement, which directed unclaimed funds to respected organizations that promoted financial literacy. The court explained that it was not feasible to identify certain bank customers who incurred overdraft fees, and stressed that, as the settlement was structured, unclaimed funds would not revert to bank, which would truly be a legally unjustifiable result. In re Checking Account Overdraft Litigation, 830 F.Supp.2d 1330, 1355, 1356.

D.N.H.

D.N.H.2007. Cit. in sup.(citing § 3.07 of Discussion Draft No. 2, 2007. § 3.07 has since been revised; see Official Text). Pension funds, as lead plaintiffs in a multidistrict securities and accounting fraud class action against corporation, its former auditor, and others, petitioned for final approval of a proposed settlement with corporation and auditor. This court approved the settlement, and found that the plan of allocation, which compensated class members according to the nature and timing of their transactions in corporation's securities, dealt appropriately with the issue of what to do with excess funds by calling for the continued redistribution of unclaimed funds to class members according to their pro rata shares, until the costs of such redistributions made it economically unfeasible to continue doing so; if and when that point was reached, then the balance of the fund would be subject to a cy pres remedy designated by co-lead counsel with corporation's and auditor's consent. In re Tyco Intern., Ltd. Multidistrict Litigation, 535 F.Supp.2d 249, 262.

E.D.N.Y.

E.D.N.Y.2016. Rptr's Note quot. in case quot. in sup. (quoting § 3.07 of P.F.D. 2009, which is now § 3.07 of the Official Text)(erron. cit. as § 3.08). Debtor filed a class action against debt collector, alleging that defendant violated the Fair Debt Collection Practices Act by leaving voicemail and answering-machine messages for debtors in which it failed to identify itself either by name or as a debt collector and failed to reveal that the purpose of the call was debt collection. This court denied the parties' motion for approval of a proposed settlement, holding that the settlement was fundamentally unfair, unreasonable, and inadequate, because it was limited to a cy pres payment to a public-interest organization that would provide no measurable benefit to class members. The court noted that, under the Principles of the Law of Aggregate Litigation, approval of settlements providing for a cy pres remedy had to be limited to circumstances in which direct distribution to individual class members was not economically feasible, or where funds remained after class members were given a full opportunity to make a claim. Graff v. United Collection Bureau, Inc., 132 F.Supp.3d 470, 494.

S.D.N.Y.

S.D.N.Y.2009. Cit. and quot. in sup. (citing § 3.07 of Council Draft No. 2, 2004. § 3.07 has since been revised; see Official Text). SEC filed civil actions against investment banks and research analysts, seeking disgorgement and civil penalties to redress alleged securities violations. After the parties entered into consent judgments and the settlement funds were distributed, more than $79 million in undistributed funds remained. After noting that every possible avenue to distribute the funds to aggrieved investors had been exhausted consistent with the position of the Principles of the Law of Aggregate Litigation—i.e., that the use of a cy pres distribution in class-action settlements should be limited to only the most appropriate situations where individual distributions were not viable—this court ordered that certain additional remedial payments be made to victims and that the remaining funds be transferred to the United States Department of the Treasury. S.E.C. v. Bear, Stearns & Co. Inc., 626 F.Supp.2d 402, 416.

N.D.Ohio.

N.D.Ohio.2016. Cit. in sup.; subsec. (b) cit. and quot. in sup.; com. (a) cit. and quot. in case cit. and quot. in disc. Class of indirect purchasers brought federal anti-trust claims against several polyurethane-foam manufacturers. This court granted plaintiffs' motion for final approval of defendants' settlement agreements with plaintiffs, dismissing the objection of several defendants to the provision allowing for contingent cy pres distribution of settlement funds. Citing the Principles of the Law of Aggregate Litigation § 3.07, the court held that the cy pres provision at issue was valid because any cy pres distributions would be de minimis and were to be made only after it was no longer economically practical to make further distributions to the class. In re Polyurethane Foam Antitrust Litigation, 168 F.Supp.3d 985, 1005.

S.D.Tex.

S.D.Tex.2012. Subsec. (c) quot. in sup., subsecs. (b) and (c) and com. (a) quot. in ftn. Payment-card holders filed a consumer class action against payment-card processor, after defendant disclosed that hackers had breached its computers systems and obtained confidential payment-card information for 130 million consumers. Granting plaintiffs' motion to certify a settlement class, this court held that the proposed settlement, in which class members with valid claims would receive the amount of their claims and any remaining unclaimed funds would be spread between three nonprofit organizations that focused on improving payment-card security, was fair, reasonable, and adequate. Noting that only 300 class members had filed claims and that only 11 of those claims were valid, the court concluded that it would be impractical to distribute the balance of the settlement funds to absent class members not filing claims, and that it would provide an inappropriate windfall to the class members who filed valid claims if the balance was divided among them. In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litigation, 851 F.Supp.2d 1040, 1067, 1068, 1076.

Tex.

Tex.2013. Com. (b) quot. in ftn. Subcontractors filed a class action against general contractor that began docking subcontractors' pay if they did not furnish proof of adequate general-liability-insurance coverage, alleging that defendant misrepresented that it would use the paycheck deductions to obtain liability insurance covering the subcontractors. The trial court approved a settlement between the parties that specified, among other things, that undistributed refunds would be given to a nonprofit charitable organization as a cy pres award consistent with Restatement Third of Trusts § 67 and Principles of the Law of Aggregate Litigation § 3.07. The state attorney general intervened to object to the cy pres award. The court of appeals reversed and remanded. This court reversed the judgment of the court of appeals and affirmed the judgment of the trial court, holding that the cy pres award did not violate the state's Unclaimed Property Act. In making its decision, the court noted that the appropriateness of the organization as a beneficiary of the cy pres award was not at issue. Highland Homes Ltd. v. State, 448 S.W.3d 403, 407.

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APPENDIX NO. 2

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Paz v. Brush Engineered Materials, Inc., Miss., January 4, 2007

755 F.Supp. 1468
United States District Court, D. Colorado.

Merilyn COOK, William Jr. and Delores Schierkolk, Richard and Sally Bartlett and Lorren and Gertrude Babb, Bank Western, a federal savings bank, a federally chartered savings bank, and Field Savings Corporation, a Colorado corporation, on their own behalf and as representatives of a class of persons and entities suffering economic harm; and Michael Dean Rice, Thomas L. and Rhonda J. Deimer, and Stephen M. and Peggy J. Sandoval, on their own behalf and as representative of a class of similarly situated residents and workers, Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation, and The Dow Chemical Company, a Delaware corporation, Defendants.

Civ. A. No. 90-B-181.

Feb. 13, 1991.

Persons who own land near nuclear weapons plant brought action against former operators of the plant. On motion to dismiss, the District Court, Babcock, J., held that: (1) plaintiffs could not recover, under CERCLA, costs incurred after judgment; (2) plaintiffs could not recover, under CERCLA, prejudgment costs of medical testing to monitor health effects of alleged releases of hazardous substance; (3) complaint did not allege any cognizable response costs incurred before the action was filed; (4) claim for medical monitoring was cognizable under Colorado law and Price Anderson Act; (5) plaintiffs could not recover costs of general scientific studies; (6) complaint did not state a cause of action for outrageous conduct or misrepresentation and concealment; and (7) Price Anderson Act barred claim for punitive damages as to incidents occurring after August 20, 1988.

Ordered accordingly.

West Headnotes (28)

[1] **Environmental Law**
⇐ Covered costs;damages

CERCLA allows recovery only of costs that have been incurred by a plaintiff before judgment. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

3 Cases that cite this headnote

[2] **Environmental Law**
⇐ Covered costs;damages

CERCLA does not provide for recovery of costs of postjudgment studies. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

Cases that cite this headnote

[3] **Environmental Law**
⇐ Covered costs;damages

Costs of medical testing necessary to monitor the environmental effects of a release or threatened release fall within the definition of "remove" and thus are recoverable under CERCLA and, if the environmental effects of a release cannot be monitored adequately without some medical testing, costs of those tests may be recovered. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

1 Cases that cite this headnote

[4] **Environmental Law**
⇐ Covered costs;damages

Costs of medical testing to monitor the health effects of a release or a threatened release of a hazardous substance are not recoverable under CERCLA. Comprehensive Environmental Response, Compensation,

and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

3 Cases that cite this headnote

[5] **Environmental Law**
⇐ Pleading, petition, or application

Conclusory allegations that merely mirror the terms of CERCLA are insufficient to plead that plaintiff has incurred response costs consistent with the national contingency plan; complaint must specify at least one cognizable response cost incurred by each named plaintiff prior to filing the lawsuit. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

4 Cases that cite this headnote

[6] **Federal Civil Procedure**
⇐ Nature and purpose

Pleadings do more than merely give notice; they also serve to identify meritless claims at an early stage in the litigation. Fed.Rules Civ.Proc.Rule 8(a), 28 U.S.C.A.

Cases that cite this headnote

[7] **Environmental Law**
⇐ Covered costs;damages

Environmental Law
⇐ Response and cleanup actions

Plaintiff who has incurred no cost, except for litigation expenses, prior to the filing of a CERCLA action has incurred no "necessary cost of response" and cannot recover the litigation expenses, such as attorney fees. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

3 Cases that cite this headnote

[8] **Damages**
⇐ Medical treatment and care of person injured

Claim for the costs of medical monitoring are distinct from a claim for enhanced risk of future harm, and defendant may be required to pay the costs of monitoring if the need for that monitoring is caused by a defendant's tortious acts or omissions. 42 U.S.C.A. §§ 2211–2284.

7 Cases that cite this headnote

[9] **Damages**
⇐ Expenses

Environmental Law
⇐ Pleading, petition, or application

Complaint which did not allege that plaintiffs had been exposed to a toxic substance did not state a claim for costs of medical monitoring under Colorado common law or the Price Anderson Act. 42 U.S.C.A. §§ 2211–2284.

19 Cases that cite this headnote

[10] **Torts**
⇐ Miscellaneous torts in general

Colorado will not recognize a tort claim for generalized scientific studies as result of threatened releases of hazardous substances.

Cases that cite this headnote

[11] **Damages**
⇐ Elements in general

Four elements of the tort of outrageous conduct are that defendant's conduct is extreme and outrageous, that it is intentional or reckless, that it caused emotional distress, and that the emotional distress is severe.

Cases that cite this headnote

[12] **Damages**
⇐ Mental suffering and emotional distress

Complaint which did not allege that plaintiffs had suffered severe emotional distress or that defendants had acted recklessly in deliberate

disregard of a high probability that emotional distress would follow did not state a claim for outrageous conduct.

Cases that cite this headnote

[13] **Fraud**
Reliance on Representations and Inducement to Act

Detrimental reliance is an element of a misrepresentation or concealment claim under Colorado law.

1 Cases that cite this headnote

[14] **Federal Civil Procedure**
Fraud, mistake and condition of mind

Detrimental reliance element of a claim of misrepresentation or concealment must be pled with particularity. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

2 Cases that cite this headnote

[15] **Fraud**
Reliance on Representations and Inducement to Act

Allegations of plaintiffs that they relied upon misrepresentation of defendants in refraining until the present from seeking redress or pursuing remedial action as result of possible exposure to radiation, and that many of the releases of radiation had thus been compounded by the passage of time might be sufficient to counter a statute of limitations defense, but were insufficient as a matter of law to establish detrimental reliance element of a claim for misrepresentation and concealment under Colorado law.

2 Cases that cite this headnote

[16] **United States**
Punitive damages

Provision of the Price Anderson Act precluding award of punitive damages with respect to a nuclear incident against a person which the United States is obligated to indemnify applies even if the United States is not obligated to make payments for punitive damages; all that is necessary for the applicability of the statute is that the United States be obligated to make payments under an agreement of indemnification covering a nuclear accident. Atomic Energy Act of 1954, § 170(s), as amended, 42 U.S.C.A. § 2210(s).

1 Cases that cite this headnote

[17] **United States**
Damages and Amount of Recovery

Private contractor which has indemnity agreement with the government has standing to assert provision of the Price Anderson Act precluding award of punitive damages in an action arising out of a nuclear incident if the United States is obligated to make indemnity payments to the defendant, and the defense need not be raised by the government. Atomic Energy Act of 1954, § 170(s), as amended, 42 U.S.C.A. § 2210(s).

3 Cases that cite this headnote

[18] **United States**
Damages

Alleged releases of radiation prior to August 20, 1988, could give rise to claim of punitive damages against government contractor, as provision of the Price Anderson Act prohibiting award of punitive damages in an action arising out of a nuclear incident if the United States is obligated to indemnify the defendant was not applicable to those releases. Atomic Energy Act of 1954, § 170(s), as amended, 42 U.S.C.A. § 2210(s).

2 Cases that cite this headnote

[19] **United States**
Damages and Amount of Recovery

Even if United States would be obligated to indemnify contractors for an eventual award of punitive damages, sovereign immunity did not bar claim for punitive damages.

Cases that cite this headnote

[20] **United States**
⇐ Derivative immunity;contractors

Indemnity agreement between the federal government and its contractor does not cloak the contractor with sovereign immunity.

Cases that cite this headnote

[21] **Damages**
⇐ Remission of Excess

Under Colorado law, it is premature to disallow punitive damages before trial on grounds that award would serve no purpose, although court has discretion to disallow an award where the purposes for such damages would not be served. West's C.R.S.A. § 13–21–102(2).

Cases that cite this headnote

[22] **Limitation of Actions**
⇐ In general;what constitutes discovery

Limitations period begins to run when the person suffering legal injury knows or, in the exercise of reasonable diligence, should have known of the injury and its cause. West's C.R.S.A. § 13–80–108.

Cases that cite this headnote

[23] **Limitation of Actions**
⇐ Limitation as affected by nature or form of remedy in general

Price Anderson Act, which mandates application of state substantive law, thereby provides for a statute of limitations, so that the Colorado two-year statute of limitations for actions upon liability created by a federal statute where no period of limitations is provided in the statute does not apply. West's C.R.S.A. § 13–80–102(1)(g); 42 U.S.C.A. §§ 2211–2284.

1 Cases that cite this headnote

[24] **Limitation of Actions**
⇐ Nature of statutory limitation

Limitation of Actions
⇐ Operation as to rights or remedies in general

Statutes of limitations are substantive.

Cases that cite this headnote

[25] **Limitation of Actions**
⇐ Diseases;drugs

Publicity surrounding nuclear weapons plant would not necessarily put a reasonable person on constructive notice prior to 1984 of claims of harm from possible releases of radiation.

Cases that cite this headnote

[26] **Injunction**
⇐ Mootness and ripeness;ineffectual remedy

Court will not grant an injunction when it would be ineffectual.

Cases that cite this headnote

[27] **Environmental Law**
⇐ Injunction

Since it was acknowledged that defendant no longer operated nuclear weapons plant, and thus did not have any power to prevent further releases of radiation from the plant, injunction prohibiting it from doing so would be ineffectual and thus would not issue.

Cases that cite this headnote

[28] **Environmental Law**
⇐ Injunction

Injunction against former operator of nuclear weapons plant to preclude further releases of radiation from the plant could not be enforced against third parties who had notice of it where court had no power to issue the injunction against the former operator because it would be ineffectual.

Cases that cite this headnote

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*1471 MEMORANDUM OPINION AND ORDER

BABCOCK, District Judge.

Plaintiffs are individuals and businesses who own land near the Rocky Flats Nuclear Weapons Plant (Rocky Flats). They sue on their own behalf and as representatives of a class of others similarly situated. No class certification has issued.

Rocky Flats is owned by the United States and operates under the jurisdiction of the U.S. Department of Energy (DOE). Under a series of management contracts with the Atomic Energy Commission and later with the DOE, defendant Dow Chemical Company (Dow) operated the plant from 1951 through June 1975. Defendant Rockwell International Corporation (Rockwell) similarly operated the plant from July 1975 until December 31, 1989. Plaintiffs allege that they have incurred injury and damages caused by releases or threatened releases of hazardous substances from Rocky Flats.

There are three types of causes of action alleged. First, plaintiffs seek to recover "response costs" under section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607. Second, plaintiffs seek damages under the Price Anderson Act, 42 U.S.C. §§ 2211–2284. Third, they seek damages under Colorado common law based on diversity jurisdiction.

Price Anderson borrows the substantive law of the state in which an alleged nuclear incident took place, which here is Colorado. *See* 42 U.S.C. § 2014(hh). Accordingly, the claims under Price Anderson and under Colorado common law are identical: negligence; strict liability; private nuisance; trespass; misrepresentation and concealment; outrageous conduct; and punitive damages.

I. SUMMARY OF RULINGS

Before me are numerous motions to dismiss or for summary judgment filed by Dow and Rockwell and various motions by plaintiffs to amend. I hold that: (1) the portion of plaintiffs' CERCLA claim that seeks costs incurred after judgment in this case fails to state a claim upon which relief may be granted; (2) the portion of plaintiffs' CERCLA claim that seeks to recover the prejudgment costs of medical testing to monitor the health effects of defendants' alleged releases of hazardous substances fails to state a claim upon which relief may be granted; however, the portion of plaintiffs' CERCLA claim that seeks to recover the prejudgment costs of medical testing necessary to monitor the environmental effects of defendants' alleged releases is cognizable; (3) plaintiffs' CERCLA claim is deficient for failure to plead at least one cognizable response cost incurred before this action was filed by each named plaintiff who is asserting a CERCLA claim, but they should be granted leave to amend; (4) plaintiffs' Price Anderson and Colorado common law claim for individualized medical monitoring is cognizable but deficient for failure to adequately plead exposure to a hazardous substance; plaintiffs should be granted leave to amend; (5) plaintiffs' Price Anderson and Colorado common law claim for general scientific studies is not cognizable and fails to state a claim upon which relief may be granted; (6) plaintiffs' claim for outrageous conduct is cognizable but deficient for failure to plead adequately the elements of severe emotional distress and requisite intent; plaintiffs should be granted leave to amend; (7) plaintiffs' claim for misrepresentation and concealment is fatally defective because they can prove no set of facts that would entitle them to relief and any effort to amend would be futile; (8) genuine questions of material fact exist whether plaintiffs may be entitled

to punitive damages arising out of nuclear incidents occurring before August 20, 1988 and I cannot say that plaintiffs are entitled to judgment as a matter of law as to these incidents; (9) as to nuclear incidents occurring on or after August 20, 1988, no genuine issues of material fact remain for resolution and defendants are entitled to judgment on plaintiffs' claim for punitive damages as a matter of law; (10) genuine issues of material fact remain whether plaintiffs' actions against Dow are barred by the applicable statute of limitations; (11) injunctive relief to prevent Rockwell's "further releases of plutonium ***1472** and radioactive and non-radioactive substances for Rocky Flats" would be ineffectual, and thus, Rockwell's motion to dismiss this claim should be granted; (12) defendants' motions for summary judgment on plaintiffs' claims for a fund to finance future scientific studies are made moot by my dismissal of these claims.

II. LEGAL STANDARD

For the purposes of a motion to dismiss, I accept all factual allegations as true and resolve all reasonable inferences in favor of the plaintiff. *Tri-Crown, Inc. v. American Federal Sav. & Loan, Ass'n*, 908 F.2d 578, 582 (10th Cir.1990). "A case should not be dismissed for failure to state a claim unless the court determines beyond doubt that the plaintiff can prove no set of facts which entitle him to relief." *Id.*

In deciding a motion for summary judgment the evidence and any possible inferences are viewed in the light most favorable to the party opposing summary judgment. *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 429 (10th Cir.1990). Summary judgment is appropriate if there is no genuine issue of material fact and the movant is entitle to judgment as a matter of law. Fed.R.Civ.P. 56(c). A genuine issue exists if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

III. DISCUSSION

A. *CERCLA*

Plaintiffs allege that defendants violated section 107(a) of CERCLA, 42 U.S.C. § 9607(a). CERCLA was designed to facilitate cleanup of environmental contamination caused by releases of hazardous substances. *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1488 (10th Cir.1990). To promote this aim, Congress created a private cause of action where certain "response costs" could be recovered against those who contributed to dumping hazardous waste at a site. 42 U.S.C. § 9607(a); *Idarado*, 916 F.2d at 1488.

To state a claim under section 9607(a), a plaintiff must allege that: (1) the waste disposal site is a "facility" as defined by 42 U.S.C. § 9601(9); (2) a "release" or "threatened release" of any "hazardous substance" has occurred, § 9607(a)(4); and (3) such "release" or "threatened release" has caused the plaintiff to incur response costs that are consistent with the national contingency plan, §§ 9607(a)(4) & (a)(4)(B). *See Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152 (9th Cir.1989). In addition, the defendant must fall within one of the classes of persons subject to CERCLA's liability provision, § 9607(a)(1)–(4).

In this case, plaintiffs have sued past operators of a facility under section 9607(a)(1). Plaintiffs seek "response costs incurred by [plaintiffs] pursuant to CERCLA, including the creation of a fund to finance independent scientific studies of exposure to hazardous substances...." Amended Complaint, Prayer For Relief ¶ d.

Defendants argue that the CERCLA claim should be dismissed in whole or in part because: (1) the costs of post-judgment studies are not recoverable under CERCLA; (2) medical monitoring costs are not available under CERCLA; and (3) plaintiffs have failed to plead a cognizable response cost incurred prior to filing this suit.

I hold that the costs of post-judgment studies are not available under CERCLA and grant defendants' motions to dismiss the portion of the complaint that seeks such relief. I also grant defendants' motions to dismiss the portion of plaintiffs' CERCLA claim that seeks to recover the costs of medical testing to monitor the health effects of defendants' releases. However, I deny defendants' motions concerning the portion of plaintiffs' CERCLA claim that seeks to recover the costs of medical testing necessary to monitor the environmental effects of defendants' releases. Finally, I conclude that plaintiffs' CERCLA claim is deficient for failure to plead at least one cognizable response cost incurred before this action was filed by each named plaintiff who is asserting a ***1473** CERCLA claim, but they should be granted leave to amend.

[1] [2] Defendants argue that the CERCLA claim should be dismissed because post-judgment costs are not recoverable under CERCLA. As plaintiffs acknowledge, CERCLA allows recovery only of costs that have been incurred by a plaintiff before judgment. *E.g., Williams v. Allied Automotive Autolite Div.*, 704 F.Supp. 782, 784 (N.D.Ohio 1988). Here, it is unclear whether plaintiffs are seeking money to finance post-judgment studies. However, to the extent that they are, defendants' motions are well taken. In so far as the complaint seeks response costs incurred prior to judgment, defendants' motions to dismiss will be denied.

Defendants also seek to dismiss the portion of the complaint that seeks medical monitoring costs under CERCLA. Plaintiffs' request for relief under CERCLA does not specifically seek medical monitoring. However, as plaintiffs acknowledge, the studies they envision entail "the study of bioaccumulation of hazardous substances in human[s] and ... epidemiological studies." Plaintiffs' Brief at 49.

Section 9607(a)(4) allows recovery for "[a]ny other necessary costs of response incurred by any other person consistent with the national contingency plan." The "national contingency plan" is a set of regulations governing CERCLA response cost action. *See* 40 C.F.R. Part 300. The phrase "necessary costs of response" is not defined. However, "response" is defined as "remove, removal, remedy and remedial action." 42 U.S.C. § 9601(25). "Remove" means the

> clean up or removal of released hazardous substances from the environment, ... such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, ... or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or a threat of release.

42 U.S.C. § 9601(23). Subsection 23 lists security fencing, provision of alternative water supplies, and temporary evacuation and housing as specific examples. "Remedy" or "remedial action" means "those actions consistent with permanent remedy taken instead of or in addition to removal actions ... to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." 42 U.S.C. § 9601(24). Specific examples include containment or diversion actions, treatment or incineration, provision for alternative water supplies, "and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment." *Id.*

[3] [4] Courts are divided on whether a claim for costs of medical monitoring are cognizable under section 107 of CERCLA. *Compare e.g., Brewer v. Ravan*, 680 F.Supp. 1176 (M.D.Tenn.1988) (medical monitoring cognizable); *Williams*, 704 F.Supp. 782 (same) *with Ambrogi v. Gould, Inc.*, 750 F.Supp. 1233 (M.D.Pa.1990) (medical monitoring not cognizable); *Werlein v. United States*, 746 F.Supp. 887 (D.Minn.1990) (same); *Coburn v. Sun Chemical Corp.*, 28 Env't.Rep.Cas. (BNA) 1668 (E.D.Pa.1988) (same).

In *Brewer*, the court denied a motion to dismiss a claim for medical testing under CERCLA, stating:

> CERCLA's legislative history clearly indicates that medical expenses incurred *in the treatment of personal injuries or disease* caused by an unlawful release or discharge of hazardous substances are not recoverable under section 9607(a).... To the extent that plaintiffs seek to recover the cost of medical testing and screening conducted *to assess the effect of the release or discharge on public health problems presented by the release*, however, they present a cognizable claim under section 9607(a).

Brewer, 680 F.Supp. at 1176 (emphasis in original). The court reasoned that "[p]ublic health related medical tests and screening clearly are necessary to 'monitor, assess, [or] evaluate a release' and therefore ***1474** constitute 'removal' under section 9601(23). *Id.*

Coburn rejected this rational in striking plaintiffs' request for medical monitoring costs under CERCLA.

First, the court stated that CERCLA's definitions of "response" and "remedy and remedial action" contain no "references whatsoever to medical expenses of any kind nor do they give any inferences that such expenses are recoverable...." 28 Env't Rep.Cas. at 1670. The court then noted that CERCLA does contain health assessment or health effects study provisions, *see* § 9604(i), but that these provisions are applied and administered apart from the liability provisions of section 107. 28 Env't Rep.Cas. at 1670. Next, the court examined CERCLA's legislative history. It pointed out that the original Senate Superfund Bill contemplated including medical monitoring under CERCLA. The court quoted Senator Randolf commenting on the bill which became CERCLA: "[w]e have deleted the federal cause of action for medical expenses or property or income loss." *Id.* (quoting 126 Cong.Rec. S314964 (daily ed. Nov. 24, 1980)). Finally, the court expressly refused to follow *Brewer* 's holding that medical testing may constitute a "response" cost. "Quite simply, we find it difficult to understand how future medical testing and monitoring of persons who were exposed to contaminated well water prior to the remedial measures currently underway will do anything to 'monitor, assess, [or] evaluate a release' of contamination from the site." *Id.* at 1671.

The recent decision of *Ambrogi* followed *Coburn*, while emphasizing two points not stressed in the *Coburn* analysis. First, *Ambrogi* noted that the 1986 SARA amendments to CERCLA allow individuals or physicians to petition the Agency for Toxic Substances and Disease Registry (ATSDR) for a health assessment of a given site. *See Ambrogi*, 750 F.Supp. at 1249 (citing 42 U.S.C. § 9604(i)(6)(B)). The court reasoned that CERCLA thus contemplated health studies and that the sole avenue for receiving such studies was through the ATSDR. *Ambrogi* also noted that because most states now allow tort claims for medical monitoring, CERCLA does not allow such a claim because "Congress surely did not intend to create an overlap between traditional state tort claims and a 'new' CERCLA federal toxic tort action." *Id.* at 1250.

The *Coburn* line of cases is persuasive authority that the costs of medical testing to monitor the *health* effects of a release or threatened release are not recoverable under section 9607(a). However, I conclude that the costs of medical testing necessary to monitor the *environmental* effects of a release or threatened release fall within the definition of "remove."

CERCLA was designed to facilitate the cleanup of toxic substances from the environment. *Idarado*, 916 F.2d at 1488. In certain cases, scientific tests may be necessary to determine, for example, the existence or extent of contamination to the environment. If plaintiffs can show that medical testing is necessary to monitor the environmental effects of a "release" or "threatened release," the costs of such medical testing plainly fall within the purview of section 9601(25). Such testing is distinct from the health assessment studies available under section 9604(i) and from a claim for medical monitoring available under Colorado common law. *See infra*. Moreover, if the environmental effects of a release could not be monitored adequately without some medical testing, it would be incompatible with CERCLA not to allow recovery for the costs of such tests. *Cf. Werlein*, 746 F.Supp. at 904 n. 18.

Accordingly, defendants' motions to dismiss will be denied as to the portion of plaintiffs' CERCLA claim that seeks to recover the costs of medical testing necessary to monitor the environmental effects of defendants' alleged releases. Defendants' motions to dismiss will be granted for all other medical testing costs sought under CERCLA.

Defendants also argue that the complaint is defective for failure to specify at least one cognizable response cost. I agree, but conclude that plaintiffs should be granted leave to amend.

[5] As stated above a plaintiff must incur response costs consistent with the *1475 "national contingency plan." The complaint reads:

> As a proximate result of the releases and threatened releases of hazardous substances into the environment surrounding Rocky Flats, plaintiffs William Jr. and Delores Schierkolk, Richard and Sally Bartlett, and members of plaintiff Class I have incurred and will continue to incur necessary response costs consistent with the National Contingency Plan.

Amended Complaint, ¶ 118.

Conclusory allegations which merely mirror the terms of the statute are insufficient. The complaint must specify at least one cognizable response cost incurred by each named plaintiff prior to filing the lawsuit. As was stated by the Ninth Circuit in *Ascon*:

> Requiring a CERCLA claimant to plead a cognizable response will assist in the proper processing of these actions. There has been extensive litigation over which types of response costs are recoverable in a section 107(a) action.... [I]f a plaintiff ultimately fails to show a proper response cost, then he will fail to prove his prima facie case.... It therefore makes sense to impose a pleading requirement that a claimant must allege at least one type of response cost cognizable under CERCLA in order to make out a prima facie case.

866 F.2d at 1154. *See also McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39, 42 (6th Cir.1988) (per curium); *Ambrogi*, 750 F.Supp. at 1250–53 (M.D.Pa.1990); *Jones v. Inmont Corp.*, 584 F.Supp. 1425, 1429 (S.D.Ohio 1984).

[6] Such a requirement is consistent with the notice pleading requirement of the Federal Rules of Civil Procedure. Pleadings do more than merely give notice; they also serve to identify meritless claims at an early stage in the litigation. As was stated in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is *and the grounds upon which it rests.*" *Id.* at 47, 78 S.Ct. at 103 (emphasis added) (quoting Fed.R.Civ.P. 8(a)). This last phrase from *Conley* suggests that the Federal Rules " 'do contemplate a statement of circumstances, occurrences, and events in support of the claim being presented.' " *McGregor*, 856 F.2d at 42 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1215 (1969)).

In certain types of cases, a plaintiff may not rest on mere conclusory allegations that trace the language of the statute. "[A] complaint in a complex, multi-party suit may require more information than a simple, single party case." *Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d 1383, 1386–87 (10th Cir.1980). *See also Blinder, Robinson & Co. v. United States SEC.*, 748 F.2d 1415, 1386–87 (10th Cir.1984), *cert. denied*, 471 U.S. 1125, 105 S.Ct. 2655, 86 L.Ed.2d 272 (1985). In a complex case such as this, it is consistent with the Federal Rules to ferret out meritless claims at the outset. *See* Fed.R.Civ.P. 1. As the Supreme Court has stated, "in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n. 17, 103 S.Ct. 897, 903 n. 17, 74 L.Ed.2d 723 (1983) (dictum).

Plaintiffs concede that CERCLA requires that they incur some response cost prior to filing their complaint. If plaintiffs have incurred no cognizable response costs, it is appropriate to dispose of the CERCLA claim at the outset. On the other hand, if plaintiffs have incurred cognizable response costs, it presents no undue burden to identify them in the complaint. I conclude that to withstand a 12(b)(6) motion to dismiss, plaintiffs must identify in their complaint at least prefiling response cost cognizable under CERCLA.

Plaintiffs argue that there should be no need to plead previously incurred response costs because attorney fees are a cognizable response cost under CERCLA. Plaintiffs argue that the preparation of a CERCLA claim necessarily entails legal expense. ***1476** Thus, there should be no need to recite that fact in the complaint.

Authority is divided as to whether a private party's attorney fees are recoverable under CERCLA. *Compare Pease & Curren Refining, Inc. v. Spectrolab, Inc.*, 744 F.Supp. 945, 949–952 (C.D.Cal.1990) (attorney fees recoverable by private party) *with T & E Industries, Inc. v. Safety Light Corp.*, 680 F.Supp. 696 (D.N.J.1988) (attorney fees not recoverable by private party). However, even assuming that attorney fees are recoverable by a private party, plaintiffs' argument still lacks merit.

[7] CERCLA's private right of action is meant to compensate plaintiffs for "necessary costs of response." 42 U.S.C. § 9607(a)(4)(B). If no costs have been incurred, then it is unnecessary to incur attorney fees to begin an enforcement proceeding. A plaintiff who has incurred no costs, except for litigation expenses, prior to the filing of

a CERCLA action has incurred no "necessary costs of response" under § 9607(a).

Plaintiffs move for leave to amend under Fed.R.Civ.P. 15(a). This motion will be granted and defendants' motions to dismiss this claim will be denied provided that plaintiffs file an adequate amended complaint within 20 days. The complaint must plead at least one cognizable response cost incurred prior to the filing of this action by each named plaintiff who is asserting a CERCLA claim.

B. Medical Monitoring Under Price Anderson and Colorado Common Law

Plaintiffs Michael Dean Rice (Rice), Thomas and Rhonda Deimer (collectively, the Deimers), and Stephen and Peggy Sandoval (collectively, the Sandovals) plead a claim for medical monitoring and health studies, not under CERCLA, but under Price Anderson and Colorado common law. For relief they seek the costs of individual periodic monitoring and a fund to finance "independent scientific studies of adverse health effects in the population living and working around Rocky Flats and of exposure of the population to radioactive and other hazardous substances." Amended Complaint at 24. Rockwell moves to dismiss their claim for these generalized scientific studies. Rockwell also argues that the claim for medical monitoring is deficient for failure to allege exposure to a toxic substance. I agree that the claim for generalized scientific studies must be dismissed, but I conclude that, with leave to amend, plaintiffs may state a cognizable claim for the costs of individual medical monitoring.

Alleged exposure to toxic substances raise unique issues under traditional common law tort theory. For instance, injuries resulting from exposure to toxic substances are often latent. This latency presents seemingly insurmountable problems of proof when analyzed under traditional tort theory because, under traditional tort theory, physical injury must be proved as an element of liability.

In response to this problem courts have recognized "non-traditional" tort claims, which afford relief even though a plaintiff has not yet manifested present physical injury. Thus, courts have allowed claims for emotional distress suffered because of fear of contracting a toxic exposure disease. *See, e.g., Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1206 (6th Cir.1988) (applying Tennessee law). Other courts have recognized claims for enhanced risk of future harm. *See, e.g., Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 319 (5th Cir.1986). Courts have also recognized claims for "medical monitoring." *See, e.g., In re: Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir.1990).

[8] A claim for medical monitoring is distinct from a claim for enhanced risk of future harm. "[A]n action for medical monitoring seeks to recover only the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm, whereas an enhanced risk claim seeks compensation for the anticipated harm itself, proportionately reduced to reflect the chance that it will not occur." *Id.* at 850. In this case, plaintiffs do not seek damages for the anticipated harm itself. Plaintiffs' Brief at 30. Rather, they seek medical monitoring and surveillance services. *1477 As such, I need only analyze the tort of medical monitoring.

The theory behind a claim for medical monitoring is simple. When a plaintiff is exposed to a hazardous substance, it is often sound medical practice to seek periodic medical monitoring to ascertain whether the plaintiff has contracted a disease. Because this need for medical monitoring was caused by a defendant's tortious acts or omissions, a defendant may be required to pay the cost of monitoring. This theory is illustrated by the hypothetical discussed by the D.C.Circuit in *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825 (D.C.Cir.1984):

> Jones is knocked down by a motorbike when Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.
>
> From our example, it is clear that even in the absence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith's negligence action.

Courts have generally accepted tort claims for medical monitoring. *See Paoli Railroad*, 916 F.2d at 850–52. In *Paoli Railroad*, the Third Circuit followed the weight of authority and predicted that the Pennsylvania Supreme Court would allow a cause of action for medical

monitoring. 916 F.2d at 852. The court listed the following elements necessary to establish a cause of action for medical monitoring:

> i. Plaintiff was significantly exposed to a proven hazardous substance through the [tortious] actions of defendant;
>
> ii. As a proximate result of exposure, plaintiff suffers an increased risk of contracting a serious latent disease;
>
> iii. That increased risk makes periodic diagnostic medical examinations reasonably necessary; and
>
> iv. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

Id. See also Ayers v. Township of Jackson, 106 N.J. 557, 525 A.2d 287, 312 (1987).

Although Colorado has yet to do so, I conclude that the Colorado Supreme Court would probably recognize, in an appropriate case, a tort claim for medical monitoring.

1. Individual medical monitoring

[9] Plaintiffs' complaint is deficient in pleading a claim for individual medical monitoring because it fails to allege that plaintiffs have been exposed to a toxic substance. *See Paoli Railroad*, 916 F.2d at 852; *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242, 248 (N.Y.App.Div.1984).

Plaintiffs argue that they have alleged exposure in paragraphs 17 and 44 of their amended complaint. Paragraph 17 of plaintiffs' amended complaint reads in part: "defendants ... have caused a *risk* of injury to persons living and working in the vicinity of [Rocky Flats]." (Emphasis added). As plaintiffs point out in their brief, "injury" in non-traditional tort cases refers not to physical harm but instead to the invasion of any legally protected interest. Plaintiffs' Brief at 30. In this case the alleged injury is exposure to a hazardous substance. Accordingly, the allegation of "risk of injury" simply means risk of exposure. Mere risk of exposure is insufficient.

In paragraph 44 of the amended complaint plaintiffs allege that defendants caused "the creation of an excess, but presently unmeasured, risk of harm from adverse health effects." Again, the allegation of mere risk of exposure and not exposure in fact is inadequate.

Because plaintiffs might be able to correct this pleading deficiency, their claim for individual medical monitoring will not now be dismissed. Instead, plaintiffs' motion for leave to amend will be granted. Plaintiffs have 20 days to file an adequate amended complaint which alleges that Rice, the Deimers, and the Sandovals have each *1478 been significantly exposed to a proven hazardous substance.

2. Fund for scientific studies

[10] Even assuming that the Colorado Supreme Court would recognize a tort claim for individualized medical monitoring, I do not believe that the Colorado Supreme Court would recognize as cognizable plaintiffs' claim for generalized scientific studies.

A medical monitoring claim compensates a plaintiff for diagnostic treatment, a tangible and quantifiable item of damage caused by a defendant's tortious conduct. Such relief is akin to future medical expenses. The claim does not compensate a plaintiff for testing others to determine the odds that a particular person might contract a disease. *See, e.g., Paoli Railroad*, 916 F.2d at 850 ("an action for medical monitoring seeks to recover only the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm"); *Ayers*, 525 A.2d at 314 (relief should insure that "medical-surveillance damages will be paid only to compensate for medical examinations and tests actually administered").

Plaintiffs have cited no authority for their common law claims to recover the costs of generalized scientific studies. I discern no basis for such a claim. Thus, I hold that the scientific studies requested by plaintiffs here are not recoverable under a medical monitoring cause of action. Accordingly, Rockwell's motion to dismiss the portions of the complaint that seek such studies will be granted.

C. Outrageous Conduct

Defendants move to dismiss plaintiffs' claim of outrageous conduct. This motion will also be denied provided that plaintiffs file an adequate amended complaint within 20 days.

The tort of outrageous conduct was first recognized by Colorado in *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970). The *Rugg* court adopted verbatim the elements of the tort from the *Restatement (Second) of Torts* § 46:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Rugg, 476 P.2d at 756.

[11] The tort has four elements: (1) defendant's conduct must be extreme and outrageous; (2) it must be intentional or reckless; (3) it must cause emotional distress; and (4) the emotional distress must be severe. *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1158 (10th Cir.1981) (applying Colorado law), *cert. denied*, 464 U.S. 824, 104 S.Ct. 92, 78 L.Ed.2d 99 (1983).

Defendants argue that plaintiffs' claim of outrageous conduct should be dismissed for four reasons: (1) plaintiffs do not allege any conduct on the part of defendants that a reasonable jury could conclude was outrageous; (2) plaintiffs do not allege the type, nature, or extent of the severe emotional distress; (3) plaintiffs do not allege that they suffer from severe emotional distress; and (4) plaintiffs do not allege that either of the defendants acted with the requisite state of mind.

The first argument is without merit. The complaint alleges sufficient conduct on the part of defendants to allow a jury to conclude that the defendants' conduct was outrageous.

Defendants' second argument is also without merit. Defendants maintain that conclusory allegations of severe emotional distress without factual allegations which indicate the nature or extent of any mental suffering are insufficient. However, I conclude that plaintiffs' allegations in this regard are sufficient.

[12] Defendants' third argument is persuasive. Severe emotional distress is an element of the tort of outrageous conduct. Plaintiffs have not pleaded this element. The complaint is thus defective.

Defendants' fourth argument is also persuasive.

> The requisite intent is present where the actor desires to inflict severe emotional *1479 distress and knows that it is substantially certain to result from his conduct, or where he acts recklessly "in deliberate disregard of a high degree of probability that the emotional distress will follow."

Malandris, 703 F.2d at 1159 (quoting *Restatement (Second) of Torts* § 46, comment i).

The complaint does not allege that defendants intended to inflict severe emotional distress or that defendants acted "recklessly in the deliberate disregard of the high probability that emotional distress will follow."

Plaintiffs have moved for leave to amend their complaint under Fed.R.Civ.P. 15(a). Such leave should be freely granted. Accordingly, the motions to dismiss the outrageous conduct claim will be denied provided that plaintiffs file an adequate amended complaint within 20 days.

D. *Misrepresentation and Concealment*

Defendants move to dismiss plaintiffs' claims for misrepresentation and concealment, contending that plaintiffs failed to plead these claims with particularity as required by Fed.R.Civ.P. 9(b). Because the complaint is fatally defective in failing to plead detrimental reliance, defendants' motions to dismiss this claim will be granted.

[13] [14] Detrimental reliance is an element of a misrepresentation or concealment claim under Colorado law. *Alzado v. Blinder, Robinson & Co.*, 752 P.2d 544, 558 (Colo.1988) (misrepresentation); *Eckley v. Colorado Real Estate Comm'n*, 752 P.2d 68, 78 (Colo.1988) (concealment). This element must be pled with particularity. *Learning Works, Inc. v. Learning Annex, Inc.*, 830 F.2d 541, 546 (4th Cir.1987).

[15] Plaintiffs' allegation of detrimental reliance is that they "relied upon [the alleged misrepresentations and concealments] in refraining until the present from seeking redress or pursuing remedial action" with the result that "many of the releases of hazardous substances into the environment have been compounded by the passage of time." Amended Complaint at ¶¶ 101–02. Such allegations may counter a statute of limitations defense. *See First Interstate Bank, N.A. v. Piper Aircraft*

Corp., 744 P.2d 1197 (Colo.1987). However, these allegations are insufficient as a matter of law to establish detrimental reliance. *Werman v. Malone*, 750 F.Supp. 21, 23 (D.Me.1990) (dismissing misrepresentation claim where only detrimental reliance alleged was that plaintiffs refrained from filing suit as a result of defendants' misrepresentations).

Plaintiffs again request leave to file an amended complaint under Fed.R.Civ.P. 15(b). Although leave to amend is to be freely granted, such leave need not be granted where the defective pleading cannot be cured. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Schepp v. Fremont County*, 900 F.2d 1448, 1451 (10th Cir.1990). It is apparent from plaintiffs' complaint viewed in its entirety that the detrimental reliance allegedly suffered by plaintiffs is insufficient as a matter of law to establish this element of their claim. Amending this count would be futile. Thus, plaintiffs' motion for leave to amend this claim for relief will be denied and defendants' motions to dismiss this claim will be granted.

E. *Punitive Damages*

Defendants contend that because the United States is required to indemnify them for an award of punitive damages, such an award is barred by 42 U.S.C. § 2210(s) and sovereign immunity. Rockwell's motion concerning this claim is for summary judgment. Dow's motion is one to dismiss under Fed.R.Civ.P. 12(b)(6). Because I consider matters outside of the pleadings, Dow's motion is treated as a motion for summary judgment under Rule 56. *See* Fed.R.Civ.P. 12(b)(6). I hold that punitive damages for nuclear incidents occurring on or after August 20, 1988 are barred by section 2210(s). However, I further hold that punitive damages for nuclear incidents occurring before that date are not barred by section 2210(s) or by sovereign immunity.

1. Section 2210(s)

42 U.S.C. § 2210(s) reads:

> ***1480** No court may award punitive damages in any action with respect to a nuclear incident ... against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident....

This section "shall become effective on the date of the enactment of this Act [August 20, 1988] and shall be applicable with respect to nuclear incidents occurring on or after such date." Pub.L. 100–104, § 20(a), Historical and Statutory Notes to 42 U.S.C.A. § 2014 (West Supp.1990).

a. *Incidents Occurring On or After August 20, 1988*

Plaintiffs seek punitive damages for nuclear incidents occurring after August 20, 1988. It is not contested that defendants have indemnity agreements with the United States. The indemnification agreements show that the United States is obligated to indemnify defendants should either of them be required to pay damages in this "nuclear incident" case. Plaintiffs maintain that at this early stage of the case it is unclear whether the United States is "obligated" to pay for an award of punitive damages, and, consequently, it is unclear whether section 2210(s) applies. Thus, plaintiffs argue, the issue is not ripe for adjudication or they require discovery under Fed.R.Civ.P. 56(f). Plaintiffs misread section 2210(s).

[16] For this section to apply, it is not necessary that the United States be obligated to make *payments for punitive damages*. Rather, it is only necessary that "the United States [be] obligated to make *payments* under an agreement of indemnification covering [a nuclear] incident." 42 U.S.C. § 2210(s) (emphasis added). The obligation to indemnify for damages generally, not the obligation to indemnify for punitive damages, triggers application of the statute.

[17] This construction of the statute is supported by the legislative history to section 2210(s). The Senate Reports make clear that this section was meant to prohibit punitive damages against any DOE contractor indemnified under Price Anderson. *See* S.Rep. No. 100–218, 100th Cong., 1st Sess. 12, *reprinted in* 1988 U.S.Code Cong. & Admin.News 1476, 1487 (under section 2210(s), "punitive damage awards would be prohibited in actions involving DOE contractors indemnified under" Price Anderson); S.Rep. No. 100–70, 100th Cong., 1st Sess. 27, *reprinted in* 1988 U.S.Code Cong. & Admin.News 1424, 1440 (section 2210(s) "prohibits courts from awarding punitive damages under State law in any action that

involves a nuclear incident if the action is brought against a Department of Energy contractor, subcontractor or supplier indemnified under the Price Anderson Act").

Plaintiffs also contend that defendants do not have standing to raise this issue because it must be raised by the government. I disagree. Section 2210(s) bars punitive damages in any action against a contractor indemnified under Price Anderson. Thus, the contractor can raise this defense.

b. *Incidents Occurring Before August 20, 1988*

Defendants contend that section 2210(s) bars all of plaintiffs' claims for punitive damages because they seek recovery for an extended, ongoing "nuclear incident" which began before, but occurred, at least in part, after August 20, 1988. I need not decide whether punitive damages arising out of an extended "nuclear incident" that began before August 20, 1988 and continued unabated until after that date are barred by section 2210(s), because, to the contrary, plaintiffs have alleged distinct "nuclear incidents" occurring before August 20, 1988.

As defined in 42 U.S.C. § 2014(q), "nuclear incident" means:

> any occurrence ... within the United States causing ... bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material....

The legislative history makes clear that a release may be either a distinct occurrence or an ongoing occurrence over a long period of time.

> ***1481** While most incidents will be happenings that can be pinpointed in time—such as a runaway reactor or an inadvertent exposure to radiation—it is not thought that an incident would necessarily have to occur within any relatively short period of time. For instance, the steady exposure to radiation, such as from an undetected leak of radioactive materials from a storage bin, could constitute an incident.

S.Rep. No. 296, 85th Cong., 1st Session 16, *reprinted in* 1957 U.S.Code Cong. & Admin.News 1803, 1817.

[18] Plaintiffs allege numerous releases that can be pinpointed in time before August 20, 1988. As such, these occurrences do not fall within 42 U.S.C. § 2210(s).

2. Sovereign immunity

[19] Defendants next contend that even if section 2210(s) does not bar an award of punitive damages for all of plaintiffs' claims, such damages are barred by sovereign immunity. Under the doctrine of sovereign immunity the United States cannot be sued without its consent. Defendants are obviously not the United States. However, they claim that because the United States is required to indemnify them for an award of punitive damages, and because the United States has not consented to be sued for punitive damages, sovereign immunity precludes such an award. Even assuming that the United States is obligated to indemnify defendants for an eventual award of punitive damages, sovereign immunity does not bar the punitive damage claim here.

[20] An indemnity agreement between the federal government and its contractor does not cloak the contractor with sovereign immunity. *Rochester Methodist Hospital v. Travelers Insurance Co.*, 728 F.2d 1006, 1012–16 (8th Cir.1984); *Foster v. Day & Zimmermann, Inc.*, 502 F.2d 867, 873–74 (8th Cir.1974); *Whitaker v. Harvell–Kilgore Corp.*, 418 F.2d 1010, 1014 (5th Cir.1969); *Group Health, Inc. v. Blue Cross Ass'n*, 625 F.Supp. 69, 74–76 (S.D.N.Y.1985); *see also Brady v. Roosevelt Steamship Co.*, 317 U.S. 575, 63 S.Ct. 425, 87 L.Ed. 471 (1943); *Griess v. Colorado*, 841 F.2d 1042, 1044–47 (10th Cir.1988) (state's obligation to indemnify defendants does not cloak defendants with state's Eleventh Amendment immunity).

Defendants attempt to distinguish these cases by arguing that this case concerns more than a "mere contractual indemnitee" of the United States. The Price Anderson Act authorizes indemnification agreements. 42 U.S.C. § 2210(d). It authorizes the United States to "take

charge" and "settle or defend any such action." 42 U.S.C. § 2210(h). In addition, under regulation, the DOE may "require the prior approval of DOE" before any settlement by a contractor. 48 C.F.R. § 952.250–70(f).

These distinctions make no difference. Sovereign immunity attaches only to "claims ... that *by their nature must* be paid from public funds, not actions directed against individuals that may ultimately be satisfied with state monies solely because the [government] has chosen to provide indemnification." *Griess*, 841 F.2d at 1046 (emphasis added).

Moreover, before the 1988 amendments to Price Anderson, the United States was permitted, but not required, to enter into indemnification agreements. 42 U.S.C.S. § 2210(d) (1973). Thus, for occurrences not covered by section 2210(s), any duty to indemnify was not mandated by statute. In *Brady*, the Supreme Court rejected the argument that a suit against a private party should be treated as a suit against the United States because the private party had an indemnification agreement with the United States. The Court stated, "if [plaintiff] had a cause of action against [the private-party defendant], it is difficult to see how she could be deprived of it by reason of a contract between [defendant] and the [United States].... At least in the absence of a clear Congressional policy to that end, we cannot go so far." *Brady*, 317 U.S. at 583–84, 63 S.Ct. at 429–430.

Defendants' reliance on cases holding that sovereign immunity applies where a judgment will expend itself upon the federal treasury, *e.g., Brown v. General Services Administration*, 425 U.S. 820, 826–27, 96 S.Ct. 1961, 1964–65, 48 L.Ed.2d 402 (1976), is similarly misplaced. In this case, ***1482** a judgment would not be against the United States, it would be against the defendants. Any federal monies would not go to pay the judgment, but to pay defendants based on an independent contract. These are not "claims ... that by their nature must be paid from public funds." *Griess*, 841 F.2d at 1046. Consequently, sovereign immunity does not attach.

Defendants also rely on *In re Three Mile Island Litigation*, 605 F.Supp. 778, 784 (M.D.Pa.1985), in which the court disallowed punitive damages based on the government's duty to indemnify. This authority is not persuasive. It applied the doctrine of sovereign immunity without discussing the long line of cases holding that an indemnity agreement does not cloak a private party with sovereign immunity.

3. Col.Rev.Stat. § 13–21–102(2)

[21] Lastly, defendants contend that because they are no longer operating the plant and because the DOE will indemnify them for any award of punitive damages, such damages are not available here since they "could not possibly serve any of the purposes for which [punitive] damages are permissible." Rockwell's Memorandum in Support of its Motions for Partial Summary Judgment on Plaintiffs' Claims For Exemplary Damages at 16.

Even assuming that the DOE must indemnify defendants for an eventual award of punitive damages, summary judgment is inappropriate. Under Col.Rev.Stat. § 13–21–102(2), a court has discretion to disallow an award of punitive damages where the purposes for such damages would not be served. However, this section permits a court to reduce or disallow punitive damages only after such damages have been awarded. *See, e.g.*, 13–21–102(2)(b) (punitive damages may be reduced or disallowed if, among other things, "[t]he conduct *which resulted in the award* has ceased) (emphasis added). Accordingly, under Colorado law disallowance of punitive damages because their award would serve no purpose is premature before trial.

F. *Statute of Limitations*

Dow moves for summary judgment on all claims against it based on the statute of limitations. Because Dow has not met its burden, this motion is denied.

[22] Plaintiffs have three types of claims: CERCLA claims; common law actions based on diversity; and the Price Anderson claims. Although the parties agree that Colorado law controls the diversity action, they disagree whether federal or Colorado law governs accrual of claims under the Price Anderson Act. This dispute is immaterial because both Colorado and the Tenth Circuit apply the same accrual standard: the limitations period begins to run when the person suffering legal injury knows or in the exercise of reasonable diligence should have known of the injury and its cause. *See* Colo.Rev.Stat. § 13–80–108; *Ebrahimi v. E.F. Hutton & Co.*, 852 F.2d 516, 523 (10th Cir.1988).

The parties further dispute whether the Price Anderson claims have the same limitations period as the analogous

diversity claims. On the theory that the Price Anderson Act is "silent" on what limitations period should apply, Dow contends that Colo.Rev.Stat. § 13–80–102(1)(g) should apply. This section establishes a two-year limitations period for "[a]ll actions upon liability created by a federal statute where no period of limitations is provided in said federal statute."

[23] [24] This section does not apply because Price Anderson does provide a period of limitations. The Price Anderson Act mandates application of state substantive law. Statutes of limitations are substantive. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750–53, 100 S.Ct. 1978, 1985–86, 64 L.Ed.2d 659 (1980). Thus, for plaintiffs' Price Anderson claims, the Colorado statute of limitations specific to each state claim applies.

[25] The parties also dispute whether claims arising before July 1, 1986 are covered by a six-year statute of limitations. Before its amendment in 1986, Colo.Rev.Stat. § 13–80–110 provided a six-year limitations period for all actions "for waste and for trespass upon land" and for "[a]ll other actions on the case, except actions for slander and libel." "The statute of limitation in effect when a cause of action accrues **1483** governs the time within which a civil action must be commenced." *Rauschenberger v. Radetsky*, 745 P.2d 640, 642 (Colo.1987). Here, genuine issues of material fact remain as to when these actions accrued. Thus, it is unclear whether the six-year limitations period should apply.

Dow argues that, as a matter of law, the pervasive publicity surrounding Rocky Flats would have necessarily put a reasonable person on constructive notice of his or her claims long before even 1984 and, thus, all the claims are barred. I disagree.

The crux of the complaint is that because of Dow's tortious behavior, hazardous substances invaded plaintiffs' property and caused damages. Some plaintiffs live as far as six miles from Rocky Flats. The record does not establish when plaintiffs knew or should have known that hazardous substances allegedly released while Dow was operating Rocky Flats reached their property. Thus, the record does not establish when plaintiffs knew or should have known of their causes of action. Accordingly, Dow's motion for summary judgment based on the statute of limitations is denied.

G. Injunction to Prevent Further Releases

Plaintiffs, among other things, seek an injunction "preventing further releases of plutonium and radioactive and non-radioactive substances from Rocky Flats." Amended Complaint ¶ e. Rockwell moves to dismiss this claim for relief because such relief cannot be granted in this case. I agree and will grant Rockwell's motion.

[26] A court will not grant an injunction when it would be ineffectual. *Thournir v. Buchanan*, 710 F.2d 1461, 1463 & n. 2 (10th Cir.1983); *United States v. Parish of St. Bernard*, 756 F.2d 1116, 1123 (5th Cir.1985) ("[i]t is black letter law than an injunction will not issue when it would be ineffectual"), *cert. denied*, 474 U.S. 1070, 106 S.Ct. 830, 88 L.Ed.2d 801 (1986).

[27] The complaint acknowledges that Rockwell no longer operates Rocky Flats. Amended Complaint ¶ 19. As such, Rockwell does not have the power to "prevent further releases" from the plant.

Plaintiffs argue that Rockwell can be ordered to "assist" in preventing further releases by disclosing certain information. The complaint does not request assistance or disclosure of information. Rather, it requests that Rockwell be enjoined to prevent further releases. Rockwell simply has no power or ability to comply with such an injunction.

[28] Plaintiffs also argue that Rockwell's motion should be denied because an injunction can be enforced against certain third parties who have notice of the injunction. Plaintiffs argument is fallacious because my power to effect injunctive relief against third parties derives from a valid injunction in the first instance against Rockwell, a party to this action. If, as here, I cannot enjoin Rockwell, then I cannot enjoin third parties not named in the complaint.

Accordingly, Rockwell's motion to dismiss plaintiffs' claim for an injunction to "prevent further releases" is granted.

H. Mootness and Lack of Grounds for Injunctive Relief

Defendants' motions for summary judgment on plaintiffs' claims for a fund to finance future scientific studies are made moot by my dismissal of those claims.

Accordingly, it is ORDERED that:

(1) defendants' motions to dismiss the CERCLA claim for post-judgment costs are GRANTED; defendants' motions to dismiss the CERCLA claims for medical monitoring are DENIED as to the portion of plaintiffs' CERCLA claim that seeks to recover the costs of medical testing necessary to monitor the environmental effects of defendants' alleged releases; defendants' motions to dismiss are GRANTED for all other medical testing costs sought under CERCLA; defendants' motions to dismiss the entire CERCLA claim are DENIED provided that plaintiffs file an adequate amended complaint within 20 days;

(2) Rockwell's motion to dismiss the portion of plaintiffs' claim for medical monitoring that seeks general scientific studies is GRANTED; Rockwell's motion to dismiss the entire claim for medical monitoring *1484 is DENIED provided that plaintiffs file an adequate amended complaint within 20 days;

(3) defendants' motions to dismiss the outrageous conduct claim are DENIED provided that plaintiffs file an adequate amended complaint within 20 days;

(4) defendants' motions to dismiss the misrepresentation and concealment claim are GRANTED;

(5) defendants' motions for summary judgment on the claim for punitive damages are GRANTED for such damages arising out of nuclear incidents occurring on or after August 20, 1988. The motions are DENIED for punitive damages arising out of nuclear incidents occurring before August 20, 1988;

(6) Dow's motion for summary judgment based on the statute of limitations is DENIED;

(7) Rockwell's motion to dismiss plaintiffs' claim for an injunction to "prevent further releases" is GRANTED;

(8) defendants' motions for summary judgment based on mootness and lack of grounds for equitable relief are DENIED.

All Citations

Nuclear Reg. Rep. P 20,537, 755 F.Supp. 1468, 59 USLW 2543

End of Document

APPENDIX NO. 3

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Eunice Train Derailment, W.D.La., January 9, 2012

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.

9 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.

17 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.

21 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.

19 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.

8 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.

4 Cases that cite this headnote

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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.

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."

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]

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]

[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]

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]

*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.

[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.

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]

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.

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.

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.

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.

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.

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 Litig.*, 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.

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:

> 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.

All Citations

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Footnotes

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.

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

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

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)).

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).

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 ....").

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.

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).

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).

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).

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.

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).

33 *Id.* § 3.07 cmt. b.

34 *Id.*

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).

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

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