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Building A Better Mousetrap:
Cy Pres Distribution Mechanisms for the 21st Century

I. Introduction

Nine West is a clothing retailer, specializing in high-end women's accessories and shoes. During the 1990s the company engaged in vertical price fixing, violating both state and federal laws and harming numerous consumers who paid more for their shoes than necessary._ Fortunately for consumers, the Federal Trade Commission and the attorneys general of the fifty states worked together to prosecute Nine West for its violations and to prevent future violations. The result of this coordinated effort was a $34 million settlement, with $30.5 million set aside for consumer distribution.

The settlement fund was established for the purpose of providing restitution to consumers, although "due to the impracticability of identifying particular injured purchasers of Nine West Products during the Relevant Period, and the high costs of administering an ad hoc refund program relative to the average award to individual consumers"_ no state made much of an effort to achieve consumer restitution._ Rather, each state, "through its Attorney General or as otherwise authorized by state law"_ chose distribute its share of the money (determined by the pro rata share of national population_) via cy pres to the state directly, or a sub-division of the state, or to a non-profit corporation or other charitable organization with conditions on the grant ensuring that the funds go toward "women's health, women's educational, women's vocational, and/or women's safety programs."

Connecticut received $384,082 as its share of the settlement._ Attorney General Richard Blumenthal successfully advocated for the money to be used by the state's Department of Public Health for the provision of breast and cervical cancer treatment services._ Such use of the funds both saves lives and serves as a deterrent to future violations of anti-trust laws, Blumenthal argued.

Wisconsin received $578,252 as its share of the Nine West settlement._ Attorney General James Doyle_ awarded some of this money to the Wisconsin Women's Health Foundation, but the largest grant went to the Wisconsin Alliance for Boys and Girls Clubs,_ hardly an organization devoted to women's issues and about as distant from the injured class of high end women's shoe buyers as it was possible for general Doyle to go.

South Carolina's expenditure of the Nine West settlement was controversial for a more popularly sinister reason, although it appears to be the exception rather than the rule. Attorney General Charles Condon made a great show of personally distributing funds to a series of anti-abortion crisis pregnancy centers, while touring the state campaigning for the Republican party's gubernatorial nomination, leading to charges that Condon was using his position to gain votes in the primary.

The Nine West case provides a good illustration of the questions that arise in cy pres distributions. How much effort should be made to provide direct restitution? What justifies "indirect" expenditures that depart widely from the injured class, such as Wisconsin's use of its Nine West fund? Should states use cy pres funds to subsidize or replace state appropriations to state agencies?_ Should the attorney general make the final decision, or should the public or the legislature be involved? Are protections against political self-dealing required to ensure that the purposes of the settlement are properly served? Or, rather than imposing limits on attorney general discretion, should the judge presiding over the settlement exercise more care in approving cy pres distributions?

This paper will attempt to analyze and answer these questions, although the scope of the issues raised by cy pres could fill hundreds of pages. This paper will focus on the practices and procedures followed by the attorney general in administering cy pres funds created by large multi-state litigations brought under the anti-trust laws._ First, the framework of cy pres will be briefly presented. Common practice among the attorney general's offices in cy pres distributions will then be discussed and analyzed. This, the problems raised by cy pres—including questions of distributional authority, comparative value (between cy pres and other options in light of consumer restitution goals) and political pressure both within and without the government—will be considered, and the value of maintaining the cy pres mechanism and making it more secure from criticism will be defended. Finally, the paper will propose some suggestions for greater uniformity and a more effective cy pres process.

II. Cy Pres—What is it?

The term cy pres is derived from the French cy pres comme possible (as near as possible)._ The doctrine was developed in the law of trusts, and allows a judge to find the "next best" use, consistent with the intent of the donor, of the proceeds of a trust when the use of the trust for its original charitable purpose is impossible, impractical or illegal. Thus, a trust to benefit deceased grandchildren might be used to serve great grandchildren, or a charitable donation to a medical school might be given to hospital—the key factors being the intent of the testator and the availability of a suitable second option.

Recently, the doctrine has moved from the law of trusts to the law of class actions suits and other large-scale litigations such as multi-state antitrust actions. Courts have held that, where the scope of the class or the size of the individual recovery would make a suit cumbersome, the court has the authority to shape a suitable remedy, both to ensure that the class is compensated for its injuries and also to ensure that illegal conduct is not

condoned by default due to high transaction costs—just as the court will shape a remedy to ensure that the good will of the testator is rewarded and encouraged.

A California Appellate Court in a landmark decision establishing cy pres in the class action field described the scope of this equitable power:

"The theory underlying fluid class recovery_ is that since each class member cannot be compensated exactly for the damage he or she suffered, the best alternative is to pay damages in a way that benefits as many of the class members as possible and in the approximate proportion that each member has been damaged, even though, most probably, some injured class members will receive no compensation and some people not in the class will benefit from the distribution."

The Bruno court explanation is clear and it invokes a cy pres distribution that is directly benefiting the injured class though not through individual restitution. This inherent check on the discretion available to a cy pres distributor breaks down in the case of a large multi-state attorney general action. Initially, the pre-suit limitations on the size and scope of the class itself are lacking in an attorney general's parens patriae action,_ as the attorney general is not required to identify a specific class of injured individuals. Further, the factors used by attorney generals and their staffs in selecting cases to prosecute tend to exacerbate the diffuse nature of the injured class and increase the likelihood that a cy pres distribution will have rather vague parameters. Attorney generals are likely to bring suit only where the harms are so diffuse that a private class action is hard to justify, or where there is no interest in bringing suit on the part of the private plaintiff's bar. Also, the attorney general may act when determining individual damages presents extremely difficult logistical issues, or where the potential class counsel in a private suit is undesirable for some reason. The result is that the multi-state parens patriae action tends to lend itself, uniquely among other types of consumer class actions, to a higher-than-usual likelihood of cy pres distribution and a much greater level of discretion in that distribution.

III. Cy Pres—How the Attorney General Distributes Funds

The discretionary authority over the cy pres funds that commonly result from the multi-state anti-trust actions provides the attorney general with a powerful tool that has the potential to both increase the attorney general's power within the state government as a regulatory officer and within the state as a political officer._ Thus, as the distribution of cy pres funds resulting from multi-state litigations has become increasingly common, the scrutiny applied to the attorney general on this issue has increased. Although no state has a formalized cy pres distribution mechanism that is used in every situation (New York is close), every state makes use of informal procedures that reflect sensitivity to protecting the benefits of cy pres distribution and releasing the pressure on the attorney general's discretion.

A. Pre-Distribution Constraints on the Attorney General

Initially, it should be noted that the cy pres issue is rendered moot with either a sufficiently narrow settlement agreement, or with sufficiently critical judicial review of the distribution plan. Although both negotiations and judicial review are beyond the scope of this paper, it is worth considering the general factors that have led both constraint mechanisms to be underutilized. First, as noted, the attorney general tends to become involved in cases only when the factors that would lead to a narrow settlement are lacking. Second, the incentive structure of the multi-state process does not lead to strong limits on distribution. Although the attorney general's staff will tend to favor a narrow view of the appropriate distribution class, the attorney general herself has no reason to do so. Her political constituencies will likely never read the settlement agreement or make an effort to assess whether or not the distribution was the actual "next best use." Rather, the attorney general almost always benefits the most from a non-controversial, high profile charitable distribution. Thus, the discretion to craft a distribution that is maximally effective, both legally and politically, is too valuable a power to sacrifice needlessly.

Arguably, this discretion should not be sacrificed. The attorney general's parens patriae is consciously broad—intended to allow the attorney general to protect the citizens of the state from diffuse yet important harms resulting from anti-trust violations. Although the distribution of funds must always consider first direct restitution_, the attorney general is not charged with representing only a discrete class—indeed, no such class need be defined in a parens patriae action. The attorney general has a dual role—as executive branch regulator and as judicial officer—and balancing this role demands a certain amount of discretion.

Just as the attorney general has no incentive to reduce her discretion, so too, the defendant has no incentive to control where the damages are distributed. Actually, it is conceivable that the incentive is just the opposite—the defendant is more likely to agree to a broadly defined set of potential recipients, perhaps in exchange for some other concession from the attorney general.

Finally, the judge has absolutely no incentive to engage in the time- and fact-intensive inquiry required to scrutinize the proposed distribution plans of every state attorney general in a massive, multi-state litigation. Generally, there is no trial before settlement, leaving the judge will a small record and little personal exposure to the often highly complex scenarios. Further, the high cost of exploring other potential uses serves as a deterrent to this application of judicial resources.

The interplay of factors is such, then, that the attorney general's discretion is not only available but desirable, making the development and application of a cogent, functional mechanism for distribution all the more critical.

B. The Post-Settlement Process

The exact process of preparing a distribution plan varies widely from state to state in form, though not necessarily in function. Large states with large sums to distribute, such as New York, tend to form a small committee of staff attorneys that receive and

review grant requests and prepare the proposal without close supervision from the attorney general. Most states allow the anti-trust division chief or some other similar senior attorney to grab other staff attorneys ad hoc and direct them to investigate potential recipients, review proposals, etc.

Utah provides an excellent example of the current process, and although no process can be precisely described as typical, the Utah process seems fairly representative of a typical cy pres distribution mechanism. Generally, the chief of the anti-trust division, who is subject to at-will removal only from his position as chief and not from the attorney general's office, will develop the proposed distribution plan through four analytic steps—identifying the injured, identifying the potential fund recipients, solicitation of proposals for the use of funds, decisions regarding final distribution.

1. Identification

First, the nature of the injured class is identified. This is analogous to the identification of sub-classes by the court in a Rule 23 certification. The citizenry of the state, represented as victims in the parens patriae action, is broken down into sub-classes, based on such factors as the severity, the frequency and the scope of the harms suffered._ This is a different inquiry than the initial determination at the settlement stage. For example, in the recent Mylan litigation, the cy pres distribution was directed to "the health care needs of a substantial number of the persons injured by the increased prices" of the drugs involved,_ but no direction was provided as to the "how" of achieving this objective—no definition of substantial number, no method for comparing the scope of different injuries. This highly subjective calculation is left to the attorney general's staff.

Second, the potential fund recipients are determined. The potential recipients are usually drawn from either the pool of actually injured parties, or interested groups that provide services to the injured parties. Key factors in this decision are the non-profit status of a potential recipient, its ability to provide services to large segments of the community and the level of need for funding. Also, the attorney general may have a statutory or constitutional mandate to satisfy, such as ensuring consumer protection or educating the public about antitrust issues, that sometimes dictates what groups are eligible for the funds. Further, the association of a government agency with remedies for the harms caused can be an important factor, as where a consumer protection agency gets funds from a suit for violation of the consumer protection laws.

2. Solicitation

The third step is not necessarily distinct from the first two steps—it depends on the level of formal organization a state employs. Most states conduct the second and third steps as a single—or at least conjoined—inquiry. Utah, for example, conducts an internal investigation into suitable recipients, determining both the affiliation of the potential recipients with the injured class and also the viability of the potential recipient in relation to the goals of the distribution._ Such goals may include the breadth of dispersal (Utah

generally favors a limited dispersal to maximize the size of grants and the effectiveness of the resulting services, while Texas usually tries to ensure that the dispersal is geographically wide_), the "direct" nature of the potential grant use in relation to the injured parties and the integrity of the potential recipients.

Only after this internal assessment is completed do most states contact potential recipients to discuss the potential grant award. Some states will solicit requests for proposals from their previously investigated pool of potential recipients and then use those requests as the basis on which to decide the appropriate distribution at step four. Other states will merely have informal discussions with identified recipients, to ensure that the recipient will accept the grant.

Solicitation also involves unexpected proposals from interested potential recipients, even in the states that do the most stringent internal assessment and identification before the solicitation begins. Again, Utah's Mylan experience provides an instructive example. A charity group, Volunteers of America, familiar with the settlement and the availability of a cy pres fund conducted an internal study regarding its own potential viability as a fund recipient. The group then contacted Utah and offered an unsolicited grant proposal that was accepted and led to Volunteers of America receiving $50,000 from the cy pres distribution.

The solicitation process in states with informal processes is closely marked by the efforts of external actors within the political process to exert influence. These are not sinister efforts, but rather a natural function of the attorney general's role as a government agency with access to external funding sources. Some states, such as Utah_ and Texas_ make an express effort to contact legislative leaders to discuss potential distributions of cy pres funds. The rational behind this effort is best summarized as "good government"—an institutional belief that the attorney general is receiving large sums on behalf of the state for the benefit of the citizens of the state, and so the input of the governing bodies of the state is valued. Further, such early consultation can avoid later problems of political controversy, alert the attorney general to potential recipients not otherwise considered or allow state legislators an opportunity to alert their own favored charities or government agencies to the availability of the cy pres funds.

A minority of states have a more formalized process. Initially, these states do not identify a class of potential recipients, except in the form of internal criteria that are used in the step-four decisional process. Rather, these states use the Internet to shift the burden of solicitation to the potential recipients. A notice of an available fund is posted on the attorney general's website, and an application for grant funds is also posted. There are no pre-solicitation limits imposed on what organizations may apply for grants—instead, the grant applications are used to sort the best potential recipients. The currently available Illinois application for Mylan grant funds provides a good example.

The Illinois application for Mylan settlement funds lists nine required forms or written plans (five of which are provided by the attorney general's office), including a cover page, a program plan (program length limited to one year), a program budget, and

justifications, both budgetary and plan related, for the disbursement of grant funds._ The instructions pages also list four criteria that the attorney general's office will use to review the grant applications. Illinois uses a point system with each of the four criteria given a maximum point value, with the total possible points equal to 100._ The application does not state what point total justifies a grant it may be that a sufficient number of applications reach 100 points, or it may be that the actual cut-off for a high enough score varies from case to case. It is interesting to note that the soundness of the proposed plan and strategy for implementation is the most important factor, with up to 40 points available. All other factors, including the required justifications, are worth only 20 points.

The Illinois Mylan Application is also useful in its explicit, though not exclusive, listing of potential fund uses and banned fund uses. Grants may be applied to personal, contractual or administrative services, equipment, travel or printing. Grants may not be used to pay debts, provide entertainment or gratuities, fund lobbying or purchase property. The detailed criteria and application conditions ensure a higher level of public accountability and political distance from the eventual fund uses that exists in states that rely on informal processed.

A further difference between the formal and the informal states is the level direct participation that the attorney general enjoys. New York, for example, leaves the proposal review system almost entirely to the attorneys and staff persons charged with the task. The attorney general is not regularly consulted during the review process and may not even closely review the eventual distribution. This is not to imply that the attorney general is not involved, or that there is no external pressure surrounding the decisional process rather, it reflects the altered incentive structure that a formal, published process produces. The attorney general, legislators or any other interested parties need only contact their favored charities or interest groups and encourage them to apply. The availability of the fund and the application criteria are both items of public knowledge thus there is no need to use, or at least to rely on, more informal, back-channel notifications.

Finally, there is one other approach to the solicitation process that some states use in a sporadic fashion—the "blue ribbon panel." This construct is an appointed panel, created by the attorney general and delegated the authority to solicit grant proposals and make decisions regarding the final distribution of funds. Wisconsin used such a panel when it handled the distribution of the Vitamins cy pres fund. The panel usually consists of community leaders and individuals experienced in charitable giving, although the entire project is subject to the attorney general's supervision and her authority to make final decisions remains. This approach to distribution seems to be popular in cases involving very large settlement funds as a method to ensure transparency and involve the public in the distribution decisions. Certainly public participation and transparent decision-making are beneficial to the legal and political systems, but the blue ribbon panel also increases the risk that decisions will be made by individuals to satisfy their own personal interests, as where members of the panel are involved in the governance or operations or potential fund recipients. Also, despite the seeming political benefit to the attorney general of

creating a highly-public mechanism for giving large sums of money to charities, the blue ribbon panel can expose the attorney general to criticism for attempting to exercise undue influence over the panel, or for disagreeing with the panel's conclusions, regardless of the legal authority for taking either action. Thus, the "blue-ribbon panel" may not be an adequate cy pres distribution mechanism.

3. Decision

The fourth step involves reviewing the submitted proposals and deciding how to distribute the funds. A proposal is not merely rubber-stamped in any state as a rule, more groups will apply for funds than there are funds available to distribute. There is little consistency in the factors used to determine appropriate recipients, although the factors identified in the Illinois Mylan Applications including organizational size, organizational need and the viability of the proposed use of the funds—tend to be considered almost everywhere. Ultimately, there appear to be no universally dispositive factors, and the weight given to the potentially relevant factors is subject to the personal or institutional decision-making criteria a particular attorney general's office has developed, especially in states that do not use the more formal, Illinois-style process.

Also subject to variation among the states is the amount of resources devoted to reviewing the grant submissions. Utah, for example, essentially leaves the task to the anti-trust division chief, while Ohio leaves the final decision to the attorney general, who may appoint a deputy to head the overall process and provide advice to the attorney general before final decisions are made. Again, some states use a "blue-ribbon panel" to make distribution decisions.

The key factor in determining the level of formality, public input and attorney general involvement in the final decision seems to be the size of the overall grant. Utah deals with much smaller cy pres funds than New York, which awarded more than 100 different grants, ranging in value between $12,000 and $600,000, during the distribution of the Vitamins cy pres fund. Thus, Utah can afford a smaller, more informal decisional structure that in New York would be wholly overwhelmed. States that need a supplement to their informal process are presently using the "blue-ribbon panel" structure, rather than adopt a more technology-based solution such as that used by Illinois.

As noted, the "final" decision of this analysis is in fact not at all final. Rather, it is a reference to the final proposed settlement plan that the attorney general must present to the presiding judge for approval. However, for reasons previously identified, the presiding judge rarely rejects or alters the product of the lengthy process described here.

IV. Problems Facing the Present Cy Pres Distribution System

The present cy pres distribution system has functioned with relative effectiveness during the first decade in which these highly discretionary funds have become regularly available through multi-state anti-trust litigations. Thus far, there have been few incidents

in which attorneys general have been accused of political self-dealings, and no serious scandals in which cy pres funds were stolen by untrustworthy charities or otherwise misused.

This record of success, however, is not enough to justify simply maintaining the present system indefinitely. As noted, the cy pres distribution is a powerful tool for the attorney general to protect and provide for injured members of the public a tool that will not be left solely to the attorney general's discretion for very long, if other branches of the state government perceive potential political advantages from restrictions on the attorney general's authority. Already, some state legislatures, Texas for example, have begun to regularly usurp the attorney general's discretion and appropriate cy pres funds directly to state agencies. Such actions raise questions about the "taxing" effect of cy pres funds that go directly to the state and also pose constitutional questions about the attorney general's independent authority.

Also, non-governmental critics of attorney general discretion have begun to argue that the cy pres fund should be given severely limited use to avoid creating an incentive for attorneys general to use the power of the state to "extort" settlements from anti-trust violators, where the settlement funds are less than private plaintiffs could have received or where the cy pres distribution provides inadequate restitution to injured consumers. These criticisms focus more on imposing stronger judicial restraints on the settlement fund prior to distribution, rather than requiring the attorney general to develop internal restraints. Advances in technology that may greatly reduce the costs associated with individual restitution, even for relatively small sums, are used to support these arguments.

Finally, the attorney general is faced with more mundane administrative problems, such as how to balance public input with decisional autonomy and how much time and money to devote to developing a solicitation or decisional system when the cy pres funds are commonly small and the typical state distribution is limited. Or, to put the question into an illustration, the attorney general of Idaho or Nebraska must determine the extent to which it would be a waste of money to replicate the distribution process used in New York or Illinois. Such problems will only grow if the number of available cy pres funds continues to increase.

Potential Judicial Limits on Cy Pres

Initially, some response must be presented to critics of cy pres discretion, especially in light of technology improvements that may reduce or eliminate the undistributed settlement funds that presently fuel cy pres. The on-line application for individual restitution that is currently available for the compact disc settlement is a certain sign of the future of settlement distribution. Security for the individual, and protection against frivolously repetitive claims, is provided by the requirement that each claimant supply the last four digits of her social security number. Although the on-line claims systems follows the "five dollar rule" (the theory that any claim for less than five dollars will cost more to process than the claim is worth) and sends all claims of less than five dollars into

the cy pres fund, the actual processing of on-line claims is handled within the computer database, and costs less than one dollar per claim processed. If the "five dollar rule" were to erode, the sums available for cy pres might evaporate.

This reduction in cy pres ought to be cheered if the sole purpose of the settlement is to provide restitution to individual consumers. Although this is a clear part of the statutory authority to distribute damages, it is not the only goal that the attorney general's parens patriae authority is intended to serve. The attorney general represents the people of the state as a whole in her anti-trust actions, not solely the injured class of consumers. It might be that the state, and even the injured class, is better served by a well-developed cy pres distribution than by the low-cost execution of individual restitution for any claimed sum greater than $1. This is especially the case, given that many forms of restitution from anti-trust cases involve subsidies for future purchases or the distribution of comparable, alternate goods. Also, on-line distribution raises questions of distributional justice; as the wealthy will be ensure access to greater levels of restitution than poorer elements still reliant on paper processing. The attorney general's duty to the citizens of the state as a whole may be better served through cy pres distribution.

Similar to the arguments for greater use of high-tech direct distribution are the arguments for more stringent judicial controls on the availability of cy pres funds. One scholar has identified a four-part test (1-a large and virtually impossible to identify injured class; 2-small individual damages; 3-no creative direct distribution methods; 4-the cy pres funds will most directly benefit the consumers represented in the original action) that she argues judges should apply before allowing a cy pres distribution in a parens patriae action. Application of this test, combined with the availability of low-cost on-line distribution would virtually eliminate cy pres funds. Although the scholarship supports the argument that Congress was seeking to provide a class-action alternative for consumers,_ the reality is that a parens patriae action under the Clayton Act does not hinge on the certification of a limited class of injured parties. The attorney general needs to preserve her ability to serve the broad interests she represents, and neither stringent judicial rules nor creative direct distributions to the last penny adequately protect those interests. These judicial remedies are harsher than the discretionary disease.

B. Legislative and Political Factors in Cy Pres

The judicial limits on attorney general discretion are inadvisable for the same reason that legislative limits on attorney general discretion would be troubling the issue is not protecting the state from the discretion, but protecting the discretion from the state. The attorney general needs to develop a consistent distribution plan to ensure that her authority and independence aren't improperly infringed.

The greatest threat to the attorney general's ability to properly distribute the cy pres funds is clearly the state legislature. Although judicial constraints may not be a perfect solution to the problems of cy pres in parens patriae cases, at least judicial authority is clear in a judicial proceeding. The authority of the legislature is less certain, and the present system tends to exacerbate the problems of legislative involvement.

The example of Texas illustrates this problem. Presently, the Texas Attorney General views cy pres money as state funds that should only be appropriated consistently with the will of the legislature, when this can be determined. The dangers with this approach are clear. First, the attorney general does have a duty to the injured consumer class, though it might be less than the private class counsel, and the legislature is not necessarily the best body to protect those interests. As a collective body, not directly subject to judicial authority as an officer of the court, the legislature is simply too unwieldy and self-interested to properly consider the interests of the injured class. The temptation to spend the cy pres funds according to legislative needs, rather than legal requirements, is certain to be very great. Arguably, this problem is controlled by well-written settlement agreements, but the reality is much closer to the case of judicial scrutiny of awarding cy pres funds to state agencies. As any student of statutory interpretation can attest, determining the "will of the legislature" is as much art as science, and it is unlikely that an attorney-general approved plan will be questioned by a court short of egregious misuse of the available money.

It might be possible for the attorney general to impose controls on legislative action by contesting potential uses of the funds, but such controls are dependent on the state legislature not acting through legislation. The Texas legislature tends to write appropriations riders into the law, providing for the application of a potential cy pres fund to a particular state agency, with instructions on how the money is to be spent. This poses two problems—first, it makes review of the appropriation for consistency with the "no replacement" rule very difficult, and second it can make life difficult for the state agency, as where the legislature decides to use cy pres to fund, say, the state library, where the cy pres money can only be spent on children's books. Consistency with the settlement agreement and intelligent legislative spending are not necessarily possible under cy pres.

While the formal intrusion of the Texas legislature is seemingly rare, the informal influence shown in Utah is probably more typical, and it poses many of the same problems. Legislative initiatives and interests are not likely to converge with the injuries suffered by the consumer class. Further, explaining the legal limitations on potential expenditures is likely to be difficult, time-consuming and potentially fruitless legislators do not always listen to staff lawyers in the attorney general's office on matters involving spending large sums of money.

Legislative input is undoubtedly valuable, and given the size of the expenditures and the political impact that distribution can have it is unrealistic to expect legislatures to politely accept a place on the sidelines. However, there is no justification for treating the legislature's views as significantly more important than the views of many other parties. The cy pres fund is a judicial settlement, not a blanket grant of money to the state. The attorney general under parens patriae does represent the state as a whole, but her concern is providing restitution for the injuries her state and its consumers suffered as a result of violations of the anti-trust laws. The attorney general is not collecting funds for a general

use. The legislature's responsibilities and focus are not likely to be in accord with the restitutional focus of the attorney general.

The sole benefit of privileged legislative input is to prevent political problems but this does not require extended legislative input. Rather, the attorney general, in her multiple roles of independent agency/executive officer/judicial officer, has a duty to consider the effect of her actions on other branches of the government. A good attorney general ought to have sufficiently clear lines of communication within her government to allow privileged legislative input (or executive input) to seep into the decisional process without dominating.

Similarly, there are political concerns with extended public involvement in the process such as through a "blue-ribbon panel." Self-interest and institutional concerns are less in the case of a panel subject to the attorney general's authority, but the general problem of interested members of the public developing a sense of entitlement toward cy pres funds, or otherwise attempting to regularize the supplemental funding that cy pres represents remains.

C. Logistics Problems with Cy Pres

Finally, the attorney general's distribution mechanism must handle the logistical difficulties that are rampant in the present system. Waste appears to be a large problem, as staff attorneys and paralegals are burdened with the extra work required to investigate recipients, solicit proposals and distribute cy pres funds. The argument is often presented that this extra work is a benefit of being in the attorney general's office the lawyers get to directly benefit citizens in ways that other attorneys do not. This "job morale" argument is important, and a cy pres distribution system should protect the role of the attorney general's staff in the process. However, given the limited resources facing many attorneys general, it seems difficult to justify the expense that is required for lawyers to take time away from their other duties to research charities, contact charities, write letters, make phone calls, read and review proposals and otherwise do part-time labor on a fairly complex task. Although it may once have been true that cy pres funds were small and irregular, the recent surge in multi-state litigation has clearly changed that paradigm, and the attorneys general would do well to change before it is absolutely necessary.

V. Suggested Alternatives to the Present Cy Pres System

The problems of improper legislative control, waste of resources and balancing the attorney general's duties to the state as a whole against her duties to the injured class cannot be wholly ameliorated by any distribution mechanism. The sole fact that this paper favors the discretion of the attorney general ensures that any alternatives suggested here leave open the possibility that discretion can be abused (a fear of which is clearly at the heart of any arguments for more rigid controls on the cy pres distribution). The potential for an abuse of discretion is not enough, under this analysis, to warrant increasing the rigidity of the process or imposing legislative restraints on the attorney general. Abuse of discretion is an inherent danger in a government of laws that need to be

interpreted and applied by men and women with ambitions, opinions and individual experience. Rather than eliminate the possibility of an abuse of discretion, a sound distributional mechanism should seek to make decisions transparent to permit easier quality control by the relevant authority, whether it is the judge, the public or the attorney general.

Thus, the informal mechanisms that rely on institutional memory and the personal integrity of the attorney general's division chiefs should be largely reduced. This is not to suggest that the staff attorney's aren't honest—rather that the current system is too open to attack, and the source of their discretionary authority is too tenuous to withstand such attack. The current anti-trust division chief in Utah has years of experience and expertise, but his successor may be a person of less integrity, less ability or simple less experience and confidence in his or her decisions, with a resulting drop in the quality of the cy pres distribution decisions. The potential for the attorney general to suddenly change course as a result of an election is very evident—Texas experienced a shift in cy pres philosophy from charities to state agencies when a Republican replaced a Democrat in the late 1990s and South Carolina's attorney general altered his level of involvement with cy pres after losing a gubernatorial primary. Again, this is not an indictment of character or politics, but a recognition that the quality of decision-making about cy pres presently depends on a host of highly variable and inconsistent factors. This is not a sound system, considering the political, legal and financial stakes that the increasing size of the cy pres funds and the multi-state litigations raise.

A sound system should include the following features. First, there should be a dedicated "cy pres" distribution officer in the attorney general's office. This person should not be politically appointed. This officer may or may not be a lawyer an individual with experience in charitable funds may be more desirable, especially in a state such as New York that distributes massive amounts of money on a regular basis. Further, this officer does not necessarily have to be an independent hire a small state without a real need for a new staff person could simply designate a senior attorney with an official responsibility.

This officer would reduce some of the chaos that can follow cy pres funds by providing a face and a name for the interested public (charities and such) to deal with on a regular basis. This officer would not necessarily need a dedicated staff (the attorneys involved in a case are always likely to desire some input into the cy pres distribution) but in large states, this might be necessary. The effect is to reduce the waste of attorney time and the excess burden on the office that results from the imposition of massive research and response projects on a periodic basis. Further, the officer, as a non-political figure, would be well suited to develop balanced distribution plans that are both politically and legally sensitive without the need to bend completely to the will of the legislature, or the public. As the figure with ultimate responsibility the attorney general will have final decisional authority, but this authority will be increasingly transparent—the result of a considered decision either to support or reject a proposal from an officer acting in an official capacity, rather than an informal give-and-take between the involved lawyers. Of course, the attorney general's own desire for sound working relationships with her

professional staff will often lead her to defer to the staff, rather than challenge it. Many states have an unofficial structure that mimics this proposal, but the mantle of official authority will only strengthen the benefits of such a system in the face of increased pressure applied by the increasingly numerous seekers of cy pres funds.

Second, the cy pres distribution should be conducted according to clear guidelines. The model presented by the Illinois application is excellent. Decisional criteria should be published and publicly available, preferably on the attorney general's website. The guidelines should identify services that can be funded, services that won't be funded and the distributional limits for each. Although such guides are often criticized as too vague to be useful, or too inflexible to be valuable, the reality is that such guides do more to shape public responses and reduce frivolous applications than they do to actually constrain attorney general decision-making. Further, a system in which nothing is continuously beyond the pale is a system that is less discretionary than arbitrary. Printing, administration, and direct services—these are all functions that any charity or government agency will engage regardless of the terms of a specific settlement agreement. The specific uses of a fund and the precise class of eligible recipients may vary, but the general categories of potential fund uses don't vary at all across the spectrum of charitable and social services. The publication of clear guidelines for cy pres funds not only makes the application of discretionary authority easier for the attorney general and more palatable for critics, it also increases transparency and improves public accountability.

Finally, a cy pres distribution should involve open solicitation, via the Internet, of spending proposals, similar to the system used in New York or Illinois. This mechanism reduces waste, by saving the attorney general's staff large amounts of time and energy. The threat of legislative control is also reduced—the public will have a clear sense of what it is potentially losing if the legislature appropriates the fund and react accordingly. Further, the incentive for legislators to interact directly with the attorney general and her staff is reduced—direct contact with favored charities and interested groups will lead to a proposal, which will be accepted or rejected according to the objective, published criteria. Also, the use of a public system allows for non-recipients to react to the failings of their proposals, theoretically resulting in a continuously improving quality of proposals and a movement toward the most beneficial use of the fund, rather than the most beneficial use of the fund that the attorney general's staff can find with its research.

One concern about the open solicitation system is that it creates waste by increasing the number of applications that a small state must review and also increasing the public pressure on the cy pres fund by increasing its visibility. The first response to this criticism is that the guidelines and review criteria should reduce the number of frivolous applications. Second, the existence of a dedicated cy pres officer would alleviate the pressure that a small office might feel, by ensuring that someone's time was dedicated to the resulting task. Third, the public awareness of, and expectations for, cy pres funds are increasing rapidly as a result of media scrutiny, and this is not a trend that can be reversed. Fourth, as the cost-savings and public access benefits of the internet

become clear, it will be difficult for attorneys general to continue using a 20th century, paper- and phone-based process where a more efficient alternative is available.

It is worth taking note of what a sound mechanism should not involve. Public comment would be wholly unproductive in this setting—increased "unofficial" input increases the political pressures on the uses of cy pres funds by increasing the public's sense of entitlement toward the fund. Similarly, legislation that directs the use of all cy pres funds would be overly rigid and perhaps a violation of state constitutional provisions structuring state government. Establishing fixed lists of potential recipients is not viable, given the need to adapt to the factual specificity of different settlement. The ultimate goal of the distribution mechanism should be effective restitution of the harms suffered by the citizens of the state, with transparency and efficiency in decision-making as primary internal goals.

VI. Conclusion

The attorney general has a duty to both the injured class and the citizens of the state as a whole when she acts under parens patriae authority. As direct restitution to the injured class is often infeasible or politically impractical or otherwise not the best method of restitution (due to issues of distributional justice or other concerns), the injured class should be favored in the distribution, but not exalted. Thus, cy pres, and the discretion to distribute the fund, is necessary for the attorney general to properly fulfill her duties.

The increasing awareness of, and size of, cy pres funds will result in greater and greater pressure on the distribution decisions, coupled with heightened legislative scrutiny and interference. The result will be a reduction in the autonomy of the attorney general. Further, ensuring that cy pres distributions are made in a legally acceptable manner is necessary to ensure that stricter judicial controls do not work to reduce the autonomy of the attorney general.

The present system of cy pres distributions is functional, but it is reaching the limits of its capacity to handle the growing load of cy pres funds. A more efficient, more modern system, including dedicated resources, integration of technology and the establishment of clear and consistent decisional guidelines should reduce the pressure from both legal and political sources and also remove some of the labor and resource waste in the attorney general's office.

_ Special thanks to Bob Hubbard, Kevin O'Connor, Beth Finnerty, Mark Tobey, Wayne Klein and Jim Tierney for their insight, information and cordiality.
_ Kalpana Srinivasan, Nine West Settles, Associated Press (March 7, 2000), available at _ HYPERLINK "http://abcnews.go.com/sections/business/DailyNews/ninewest000307.html" __http://abcnews.go.com/sections/business/DailyNews/ninewest000307.html_
_ Florida v. Nine West Group, No. 00-CV-1707, 8-9 (S.D.N.Y. March 6, 2000) available at _ HYPERLINK "http://legal.firn.edu/units/NineWestSettlement.pdf"

__http://legal.firn.edu/units/NineWestSettlement.pdf_ (hereafter “Nine West Settlement”).
_ Id. at 15.
_ Another, perhaps equally important factor in the distribution decisions in the Nine West case was the political difficulty with providing restitution to the injured class—upper-income women. Providing a show subsidy to the wealthy may not be a publicly palatable use of the attorney general’s consumer protection power. Further, the more “direct” of the indirect spending options were even less viable—as some sources humorously noted, appropriate expenditures consistent with the harms suffered include pedicure subsidies or gym memberships.
_ Nine West Settlement, supra note 2, at 15.
_ Id. at 8.
_ Id. at 15.
_ Connecticut Attorney General’s Office Press Release, Money from Nine West Settlement Reaches Connecticut Programs, (March 8, 2001), available at _ HYPERLINK "http://www.cslib.org/attygenl/press/2001/coniss/nine.htm" __http://www.cslib.org/attygenl/press/2001/coniss/nine.htm_ (hereafter “CT Press Release”)
_ Id.
_ Id.
_ States to Spend Cash for Women’s Programs, Women’s E-News Staff (Oct. 11, 2000), available at _ HYPERLINK "http://www.womensenews.org/article.cfm?aid=304&mode=today" __http://www.womensenews.org/article.cfm?aid=304&mode=today_ (hereafter “Nine West Distribution”)
_ The Wisconsin attorney general makes the final decision on cy pres fund distributions. Telephone interview with Kevin O’Connor (Jan. 2, 2003). (Hereafter “O’Connor”)
_ Id. The Boys and Girls Clubs received $225,000.
_ It isn’t clear exactly how much the centers received. An article published in the Augusta Chronicle stated that the amount was more than $13,000, while a list of state distributions published by an Internet women’s news organization put the amount at $17,500 for each center. See Matthew Boedy, Condon’s Campaign Draws Fire, Augusta Chronicle, March 20, 2002, available at _ HYPERLINK "http://www.augustachronicle.com/stories/032002/met_140-6744.000.shtml" __http://www.augustachronicle.com/stories/032002/met_140-6744.000.shtml_; Nine West Distribution, supra note 12.
_ Matthew Boedy, Condon’s Campaign Draws Fire, Augusta Chronicle, March 20, 2002, available at _ HYPERLINK "http://www.augustachronicle.com/stories/032002/met_140-6744.000.shtml" __http://www.augustachronicle.com/stories/032002/met_140-6744.000.shtml_ South Carolina was not the only state to provide funds to the controversial crisis pregnancy centers, according to a women’s news service, but general Condon was the only AG to apparently campaign on his expenditures. See Cynthia L. Cooper, Judge Oks Funds for Anti-Choice Crisis Centers (Dec. 15, 2000) available at _ HYPERLINK "http://www.womensenews.org/article.cfm/dyn/aid/373" __http://www.womensenews.org/article.cfm/dyn/aid/373_

_ The Nine West Settlement limits the direct expenditure of cy pres money by the state to alleviate “shortfalls in existing funding” and prohibits expenditures that “supplant existing funding.” Nine West Settlement, supra note 2, at 15. Of course, in most cases it is likely to be extremely difficult for the court to verify that an expenditure is in lieu of, rather than supplementary to, existing funding.
_ Cy pres funds subject to attorney general administration are created in a variety of contexts.
_ See 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 at fn. 212 (1999).
_ Id. at 391.
_ For reasons that aren’t clear, cy pres is commonly referred to as “fluid recovery” in the class action context, perhaps to avoid confusion. I will refer to the doctrine as cy pres.
_ Bruno v. Superior Court, 127 Cal.App.3d 120, 123-124 (1981).
_ F.R.C.P. 23 requires that common issues predominate the class and that the class counsel protect the interests of the class as a whole and any distinct sub-classes.
_ “Parens patriae” means “father of the country”—it is an ancient doctrine that allowed the ruling monarch to act on behalf of the country as a whole. This power devolved to the states in the American government. See Farmer, supra note 19 at 366-376. Congress enshrined the authority of the state attorney general to bring parens patriae actions in the anti-trust context in 15 U.S.C. §15(c). See also Farmer, supra note 19 at 376-391.
_ O’Connor, supra note 13.
_ This characterization only applies directly where the attorney general is elected. An appointed attorney general faces similar, but different, questions of authority and politics. This paper uses only elected attorney generals and their staff as points of reference, except where noted.
_ 15 U.S.C. §15(e). The judge may authorize any distribution, so long as an effort is made to give each injured party restitution in proportion to the injury suffered.
_ Specifically, the preclusive aspects of settlements can be important leverage in negotiating for damages. This potentially severe problem with the attorney general’s discretionary will not be explored here, but it is worth consideration.
_ Telephone interview with Bob Hubbard, New York Attorney General’s Office, (Dec. 6, 2002). (Hereafter “Hubbard”).
_ It should be noted that the attorney general is rarely the individual most directly involved in either the settlement negotiation, the drafting of the agreement or the formation of the distribution plan. However, in virtually every state (New York appears to be the lone exception, although I had no direct contact with California) the attorney general exerts a “buck stops here” influence that affects the process.
_ Telephone interview with Wayne Klein, Utah Attorney General’s Office (Dec. 31, 2002). (Hereafter, “Klein”).
_ Id.
_ Mylan Settlement Agreement at 141 (Jan. 30, 2001) available at _ HYPERLINK "http://www.abanet.org/antitrust/committees/state-antitrust/mylan.pdf" __http://www.abanet.org/antitrust/committees/state-antitrust/mylan.pdf_
_ Klein, supra note 31.
_ Id.

_ Telephone interview with Mark Tobey, Texas Attorney General's Office (Jan. 3, 2003). (Hereafter "Tobey").
_ Klein, supra note 31.
_ Utah Attorney General's Office Press Release, Alzheimer's Patients & Others Get Antitrust Money (Nov. 20, 2002) available at _ HYPERLINK "http://attorneygeneral.utah.gov/PrRel/prnov202002.htm" __http://attorneygeneral.utah.gov/PrRel/prnov202002.htm_
_ Klein, supra note 31. Utah also contacts the governor's office.
_ Tobey, supra note 36.
_ At least Washington, Illinois and New York seem to use this approach in a majority, perhaps even all, cy pres distributions.
_ Illinois Office of the Attorney General, "Application for Mylan Anti-Trust Settlement Funds: Outline and Instructions", available at _ HYPERLINK "http://www.ag.state.il.us/pdf/mylan.pdf" __http://www.ag.state.il.us/pdf/mylan.pdf_ (hereafter "Illinois Application"). The application requires specific font sizes and page limits for certain sections.
_ Id.
_ The four criteria are: organizational capacity (20 points), statement of need and project rationale (20 points), soundness of proposed plan and strategy (40 points), and proposed budget and justification (20 points). Illinois Application, supra note 42.
_ Illinois Application, supra note 42.
_ Id.
_ Note, in this regard, that the Illinois Application requires any publication funded by a grant to include a disclaimer that the views presented do not necessarily reflect those of the Attorney General. Illinois Application, supra note 42.
_ Hubbard, supra note 29. See also New York Attorney General's Press Release, Spitzer Announces Recipients of $18.5 Million Consumer Settlement from Vitamin Price-Fixing Case (March 18, 2002), available at _ HYPERLINK "http://www.oag.state.ny.us/press/2002/mar/mar18a_02.html" __http://www.oag.state.ny.us/press/2002/mar/mar18a_02.html_
_ Hubbard, supra note 29.
_ O'Connor, supra note 13.
_ Klein, supra note 31.
_ Telephone Interview with Beth Finnerty, Ohio Attorney General's Office (Jan. 2, 2003). (Hereafter "Finnerty").
_ New York Office of the Attorney General, Vitagrants Chart (March 18, 2002), available at _ HYPERLINK "http://www.oag.state.ny.us/press/2002/mar/mar18a_02_attach.pdf" __http://www.oag.state.ny.us/press/2002/mar/mar18a_02_attach.pdf_
_Claims for refunds from the Compact Disc settlement may be filed on-line through the website _ HYPERLINK "http://www.musiccdsettlement.com/english/default.htm" __http://www.musiccdsettlement.com/english/default.htm_. (Hereafter "Compact Disc Claim Site")
_ Id. The use of the social security number as an identification tool is far beyond the scope of this paper, but it is controversial, and could limit the availability of such on-line claims processing in the future.

_ O’Connor, supra note 13. See Tobey, supra note 36.
_ O’Connor, supra note 13.
_ 15 U.S.C. §15(e)
_ Farmer, supra note 19 at 365-66.
_ Id. at 380-386.
_ Tobey, supra note 36.
_ Executive control of executive officers is a different issue than legislative control. Depending on the state constitution and the structure of state government, it might be that the most appropriate avenue for legislative input into the cy pres process is through the governor—exerting pressure on the executive through the chief executive, who should have the strongest legal authority to direct executive officers.
_ Consider the Utah Mylan experience. A viable recipient—one that eventually received a grant—would have been overlooked, based solely on the attorney general’s internal investigative process.