
What Can a Court Do with Leftover Class Action Funds? Almost Anything!

By Kevin M. Forde

At the conclusion of class action cases it is common to have funds that, for a number of reasons, cannot be distributed to the class members technically entitled to their funds. In some instances, members of the class simply cannot be located. In other instances, eligible class members fail to submit claims as required by the judgment order or settlement. And, on occasion, the court may order that no disbursement be made to certain class members because the amount of recovery due is so small that the cost of disbursement, notice, and administration may exceed the value of the claim.

In some cases, the undistributed funds may be substantial. For example, in *West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971), \$32 million remained undistributed ("unclaimed") from a \$100 million settlement. And, in *Van Gemert v. Boeing*, 739 F.2d 730 (2d Cir. 1984), more than \$2.5 million remained in the fund after all claims were satisfied.

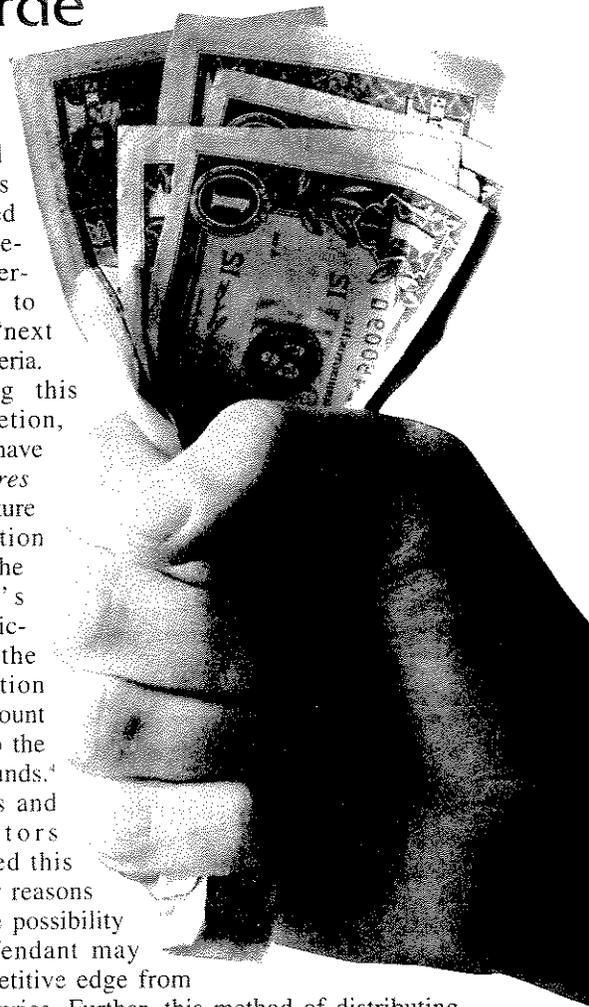
If, in fashioning a decree or negotiating a settlement, the parties do not consider and anticipate this predicament, the responsibility falls on the court to resolve any ensuing dispute or to otherwise direct the distribution of these funds. The scope of a court's discretion in disposing of nondistributable funds has been tested in recent cases. In ordering distribution, courts rely on their general equity power or on the *cy pres* doctrine.

The *cy pres* doctrine originated in the common law as a method of fairly distributing a trust fund, the original purpose of which failed in some respect. The term *cy pres* derived from the Norman French term "*cy pres comme possible*," which means "as near as possible."¹ Under the *cy pres* doctrine, once a trust fund's original purpose fails, the fund is to be distributed to the "next best" use. This remedy now extends to other areas, including the situation where funds remain after distribution in a class action.² The *cy pres* approach in the class action situation puts the unclaimed portion of the fund to its "next best" compensation use, usually by giving it to a third party or agency to use for court-designated purposes.³ It should be

emphasized that courts have claimed broad discretion in determining how to satisfy the "next best" use criteria.

Exercising this broad discretion, some courts have applied *cy pres* to order a future price reduction on sales of the defendant's product applicable until the total reduction equals an amount equivalent to the unclaimed funds.⁴ Other courts and commentators have rejected this approach for reasons including the possibility that the defendant may gain a competitive edge from the lowered price. Further, this method of distributing the excess requires the injured class members in product class actions to make future purchases to collect their refund.⁵

The prospect of excess or undistributed funds raises the possibility that these funds should "escheat" to the state or federal government as unclaimed property. Even if not required, escheat to the state is a method of disposition within the discretion of the court. For example, a California state escheat statute allows a court to escheat unclaimed funds to the government, yet specifically provides that, "nothing in this section shall be construed to change the authority of a court or administrative agency to order equi-





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table remedies.”⁶ Similarly, a New York court opined the class action concept has its origin in equity . . . and the courts still retain traditional equity power over the fund which is created until it is disbursed. . . . Although the application of abandoned property statutes to unclaimed class action funds is not required, we cannot say it was an abuse of discretion to dispose of the unclaimed funds in accordance with the scheme created by the Abandoned Property Law.⁷

On the other hand, numerous federal and state courts have distributed such funds to educational institutions or charities, apparently without regard to state or federal escheat statutes. In addition, some courts and commentators have concluded that escheat laws are inapplicable in analogous situations. For example, in *Van Gemert v. Boeing Co.*,⁸ the Second Circuit found that “a court of equity may dispose of funds fairly—without being compelled to utilize [the federal statutes].”⁹ The court explained:

We hold that [28 U.S.C.] § 2041 [the federal statute providing for the deposit of unclaimed funds in the U.S. Treasury] does not limit the discretion of the district court to control the unclaimed portion of a class action judgment fund. Whether the money has been paid into court or whether an alternative method of administering payment is used, the money held is subject to the court’s order. . . . The statute referred to does not control when a court fashions a plan for distributing unclaimed funds.¹⁰

The *Van Gemert* court also rejected the argument that the monies should escheat to the state:

The critical determining factor here, however, is that trial courts are given broad discretionary powers in shaping equitable decrees. “[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable.” *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (footnotes omitted). Appellate review is narrow. *Id.* We believe that this principle should apply to equitable decrees involving the distribution of any unclaimed class action fund.¹¹

Finally, several cases reject government escheat as controlling the nondistributed funds. After referring to a state statute providing for residue to be treated as unclaimed property, which would eventually escheat to the state’s general fund, the court noted that in a class action context, “to compel this method [general escheat] would be to cripple the compensatory function

for the private class action.”¹² The court also noted, “that [the] statute was not intended to limit the equitable discretion of the courts in managing private consumer class actions.”¹³

For these reasons, the disposition of undistributed funds should not be limited by escheat laws or other state abandoned property statutes.¹⁴

One possibility is to order the payment of undistributed funds to the already paid class members, as a supplemental payment. This approach has some obvious inequities and has been rejected by courts where it has been directly challenged.¹⁵

A further disposition of funds to already paid class members produces a windfall to them, particularly where the case resulted in a judgment, rather than a settlement, because each of the class members who had submitted a proper claim would have already been fully compensated. Further, there is no compelling reason to distribute the unclaimed or otherwise undistributed monies to this group.

Another *cy pres* method of distributing the excess funds involves the establishment of a form of trust fund to which disposition is provided according to the terms of the settlement agreement or, in case of judicial resolution, by application and suggestion to the court by interested persons or parties. This method allows the court to create a flexible, equitable remedy. As one leading commentator has pointed out:

While the use of *cy pres* distribution remains controversial and unsettled in an adjudicated class action context, courts are not in disagreement that *cy pres* distributions are proper in connection with a class settlement, subject to court approval of the particular application of the funds. Thus, even in circuits that have ruled that *cy pres* or fluid class recovery distributions are not valid in contested adjudications, these distributions have obtained a stamp of approval as part of a class settlement.¹⁶

The Supreme Court of California in *State v. Levi Strauss & Co.*, 715 P.2d 564 (Cal. 1986), discussed the *cy pres* doctrine as a means to distribute litigation benefits to a class. As to residual funds, the court suggested that the best method of distribution would be to establish a consumer trust fund “which would engage in consumer protection projects, including research and litigation.”¹⁷ This method would put the funds to their “next best” use by providing indirect benefits to silent class members while promoting the statute under which

The *cy pres* doctrine allows for practically any charitable, educational, or legally related purpose

the suit was brought. The court did recognize, however, that establishing and administering such a trust fund would be costly and that some courts avoided these costs by distributing residual money to established private organizations.¹⁸

Many courts have approved of this type of distribution of unclaimed funds. In *Nelson v. Greater Gadsden Housing Authority*, 802 F.2d 405, 409 (11th Cir. 1986), the Eleventh Circuit expressly approved the use of fluid recovery to distribute unclaimed class action funds. The California Supreme Court also supports this approach.¹⁹

The saga of the *Folding Carton* litigation²⁰ is an example of how the views of judges may differ as to the appropriate use of residual funds, and ultimately, the breadth of the discretion afforded courts when determining what the "next best" use of such monies might be. In the *Folding Carton* case, approximately \$6 million was unclaimed following the distribution of more than \$200 million in settlement funds to class members. The district court originally directed that a portion of the fund be used to establish an "Antitrust Development and Research Foundation."²¹ The Seventh Circuit disagreed with the disposition, describing the proposal as "carrying coals to Newcastle," because, in the view of that court, there were already sufficient institutions conducting studies of the antitrust laws. Consequently, the court found that creation of such a foundation was "a miscarriage of justice and an abuse of discretion."²² The Seventh Circuit directed, instead, that the remainder of the reserve fund "escheat" to the United States, under federal law (28 U.S.C. § 2041). (See discussion of *Van Gemert v. Boeing Co.*, *supra*.)

Most of the parties to that appeal, and the district judges who were found to have abused their discretion, sought Supreme Court review. Before those petitions were acted upon, the parties entered into a settlement agreement under which half of the remaining funds would be distributed to all previously paid class members, and the other half would be paid to two or more Chicago-area law schools to fund research projects involving enforcement of the antitrust laws or management of complex litigation, or to assist needy students. The government [the ultimate potential beneficiary of the appeal court's escheat ruling] initially took no position on this proposed settlement. The district court approved the settlement when it was presented, but insisted on further notice to the government. The government did not respond and the settlement was approved. When the government later attempted to intervene in the case to block the proposed distribution, the district court denied the government's untimely peti-

tion. The government appealed and, thus, the Seventh Circuit had a second opportunity to address the appropriate use of the undistributed funds. The appeal was heard by a different panel of judges.

In its opinion, the second panel of the Court of Appeals agreed with the district court that the government's petition to intervene was untimely and inferentially overruled the previous panel's holding that the money "escheat" to the federal government. The court further stated, however, that the prohibition in its earlier opinion "against using the funds for antitrust purposes remains and shall not be circumvented by the parties or the district court."²³ The lower court was directed to collect the monies from the law schools to which they had been disbursed and to "consider entirely different and appropriate uses under the *cy pres* doctrine."²⁴ Significantly, this panel of the Seventh Circuit suggested that the money be given to the Federal Judicial Center Foundation, a use that would have no direct benefit to the class and no direct bearing on the enforcement of the antitrust laws, the subject of the underlying litigation.²⁵ The result reached by the Seventh Circuit suggests a policy of giving the trial court almost unlimited discretion in directing the use of the funds. The case was remanded to the district court.

In response to the Seventh Circuit's invitation, eleven public interest and charitable organizations, including the Federal Judicial Center Foundation, filed applications with the district court. In general, these applications were straightforward requests for grants. After a review of the proposals, the district court, Judge Ann Claire Williams, entered an order directing that the entire balance of the fund, approximately two and one-third million dollars, be paid to the National Association for Public Interest Law to be used to finance "a national fellowship program" to give young lawyers the opportunity to work at public interest organizations and provide legal services to the poor.²⁶ Judge Williams' decision was promptly affirmed by the Seventh Circuit, without published opinion.²⁷

The second *Folding Carton* opinion of the Seventh Circuit Court of Appeals appears to stand for the proposition that in an antitrust class action the *cy pres* doctrine allows for practically any charitable, educational, or legally-related purpose—except the creation of an antitrust foundation barred by its earlier opinion.²⁸

The following list of other reported and unreported cases is consistent with this approach. Some of these cases rely on the *cy pres* doctrine and some on the court's general equity power; others are silent as to their authority and simply order the distribution:

• *Coordinating Committee of Mechanical Specialty*

Contractors Ass'n v. Duncan, Nos. 76 L 12896, 77 CH 6497 (Cir. Ct. Cook County Aug. 1, 1985) (funds distributed to four Chicago area law schools and the Lawyers Trust Fund of Illinois for legal services to the poor).

- *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, CA No. 71774 (E.D. Pa. Feb. 28, 1978) (approximately \$25,000 given to two law schools to establish loan funds for needy students at those institutions).

- *Illinois v. J.W. Petersen Coal & Oil Co.*, No. 71 C 2548 (N.D. Ill. Mar. 15, 1976) (one-half of the residue funds distributed to the Chicago Bar Foundation and one-half distributed to the Chicago Lawyers Committee for Civil Rights).

- *Liebman v. J.W. Petersen Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill. 1974) (unclaimed funds given to the Legal Assistance Foundation and the Lawyers' Committee for Civil Rights Under Law).

- *Boothe v. Recrion*, No. 74 C 1547 (N.D. Ill. 1974) (monies given to the Roger Baldwin Foundation and the Lawyers' Committee for Civil Rights Under Law).

- *Benaron v. Sears Roebuck & Co.*, No. 75 C 4026 (N.D. Ill. 1975) (funds dispersed to the Roger Baldwin Foundation and Lawyers' Committee for Civil Rights Under Law).

- *Seiden v. Nicholson*, No. 74 C 3117 (N.D. Ill. 1974) (funds given to the Chicago Bar Foundation).

- *In re Three Mile Island Litigation*, 557 F.Supp. 96 (M.D. Pa. 1982), later proceeding, 596 F.Supp. 1274 (1985) (payment made to a newly formed foundation to study the biological effects of radiation exposures from a nuclear plant accident).

- *Girsch v. Jenson*, No. 73-652 (E.D. Pa. July 31, 1981) (the unclaimed securities class settlement fund of approximately \$7,100 to be divided equally and distributed to the legal libraries at Temple, University of Pennsylvania, and Villanova law schools).

- *Sanchez v. Lowell Leberman, Inc.*, No. A-77-CA-198 (W.D. Tex. 1979) (undistributed portion of settlement fund to be paid to designated medical center as donation).

- *In re Corrugated Container Antitrust Litigation*, MDL 310, 53 Antitrust & Trade Regulation Reports 711 (S.D. Tex. Oct. 6, 1987) (more than \$1 million to be distributed to six Texas law schools, the law schools at the University of Pennsylvania and Stanford University, the National Association of Attorneys General, the Packaging Education Foundation and the International Corrugated Packaging Foundation).

- *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 728 (S.D.N.Y. 1970), *aff'd*, 440

F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) (settlement agreement approved to distribute unclaimed funds to states for "public health" purposes—funds eventually financed drug addiction treatment, pollution control programs, and a public awareness of environmental pollution laws).

- *Ohio Public Interest Campaign v. Fisher Foods*, 546 F. Supp. 1 (N.D. Ohio 1982) (court approved a settlement agreement providing that unused food certificates be given to organizations that feed the needy).

- *New York v. Dairy Cooperative, Inc.*, 81 Cir. 1891 (R.O.) (S.D.N.Y. 1988) (\$529,438 residue funds paid to the National Association of Attorneys General).

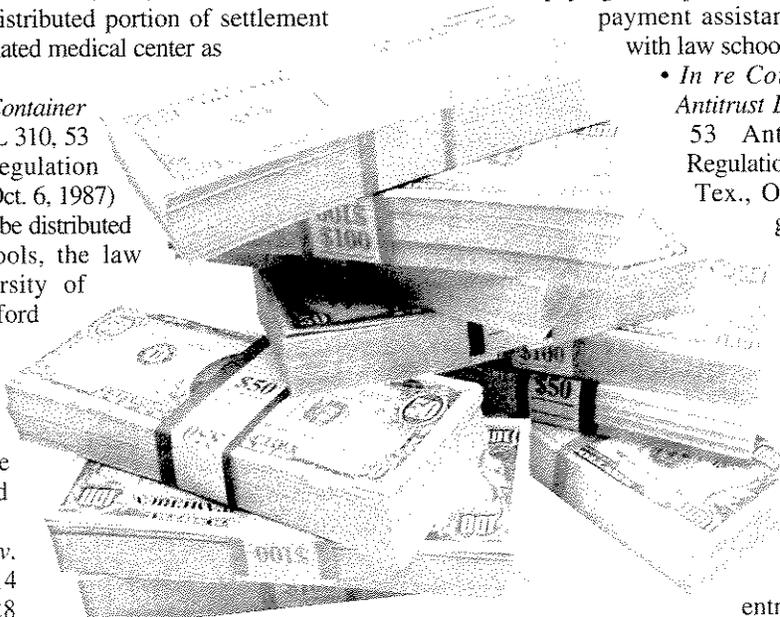
- *New York v. Chas. Pfizer & Co, Inc.*, No. 68 Civ. 845 (M 19-93)(S.D.N.Y. 1972) (two specified medical programs).

- *Superior Beverage Co. v. Owens-Illinois, Inc.*, 89 C 5251 (N.D.Ill., June 22, 1993) (modified Sept. 7, 1993) (more than \$2 million to be distributed to various organizations including Public Interest Law Initiative, University of Chicago Mandel Legal Aid Clinic, Legal Aid Bureau of United Charities, University of Illinois College of Law, Loyola University of Chicago College of Law, Chicago Lawyers Committee For Civil Rights Under the Law, Legal Assistance Foundation of Chicago, Roger Baldwin Foundation of the ACLU of Illinois, Northwestern University Law School, San Jose Museum of Art, AIDS Legal Counsel of Chicago, Chicago Volunteer Legal Services, WTTW public television station, American Jewish Congress, and National Association for Public Interest Law).

- *In re Ocean Shipgoing Antitrust Litigation*, MDL 395 (S.D.N.Y. July 29, 1991) (more than \$8 million regarding final disposition of settlement fund ordered to be added to the National Association for Public Interest Law, a program that conducts a fellowship program for recent law school graduates to work in the public interest sector by paying all or part of their salaries, plus loan payment assistance to those fellows with law school obligations).

- *In re Corrugated Container Antitrust Litigation*, MDL 310, 53 Antitrust and Trade Regulations Reports 711 (S.D. Tex., Oct. 6, 1987)(money given to law schools to be used to teach advocacy skills and ethics).

- *Vasquez v. Avco Fin. Servs.*, No. NCC 11933 B (Los Angeles Superior Ct., Apr. 24, 1984) (\$1.4 million in undistributed funds entrusted to Consumers Union of United States,



Inc./West Coast Regional Office for use in projects involving the public interest).

• *Evans v. McMorris Downtown Ford, Inc.*, No. 272, 850 (Travis Co., Texas 126th Judicial Dist. Apr. 24, 1980) (half of undistributed funds to nonprofit boys ranch; remainder to defendant).

• *Market St. Ry. Co. v. Railroad Commission*, 171 P.2d 875 (Cal. 1946)(after individual rider refunds paid, remainder of \$700,000 in streetcar overcharges awarded to City and County of San Francisco, for the improvement of street car services, which benefitted those who paid overcharges in the first place).

• *Shapiro v. Barrett*, No. 71 L 5745 (Cir. Ct. of Cook County, Ill., Nov. 3, 1993) (\$200,000 to Cook County Judicial Advisory Council to improve or augment existing programs in the areas of child support enforcement, prevention, and protection of victims of domestic violence, as well as greater protection for abused and neglected children, and drug treatment and drug rehabilitation).

• *Isenstein v. Rosewell*, No. 85 CH 7019 (Cir. Ct. Cook County Jan. 3, 1992) (court distributed unclaimed funds to the Cook County Judicial Advisory Council, Lawyer's Trust Fund of Illinois, Chicago area law schools, the Women's Bar Association of Illinois, and to the American Judicature Society).

Allowing broad discretion as to distribution has many benefits. First, the deterrence goals of the law are met, as the unclaimed funds do not revert to the defendant. Second, the defendant is not unjustly enriched, as the defendant is still required to pay the entire liability regardless of the number of class members who are located or who come forward and claim the amount to which they are entitled. Third, an indirect benefit accrues to those class members who were entitled to the money that constitutes the residual fund, through the benefits provided to society in general.

To expedite the distribution of undistributable or unclaimed funds, the parties can include in their settlement agreement a provision that unclaimed funds will go to a designated charity or to a charitable purpose to be designated later, by the parties or the court. This provision of the agreement should be respected by the courts. In the event that a case is resolved by judgment rather than by settlement, the court should consider requests or applications from interested parties representing various philanthropic causes.

One non-*cy pres* method of distributing unclaimed funds is to return the excess to the defendant. Although some courts have done this, and perhaps it is within the discretion of the court to do so, strong policy reasons and other case law weigh against such distribution. This has been the conclusion of the courts that have considered the question.

In *Friar v. Vanguard Holding Corp.*, 509 N.Y.S. 2d

374 (1986), a settlement agreement resolved a class action against a company alleged to have illegally collected additional mortgage recording taxes from vendors of real property. The defendant sought the return of that portion of the settlement fund that remained unclaimed six months after settlement had been approved by the court. The court stated that, "the defendant does not have a rightful claim, since the deposit of funds into court constituted the payment of a judgment,

and therefore title passed to the plaintiffs, with the property being held for their benefit by the court."²⁹ "Furthermore, permitting reversion of the unclaimed funds to this defendant would be equivalent to awarding it the benefit of its own wrongdoing, a result which should not be sanctioned."³⁰

Similarly, in *Hansen v. United States*, 340 F.2d 142 (8th Cir. 1965), the defendant-landlord who paid judgment for rent over-

charges, made a motion to direct payment to him of undisbursed funds not distributed to tenants. The court ruled that the "[d]efendant has no title or right to any money he paid to satisfy the judgment. A judgment debtor who has paid his judgment is not the rightful owner of unclaimed portions of the judgment deposited in a trust account in the Treasury pursuant to the statute."³¹

Further, "[t]here is nothing in the applicable federal statutory or case law which gives a judgment debtor who has paid a judgment against him for damages based upon his wrongful act a right to recover any portion of the payment made to satisfy the judgment in the event parties entitled to the proceeds of the judgment fail to claim their portion thereof. Moreover, no equitable basis exists for returning to the defendant the alleged illegal rent overcharges he wrongfully exacted. . . ."³²

Also in *Hanson* the court said "The only issue decided by the trial court is that the defendant is not entitled to any of the undisbursed balance of the trust fund arising out of payment of the judgment. The trial court's decision upon such issue is clearly right."³³

The same conclusion was reached in *Wilson v. Bank of American Nat'l Trust & Sav. Ass'n*, No. 643,872 (Cal. Super. Ct. San Francisco County Aug. 16, 1982). That case involved the illegal use of real estate tax escrow funds. The court ordered that no unused portion of the settlement funds would revert to defendant in the event that there was an excess. The court reserved the right to determine its disposition noting that reversion would defeat the deterrence goals of a

(Please turn to page 44)

Courts can disperse undistributed settlement funds in a variety of ways

This year has been challenging and rewarding. It has been a privilege to serve as your Chair. Dave Horowitz and Mike Harrison are going to carry us further than I was able to, and I know that you will be proud of them

and the accomplishments they will make. Thank you for a rewarding year. I am confident that our Conference will continue to grow both in membership and in what we are able to accomplish.

Forde

(Continued from page 23)

defendant found liable.

Finally, in *Securities & Exchange Com'n v. Golconda Mining Co.*, 327 F.Supp. 257 (S.D.N.Y. 1971), pursuant to a consent judgment, the defendant deposited profits he realized as a result of alleged insider trading with a trustee. This trustee could not locate all the persons entitled to share in the funds, and sought a direction by the court as to disposition of the unclaimed balance. The court noted that, "[t]he circumstance that some of the claimants cannot presently be found does not justify turning back to them [defendants] their ill-gotten profits."³⁴ "To permit the return of the unclaimed funds, a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement of the securities acts is to be achieved."³⁵

CONCLUSION

Clearly, courts have discretion to disburse undistributed class action settlement funds in a variety of ways. A number of courts have chosen to utilize the power to distribute these funds for the benefit of a variety of charitable purposes, including many devoted to improvements in the administration of justice. Such distributions generally have been approved on review. In class action settlements, a better method is to provide for the ultimate distribution of these funds in the Settlement Agreement. If the court-approved settlement provides for this distribution there can be no question of the court's power to order that the terms of the agreement be carried out.

position in a later opinion in that case. 881 F.2d 494 (7th Cir., 1989).

10. 739 F.2d at 735-36.

11. 739 F.2d at 737. See also H. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 10.25, at 10-67 (1992):

[I]t would appear that while escheat laws govern the disposition of unclaimed third party funds in private depositories, it is well within the court's discretion to determine the distribution of an unclaimed balance of an aggregate class recovery fund that is within the court's jurisdiction.

12. *State of California v. Levi Strauss & Co.*, 715 P.2d 564, 575 (Cal. 1986).

13. *Levi Strauss & Co.*, 715 P.2d at 574.

14. In addition to general escheat laws, some states have adopted the Uniform Disposition of Unclaimed Property Act which contains a specific reference to utility refunds. Courts have limited this statute to cases involving utility refunds. See, *Bosewell v. Whally*, 345 So. 2d 1324 (Ala. 1970); *Cory v. Public Utilities Commission*, 658 P. 2d 749 (Cal. 1983); *Lewis v. Public Service Commission*, 463 S. 2d 227 (Fla. 1985); *contra ABATE v. Public Service Commission*, 435 N.W. 2d 766 (Mich. 1989) These utility cases should not influence the distribution of refunds in other nonutility cases.

15. See, e.g., *In re Folding Carton Antitrust Litigation*, 881 F.2d 494, 503 (7th Cir. 1989) (affirming the district court's holding that the already compensated plaintiff class had no further claim to a \$6 million reserve fund created to pay late claimants and administrative costs); *Van Gemert v. Boeing Co.*, 739 F.2d 730, 736 (2d Cir. 1984) (rejecting class members' argument that the unclaimed funds should be used to offset their costs of litigation); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 811-12 (5th Cir. 1989) ("[A]ll class members who presented their claims received the full payment due them, and those who did not present claims waived their legal right to do so.")

16. H. Newberg, *supra* note 2, § 11.20, at 11-26, 11-27 (1992).

17. 715 P.2d at 567.

18. *Id.* at 573.

19. See *Levi Strauss*, 715 P.2d at 576, "The disposition of the residue on remand is a matter within the discretion for the trial court. However, it should be noted that under the criteria set forth here, amici's suggestion that the residue should be used to establish a consumer trust fund has considerable merit. . . ." See also, *Securities & Exchange Com'n v. Golconda Mining*, 327 F. Supp. 257, 259 (S.D.N.Y. 1971), "but as to the balance remaining, the disposition is subject to the Court's discretion."

20. *In re Folding Carton Antitrust Litigation*, 557 F.Supp. (N.D.Ill. 1983), *aff'd in part, rev'd in part*, 744 F.2d 1252 (7th Cir. 1984), [*Folding Carton I*] *on remand*, 687 F.Supp. 1223 (N.D.Ill. 1988), *aff'd in part, rev'd in part*, 881 F.2d 494 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027, (1990).

21. 557 F.Supp. at 1112.

22. 744 F.2d at 1255.

23. 881 F.2d at 502.

24. 881 F.2d at 502.

25. 881 F.2d at 502 n. 8.

26. *In re Folding Carton Antitrust Litigation*, MDL 250 (N.D. Ill., March 6, 1991) 1991 W.L. 32867.

27. 88-2438 & 88-1314, May 29, 1992.

28. Note, however, *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), The Appeals Court reversed a district court's award to the Inter-American Fund for indirect distribution in Mexico. This fund operates human assistance projects in areas where many of the class members were believed to reside. The court did not earmark the funds for any specific projects. The Ninth Circuit, while supporting the *cy pres* doctrine in general, rejected the district court's application, as the recipient group was far too remote from the plaintiff

1. Note, *The Consumer Trust Fund: A cy pres Solution to Undistributed Funds In Consumer Class Actions*, 38 HASTINGS L.J. 729, 730 (1987).

2. H. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 10.17, (1992).

3. *Supra*, note 1, 38 HASTINGS L.J. 729, at 730.

4. See, *Daar v. Yellow*, 433 P.2d 732 (Cal. 1967) (involving taxicab rate reductions); *Colson v. Hilton*, 59 F.R.D. 324 (N.D.Ill. 1972) (involving hotel telephone charge rates).

5. See, *State of California v. Levi Strauss & Co.*, 715 P.2d 564, 572 (Cal. 1986)(price rollback is not appropriate in nonmonopoly markets like the jeans market because it compels consumers to collect their refunds by making further purchases of the defendant's products, to the detriment of the defendant's competitors).

6. Cal. Civ. Proc. Code § 1519.5 (West 1982).

7. *Friar v. Vanguard Holding Corp.*, 509 N.Y.S.2d 374, 376 (1986) (emphasis added).

8. 739 F.2d 730 (2d Cir. 1984).

9. 739 F.2d at 735. *But see* the Seventh Circuit's first opinion *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252 (7th Cir. 1984). [*Folding Carton.*] That court, however, seems to have changed its

class. "The plan does not adequately target the plaintiff class and fails to provide adequate supervision over distribution. We therefore set aside the court's *cy pres* application as an abuse of discretion." *Id.* at 1309.

29. *Friar*, 509 N.Y.S.2d at 376.

30. *Id.*

31. *Id.* 340 F.2d at 143.

32. *Id.* at 144-45.

33. *Id.*

34. *Id.* at 259.

35. *Id.*

Federal

(Continued from page 27)

Not only is the federal judiciary's law making independence being challenged, but it is under pressure in all four categories. As a result, threats should be taken seriously and should cause us to consider carefully what it is we want to defend. That judgment, once made, should influence the nature and intensity of our response.

ABA President Roberta Cooper Ramo has strongly supported federal judicial independence by writing both

President Clinton and Senator Dole on the importance of standing up for an independent federal judiciary. The ABA also has provided informational packets on judicial independence to all state and local bar associations to help develop a grass roots movement on this subject. Other organizations have responded to the challenge, as well. The Federal Judges' Association (FJA) continues to obtain sponsors for Senate Bill 1101 and House Bill 1989 (versions of the Federal Courts Improvement Act with its expanded Rule of 80) and has publicly put forth the position of the ABA respecting statements made by certain members of the other branches of government.

Traffic Court

(Continued from page 36)

On another subject, the 52nd Annual National Traffic Court Seminar will be held this year, October 16-18, 1996, at the Marvin Center, George Washington University, Washington, D.C.

One of the interesting live presentations will be of the EM/I, a new instrument for checking HGN. This is a combined video and computer instrument. It has use in both probation work and at the time of initial charge. If

you have recently visited an ophthalmologist, you might have had an eye refraction using new instruments. No longer do they put the drops in your eye or put the balance scale on the eye to check for glaucoma. They use an instrument with a light and a puff of air. The EM/I is a cousin of these new instruments.

Participants will also have a chance to use a Conrail simulator, which will let us see what it feels like to be in the engineer's seat of a train. This is a true hands-on type of experience.

Information about the seminar can be secured by contacting Teddi Fangon at the Chicago Office, 312/988-5693.

College

(Continued from page 36)

leadership of U.S. Supreme Court Justice Tom C. Clark and members of the National Conference of State Trial Judges, operated as a JAD committee until 1978. It was then organized as a Nevada not-for-profit corporation.

Under the College's bylaws, revised in 1995, nine of the 15 Trustees are chosen from nominations made by the NJC Board, three are selected from nominations made by the JAD Council, and three from nominations by the ABA Board of Governors itself.

Newly elected Trustees, who serve three-year terms beginning in July include: Judge Janet J. Berry, Washoe County District Judge, Reno, Nevada; Judge Judith Billings, Utah Court of Appeals, Salt Lake City, Utah; Ralph Kennedy Frasier, Esquire, Executive Vice President and General Counsel, The Huntington National Bank, Columbus, Ohio; and Charles W. Matthews, Esquire, Vice President and General Counsel, Exxon Corporation, Irving Texas.

Reelected to a second three-year term was Daniel E. Wathen, Chief Justice of the Supreme Court of Maine.

Scholarships. In adopting its omnibus budget bill for

the current fiscal year, the Congress included an earmark of \$1 million to be used to assist The National Judicial College to train judges. The Congressional language was applied to the discretionary funds appropriated for the Bureau of Justice Assistance. Most of the funds will be used as scholarship grants to assist judges attending specific NJC courses related to court management and criminal matters.

Some funds will also be available to conduct faculty development workshops at which current and prospective NJC faculty members will receive advanced training in adult education techniques.

In addition to the federal funds, a permanently endowed scholarship valued at nearly \$200,000 has been received by the College. Louis Wiener, Jr., a distinguished Las Vegas attorney, created a Charitable Remainder Unitrust that included NJC as one of the major beneficiaries. The Louis Wiener, Jr., Scholarship will be available in 1997 and will be a continuing gift from Mr. Wiener to the improvement of justice, a cause which he furthered in 55 years of law practice.

Information concerning scholarships to attend NJC courses is available from Nancy Copfer, State Liaison Officer, at 1/800-25JUDGE.