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# TESTIMONY OF MARTIN H. REDISH

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Constitution of the Committee on the  
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## INTRODUCTION

My name is Martin H. Redish. I am the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law, where for the last 39 years I have taught and written extensively on the subjects of constitutional law, free expression, federal jurisdiction and civil procedure. I am the author of 15 books and 90 scholarly articles on those subjects. I am one of the primary revisers of the current edition of the multi-volume treatise, Moore's Federal Practice. I am also Senior Counsel to the law firm of Sidley Austin (though none of the views expressed today should necessarily be attributed to either institution).

I have been asked by this Subcommittee to testify today about the need for legislative reform of federal class actions in general and the need for legislative revision of the use of so-called "cy pres" awards in class action proceedings in particular. In responding to that request, I draw on the insights I gained in writing my book, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* (Stanford University Press; 2009), as well as my subsequent article, co-authored with Peter Julian and Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Florida Law Review 617 (2010). That article has been either quoted or cited in three recent cy pres decisions in the federal courts of appeals, in three different circuits.<sup>1</sup>

Cy pres awards are designed to provide the "next best" form of relief in cases in which it is impractical or impossible to compensate directly injured class members once liability has been determined or the case has been settled. Cy pres refers to efforts to provide unclaimed compensatory funds to a charitable institution that is in some way related either to the subject of the case or the interests of the victims, broadly defined. Such awards (which are employed in the form of either coercive judicial awards or settlements in class action proceedings) are generally described as a means of disposing of unclaimed property. In reality, however, such awards function as an integral part of the remedy awarded in a class proceeding.

In 2005, Congress enacted the Class Action Fairness Act, which has gone a long way towards reducing some of the abuses imposed on out-of-state corporate defendants in state court class actions. It is now time for Congress to remedy some of the most important pathologies in administration of the federal class action. The ever-increasing resort to cy pres awards as part of the resolution of federal class actions, while of legitimately great concern in and of itself, is in many ways merely a symptom of deeper and more fundamental defects in administration of the modern class action. Simply put, in far too many instances the class action proceeding is viewed by courts, advocates and the public as some sort of roaming device for doing justice. In reality, it is nothing of the sort. It is, rather, nothing more than a complex procedural joinder device, laid out in Rule 23 of the Federal Rules of Civil Procedure—appearing in between Rule 22 (Interpleader) and Rule 24 (Intervention). It is nothing more and nothing less than that. A lawsuit does not "arise under" Rule 23; it "arises under" the underlying substantive law—either federal or state—which the plaintiffs

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<sup>1</sup> *In re Lupron Marketing and Sales Practices Litigation*, \_\_\_ F.3d \_\_\_, 2012 WL 1413372 (1<sup>st</sup> Cir. 2012); *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 480-82 (5<sup>th</sup> Cir. 2011) (Jones, J., concurring); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9<sup>th</sup> Cir. 2011).

seek to enforce. In those instances in which existing remedies provided by substantive law fail to achieve legislative goals of deterrence, it may well be appropriate for the relevant legislative body to consider adjustments in the available remedies. But neither our controlling constitutional nor statutory framework permits those changes to be implemented by the judiciary under the guise of procedure through implementation of the class action procedure. To pervert the class action device into a means of furtively altering applicable substantive law not only unambiguously contravenes the Rules Enabling Act<sup>2</sup> pursuant to which Rule 23 was promulgated; it also threatens core elements of our form of constitutional democracy, in which the authority for promulgation of substantive law is exercised by a representative and accountable legislative body.

The widespread use of cy pres awards as a means of resolving federal class actions<sup>3</sup> is little more than a cover for these far deeper constitutional and democratic pathologies in the modern use of the class action procedure. Thus, while it is extremely important for Congress to correct the constitutional and statutory harms brought about by cy pres, it is equally important to impose legislative checks on the abuses which have allowed the class action device to be magically transformed, in a manner similar to alchemy, into a freestanding means of remedying corporate and governmental wrongdoing.

In the first section of my testimony I explain the concept of cy pres, briefly describe both its origins in the law of trusts and its modern transformation into a device for resolving litigation in class action law. In the second section I explore the serious constitutional and statutory problems to which that transformation gives rise. In the third section I explain how the use of cy pres has been employed to mask the fundamental pathologies of the modern class action. In the final section I suggest ways in which Congress might reform class action procedure in order to avoid these harms.

## I. THE ORIGINS AND DEVELOPMENT OF CY PRES IN CLASS ACTIONS

The term “cy pres” derives from the French expression, “cy pres comme possible,” which translates to “as near as possible.” The device was developed originally in the law of trusts, where it is deeply rooted (extending back to the time of Justinian). However, it was only by means of rather strained analogy that the concept of cy pres was introduced into the law of class actions. Following the revolutionary amendment of the class action procedure in 1966, large damage classes with large numbers of small claims became a relatively common occurrence. Because of Rule 23’s new structure, many individuals holding these claims could become claimants without even being aware that they were plaintiffs in a class action proceeding. Both courts and attorneys quickly became

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<sup>2</sup> 28 U.S.C. § 2072.

<sup>3</sup> While it is difficult to know with any level of certainty how often cy pres awards are employed in the federal courts, few could doubt the practice’s importance in modern class action procedure. In our 2010 article on the cy pres doctrine, my co-authors and I noted that a study of the relevant online sources “revealed 120 federal class action cases from 1974 through 2008, where the court either included a cy pres award as part of a judgment or approved a cy pres distribution as part of a settlement.” Redish, Julian & Zyontz, *supra*, 62 Fla. L. Rev. 617, at Section IV. Our study revealed that the practice’s use has clearly been on the rise: “From 1974 through 2000, federal courts granted or approved cy pres awards to third party charities in thirty class actions, or an average of approximately once per year. Since 2001, federal courts granted or approved cy pres awards in sixty-five class actions, or an average of roughly eight per year.” *Id.*

aware that there would be serious problems transferring awards or settlement funds from defendants to their victims. By the early 1970s scholarly commentary began to suggest the drawing of an analogy to trust law's version of *cy pres* as a means of disposing of the often large amounts of unclaimed funds in a manner that satisfied the interests of justice: the amounts remaining in the damages or settlement fund due to the failure of absent class plaintiffs to claim their share would be awarded to a deserving charity that was in some way related to the subject of the lawsuit. In this way, much like the use of *cy pres* in trust law, the funds would be awarded in "the second best" manner. Many considered this alternative to be far preferable to the other alternatives for disposing of those unclaimed funds, such as escheat to the state, reversion to the defendant or additions to the awards of those class members who had in fact filed claims.<sup>4</sup>

Though no one seemed to recognize the problem at the time, the analogy of class action *cy pres* to trust law's version of the doctrine is plagued with logical and practical flaws. In the context of trust law, it is quite possible that the wishes of the trust creator, for whatever reason, may no longer be carried out. Because the trust creator has passed on by this point, however, there is of course no way to ask what his or her second choice for the disposal of the trust corpus would be. Thus, the alternatives facing the court charged with enforcing the trust are either to have the funds escheat to the state—the one result we can be sure that the trust creator did *not* intend—or come up with a second best alternative. In stark contrast, litigation and the substantive laws enforced in it do not normally contemplate a "second best" alternative; the substantive law vests in specified victims the legal right to sue to enforce its directives. Either that law is able to be enforced, or it is not. If it cannot be enforced, it is up to the law creator (usually a legislative body) to go back to the legislative drawing board to consider alternative means of enforcing its substantive directives and prohibitions. Unless and until it does so, there is nothing in the substantive law that authorizes an enforcing court to shape alternative substantive remedies, whether or not they can be described as the "second best" alternative. Most certainly, there is nothing in either Rule 23 (the class action rule) or the Rules Enabling Act (pursuant to which all of the Federal Rules of Civil Procedure have been promulgated) that authorizes the exercise of such judicial creativity. To the contrary, that Act expressly *prohibits* the Supreme Court, under the guise of procedural rulemaking, from modifying or enlarging existing substantive rights.<sup>5</sup> In the section that follows, I explore in more detail the fundamental problems, both conceptual and practical, in the use of *cy pres* awards in class action proceedings.

## II. THE CONSTITUTIONAL AND STATUTORY PROBLEMS WITH THE USE OF CY PRES IN CLASS ACTIONS

By criticizing judicially authorized donations to what are concededly worthy charities, one naturally risks subjecting oneself to the most unattractive labels of "Grinch" or "Scrooge." Nevertheless, there is little doubt that use of *cy pres* in the class action context is improper as a matter of both democratic theory and constitutional law. As an intrinsic matter, *cy pres* suffers from two key constitutional flaws. First, the doctrine unconstitutionally transforms the judicial process

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<sup>4</sup> For a more detailed description of the history of *cy pres* and its use in the modern class action, see Redish, Julian & Zyontz, *supra*, 62 Fla. L. Rev. 617, at Section II.

<sup>5</sup> 28 U.S.C. s 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right.").

from a *bilateral* private rights adjudicatory model into an impermissible *trilateral* process, involving the plaintiff class, the defendants and the entity which may well benefit the most from the proceeding, the receiving charity. Second, the practice violates constitutionally dictated separation of powers (as well as the Rules Enabling Act) because through the use of a wholly procedural device it effectively transforms the underlying substantive law from a compensatory remedial structure to the equivalent of a civil fine—a remedy at no point authorized by that substantive law.

#### A. “Trilaterization” of the Bilateral Adjudicatory Process

When courts invoke *cy pres* in a class action,<sup>6</sup> they introduce a non-party into the litigation as a legally significant actor. In this manner, *cy pres* transforms what begins as an adversary dispute into a less than full adversarial trilateral process, wholly unknown in the adjudicatory structure contemplated by the case-or-controversy requirement of Article III of the Constitution. It achieves this result by ordering or authorizing an award to an uninjured private entity which has no involvement whatsoever in the legally relevant events that gave rise to the suit. Awarding “damages” to an uninjured third party effectively transforms the court’s function into a fundamentally executive role; no longer is the court functioning as a judicial vehicle by which legal injuries suffered by those bring suit are remedied. Instead, the court is presiding over the administrative redistribution of wealth for purposes of social good. As a result, the practice violates both the constitutional separation of powers and the constitutionally dictated case-or-controversy requirement.<sup>7</sup>

Compounding this constitutional violation is the inherently deceptive manner in which it is achieved. What makes *cy pres* so deceptive is the superficial appearance of the resolution of a live dispute: the plaintiff class is presumably made up of those who claim to be victims, and whose rights are alleged to have been violated by defendants’ unlawful behavior. The constitutional problem, however, is that requiring defendants to donate to an uninjured charitable recipient amounts to a remedial non-sequitur. The primary beneficiary of the process has sued no one—and with good reason, since its legal rights have presumably been violated by no one. Thus, ordering the transfer of defendants’ funds to the charitable third party remedies the violation of no one’s rights protected under the applicable substantive law. *Cy pres* thus ignores the core requirements of the “private rights” adjudicatory model dictated by the case-or-controversy requirement imposed by Article III of the Constitution. Under that model, it is only plaintiffs who have been injured in fact by the unlawful actions of the defendant who are allowed to sue. While in a *cy pres* situation the charity is of course not technically a party to the suit, as a practical matter its interests are as implicated and impacted by the adjudication as any of the named litigants. For all practical purposes, then, use of *cy pres* in federal class actions introduces the equivalent of an uninjured party who will formally benefit from resolution of the federal judicial process.

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<sup>6</sup> It should be noted that while courts have on occasion provided for *cy pres* awards in coercive relief, more often *cy pres* appears in a settlement agreed upon by the parties. However, every such settlement must be approved by the court. Moreover, absent the defendant’s awareness that such relief might well be awarded coercively it is highly doubtful that it would agree to *cy pres* awards in many instances.

<sup>7</sup> Courts have on occasion reasoned that the charity is not a “party” to the proceeding. But such reasoning puts form over substance. Indeed, the charity will often be the primary beneficiary of the entire process.

## B. Indirect Transformation of the Underlying Substantive Law

An additional pathological consequence of this trilateralization process is the legally improper transformation of the underlying substantive law from the compensatory framework enacted in that substantive law from a compensatory remedial framework into the practical equivalent of a civil fine. Substantive laws necessarily contain two elements: a behavioral proscription and an enforcement mechanism. The proscription regulates a private or governmental actor's primary behavior, while the enforcement mechanism dictates either consequences for violation of that proscription or some directly coercive means for future enforcement of that proscription. The enforcement mechanism may compensate a victim of the wrongdoer's behavior or provide for punitive damages or criminal or administrative enforcement. The remedial choice adopted by the promulgating legislative body is as much a part of the substantive law as is the proscriptive element.

Alteration of the underlying substantive law's remedial choice may not be made under the guise of a rule of procedure. To do so could easily lead to deception of the electorate by leading them to believe that the remedy imposed for law violation is one thing, while in reality the procedural rules have furtively transformed that chosen remedy.<sup>8</sup> It is presumably for this reason that the drafters of the Rules Enabling Act expressly prohibited such indirect substantive modification. Thus, in addition to contravening the constitutional principles of separation of powers and case-or-controversy and undermining core precepts of American democracy, use of cy pres in federal class actions violates the unambiguous restrictions imposed by the Enabling Act.

It might be responded that, rather than transform the remedial element of the underlying substantive law into a form of civil fine, cy pres is instead properly seen as relevant solely to the question of how to dispose of unclaimed property, an issue that arises not infrequently both in the litigation context and other situations. By viewing cy pres through the lens of unclaimed property disposition, one might reason that the question of cy pres relief should be thought to be divorced from the underlying substantive law that is enforced in the class proceeding. In reality, however, viewing class action cy pres as merely a matter of the substantively neutral administration of unclaimed property grossly and misleadingly oversimplifies the applicable legal dynamics. To conceptualize this radical non-compensatory damage disposition method as nothing more than the trans-substantive disposal of unclaimed property effectively places form over substance. The difficulties in distribution of class wide relief to individual claimants will often be readily apparent to all involved at the time of class certification. Yet when cy pres relief is deemed available, the court will certify the class, despite the presence of these glaring difficulties in administering relief. Both court and parties, then, often recognize that cy pres relief will form a central element in the "relief" awarded to the class. Thus, cy pres relief is much more appropriately deemed an integral part of class relief.

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<sup>8</sup> For a more detailed examination of the theory of legislative deception, see Redish & Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 Nw. U. L. Rev. 437 (2006).

### III. CY PRES RELIEF AND THE “FAUX” CLASS ACTION

While cy pres awards have been employed in a variety of class action proceedings, there can be little doubt that its use’s most invidious impact is the facilitation of what I referred to in my book on class actions as the most serious perversion of the class action procedure: the development of the “faux” class action.<sup>9</sup> The faux class action describes those class proceedings in which the claims of the individual absent class members are so small and/or the difficulty in either finding them or distributing the individual awards so great that as a practical matter they will receive no damages, despite a plaintiffs’ victory. Those absent class members, then, are interested parties in name only. They have not made the choice to sue, and because they are deemed members of the class without any affirmative assent on their part, they may well not even be aware of the class proceeding’s existence. In short, they are little more than a cardboard cutout of a class. The real parties in interest in these faux class actions are the plaintiffs’ lawyers, who are the ones primarily responsible for bringing this proceeding.

I should emphasize that this is not necessarily a criticism of plaintiffs’ lawyers as a theoretical matter. While no doubt abuses exist, to seek to profit from efforts to ferret out wrongdoing is a venerable tradition in our social and legal history. We have long accepted the concept of “bounty hunters,” who make their living by bringing wrongdoers to justice. In the litigation process, such efforts are referred to as qui tam proceedings, in which those who have not themselves been injured by a private actor’s unlawful behavior are entitled to benefit from successfully bringing a civil proceeding against that wrongdoer in court. Qui tam today takes the form of suits brought under the False Claims Act, as a means of ferreting out and punishing fraud on the government. But the key point to recognize is that such a remedial model has been adopted in no other substantive law that might be enforced in a class action.<sup>10</sup> To the contrary, all of those laws have adopted a purely compensatory remedial model as a means of enforcing their behavioral proscriptions. Under the model adopted by these laws, the remedy provided contemplates only that those actually injured by defendant’s unlawful behavior will be made whole by the award of damages from the wrongdoer. In this way, these substantive laws are designed to simultaneously compensate victims and deter future unlawful behavior. Use of the class action procedure in those cases in which the supposedly real parties in interest—the absent plaintiffs in the class—will never be compensated and the only actors to actually profit are the plaintiffs’ attorneys (i.e., faux class actions) effectively transforms the remedial element of the underlying substantive law from a compensatory model into a qui tam—or “bounty hunter”—remedial model. As a result, while the electorate is led to believe that the remedy for wrongdoing committed by corporate defendants will be compensation

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<sup>9</sup> See Martin H. Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* 23-56 (2009).

<sup>10</sup> It should be noted that due to an absence of injury in fact on the part of bounty hunter plaintiffs, serious constitutional problems of standing may restrict Congress’s ability to create such a bounty hunter remedial model outside of the narrow and historically well established practice involving fraud against the government, where the qui tam action provided for in the False Claims Act has been rationalized as an assignment of the government’s claim against the defendant. That issue is beyond the scope of my present testimony. For present purposes, I may assume, solely for purposes of argument, that such an action would not run afoul of Article III’s case-or-controversy requirement.

of the victims, in reality most of those victims will benefit not at all from the litigation; instead, it will be only the attorneys who brought the suit who will benefit.

Will the electorate be deceived by such a transformation? Would anyone really care? Is it likely to matter to anyone that what purports to be a compensatory remedial model in a statute proscribing specified corporate behavior in reality has been made into a bounty hunter form of relief actually bother anyone? We cannot really know the answer to that question, though it is, at the very least, plausible that many citizens who (for whatever reason) do not approve of plaintiffs' lawyers<sup>11</sup> but who are willing to tolerate them because they facilitate the compensation of injured victims would no doubt consider important the fact that no victims are actually being compensated. For democracy to function effectively, however, courts and legislative bodies must presume that citizens care whether a law will in reality do what it purports on its face to do. To be sure, some will care about some laws more than others, but it is highly likely that different citizens will care about different laws. In the end, then, it is likely that at least some citizens will care—often deeply--about most laws enacted by Congress. That a law that provides “X” has, through the shell game of procedure been effectively transformed into “Y” or even “not X” is surely inconsistent with the democratic premise that the citizenry may judge its elected legislators by what laws they enact. It undermines core precepts of representation and accountability, without which democracy is rendered meaningless.

It should be recalled that in any event, one need not even accept this core precept of American political theory in order to reject the faux class action. As already noted, the Rules Enabling Act expressly prohibits such indirect manipulation of controlling substantive law. Thus, a court should invalidate the use of a procedural rule to manipulate underlying substantive law without even reaching issues of constitutional law or democratic theory.

The reason that cy pres has become so popular as a means of disposing of unclaimed class action awards is quite probably that it serves as a superficial antidote to the invidiousness of the faux class action. Cy pres allows those responsible for the bringing of the class action proceeding to add the appearance of a socially valuable wealth transfer (i.e., the award of unclaimed funds to a charity)—something that would be completely missing absent the charitable award. But as already explained, this laundering of the faux class action is a change in appearance only. In reality, the cy pres award is itself improper as a violation of controlling constitutional and statutory directives. That it also disguises the fundamental pathologies of the faux class action only exacerbates the serious problems caused by the award of cy pres relief in federal class action suits.

I should emphasize that my concern over the pathologies and abuses of the modern class action does not necessarily imply that I am opposed to the class action procedure in its entirety. Indeed, as I wrote in my book on the subject of class actions, “in no way am I opposed to the existence of the class action procedure. To the contrary, the class action represents an innovative means of resolving major legal problems that might otherwise overwhelm the judicial system. I doing so, however, it should not be permitted to overwhelm our nation’s normative and

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<sup>11</sup> It should, after all, be recalled that the activities of plaintiffs' lawyers, such as John Edwards, have become a subject of hot debate in recent presidential elections.

constitutional commitments to democratic accountability, separation of powers, procedural due process, or individual autonomy.”<sup>12</sup> A class action proceeding in which injured parties voluntarily choose to join their claims with others who possess similarly situated claims, with the majority of claimants assuming a passive role and representation handled by a few named parties, is a perfectly legitimate—often valuable--multi-party procedural device. It is only when the class action procedure is employed in a manner that effectively transforms the underlying substantive law or undermines the due process rights of either absent class members or defendants that the process becomes pathological.

The argument has often been made that even where the class action procedure fails to compensate absent class members, its use is still of vital social importance because it acts as a deterrent to widespread unlawful corporate behavior. Absent the class proceeding, the argument proceeds, the small amount of individual damage would allow the wrongdoer to cause widespread harm without fear of policing through private lawsuits. I fully appreciate the argument. Indeed, its accuracy is, purely as a practical matter, virtually indisputable. But that fact does not justify use of a procedural aggregation device such as the class action to establish an entirely new substantive remedial framework. Rule 23 of the Federal Rules of Civil Procedure is simply too small a procedural tail to wag so large a substantive dog. Surely, such a narrow focus on result orientation cannot allow the circumvention of the Rules Enabling Act, basic separation-of-powers principles, the case-or-controversy requirement of Article III, or the core democratic premises of transparency, representation and accountability. Yet those will inevitably be the results if Rule 23 is employed to impose so dramatic an alteration in the DNA of the underlying substantive law.

If Congress ultimately determines that its existing remedial framework fails to achieve congressionally established goals, it is of course appropriate for Congress to consider adoption of alternative remedial devices. But neither Congress nor the judiciary is permitted to achieve those goals indirectly, through the manipulation of the controlling legal and constitutional framework.

#### **IV. POSSIBLE LEGISLATIVE REMEDIES**

In my opinion, the courts should themselves invalidate the use of cy pres relief in class actions, because of the practice’s inconsistency with applicable constitutional and statutory directives. But while recent decisions have evinced a growing judicial concern with the practice,<sup>13</sup> to this point no decision—at least of which I am aware—has reached this conclusion. But it must be remembered that Congress retains full legislative control over the Federal Rules of Civil Procedure, and may therefore modify them through the enactment of legislation if it so desires. I strongly urge Congress to consider and ultimately adopt reform legislation to cure the pathologies to which cy pres relief has given rise, as well as the deeper pathologies which cy pres is likely designed to shield.

The first option, naturally, is simply for Congress to prohibit the use of cy pres awards, included as either elements of coercive judicial awards or as part of judicially approved settlements of class

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<sup>12</sup> Redish, *supra* note 9, at ix.

<sup>13</sup> See cases cited in note 1, *supra*.

action proceedings in federal court. In addition, however, Congress should consider a second reform: insertion into the class certification process of an additional requirement, above and beyond those currently imposed by Rules 23(a) and (b): the prerequisite that prior to certification the certifying court have determined that there is legitimate reason to believe that a substantial portion of the class will actually be compensated as a result of a settlement or coercive award. Absent such a finding, the class will degenerate into a faux class action. Where such a finding has been made (and it will probably be necessary at some point to operationalize the concept of “substantial portion”). It is true that such a determination necessarily involves a prediction of future events, rendering the decision difficult in many instances. But in a large number of class proceedings it should not be all that difficult for the court to determine that neither an award nor a settlement is likely to benefit much of the absent class. In making this determination, the court may look to four factors: (1) the size of the absent class; (2) the amount of injury likely suffered by individual class members; (3) the difficulty in finding absent class members; and (4) the difficulty in actually compensating absent class members. Where a class is very large, individual class members have likely suffered only a relatively small amount of damages, it will be difficult to find many of the class members, and there is no obvious means of easily compensating them, it is highly likely that a large portion of the absent class members will benefit not at all from the award. In these cases, payment of the remaining funds to an uninjured charity should not be considered an acceptable alternative mode of punishment.

These suggestions are designed to represent merely possible beginnings of what would have to be a far more detailed process of developing specific legislative reforms as a means of curing the pathologies to which my testimony has pointed. The main goal of my testimony, however, has been to convince members of this Subcommittee that such reform is essential to the preservation of the effective and legitimate operation of the federal system of litigation. If I have achieved that goal, then I will take satisfaction that I have been able to contribute to the start of an effort to make sure that the class action does only what a complex procedural aggregation device is designed to do.

Thank you for providing me with this opportunity.