An Economic Analysis of Computer Class Action Settlements and Proposal for Their Use to Fund Open Source Software

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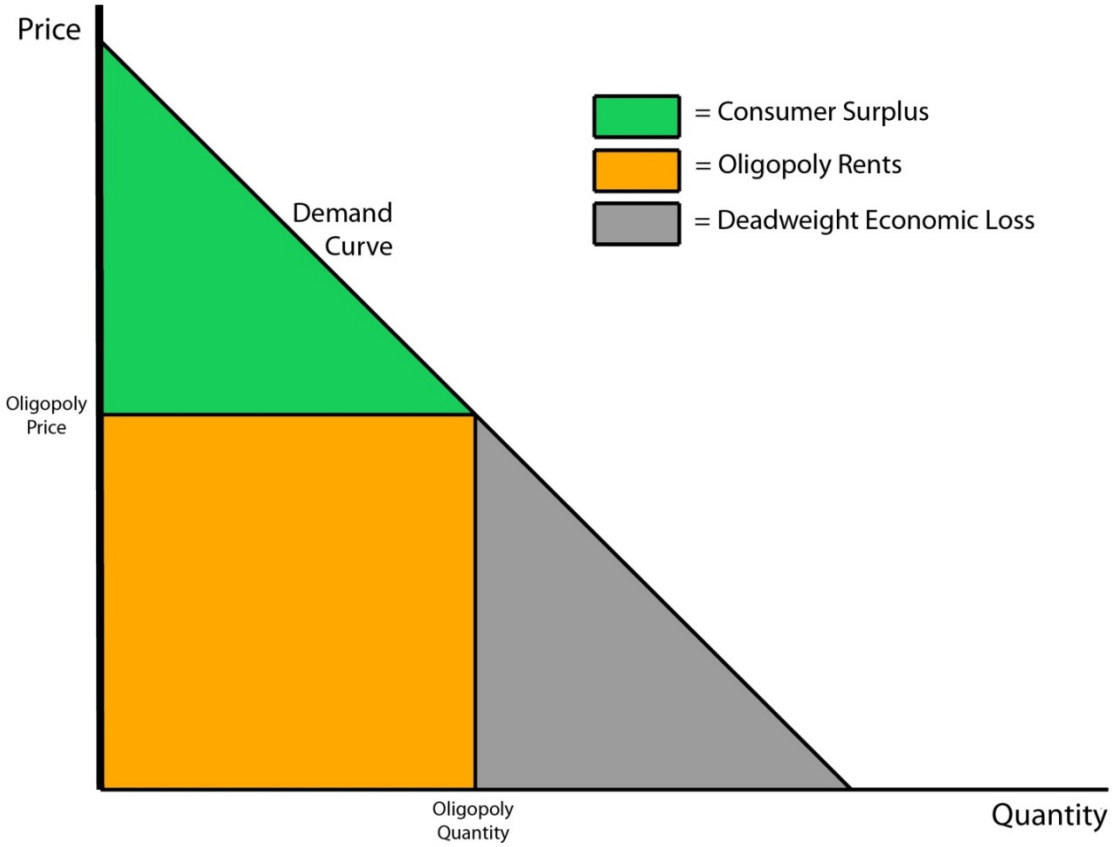
In this article I compare two methods of directing damages paid by computer industry defendants in class action suits: (1) traditional direct payments to identified class members and (2) a distribution to fund the development of open source software. The conclusion of this analysis is the latter method is superior.

There is a Market Failure in the Consumer Desktop Software Market

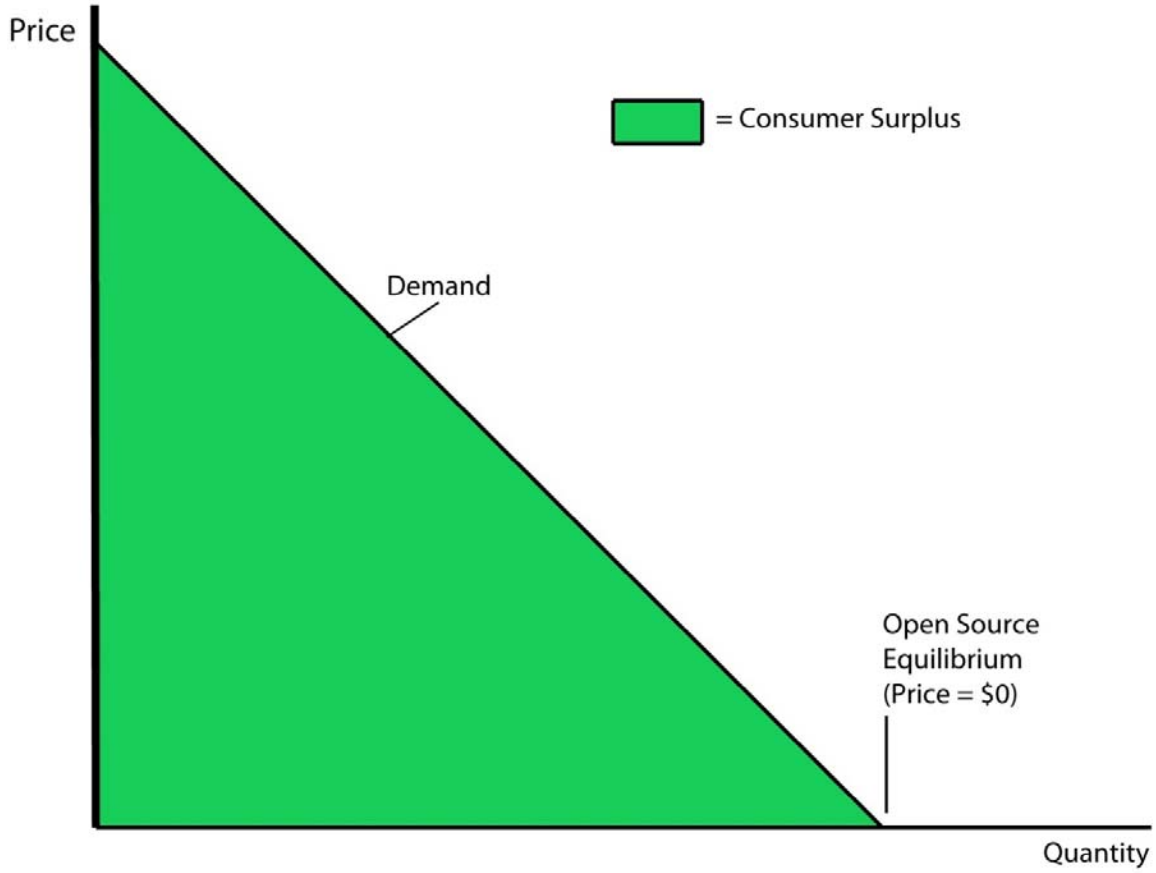
A large market failure exists in the market for most types of software, including all consumer desktop software. This is because the Kaldor-Hicks efficient price and terms of consumer software is $0 with no license restrictions, but private companies generally lack an economic incentive to produce software under such terms. Such market failure imposes a large deadweight loss on the American economy, as shown in figure one.



United States public policy currently does almost nothing to rectify this market failure, unlike such countries as Malaysia[1] and Brazil[2], which divert public funds directly to open source software projects. Such a policy likely enhances and augments their local software industries and reduces software costs for their residents. Like all attempts to correct market failures with public spending, it suffers the drawback that it must be paid for with taxes, the imposition of which itself imposes negative economic externalities. See Joel Slemrod and Shlomo Yitzhaki, The Cost of Taxation and the Marginal Efficiency Cost of Funds, *International Monetary Fund Staff Papers*, March, 43(1): 172-98 (1996).[3]

Class action settlement funds, in particular those benefiting classes of computer software and equipment buyers, offer a superior source of funding that, far from imposing the inefficiencies of taxation, instead lower administrative waste involved with the settlement claim and administration process.

Figure two illustrates two direct and beneficial effects to the economy when software is released free of cost and licensing restrictions, as opposed to sold and/or restricted.



[1] Jonathan Schwartz, Personal View: 'Markets Set Free by Open Source', Financial Times, September 16, 2008.

[2] Todd Benson, Brazil: Free Software's Biggest and Best Friend, N.Y. Times, March 29, 2005.

[3] See also Anil Kumar, Labor Supply, Deadweight Loss and Tax Reform Act of 1986: A Nonparametric Evaluation Using Panel Data, *Journal of Public Economics* 92, 236-53 (2007).

First, the relatively small level of oligopoly profit is converted to consumer surplus. Second, the much larger deadweight loss is also converted to consumer surplus. The first benefit models those who would have paid for software, but instead receive it for free. The second displays the benefit to those who utilize free software they would not have paid for. This second movement is a free lunch to the economy earned by the elimination of a deadweight loss.

Many of the most important class actions are brought on behalf of classes whose members are entirely computer owners.[4] The various class actions against Microsoft are among high profile examples. A simpler instructive example here is *In re Graphics Processing Units Antitrust Litigation*, No. M:07-cv-01826 *("GPU Antitrust"),* which is the private class action that was brought in tandem with the government investigations of collusion between Nvidia and ATI, the two giants that dominate the industry for graphics hardware ("GPUs" or "Graphics Cards").

Funding Open Source Software is a Better Way to Compensate Victims of Price Fixing

The largest antitrust class action settlement involving computer hardware in recent memory was against the companies that fixed prices on DRAM, where settlements thus far have amounted to $325.997 million.[5]

Assuming that the GPU class manages to achieve the same result, and that there are 50 million class members, this represents $6.50 per class member.

This is not very much money on a per-person basis. In fact, the main benefit to class members of the settlement will not be the dollar value of the settlement if it is distributed, but the deterrence effect that the settlement will provide in scaring the defendants and other computer companies from future violations of antitrust law, thus keeping the prices class members pay down and encouraging the competition between companies that is the "pillar of our free market economy."[6]

Superiority #1 - An Open-Source Settlement Allows More Class Members to be Compensated

Sending out tens of millions of checks for under $10 is an economically wasteful activity. The average hourly wage in the United States in September 2009 was $18.67.[7] Optimistically, the process of receiving class notice, filing a claim form, and cashing the claim check might take 15 minutes total. A 30-minute estimate is more realistic in *GPU Antitrust* because not all GPUs are the same, and thus class members will have to individually ascertain which GPU/s their computer contains. Some graphics cards cost $50, others $800. Thirty minutes multiplied by the average hourly American wage gives us an average time cost for class members of $9.34. Further, most potential GPU class members don't actually know they are class members. Indeed,

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[4] Pending class actions against computer companies include: The Apple Itunes/Ipod Antitrust Litigation, No. C05-37 JW; IN RE: TFT-LCD (Flat Panel) Antitrust Litigation, No. M:07-cv-01827-SI; IN RE: Static Random Access Memory (SRAM) Antitrust Litigation, No. M:07-cv-1819; IN RE: Intel Corp. Microprocessor Antitrust Litigation, No. 05md1717; IN RE: Microsoft Corp. Windows Operating Systems Antitrust Litigation, No. _____ .

[5] http://www.dramantitrustsettlement.com/dram/default.htm

[6] See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972).

[7] http://www.bls.gov/news.release/empsit.t17.htm

most class members only have a foggy idea of what a GPU is, much less if their computer has one. (Most PCs sold in the United States do have GPUs, but many laptops and lower-end desktops instead have what is called "integrated graphics processing" instead of a separate GPU manufactured by the *GPU Antitrust* defendants.)

Thus, the percentage of class members who will file claims is likely to be low. Most class members will receive no benefit from the lawsuit other than its deterrent effect on future computer industry price-fixing.

Superiority #2 - Open-Source Software and Cheaper Commercial Software Provides a Greater Economic Benefit to the Class Than Cash Payments

The development of open source software benefits class members directly in the form of both free open source software ***and*** cheaper commercial software, and does not require class members to spend any time on the claims process. As the quality and quantity of free software increases, commercial software vendors' reaction in the market will be some combination of cutting prices and improving quality. Thus even consumers who continue to buy commercial software will benefit from the competition that a well-funded open source project provides commercial software.

Superiority #3 - Open Source Software Projects can be Weighted to Benefit Class Members in Proportion to their Damages

Some types of buyers, namely those who purchased more expensive high-end graphics cards, suffered more damages than the average class members. Weighting the distribution of a cash GPU settlement by the amount of damages consumer class members suffered, however, would require class members to establish and prove, or at minimum estimate, how much they paid for their graphics cards. For most class members this would be a difficult and time-consuming process, if not an impossible task.

In contrast, an open-source software settlement could fund specific software projects according to whatever general demographic information is available about the class. The majority of class members who bought basic personal computers have fairly cheap graphics cards and spent perhaps an average of $50. Those that purchased "media center" computers to use as the hub of their home entertainment system might have spent an average of $200 on their graphics cards. Graphic designers, engineers, and digital video producers might have spent an average of $1000 of graphics cards during the class period, including expenses incurred by those who upgrade existing PCs with new graphics cards. Networked video game enthusiasts also frequently spend large amounts of money on graphics cards. This submarket is so large that both *GPU Antitrust* defendants produce expensive specialized graphics cards catering to it.

An open source software settlement of *GPU Antitrust* could thus be proportioned in a manner that uses settlement monies to fund both general consumer software as well as specialty software benefiting groups who purchased the most expensive models. Examples of general consumer applications that the *GPU Antitrust* settlement might fund are the Firefox[8] web browser and the

[8] Project Website: http://www.firefox.com

Open Office[9] software suite, which like the commercial Microsoft Office suite includes a word processor, spreadsheet, and PowerPoint-style slideshow software. For video game class members a worthy recipient might not be a particular program, but rather sub-programs that could be utilized to reduce the development costs of commercial video games as well as perhaps lead to the creation of the first mass market and competitive open source video games. Video production class members would directly benefit from further funding project such as Miro[10], an already popular and developed video rendering software and Jashaka[11], a multi-featured video editing software. Even if particular class members don't like and will never use these particular programs, funding one open source project benefits all other free software projects by increasing the amount of free software code available for these other free software projects. Further, more free software increases competition in software markets, resulting in lower commercial software prices. Finally open source software, depending on the particular licensing, may be incorporated into and reduce development costs and eventual prices for commercial software.

Superiority #4 - Faster and Larger Settlements

Computer hardware manufacturers such as Nvidia and ATI would be more inclined to settle promptly because the benefits from an open source settlement would partially offset the costs of settlement and litigation.

Computer software and computer hardware are classic complementary goods, defined as goods with a negative cross-elasticity of demand.[12] This in turn means a price-reducing subsidy of one complementary good via a settlement will increase the demand for the other complementary good. Computer hardware manufacturers liable to classes of their customers therefore benefit in the form of increased demand by funding free software that is complimentary to their products. This is not the case for cash settlements. Given this off-setting gain to the pain of a class action settlement, such defendants will have greater incentives to settle for larger amounts, and do so sooner, to the benefit of both the class and the court system.

Again turning to the instructive example of *GPU Antitrust*, if more computer owners download an improved Jahshaka video editing software because of a software-funding class action settlement, their desire for a higher-end graphics card will increase, to the benefit of ATI and Nvidia. Under the assumption that for each extra dollar in open-source development the defendants would increase the present value of future profits by 20 cents, a $400 million software-funding settlement, which would cost them $400 million but increase their profits over time by $80 million, costing a net $320 million is more attractive than a $350 million cash settlement.

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[9] Project Website: http://www.openoffice.org

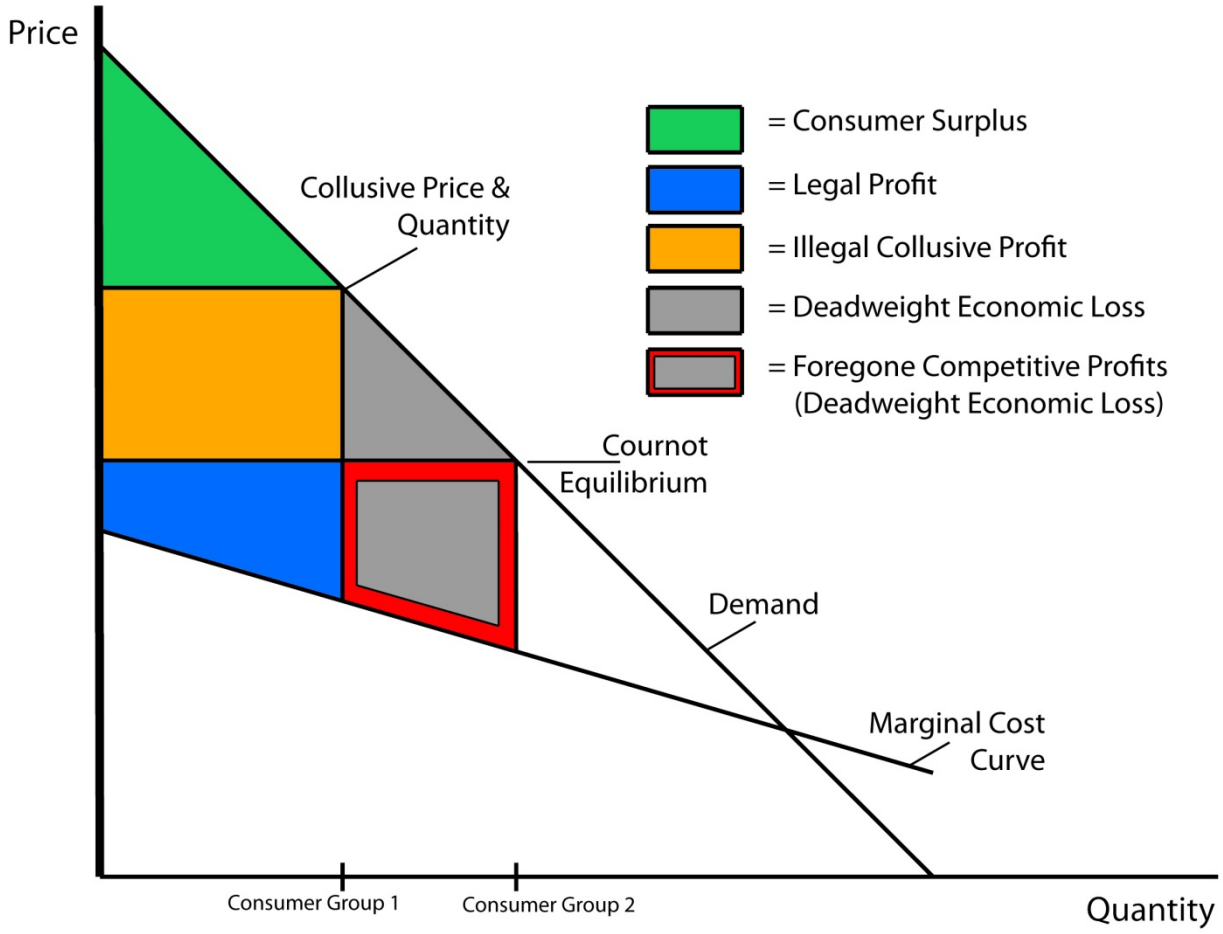
[10] Project Website: http://www.getmiro.com

[11] Project Website: http://jashaka.org

[12] Graham Bannock, R. E. Baxter, & Evan Davis, The Economist Dictionary of Economics 77 (1972).

Superiority #5 - All Consumers Harmed by Price-Fixing Benefit

A classic price fixing conspiracy such as those the *GPU Antitrust* defendants perpetrated harms two groups of consumers, represented in the graph below modeling an idealized two-player graphics card market. Only Consumer Group 1, however, can possibly be compensated by a cash class action settlement.



The point on the demand curve marked "Cournot Equilibrium" shows the price and quantity produced that would have been sold in a market free of illegal collusion, but still dominated by the Nvidia/ATI duopoly. However, because of the conspiracy, prices have increased and production and sales have decreased to the point on the demand curve marked "Collusive Price & Quantity." Consumers responded to the collusion in two different ways.

Consumer Group 1 paid the higher prices that resulted from the collusion. The higher prices that these consumers paid is the illegal profit earned by the conspirators, and is represented graphically by the orange box. Group 1 will have standing to sue the companies engaged in the illegal behavior for their losses.

Consumer Group 2 also suffered direct harm as a result of the collusive price raising, not because they paid a higher price for their GPUs, but because they didn't purchase the them at all. Their

losses are shown by the grey triangle to the right of the orange box. A class action settlement compensating only Consumer Group 1 thus does not compensate all the victims of the conspiracy, but compensating Group 2 with cash for their antitrust injury is *impossible* because indentifying them individually to send them checks would require knowing what individuals would have purchased in the past had prices been lower.

While payments to Group 1 do nothing for Group 2, an open-source software settlement benefits *both* groups because they are both participants in the market for computer hardware and therefore also in the market for computer software.

As a further policy matter, while Group 2's injuries are smaller in magnitude in the above graph than Group 1's, they are worse from an economic perspective. Group 1's injuries result in a transfer of wealth from the buyers to the sellers, which in a short-run simplified model does not otherwise harm the economy. Group 2's injuries, however, are the result of the shrinking of the economic pie by reducing production and consumption, as the supply of graphics cards is reduced by the colluding companies to produce sufficient scarcity to support their collusive price.

JUSTIFICATION

Cy pres, from the Norman phrase *cy pres comme possible*,[13] is the common law doctrine that applies when a trust's original purpose to some extent fails.[14] For more than thirty years it has been applied to the trust corpus of class action settlement funds.[15] See *Miller v. Steinbach*, 1974 U.S. Dist. LEXIS 12981 at *3 (S.D.N.Y. 1974).[16]

Originally, *cy pres* remedies were employed in a manner or with a purpose similar to the grantor's original intent.[17] The courts have expanded the doctrine to apply to an entire trust corpus, often citing the invalidity governmental escheat theory.[18] In an 18-year-old example, in *In re Oceangoing Ship Antitrust Litigation*[19] $8 million in settlement funds remained after direct distributions were completed. These funds were paid to the National Association for Public

[13] "as close as possible"

[14] *See* Jonathan T. Brand and Paul Steven Singerman, "Doing Good" in Chapter 11 Liquidating Plans, 25-10 ABIJ 48, 105. (2006).

[15] Kevin M. Forde, What Can a Court Do with Leftover Class Action Funds? Almost Anything!, Judges' J., Summer 1996 at 19, 19-20.

[16] The first case in which *cy pres* logic was applied to a class action settlement.

[17] 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, 364 (1999).

[18] *Id.* See also *Van Gemert v. Boeing Co.*, 739 F.2d 730 (2d Cir. 1984) for a Judge's opinion regarding the court's authority to decide how to distribute fluid recovery.

[19] MDL No. 395 (S.D.N.Y. July 29, 1991)

Interest Law, which funds fellowships for recent law school graduates.[20] An overlapping concept with cy pres distributions from class action settlement funds is "fluid recovery."[21]

Cy pres distribution mechanisms serve several principal benefits in class actions. First, recovered funds can be fully distributed.[22] Second, courts are more likely to certify class actions when *cy pres* mechanisms are available because they simplify distribution.[23] Finally, because in many class actions compensating all class members may be inefficient, expensive, or impossible, *cy pres* remedies maximize the number of individuals benefiting from settlement.[24]

Courts generally direct funds to charitable organizations that directly or indirectly benefit class members [See, *e.g.*, *Jones v. National Distillers*, 56 F. Supp. 25 355 (S.D.N.Y. 1999)]. As one author notes, "such distributions... can be used successfully because there is a close nexus between the injury... and the distribution... which would be used to remedy a much wider class of individuals".[25] Courts have subsequently further made use of their broad equitable powers to direct fluid recovery funds to purposes unrelated to the class.[26] For example, in *Superior Beverage Co. v. Owens-Illinois*, 827 F. Supp. 477 (N.D. Ill. 1993), the Court diverted fluid recovery funds to charitable organizations whose missions did not benefit the class.[27] By continuously expanding the breadth of possible streams of *cy pres* funding, courts have reduced the problems of inefficient distribution that direct class member repayment in many cases fails to overcome.

There exists copious academic discussion on *cy pres* remedies. Arguments range from confirming/questioning use of the such remedies to assertions deeming one type of funds

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[20] *See* Kevin M. Forde, What Can a Court Do with Leftover Class Action Funds? Almost Anything!, Judges' J., Summer 1996 at 19, 27.

[21] *See* George T. Anagnost, Note, Federal Procedure – Rule 23 – Notice and Manageability Requirements Interpreted in Class Actions, 48 Tul. L. Rev. 721, 727 (1974). ("The mechanics of a fluid recovery device are simple: (1) the "class as a whole" is substituted for the individual members; (2) the amount of damages incurred by the class as a whole is determined, thereby creating a gross damage fund; (3) class members prove their individual claims, and (4) the unclaimed portion of the fund is then applied in an unspecified manner to the class's benefit. The recovery is 'fluid' because the use of the unclaimed portion of the fund is not limited to the original class...")

[22] Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 740 (1987).

[23] Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 740 (1987).

[24] Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 740 (1987).

[25] Jason J. Czarnezki and Mark L. Thomsen, Article, Advancing the Rebirth of Environmental Common Law, 34 B.C. Envtl. Aff. L. Rev. 1, 28 (2007).

[26] *See* Jonathan T. Brand and Paul Steven Singerman, "Doing Good" in Chapter 11 Liquidating Plans, 25-10 ABIJ 48, 106 (2006).

[27] *See* Jonathan T. Brand and Paul Steven Singerman, "Doing Good" in Chapter 11 Liquidating Plans, 25-10 ABIJ 48, 106 (2006).

distribution more appropriate than another arguable "next best" selection. At least one author goes so far as to lament a Court's rejection of employing fluid recovery in specific types of consumer class actions.[28] A canvassing of especially relevant research is appropriate and follows.

In his article "What Can a Court Do with Leftover Class Action Funds? Almost Anything!," Kevin M. Forde traces *cy pres* remedies through the case law and comes to the conclusion that broad judicial discretion is a beneficial and necessary facet of fluid recovery distribution when the settling parties don't explicitly decide on a destination for unclaimed funds.[29] Forde cites several cases, such as *Shapiro v. Barrett*, No. 71 L 5745 (Cir. Ct. of Cook County, Ill., Nov. 3, 1993), in which $200,000 was directed to a Judicial Advisory Council to "improve or augment existing programs in... child support enforcement, prevention, and protection of victims of domestic violence, [and] greater protection for abused and neglected children [as well as] drug treatment and drug rehabilitation."[30] The *Shapiro* decision offers support that societal advocacy programs which benefit the class as well as the general public are a welcome "next best" application. Forde cites cases similar to *Shapiro* to delineate between the benefits of public-oriented "next best" use and governmental escheat, the latter of which he considers within the discretion of the court but an overwhelmingly inefficient "next best" application.[31]

Bradley Vauter poses a similar, though less court-oriented approach to *cy pres* remedies. Like Forde, Vauter argues that fluid recovery should be put into advocacy organizations benefiting the class as well as the public-at-large.[32] Vauter more narrowly recommends that fluid recovery be employed in a manner that potentially aids the "poor and near-poor."[33] He posits that *cy pres* remedies can improve the lives of "vulnerable" citizens in need of legal services, and proposes that *cy pres* funding be placed in "consumer organizations, legal service organizations,

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[28] See Stan Karas, Casenote, The Role of Fluid Recovery in Consumer Protection Litigation: Kraus v. Trinity Management Services, 90 Calif. L. Rev. 959 (2002). (Supreme court declared fluid recovery inappropriate in California "Unfair Competition Law" cases.)

[29] See Gail Hillebrand, Laura Kaplan, James R. McCall, and Patricia Sturdevant, Article, Greater Representation for California Consumers – Fluid Recovery, Consumer Trust Funds, and Representative Actions, 46 Hastings LJ 797, 850 (1995) (a discussion of the role of Counsel in proposing fluid recovery.)

[30] Kevin M. Forde, What Can a Court Do with Leftover Class Action Funds? Almost Anything!, Judges' J., Summer 1996 at at 27.

[31] Kevin M. Forde, What Can a Court Do with Leftover Class Action Funds? Almost Anything!, Judges' J., Summer 1996 at 20-21. See also *Van Gemert v. Boeing Co.*, 739 F. 2d 730 (2d Cir. 1984). ("We hold that [the federal statue providing for the governmental escheat of unclaimed funds] does not limit the discretion of the district court to control the unclaimed portion of a class action judgment fund.")

[32] Bradley A. Vauter, The Next Best Thing: Unclaimed Funds from Class Action Settlements Could Benefit Low-Income Consumers by Deposits in the State Bar of Michigan Access to Justice Development Fund, 80 MI Bar Jnl. 68, 68 (2001)

[33] Bradley A. Vauter, The Next Best Thing: Unclaimed Funds from Class Action Settlements Could Benefit Low-Income Consumers by Deposits in the State Bar of Michigan Access to Justice Development Fund, 80 MI Bar Jnl. 68, 68 (2001)

and charities."[34] Vauter mentions that class action lawyers in Michigan have attempted to utilize the State's "Access to Justice Fund" as a repository for unclaimed class action settlement funds as such distribution would improve consumer advocacy and access to legal aid for the socioeconomically disadvantaged.[35] The aforementioned attorneys cited efforts in California and Washington to substantiate their claim.[36] Vauter thus poses a similar and equally laudable approach to *cy pres* distribution that strives to maximize societal benefit from "next best" funding.

In "The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions," Natalie A. DeJarlais[37] defines the proper criteria for settlement fund distributions other than direct payments as those that "benefit the uncompensated class members while minimizing management costs and judicial involvement."[38] She argues in favor of the creation of consumer trust funds, especially those that are "creatively" actuated with goals of "provid[ing] the best long-term results to class members of all socioeconomic groups..."[39]

Though written earlier, DeJarlais provides a strong rebuke to the unfounded criticism in "Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis," that *cy pres* is somehow unconstitutional because benefits accrue to those outside of the class.[40] At the outset, such "windfalls" are "hardly taboo in the law" but rather are clearly contemplated in consumer and antitrust laws which provide private parties rights to seek broad injunctions that protect parties other than themselves, and to receive treble damages and punitive damages that by their nature are greater than the value of the harm suffered.[41] She further examines alternatives if windfall were prohibited: fund-sharing among claimants, allowing funds

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[34] Bradley A. Vauter, The Next Best Thing: Unclaimed Funds from Class Action Settlements Could Benefit Low-Income Consumers by Deposits in the State Bar of Michigan Access to Justice Development Fund, 80 MI Bar Jnl. 68, 68 (2001)

[35] Bradley A. Vauter, The Next Best Thing: Unclaimed Funds from Class Action Settlements Could Benefit Low-Income Consumers by Deposits in the State Bar of Michigan Access to Justice Development Fund, 80 MI Bar Jnl. 68, 68 (2001)

[36] Bradley A. Vauter, The Next Best Thing: Unclaimed Funds from Class Action Settlements Could Benefit Low-Income Consumers by Deposits in the State Bar of Michigan Access to Justice Development Fund, 80 MI Bar Jnl. 68, 68 (2001)

[37] Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729 (1987).

[38] Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 730 (1987).

[39] Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 732 (1987).

[40] Peter Julian, Martin H. Redish, and Samantha Zyontz, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 48 (Oct. 2009) (unpublished manuscript, on file with the Searle Center at Northwestern University School of Law).

[41] Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 741 (1987).

to revert to defendants, and dismissing the suit.[42] Each of these alternatives, however, does "little to redress legitimate grievances of class members or to effectuate the purposes of consumer protection laws".[43]

She notes also the drawback of direct distributions in that:

> ...[in many cases,] minorities were underrepresented within the claimant group... If minorities, blue-collar workers, the less educated, and the less affluent are not participating in claims for damage refunds in a representative manner, the goal of compensation requires that their rights, as well as the rights of those who submit claims, be considered.[44]

DeJarlais thus provides justification for directing funds that are targeted at those harmed by the acts or omissions that gave rise to the suit but least likely to file claims. Efficiency is enhanced: notice and administrative costs, which are typically paid out of non-claimants' shares of the funds, are decreased to zero.[45] Thus, in comparison to direct repayment, governmental escheat, reversion, and other forms of advocacy, *cy pres* awards benefiting the consumer serve more of the various goals that *cy pres* awards seek to achieve. The consumer trust fund, then, fills the goals of compensation, disgorgement of illegally obtained profits, and deterrence of unlawful conduct in a cost-effective and judicially economic manner.[46]

The number of class actions in which *cy pres* awards are settled upon or granted by courts has increased dramatically in recent years.[47] Peter Julian, *et al.* note that, of the 95 reported federal class actions approving *cy pres* distribution, 65 occurred between Jan 1, 2001 and December 31, 2008.[48] The prevalence of *cy pres* awards in settlement class actions has risen substantially as well: from 1974 through 2000, only 26.7% of cases involved settlement classes, whereas from 2001 through 2008 settlement classes represented 52.3% of all cases involving *cy*

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[42] Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 742 (1987).

[43] Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 742 (1987).

[44] Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 763 (1987)

[45] Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 763-764 (1987).

[46] Natalie A. DeJarlais, Note, The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729, 763-764 (1987).

[47] Peter Julian, Martin H. Redish, and Samantha Zyontz, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 48 (Oct. 2009) (unpublished manuscript, on file with the Searle Center at Northwestern University School of Law).

[48] Peter Julian, Martin H. Redish, and Samantha Zyontz, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 48 (Oct. 2009) (unpublished manuscript, on file with the Searle Center at Northwestern University School of Law).

pres awards.[49] The prevalence of actions in which individual awards amounted to less than $100 has been relatively stable, averaging just below 37% of all *cy pres* class actions in both the 1974-2000 and the 2001-08 periods.[50] Of those cases for which the total sum awarded could be parsed into damages, *cy pres* awards, and attorneys' fees, compensatory damages averaged $51,778,958, though the median was a dramatically lower $11,300,000.[51] Similarly, *cy pres* awards averaged $5,487,866, though the median *cy pres* award totaled $243,000.[52] Attorneys' fees averaged $14.1 million, with a median slightly below $1.1 million.[53]

This dataset evinces that courts over time have become increasingly supportive of *cy pres* distribution and have legitimized the use of "next best" settlement solutions. Though the authors of the article compiled the data in an attempt to advance an improper claim that *cy pres* remedies are somehow illegal and superfluous, they fail to acknowledge the wisdom and equitable power of the courts and at the same time disregard the myriad efficiencies that *cy pres* settlements provide. The expanding prevalence of *cy pres* settlements in class actions shown in the numbers supports that the goals of compensation, disgorgement, and judicial economy are being adequately achieved, or such settlements would not be approved in increasing amounts and by an expanding number of courts. Indeed, *cy pres* remedies are propitious tool in that they ensure the various goals associated with class action remedies are met.

Conclusion

Normally when a portion of a class action settlement is not used for either payments to class members or their attorneys, the funding is considered *cy pres*, or "as close as possible" to the impractical ideal of a cash distribution. However, action settlements involving computer user classes should be used to fund open source software because class members are likely to receive a vastly greater direct economic benefit in the form of lower prices and improved software quality than if some small portion of them were simply cut a check.

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[49] Peter Julian, Martin H. Redish, and Samantha Zyontz, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 25 (Oct. 2009) (unpublished manuscript, on file with the Searle Center at Northwestern University School of Law).

[50] Peter Julian, Martin H. Redish, and Samantha Zyontz, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 51 (Oct. 2009) (unpublished manuscript, on file with the Searle Center at Northwestern University School of Law).

[51] Peter Julian, Martin H. Redish, and Samantha Zyontz, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 55 (Oct. 2009) (unpublished manuscript, on file with the Searle Center at Northwestern University School of Law).

[52] Peter Julian, Martin H. Redish, and Samantha Zyontz, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 55 (Oct. 2009) (unpublished manuscript, on file with the Searle Center at Northwestern University School of Law).

[53] Peter Julian, Martin H. Redish, and Samantha Zyontz, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 56-57 (Oct. 2009) (unpublished manuscript, on file with the Searle Center at Northwestern University School of Law).

At minimum, every computer class action should reserve some part of the settlement for open source software projects, since absent the availability of quality open source software many if not most class members will receive no direct economic benefit from the settlement.