Jackpot!

Using Lotteries to Distribute Class Action Settlement Funds

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One of the perennial problems facing class action lawyers is how to distribute the money in class action settlement funds. To a casual observer, this problem is counterintuitive: Everyone wants money, so distributing it should be an easy task. There is some truth to this: Putting aside extreme cases, it is usually possible to distribute *most* of the money in a settlement fund directly to class members. But it is often extremely difficult – especially in settlements with low individual payment amounts – to distribute *all the money* in a settlement fund to class members. Practitioners and courts are then left with a set of suboptimal choices for distributing the remainder of the fund.

Perhaps the most obvious solution is reversion to the defendant, but judges are (whether rightly or wrongly) often suspicious of reversionary settlements.[1] In theory, the unclaimed money could be paid (or "escheat") to the state, but that technique is seldom used and intellectually unsatisfying.[2] Thus, at least some portion of most class action settlement funds are distributed to non-profit organizations that, in theory, provide some benefit to the class. This is known as *cy pres* distribution, from a French phrase meaning "next best."

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[1] 4 William B. Rubenstein, *Newberg on Class Actions* § 12:29 (5th ed. 2019).

[2] *Newberg*, § 12.31 (describing escheat in the class action context and explaining that it is "rare").

As many other commentators have explained, *cy pres* distributions, while perhaps the least-bad current option, also pose significant problems.[3] Most importantly, it is often difficult – if not impossible – to identify a non-profit organization whose work will benefit the interests of the class. Thus, class action settlement funds are often distributed to non-profit organizations that are not so much the "next best," from the perspective of the class members' interests, but "pretty good" from the perspective of the plaintiffs' lawyers and the presiding judge.

This article presents a novel and perhaps controversial solution. The money that remains in a settlement fund and that cannot be distributed to class members in an economically rational way should be distributed to several class members selected by lottery from the group that both submitted a claim and cashed the resulting settlement check. This lottery distribution method has significant advantages. Most importantly, it should increase participation rates in class action settlements, which are notoriously low. Some class members fail to submit claims because they did not know they could, but many class members receive notice of the settlement and choose not to make a claim (or opt out or object) simply because the amount they stand to receive is not worth the trouble of submitting a claim.[4]

The lottery method changes those incentives. In addition to receiving an individual payment in the settlement, each class member receives a chance to win a significant pot of money. Given the popularity of lotteries in the United States, the appeal of this potential large payout, if properly emphasized in the notice campaign, should lead more class members to submit claims. This technique will therefore result in more money being distributed to more class members, which is the most legitimate use of class action funds.

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[3] Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 641 (2010) (arguing that "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").

[4] The use of a lottery in the class action context was also proposed by Professor Shay Lavie, primarily as a way to minimize administration costs, in *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Action*, 79 Geo. Wash. L. Rev. 1065 (2011). This article, in contrast, does not make the case for using a lottery as a way to minimize administrative costs – although it does have that benefit – but as a method (1) to drive additional class members to submit claims, thereby increasing the legitimacy of class actions; and (2) for distributing residual funds.

1.
THE BASICS: HOW CLASS ACTIONS SEEKING MONEY DAMAGES WORK

A "class action" is a form of representative litigation that allows an individual named plaintiff, if certain requirements are met, to represent and litigate on behalf of a class of people who are similarly situated.[5] The basic premise of class actions is that, because the named plaintiff and the absent class members are similarly situated, the class members' claims should meet with the same result as the named plaintiff's claims in the litigation.[6] The basic structural advantage of the class action is that it can be used, in theory, to avoid the expense of hundreds or thousands of duplicative litigation proceedings.[7]

Because this article focuses on the distribution of monetary funds produced by class actions, it may be useful to explain how class actions generate funds in the first place. For simplicity's sake, this article will focus on the "adventuresome innovation" of class actions seeking money damages under Federal Rule of Civil Procedure 23(b)(3).[8]

To certify any class action in federal court, the named plaintiff must satisfy the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy. First, numerosity requires that the absent class members be so numerous that it would be impractical to join them as parties to the action and litigate their claims individually. Classes with 100 or more members generally satisfy this requirement easily. Second, commonality requires that there be at least one question of law or fact that is common to the class. In *Dukes*, the Supreme Court explained that a question is "common" if it will produce a *common answer* that is applicable to all class members.[9] Third, typicality requires that the claims and defenses applicable to the named plaintiff be typical of the claims and defenses applicable to the class.

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[5] *Newberg*, § 1:1.

[6] 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 1:1 (16th ed. 2019).

[7] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 (1999) ("One great advantage of class action treatment . . . is the opportunity to save the enormous transaction costs of piecemeal litigation.").

[8] *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

[9] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011).

If, for example, the named plaintiff is subject to a unique defense that would not apply to the absent class members, the plaintiff would likely not satisfy the typicality requirement. Fourth, adequacy requires that the lawyers who represent the named plaintiff have the skills to adequately represent the interests of the absent class members.

In addition to the four Rule 23(a) factors, in order to certify a *money damages* class action under Rule 23(b)(3), the named plaintiff must also show that common issues – as discussed above – predominate over any individual issues and that a class action is superior to other methods for resolving the controversy.

Once a class is certified, it can produce a "fund" in essentially two ways: (1) a settlement negotiated by the parties and approved by the court, or (2) the entry of judgment in favor of the class, whether through motion practice or trial. The same distribution problems apply to funds created by settlement or litigation, but class action trials are exceedingly rare. This article therefore speaks the language of settlement.

Subject to a few exceptions, private parties can settle their disputes on their own, without the involvement or approval of a court. Class action settlements are different because they address the rights of absent class members who may not even know about the litigation, let alone the settlement agreement. To protect their rights, courts review and approve class action settlements.

In general, class settlements follow this sequence of steps. First, the defendant and the named plaintiff (really the plaintiffs' lawyers) negotiate a classwide settlement. Second, the plaintiffs' lawyers submit the settlement to the court for preliminary approval. Third, the court grants preliminary approval; appoints the named plaintiff as the class representative and the plaintiffs' lawyers as counsel for the class; appoints a settlement administrator; and directs the administrator to send notice to the absent class members (usually following a plan proposed by the parties).[10] Fourth, the administrator sends notice to the class members, which informs them of their rights to object to the settlement, ask to be excluded from it, or file a claim for compensation from the settlement fund.[11] If class members "opt out," they are not bound by the settlement and are ineligible for benefits

[10] Fed. R. Civ. P. 23(e)(1)(B); *Manual Complex Lit.* § 21.61 (4th ed. 2019); *Newberg*, § 13:10.

[11] *McLaughlin*, § 6:17; *Newberg*, § 13:20-38.

under it. Fifth, after considering objectors' comments, opt-outs, claims rates, and various other factors, the court grants final approval of the settlement.[12] Only after final approval is the defendant obliged to pay the settlement payment into a fund held by the class administrator. Following the terms of the settlement agreement and final approval order, the class administrator then distributes those funds to class counsel (to pay for court-approved fees and costs), to the class representative (to pay for court-approved service awards), and to class members.[13]

2.
WHY THE UNDISTRIBUTED FUND PROBLEM PERSISTS

Why can't a class action settlement fund be distributed in its entirety to absent class members? The easiest way to understand the undistributed fund problem is with an (unrealistically simple) hypothetical: A defendant pays \$1,000,000 into a fixed-fund (or "common fund") settlement to resolve a consumer class action where each consumer's alleged damages were the same. Out of that amount, \$100,000 is used to pay for class notice and administration (*e.g.*, postage, printing, and the class administrator's fees), and plaintiffs' counsel receive \$200,000, leaving \$700,000 available for distribution to class members. Out of 300,000 potential class members, 20,000 submit claims.[14] Based on the 20,000 claims received, the administrator adjusts the amount of each cash award to use the entire settlement fund (more about that below), resulting in individual checks of \$35. Even though the settlement checks are for a respectable amount, 600 of the 20,000 class members who submitted claims do not cash their checks, even after they are re-mailed by the administrator, leaving \$21,000 in the settlement fund.

[12] Fed. R. Civ. P. 23(e)(2).

[13] *Newberg*, § 13:3.

[14] Claims rates in class actions vary widely, but this 6.6% claims rate is within the typical range for consumer class actions. In a recent FTC study, the median claims rate in all consumer class actions was 10%. *See* FTC, Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns, at 21 (2019), www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf.

One might wonder whether uncashed checks are really such a common problem. They are, especially in settlements with comparatively low individual payouts.[15]

The class administrator could continue to try to get those 600 class members to cash their checks, but those efforts are unlikely to succeed and will eventually exhaust the settlement fund through postage costs and other administrative expenses. At this point, the only viable way to reach those 600 class members is for class counsel to undertake – as part of their service to the class and at no additional charge – efforts to contact them. This is not a common occurrence.

The class administrator could also make a second distribution to those class members who cashed their first check (again, more about that below), but the cost of mailing those checks makes that option economically irrational. Even assuming the administrator can print and mail the checks for $0.30 each, it would cost $5,820.00 to mail them. After those mailing costs are deducted, there is only $15,180.00 to distribute to the 19,400 class members who cashed their initial payment check, resulting in second-round distribution checks of about *seventy-eight cents*. It is at this point, when further distributions to class members have become economically impractical, that the remaining funds are distributed by one of the methods discussed at the beginning of this article, including *cy pres* distributions or reversion.

3.

TECHNIQUES FOR MAXIMIZING THE DISTRIBUTION OF FUNDS TO CLASS MEMBERS

There are various techniques that can maximize the portion of the settlement fund that is distributed to class members. Some of these techniques are already generally accepted practices among class action practitioners.

First, the amount of cash awards can be adjusted *pro rata* based on the number of valid claims submitted, so that the first round of settlement checks (if cashed) would exhaust the entire settlement fund. Returning to

[15] *See id.*; *see also* Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & Bus. 767, 790 (2015) ("Class members who receive unsolicited checks in the mail do not negotiate them in significant numbers."). Based on personal experience, an unclaimed check rate between 3% and 8% is typical.

the hypothetical settlement above, there were 300,000 class members and $700,000 available for cash awards. Absent an adjustment, each class member would receive $2.33. But only 20,000 class members submitted claims. Thus, the amount of each cash award was adjusted to $35, so that the entire fund would be distributed (assuming all checks are cashed) after the first distribution.

Second, the class administrator can make a second distribution to class members. This was not practical in the hypothetical described above. But in many settlements, there will be sufficient money left in the fund to support a second cash award. This technique is most efficient when the second distribution is limited to class members who *actually cashed* their first settlement check.

Third, the class administrator can use digital payment technologies like PayPal and Zelle. These digital payments eliminate the postage costs associated with sending subsequent rounds of distribution and largely eliminate the uncashed check problem. Unfortunately, adoption of these payment systems in the United States has been slow, and services like Zelle require that the payee have a bank account, which precludes participation by the large "unbanked" population.

Fourth, in certain circumstances, practitioners can use credits or other options to "push" payments directly to existing, known customers with known bank or credit card accounts.

In addition to these tried-and-true techniques, there are some approaches that daring class practitioners could use to maximize the portion of the fund distributed to class members. For example, since it is a virtual certainty that some portion of checks will – even under the best circumstances – go uncashed, the face amount of cash awards could be adjusted to add up to *more* than the entire settlement fund. Returning to the hypothetical above, if the parties felt confident that *at least* 100 (or 0.5%) of the 20,000 checks would go uncashed, they could set the amount of each check at $35.15 (rather than $35). In our hypothetical, 600 checks went uncashed (3%), and 19,400 were cashed, meaning that $679,000 was distributed to class members and $21,000 was left undistributed. Increasing the amount of each check by fifteen cents would have reduced the amount of undistributed funds from $21,000 to $18,090. The appeal of this technique is obvious. But so is its downside: No one wants to be financially responsible if the

amount of cashed checks exceeds expectations. It is therefore unsurprising that this has not become a common technique for distributing class action settlements.

4.
PROBLEMS WITH THE EXISTING TECHNIQUES FOR DISTRIBUTING UNCLAIMED FUNDS

So what happens to class action settlement funds that cannot be distributed to absent class members? The three primary options are reversion to the defendant, escheat to the state, and *cy pres* distribution to a non-profit organization. Each of these options presents significant practical and theoretical problems, problems that have been discussed extensively in the literature, and which this article will mention only briefly.

Unclaimed funds could revert to the defendant. The primary criticisms of reversionary settlements (whether legitimate or not) are (a) if the money ultimately returns to the defendant, the class action does not serve its deterrent function, and (b) it presents the potential for collusion between plaintiffs' counsel (who want a significant attorneys' fees award) and the defendant (who wants the ultimate cost of the settlement to be as low as possible). Putting aside the merits of these points, courts frequently reject reversionary class settlements, citing these concerns.[16]

Unclaimed funds could escheat to the state. But this rewards the state and does not compensate the class members, and creates the risk of distorting incentives for the governments that stand to receive the funds.[17] Escheat is rarely used in class action settlements and courts generally consider it "a last resort."[18]

Unclaimed funds could be distributed to a non-profit organization that will benefit the class members. These *cy pres* distributions, while the most common and generally agreed to be the least-bad method of addressing the unclaimed-fund problem, have significant flaws. As another commentator explained, (1) *cy pres* distributions do not compensate class members directly,

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[16] Kevin M. Forde, *What Can a Court Do with Leftover Class Action Funds? Almost Anything!*, 35 Judges J. 19, 23 (1996).

[17] Lavie, *supra* note 4, at 1093.

[18] *State v. Levi Strauss & Co.*, 715 P.2d 564, 572 (Cal. 1986).

(2) there is often a poor fit between the class members' interests and the non-profit organization selected, and (3) giving judges power to select (or influence) the payment of significant sums to non-profits can be corrupting.[19]

5.
THE CASE FOR THE LOTTERY DISTRIBUTION METHOD

The argument for the lottery method is based on the fundamental idea that money damages class actions are at their most legitimate when they put money in the hands of class members.[20] In the context of a class settlement, the funds should thus be distributed in the way that gets the most money to the most class members. If a distribution method both increases the number of class members who receive money and also increases the portion of the fund that goes to class members, then – all else being equal – it is a better method. It is certainly possible to challenge these normative positions. But if they are accepted, the case for the lottery distribution method is compelling.

Americans love lotteries. In 2017, Americans spent $73.5 billion playing lotteries.[21] Ultimate confirmation will have to wait for pathbreaking class action lawyers and a practical judge, but it seems entirely reasonable to predict that, at least at the margin, more people will participate in a class action settlement if they have, on top of an initial $10 or $30 award, a chance to receive an award of several thousand or even tens of thousands of dollars, as opposed to a chance to receive a second residual payment of $1 or $2.[22]

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[19] Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1023 n.35 (2009) (citing criticisms of *cy pres* distributions); Lavie, *supra* note 4, at 1096-97.

[20] *See, e.g.,* American Law Institute, Principles of the Law of Aggregate Litigation § 3.07 cmt. b (2010) (taking the position that "funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members").

[21] Mahita Gajanan, *Bought Mega Millions Tickets? Here's What You Could Have Made If You Invested That Money Instead*, Time (October 25, 2018), time.com/5431897/lottery-tickets-invest-money/ (noting further that "[t]he average American spends about $223.04 per year on lottery tickets").

[22] People like to gamble. For example, researchers found that, when asked to choose between a certain $50 and a 10% chance at $500, a majority choose to gamble on the low-chance, larger-amount option. *See* Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*,

Thus, the lottery method is a good thing because it will lead more class members to submit claims and cash their checks in the first place, thereby increasing the legitimacy of class action settlements.

Second, the lottery method will effectively eliminate the unclaimed-fund problem. While it may be hard to get every person in a large group to cash a $30 check, it is much easier to get one person to cash a four- or five-figure check. And since there will be only one (or a few) "winners," the class administrator can contact them personally.

Third, the lottery method will generally decrease costs of administration relative to other methods of distributing residual funds.[23] Rather than continuing to pursue economically irrational rounds of distribution, with all of their attendant costs, the parties can agree to a floor amount of money in the fund that, when reached, will trigger the lottery.

6.

RESPONSES TO ARGUMENTS AGAINST THE LOTTERY DISTRIBUTION METHOD

There are, of course, arguments to be made against the lottery method. In this section, I identify and rebut six of the most likely criticisms.

First, one could argue that the lottery method would deliver a windfall to the "winning" class member. This is not a compelling argument because, at the tail end of a distribution program, a distribution to *any* of the potential recipients would represent a windfall. An escheat to the state would certainly present a windfall, as would a *cy pres* distribution to a non-party charity. And plaintiffs' attorneys would certainly argue that reversion to the defendant would be a windfall.[24] In fact, of the potential options, the

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67 U. Chi. L. Rev. 163, 179-80 (2000) (citing Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. Risk & Uncertainty 297, 308 (1992)); *see generally* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 Econometrica 236 (1979).

[23] To be sure, if the lottery involves complicated analyses (*e.g.*, multiple "tickets" for certain class members), it could be costly to administer. These costs might exceed the administrative costs of making a single payment to a *cy pres* organization – though almost certainly not of sending residual payments to class members.

[24] In most cases, however, this is likely not logically correct. Assuming that the class members have been – to the extent reasonably possible – compensated for their alleged damages, it

windfall criticism is *least* applicable to distribution through lottery to a class member. Settlements are inherently compromises, and so class members rarely receive full value for their claims through a class action settlement.[25] Thus, at least some portion of the lottery recipient's winnings would not be a windfall but legitimate compensation for the injury suffered.[26]

But even granting that the windfall criticism applies, it does not counsel against using the lottery. Since the criticism applies across the board to all available distribution methods, the question is which method produces the most good. Assuming one believes the most legitimate use of settlement funds is the one that delivers the most money to the most class members, which the lottery will do by increasing class participation, then the lottery is the best choice. The other candidates (*e.g.*, escheat or *cy pres* distribution) do not offer any equally compelling justifications.

Finally, to address the windfall criticism, the amount of the lottery payments could be set at the minimum amount necessary to incentivize strong participation. Thus, for example, class members could receive their regular award plus a chance to receive $500 (rather than all remaining funds). The administrator would award as many $500 prizes as necessary to use up the unclaimed funds. Reducing the lottery award amount would have the virtues of (1) allowing more class members to share in the largesse, and (2) reducing the amount of any "windfall." If the amount is made certain up front, it will likely further drive claims rates, because people are more likely to act in response to certain numbers than uncertain numbers.

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is inappropriate to take additional money from the defendant only to serve punitive ends. The same logic should apply to the question whether to *return* funds to the defendant. And punitive damages are not appropriate in most class actions – and certainly not in most class action settlements.

[25] *Leonhardt v. ArvinMeritor, Inc.*, 581 F. Supp. 2d 818, 835 (E.D. Mich. 2008) ("All settlements involve compromise, and courts 'routinely recognize that settlements never equal the full value of the loss claimed by the plaintiffs.'"). Admittedly, when pro rata distributions are made and a small number of class members submit claims, those class members sometimes do receive full value for their claims.

[26] Another potential problem is that, if the lottery payment is large enough, it could create taxable income for the recipient. Ordinarily, class settlements are not taxable because they're making up for losses. But if the payment is so large that it makes up any possible loss and then some, it would likely be treated as income under the Internal Revenue Code. This could also trigger tax reporting requirements on the administrator and a slight increase in the costs of administration.

Second, one could argue that the lottery creates a conflict among class members. This is incorrect because, in the basic lottery setting, each person will have the same *ex ante* chance to win. This is not a conflict.[27] The lottery method can also be adjusted to make sure class members who are situated differently are treated fairly. For example, if some people have suffered greater harm because, for example, they bought more of the product at issue, they could be given multiple "tickets." While it is possible that, in some cases, material variations in class members' situations could make the lottery method problematic, this is not as much a criticism of the lottery method as a criticism of including such divergent claims in a single class in the first place.

Third, one could argue that selecting the winner could present technical or operational challenges for administrators. This argument is easily addressed. Class administrators are already responsible for making random selections (*e.g.*, when picking a case for a bellwether trial) and are equipped to do so in reliable, appropriately random ways.

Fourth, one could argue that the lottery method will increase fraudulent submissions, which are already a fact of life in class action settlements. The primary response is that because the lottery payment will be made to only a few class members, the class administrator and counsel could devote much greater energy to validating the claim of the "winners" than they can to verifying each and every claim submitted in a settlement program. But in fairness, a lottery jackpot will likely increase the total amount of fraudulent submissions, which will be a problem even if the fraudulent claimants receive only a regular claim award and not the lottery amount. The increased number of fraudulent claims will both dilute the money going to legitimate class members and increase the administration costs spent trying to screen out fraudulent claims. These problems are real and legitimate, but on balance, the benefits provided by the lottery method – increased claim rates and a solution to the unclaimed-fund problem – seem worth it.

Fifth, one could argue that class members will not understand the process. But this is not so much an argument against doing a lottery distribution as against doing one badly. It will of course be critical to draft notice and claim

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[27] An intraclass conflict exists when class members' interests are "actually divergent." Newberg, § 7.31. Moreover, not all intra-class conflicts are fatal to class certification – only "fundamental" ones. *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003).

forms that explain the rules of the settlement in plain, easy-to-understand language.[28] And it would be illogical to say that consumers cannot understand the concept of a lottery, when the very premise of a money damages class action is that consumers can evaluate complicated legal risks and benefits and decide whether to submit a claim, opt out of a settlement, or object to that settlement.

Sixth, one could argue that the lottery will defeat itself: Because more people will submit claims and cash checks, there will not be much money left to distribute *via* lottery, which people will find frustrating. But this is not so much a criticism of the lottery concept as an endorsement of its power to make the distribution more effective. To address this concern, however, the class settlement could be structured to guarantee at least one lottery award of a reasonable amount ($500 in the example above), to ensure that the possibility of a lottery award is not illusory.

Conclusion

The lottery distribution method should increase claims rates and thereby enhance the legitimacy of class action settlements. The lottery method also provides an elegant solution to the unclaimed-fund problem. All that is needed now is pragmatic counsel and judges ready to put the concept into practice.

[28] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (holding that due process requires notice to class members that is reasonably understandable).