Case No. 18-2346

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Joshua Rawa, on behalf of himself and all others similarly situated, et al.

Plaintiffs - Appellees,

v.

Monsanto Company,

Defendant - Appellee

v.

James Migliaccio; et al.,

Objector - Appellant

Appeal from U.S. District Court for the Eastern District of Missouri – St. Louis
(4:17-cv-01252-AGF)
(4:17-cv-02300-AGF)

PETITION FOR REHEARING EN BANC

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INTRODUCTION AND RULE 35(B) STATEMENT

The panel's upholding of a *cy pres* distribution of surplus funds from a class action settlement, where the district court specially found further class distribution feasible, conflicts with *In re BankAmerica Corp. Securities Litig.*, 775 F.3d 1060 (8th Cir. 2015). According to the panel, diverting funds to charities instead of the class was allowed because the parties agreed to a *cy pres* provision and "courts do not rewrite settlement agreements." *Rawa v. Monsanto Co.*, 18-2346, 2019 WL 3916537, at *6 (8th Cir. Aug. 20, 2019).

Under *BankAmerica*, a settlement does not displace judicial limits on *cy pres*. *BankAmerica*, 775 F.3d at 1066. Rather, "[a] proposed *cy pres* distribution must meet [our standards governing *cy pres* awards] regardless of whether the award was fashioned by the settling parties or the trial court." *Id.* (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011)) (emphasis added); *see also Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (same). Thus, the panel's decision that "the terms of the settlement agreement are always to be given controlling effect" conflicts directly with *BankAmerica*.

En banc review is thus necessary to secure and maintain uniformity of the Court's decisions under FRAP 35(a)(1)&(b)(1)(A). The proceeding also involves questions of exceptional importance under FRAP 35(a)(2) & (b)(1)(B), including the role of American Law Institute's Principles of the Law of Aggregate Litigation ("ALI

Principles") on *cy pres* distributions in this and other circuits. *BankAmerica*, 775 F.3d at 1063-67 (following the ALI Principles and vacating a *cy pres* distribution made pursuant to a settlement agreement where redistribution to the class was feasible); *id.* at 1071 (noting that other circuit courts "have adopted the American Law Institute's preference for pro rata distributions to class members"); *In re Lupron Marketing and Sales Practices Litigation*, 677 F.3d 21, 25–26, 31 (1st Cir. 2012) (endorsing the ALI Principles while affirming a *cy pres* distribution as provided in a settlement agreement); *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 475-76 (5th Cir. 2011) (citing ALI Principles with approval).

Compensating class members is always the first-best use of settlement funds. "The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 475 (emphasis added). "There is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

Stated simply, when the money can be allocated to the class, it should be. Allowing class counsel and defendants to agree otherwise not only takes funds away from the intended beneficiaries, it also exacerbates conflicts already inherent in class action settlements. *See generally* John Beisner, Jessica Miller & Jordan Schwartz, *Cy Pres: A Not So Charitable Contribution to Class Action Practice* 13 (U.S. Chamber Inst. Legal

Reform, Oct. 2010).[1] Class counsel may be tempted to negotiate *cy pres* distributions that inflate claimed settlement value for purposes of calculating fees, even though they do not necessarily benefit the class. And the parties and even the court may allow personal interests to invade the selection of beneficiaries, giving the appearance of impropriety.

The Supreme Court has yet to address the "fundamental concerns" raised by *cy pres* distributions, including "when, if ever, such relief should be considered" and "how to assess its fairness as a general matter." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari). The Chief Justice, however, has suggested that "[i]n a suitable case, [the] Court may need to clarify the limits on the use of such remedies." *Id.*

This Court should grant rehearing and clarify that the *cy pres* rules annunciated in *BankAmerica* and *Caligiuri*, which inure to the benefit of the class members, apply regardless of whether the parties agreed to a *cy pres* provision in the settlement.

ISSUES PRESENTED

1. Did the Court intend to overrule *BankAmerica's* requirement that surplus funds from a class action settlement be paid, where feasible, to class members rather than third parties? Are parties free to disregard the *cy pres* principles outlined in *BankAmerica* so long as they include a *cy pres* provision in a settlement agreement?

[1] Accessible at https://www.instituteforlegalreform.com/uploads/sites/1/cypres_0.pdf.

2. Is the panel's holding that attorneys need not disclose opinions regarding a potential conflict in representation at odds with the Supreme Court's requirement in *Amchem* that courts affirmatively "uncover conflicts"?

STATEMENT OF THE CASE

This consumer class action settlement releases an estimated $70.5 million in nationwide class damages (A-368) caused by Monsanto's mislabeling of Roundup weed killer. A29-30. Less than a year after commencing litigation, the parties agreed to a $21.5 million common fund to cover class members' claims, attorneys' fees, and other costs. A-152, 155, 159-60. Under the agreement, "any remaining funds will be exhausted through a *cy pres* distribution to a charitable and tax-exempt organization to be mutually determined by the Parties." A-163. The *cy pres* provision does not require a secondary attempt to distribute excess funds to the class.

The $21.5 million was distributed as follows: $10.7 million to the class; $6.1 million in attorneys' fees and costs; $630,944 in notice and settlement administration costs; and $42,500 in service awards to the representative plaintiffs. A-509-511. After the administrator rejected more than 20% of class members' claims[2] and the court

[2] A-496-97.

awarded $1 million less in fees than sought by class counsel,[3] approximately $3.9 million remained in the common fund.[4] A-512.

Class member James Migliaccio objected to the settlement, class counsels' requested fee (A-332-48), and the parties' assertion that the $1 million plus in excess fees could not be returned to the class. A-401-03. Migliaccio also called for the disclosure of expert opinions obtained by class counsel concerning a potential conflict in their dual representation of a certified California class to an uncertified nationwide class. A-332-42, 395-98.

The district court overruled the objections, approved the settlement, and awarded class counsel $6 million plus in fees based on a 5.3 lodestar multiplier. A-491-518. The district court declined to return any of the surplus funds to the class even while acknowledging "a further distribution to claimants is mechanically feasible." A-514 (emphasis added).

Under the terms of the settlement agreement, the court ordered the surplus allocated to charity (the National Consumer Law Center and the Better Business Bureau). A-516. In the court's view, since claimants with approved claims receive full compensatory damages, any amount above that would be a "windfall." *Id.* The district court did not reconcile that with the $21.5 million recovery of $70.5 million in class

[3] Class counsel sought $7,166,666 in fees (A-497); the court awarded $6,020,000 in fees plus $97,614 in costs. A-509-11.

[4] That amount may be reduced by any successful appeals of rejected claims and by additional administrative costs. A-523-24.

damages, or the lack of recovery of punitive damages pled. *BankAmerica Corp.*, 775 F.3d at 1065–66 ("a *cy pres* distribution is not authorized by declaring, as class counsel and the district court did in this case, that 'all class members submitting claims have been satisfied in full.'") (citing *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 433-34 (2d Cir. 2007) (district court improperly failed to consider that full restitution to antitrust plaintiffs includes treble damages in making *cy pres* distribution)).

This Court's panel decision affirmed approval of the settlement, the award of fees, and the *cy pres* distribution. The panel addressed Migliaccio's complaint that reduced attorneys' fees should benefit the class rather than third-party charities "[b]ecause he made this argument below[.]" *Rawa*, 2019 WL 3916537, at *3. The panel found significant that the "court did not order the *cy pres* distribution of the difference in fees—the terms of the settlement agreement did." *Id.* at *6. Without mentioning *BankAmerica*, the panel found no error with the *cy pres* distribution because "[t]he terms of the settlement agreement are always to be given controlling effect." *Id.* (quoting *Klier*, 658 F.3d at 475-76 (emphasis added)). The panel also upheld the decision not to require disclosure of expert opinions on a conflict involving class counsel since Migliaccio could not "name a specific potential conflict that concerns him." *Id.* at *4.

Migliaccio now seeks rehearing en banc.

REASONS FOR GRANTING THE PETITION

The panel decision overrules *BankAmerica* without citing it, inexplicably displacing existing *cy pres* law in the Eighth Circuit. It is now no longer necessary to distribute surplus funds from settlements to class members even when feasible. Under the panel decision, as long as the parties agree to a *cy pres* provision, it should be given effect.

Not only is that not the law as stated in *BankAmerica* (and repeated in *Caligiuri*), it is also discordant with *cy pres* law in other circuits. *See Lupron*, 677 F.3d at 25–26, 31; *Klier*, 658 F.3d at 475-76; *Masters*, 473 F.3d at 433-34. The holding marginalizes what should obviously be a primary concern for any class action settlement—compensating the class members. It also invites attorney abuse and self-dealing.

I. Disregarding limitations on *cy pres* because the parties agreed to it conflicts with precedent from this Circuit.

BankAmerica clarified the legal principles surrounding *cy pres* distributions in the Eighth Circuit, citing with approval recommendations from the ALI concerning *cy pres*. *BankAmerica*, 775 F.3d at 1064. In *BankAmerica*, the district court ordered a *cy pres* distribution of $2.5 million in residual funds. This Court reversed and ordered the funds allocated to the class because a further class distribution was feasible. *Id.* at 1064.

According to *BankAmerica*, "[b]ecause the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is

permissible only when it is not feasible to make further distributions to class members" who have not yet been fully compensated. *Id.* (quoting *Klier*, 658 F.3d at 475 (quoting ALI § 3.07) (emphasis original).

Like this case, the distribution in *BankAmerica* followed the terms of the settlement agreement. *Id.* at 1066. *BankAmerica* explicitly rejected the same principle relied on by the panel here: "that the *cy pres* distribution must be affirmed because the district court and this court are bound by language in the settlement agreement…." *Id.* To the contrary, "[a] proposed *cy pres* distribution must meet [our standards governing *cy pres* awards] regardless of whether the award was fashioned by the settling parties or the trial court." *Id.* (citing *Nachshin*, 663 F.3d at 1040).

Most recently in *Caligiuri*, this Court confirmed that class action settlements, and not just court-ordered *cy pres* distributions, "must meet our standards governing *cy pres* awards." *Caligiuri*, 855 F.3d at 867. The Court reiterated that those standards govern "regardless of whether the award was fashioned by the settling parties or the trial court." *Caligiuri*, 855 F.3d at 867. *Caligiuri* only upheld the *cy pres* distribution that followed a settlement agreement where further class distribution was infeasible. *Id.*

The panel decision in this case conflicts directly with *BankAmerica* and *Caligiuri*. Yet it fails even to distinguish them. The panel deferred to the terms of the settlement, noting that "courts do not rewrite settlement agreements." *Rawa*, 2019 WL 39165374, at *6. True enough. But, neither do they approve or enforce invalid provisions.

The panel decisions' reliance on *Klier* is misplaced. *Rawa*, 2019 WL 3916537, at *6 (citing *Klier*, 658 F.3d at 475-76). In noting that settlement agreements are to be given effect once approved, the Fifth Circuit in *Klier* was not speaking to *cy pres* provisions. *Klier*, 658 F.3d at 476-77. There was no *cy pres* provision in *Klier*. *Id.* *BankAmerica* recognized that this interpretation "misstates the holding of *Klier*, which *overturned* the district court's *cy pres* award because 'a *cy pres* distribution to a third party of unclaimed settlement funds is permissible only when it is not feasible to make further distributions to class members.'" *BankAmerica*, 775 F.3d at 1064 (emphasis original) (quoting *Klier*, 658 F.3d at 475).

Rehearing should not be denied on the district court's justification that any more to the class would be a "windfall." Even if correct, the panel opinion makes no mention of it and instead implicitly overrules *BankAmerica* without addressing it. If nothing else, this Court should grant rehearing to clarify that *BankAmerica* is still good law and parties are not free to contract around *cy pres* limitations.

But, the district court was mistaken that any more to the class would be a "windfall." Whether on a class-wide or individual claimant basis, the settlement is not complete recovery. The $10.7 million actually claimed by the class members is around 15% of class counsels' $70.5 million estimate of class damages. A-368. Even on a per-claimant basis, it is not complete recovery either because the plaintiffs' pled for punitive damages under the Missouri Merchandising Purchases Act. A-51, A-129; Mo. Rev. Stat. §§ 407.025, *et seq*. As *BankAmerica* noted, claimants' recovery of actual

damages doesn't make additional class distribution a "windfall" if there are still uncompensated damages beyond actual damages, such as treble damages. *BankAmerica*, 775 F.3d at 1065-66 (citing *Masters*, 473 F.3d at 434-35). Given the outstanding damages here, the "*cy pres* distribution is not authorized by declaring, as class counsel and the district court did in this case, that 'all class members submitting claims have been satisfied in full.'" *Id.*

Consistent with *BankAmerica*, this Court should vacate the *cy pres* distribution and order the funds allocated to the class. Further, because the district court did not consider whether class counsel met its responsibility to seek "an award that adequately prioritizes direct benefit to the class" in light of the impermissible *cy pres* distribution, the Court should also remand the $6 million fee. *BankAmerica*, 775 F.3d at 1068 (when counsel fail to prioritize class recovery over *cy pres* beneficiaries, the court should consider that among the factors in awarding fees; any fee entered beforehand is "premature" and should be vacated to be considered "upon completion of the additional distribution(s)"); *accord Pearson v. NBTY, Inc.*, 772 F.3d 778, 780, 781 (7th Cir. 2014) (*cy pres* should not be counted as a class benefit in calculating fees).

II. The panel's *cy pres* holding also conflicts with precedent from other circuits.

By allowing parties to earmark funds for charity that can feasibly reach the class, the panel opinion also conflicts with authority from multiple circuits. The Seventh Circuit has held that a *cy pres* distribution of residual funds under the terms of

a settlement agreement was impermissible because the funds could have "feasibly be[en] awarded to the intended beneficiaries[,]" *i.e.,* the class members. *Pearson*, 772 F.3d at 780, 784.

The Second Circuit also does not allow funds that can feasibly reach the class to be diverted to charity simply because there is a *cy pres* provision. In *Masters*, the Court of Appeals reversed a *cy pres* distribution made pursuant to a settlement agreement since there was no indication that "it would be onerous or impossible to locate class members or because each class member's recovery would be so small as to make an individual distribution economically impracticable." 473 F.3d at 436.

The First Circuit essentially tracks the ALI Principles (and *BankAmerica*), and only allows *cy pres* distributions under the terms of a settlement agreement, even where the funds could feasibly reach the class, if there has been complete class recovery and any more would be a windfall. *Lupron*, 677 F.3d at 32-35.

The only circuit to allow funds that can feasibly reach the class (and not provide a windfall) to nevertheless go to charity is the Ninth Circuit. In *Easysaver Rewards*, the Ninth Circuit allowed a *cy pres* distribution under a settlement even though additional payments to the class "might be technically feasible" because payment on a per-claimant would be "*de minimis*." *In re Easysaver Rewards Litig.*, 906 F.3d 747, 761 (9th Cir. 2018), *cert. denied sub nom. Perryman v. Romero*, 139 S. Ct. 2744 (2019) (citation omitted).

The panel's decision here is out of step with most circuits and only widens the ostensible circuit split. This is an issue of exceptional importance because the concept of distributing settlement funds to class members rather than some third party should not turn on the vagaries of where the class action settlement is approved.

III. The panel's holding harms consumers and invites abuse.

Considering the judiciary's role as guardian of the rights of absent class members,[5] *BankAmerica* set appropriate boundaries for *cy pres* distributions. If this Court is inclined to abandon *BankAmerica*, it should do so head-on and address the concerns that prompted the guidelines in the first place.

Allowing parties to contract to pay charities instead of class members even when class distribution is feasible takes funds away from the intended beneficiaries. *BankAmerica*, 775 F.3d at 1060 ("settlement funds are the property of the class"). "[I]n most circumstances distributions to class members better approximate the goals of the substantive laws than distributions to third parties that were not directly injured by the defendant's conduct." ALI Principles, § 3.07 cmt. B; *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) (cautioning that "direct distributions to the class are preferred over *cy pres* distributions").

It also invites class counsel to compromise class interests in favor of *cy pres* distributions that inflate settlement value so counsel can "reap exorbitant fees regardless of whether the absent class members are adequately compensated."

Beisner, at 13; *see also Baby Products*, 708 F.3d at 178*; S.E.C. v. Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 415–16 (S.D.N.Y. 2009).

Further, if *cy pres* provisions in settlements are unassailable, class counsel and defendants may be emboldened to designate charities in which they have a vested interest. *See* Adam Liptak, *Doling out Other People's Money,* N.Y. Times, Nov. 26, 2007 ("Lawyers and judges have grown used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like."); *see also Bear, Stearns*, 626 F. Supp. 2d at 415–16 (listing cases in which *cy pres* distributions benefitted causes in which defendants already had an interest). Or, parties may be tempted to select charities favored by judges to increase the likelihood of settlement approval. *See Nachshin*, 663 F.3d at 1039 ("the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety"); Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 101 (Nov. 2014) ("reviewing courts may enjoy the opportunity to steer the funds to a favored charity or alma matter.").

As this Court noted in *BankAmerica*, the Chief Justice of the Supreme Court has recognized that *cy pres* is "a growing feature of class action settlements" that raises "fundamental concerns." *Marek*, 134 S. Ct. at 9 (Roberts, C.J., respecting denial of certiorari). Those include "when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part

[5] *See e.g., In re Wireless Telephone*, 396 F.3d 922, 932 (8th Cir. 2005).

of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on." *Id.*

BankAmerica provides clear guidelines for *cy pres* distributions. The panel abandons them in favor of the sanctity of the parties' agreement. But Rule 23, by design, limits settlement agreements between class counsel and defendants given the conflicts of interests inherent in class action settlements. *See generally* Martin H. Redish, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 621-22 (July 2010).

This Court should grant rehearing *en banc* and clarify that *BankAmerica* is still the law, that *cy pres* distributions aren't appropriate where class redistribution is feasible, and that *BankAmerica's* limitations apply to *cy pres* provisions in class action settlements.

IV. The panel's holding that class counsel are not required to disclose expert opinions about a potential conflict of interest in their representation of the class conflicts with *Amchem*.

The panel opinion also conflicts with the Supreme Court's requirement that in certifying settlement classes, district courts must "uncover conflicts of interest between named parties and the class they seek to represent," as well as the "competency and conflicts of class counsel." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 626 n. 20 (1997). Class counsel consulted multiple experts on a potential conflict involving dual representation of the already certified California class and an

uncertified nationwide class. A-412; CC's Opening Brief at 15 ("Mr. Fitzgerald contacted several ethics experts to ensure there was in fact nothing about transferring the action that would create a legitimate conflict."). Migliaccio called for disclosure of the opinions and presented a declaration from co-counsel in the California class who believed there was, in fact, a conflict. A-409.[6]

The panel decision concludes the district court did not abuse its discretion since Migliaccio does not "name a specific potential conflict that concerns him." *Rawa*, 2019 WL 397165374, at *4. That conclusion relieves the district court of its Rule 23(a)(4) obligations. The fact that the clients do not have the details about the potential conflict involving their counsel is precisely the point. "Class representatives are … fiduciaries of the class members, and fiduciaries are not allowed to have conflicts of interest without the informed consent of their beneficiaries." *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 714 (7th Cir. 2015); *Sheftelman v. Jones,* 667 F. Supp. 859, 865–66 (N.D. Ga. 1987) ("the court can and will require that the notice to the class members disclose the alleged conflict. Other courts have adopted this measure to ensure adequacy of representation").

The Model Rules of Professional Conduct require attorneys to provide their clients informed consent concerning any conflict of interest. Mod. R. Prof'l Cond. 1.7; *In re Katrina Canal Breaches Consol. Litig.*, No. CV 05-4182, 2008 WL 11355078, at *4

[6] The panel decision fails to address the district court's disregard for the declaration on the mistaken belief that it was unsigned. A-410, A-508.

(E.D. La. Aug. 13, 2008) (informed consent of conflict was obtained from all named individual plaintiffs in class action). The California Rules of Professional Responsibility (applicable to counsel representing the certified California class) prohibit representation of more than one client "without the informed written consent of each client" when "the interests of the client potentially conflict[.]" CPRC, Rule 3-310(c) (emphasis added).

Considering "the responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel[,]" *Kayers v. Pacific Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir. 1995),[7] class counsels' consultation with multiple experts on a conflict required, at a minimum, disclosure of the opinions. The panel decision flips the burden and requires class members to investigate and then specifically name a conflict while at the same time precluding the class members from reviewing the documents which speak to the potential conflict.

CONCLUSION

Class member James Migliaccio respectfully requests that the Court grant his petition for rehearing en banc to avert a conflict with *BankAmerica*, *Cailiguiri*, and *Amchem*.

Respectfully submitted,

Dated: September 17, 2019

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[7] *See also Sandoval v. M1 Auto Collisions Ctrs.*, 309 F.R.D. 549, 569 (N.D. Cal. 2015) ("even the appearance of divided loyalties of counsel is contrary to class counsel's responsibility to absent class members").

CERTIFICATION OF COMPLIANCE WITH PAGE LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type–volume limitations of Fed. R. App. P. 35(b)(2)(A) because this brief contains 3,897 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2016 in 14–point Garamond font.

Dated: September 17, 2019

/s/ Robert W. Clore
Robert W. Clore

ANTI-VIRUS CERTIFICATION

In accordance with Eighth Circuit Local Rule 28A(h)(2), I hereby certify that the Motion for Reconsideration thereto have been scanned for viruses and are virus–free.

Dated: September 17, 2019

/s/ Robert W. Clore
Robert W. Clore