
No. 12-0604

In the Supreme Court of Texas

HIGHLAND HOMES LTD.,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Review from the
Eighth Court of Appeals, El Paso, Texas
Cause No. 08-10-00215-CV

**BRIEF OF AMICI CURIAE TEXAS ACCESS TO JUSTICE FOUNDATION,
TEXAS ACCESS TO JUSTICE COMMISSION, AND TEXAS APPLESEED**

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<i>In re Infant Formula Multidistrict Litig.</i> , No. 4:91-cv-00878-MP (N.D. Fla. 2005)	6
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<i>In re Motorsports Merch. Antitrust Litig.</i> , 160 F. Supp. 2d 1392 (N.D. Ga. 2001).....	6, 14

<i>In re Pharm. Indus. Average Wholesale Price Litig.</i> , 588 F.3d 24 (1st Cir. 2009).....	5
<i>In re Vitamin Cases</i> , 132 Cal. Rptr. 2d 425 (Cal. Ct. App. 2003).....	7
<i>Jones v. National Distillers</i> , 56 F. Supp. 2d 355 (S.D.N.Y 1999)	6
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<i>Superior Beverage Co. v. Owens-Illinois, Inc.</i> , 827 F. Supp. 477 (N.D. Ill. 1993).....	6
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Mass. R. Civ. P. 23(e)(2)	8
N.C. Gen. Stat. § 1-267.10(a)-(b)	8

S.D. Codified Laws § 16-2-57	8
Tex. Prop. Code, tit. 6, chs. 72-76	3, 12-14
Tex. R. App. P. 11(c)	1
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Other Authorities

<i>Access to Justice Facts</i> , Tex. Access to Justice Found., http://www.teajf.org/news/statistics.aspx (last visited Oct. 1, 2012)	9
<i>Cy Pres & Residual Fund Awards</i> , Chicago Bar Found., http://www.chicagobarfoundation.org/cy-pres-awards (last visited Oct. 1, 2012)	10
<i>Cy Pres for Civil Legal Services</i> , N.Y. State Bar Ass’n (Apr. 1, 2006), http://www.nysba.org/AM/Template.cfm?Section=	10
<i>Dallas firm The Rasansky Law Firm secures \$230K award for Texas Access to Justice Foundation</i> , Pegasus News (May 29, 2009), available at http://www.pegasusnews.com/news/2009/may/29/dallas-firm-rasansky-law-firm-secures-230k-award-t/	5
<i>Five Year Strategic Plan for the Texas Access to Justice Commission</i> , TexATJ.org (May 27, 2009), http://www.texasatj.org/files/file/5%20YR%20Strategic%20Plan%20Adopted%20052709.pdf	9
<i>Impact on Justice Through Court Awards Toolkit</i> , Tex. Access to Justice Found. (Sept. 2010), http://www.teajf.org/donate/Cy%20Pres%20Toolkit%20Version%20Sept%202010%20(web-low-res).pdf	9
<i>Legal aid groups get cut of multi-million dollar settlement</i> , San Antonio Bus. J. (Sept. 17, 2010), available at http://www.bizjournals.com/sanantonio/stories/2010/09/13/daily42.html	5
<i>Legal Aid Receives \$18,000 Cy Pres Award</i> , LegalFront, 19 (Fall 2009), available at http://www.texasatj.org/files/file/LegalFrontFall2009.pdf	5
<i>Legal Aid to Receive \$26,000 Donation</i> , Tex. RioGrande Legal Aid Newsroom (May 29, 2008), available at http://trla.wordpress.com/2008/05/29/legal-aid-to-receive-26000-donation/	5

Legal Hospice of Texas receives 'cy pres' award, Dallas Voice (Nov. 12, 2010),
available at [http://www.dallasvoice.com/legal-hospice-texas-receives-cy-
pres-award-1052099.html](http://www.dallasvoice.com/legal-hospice-texas-receives-cy-pres-award-1052099.html).....5

RECORD REFERENCES

CR ____

Clerk's Record

Supp. CR ____

[Volume] Supplemental Clerk's Record

HH Pet. at ____

Highland Homes Ltd.'s Petition for Review

ADOPTION OF PORTIONS OF HIGHLAND HOMES'S PETITION

Amici curiae adopt the list of parties and counsel, the statement of the case, the statement of jurisdiction, the issue presented, and the statement of facts in Highland Homes Ltd.'s Petition for Review.

STATEMENT OF INTEREST OF AMICI CURIAE

Texas Access to Justice Foundation, Texas Access to Justice Commission, and Texas Appleseed (“Amici”) respectfully submit this brief of *amici curiae* in support of Petitioner Highland Homes Ltd. In compliance with Texas Rule of Appellate Procedure 11(c), Amici state that no fee was charged or paid for the preparation of this brief.

Texas Access to Justice Foundation (TAJF) is the leading funder of legal aid in Texas. The need for legal aid here is staggering, and resources are scarce. *See infra* at 8-10. To help address this problem, TAJF grants millions of dollars each year to approximately 35-40 nonprofit organizations throughout the state. Annually, grants from TAJF have assisted more than 100,000 low-income Texans with their civil legal needs, including more than 10,000 victims of domestic violence, 17,000 people with disabilities, and 10,000 elderly individuals.

Texas Access to Justice Commission (TAJC), created by the Supreme Court of Texas in 2001, is charged with developing and implementing initiatives to improve the scope and quality of legal aid for low-income Texans. TAJC consists of members from the legal, education, public-service, and nonprofit sectors.

In 2008, TAJF and TAJC created a Joint Court Awards Strategies Committee to identify court-awards strategies to increase funding for legal aid. These strategies include cy pres. The committee was created at a time when a dramatic drop in revenue from IOLTA (Interest on Lawyers’ Trust Accounts), due to historically low interest rates, threatened to destroy the fragile legal-aid infrastructure in this state. Since then, the

committee has engaged in a comprehensive campaign to educate Texas lawyers and judges about cy pres and how those funds can immensely benefit legal-aid programs.

Texas Appleseed is a nonprofit organization that promotes social and economic justice for all Texans by identifying and implementing practical solutions to difficult systemic problems with the help of volunteer lawyers and other professionals. Its efforts have included work on a broad range of issues. Texas Appleseed is affiliated with the National Appleseed and is one of 17 members of the Appleseed network in 16 states and Mexico City. As a nonprofit organization devoted to helping underserved Texans and addressing systemic problems, Texas Appleseed is acutely aware of the funding challenges facing many nonprofit programs and organizations. While it has, to date, never received a cy pres award from a class-action lawsuit, it would be pleased to do so and is aware that National Appleseed and Appleseed Centers in other states have received, and are actively seeking, such funding.

Cy pres awards are a well-known source of funding for nonprofits throughout the country. This revenue stream, although sporadic, is a significant and essential piece in the patchwork of nonprofit funding. Amici are deeply concerned that the court of appeals' opinion in this case will chill the use of cy pres awards in Texas state courts.

SUMMARY OF ARGUMENT

This case presents an issue of the greatest importance to legal-aid and charitable organizations in Texas: can unclaimed class-action settlement funds be distributed, by agreement, through a court-approved cy pres award to appropriate nonprofit organizations?

Under Texas law, Highland Homes is correct—the answer is clearly yes. The trial court agreed, but the court of appeals erroneously reversed and struck the cy pres award from the parties’ settlement agreement. *State v. Highland Homes, Ltd.*, --- S.W.3d ----, 2012 WL 2127721, at *8 (Tex. App.—El Paso 2012, pet. filed).

In so holding, the court of appeals disregarded a national trend favoring cy pres awards in class settlements. Numerous courts, both in Texas and elsewhere, have recognized cy pres as a favored method of distributing residual class-settlement funds. As a result, nonprofit organizations have increasingly and unabashedly relied on cy pres awards as an essential source of necessary funding. If these awards become more difficult to obtain, many nonprofits already struggling with limited resources will face even higher hurdles going forward.

Amici believe that the court of appeals’ opinion will have exactly this unwarranted chilling effect on cy pres awards in Texas. If the cy pres award here cannot stand, many awards in future class settlements will also fail (and ultimately will never be negotiated in the first place). This result would be legally unjustifiable, as the court of appeals’ holding relies on an erroneous application of Texas’s Unclaimed Property Act. Tex. Prop. Code, tit. 6, chs. 72-76.

Because of its potential impact on nonprofit funding, this case warrants review. Amici respectfully ask this Court to correct the court of appeals’ flawed analysis and preserve the viability of cy pres awards to deserving Texas nonprofits.

ARGUMENT

I. Cy pres awards provide an important and widely-recognized source of desperately needed funding for nonprofit organizations.

The court of appeals' decision in this case carries serious ramifications for Texas nonprofits. In recent years, cy pres awards have become a critically important source of nonprofit funding. Recognizing that these organizations constantly struggle with limited resources, courts around the nation (including in Texas) have regularly endorsed cy pres as a preferred method of distributing residual class-settlement funds.

Here, the court of appeals spurned this widely-accepted charitable practice. Relying on an erroneous ownership-rights analysis, *see infra* section II.A, the court of appeals overturned the parties' agreed-upon cy pres award and held that any residual settlement funds must escheat to the state under Texas's Unclaimed Property Act. *Highland Homes*, 2012 WL 2127721, at *8. If not corrected by this Court, this errant precedent will, without basis, put Texas significantly out-of-step with the national trend favoring cy pres in class settlements. It will also undercut an established, much-needed source of funding for Texas nonprofits.

A. Courts consistently favor cy pres as a means of distributing residual class-settlement funds.

Over the past several decades, numerous courts have ordered or approved cy pres distributions of residual class-settlement funds. These courts have often done so over competing claims to the residual funds by class members, settling defendants, or (as here) the state.

Texas is no exception. Courts here, both federal and state, have repeatedly endorsed cy pres awards in class settlements.¹ Perhaps most notably for purposes here, in *Meyers v. State*, a district court in the Western District of Texas implemented a cy pres award of more than \$2,600,000 to TAJF and five other Texas legal-aid organizations. *Meyers*, 2010 WL 7505813, at *1; *Legal aid groups get cut of multi-million dollar settlement*, *supra* n.1. Over \$800,000 of this award went directly to TAJF, which then disbursed the funds to numerous legal-aid providers throughout Texas.

The *Meyers* decision is far from an outlier. Indeed, courts' unmistakable preference for cy pres extends far beyond Texas. Federal courts from California to New York have regularly distributed residual settlement funds via cy pres.² In many of these

¹ See, e.g., *Meyers v. State*, No. A-00-CV-00430, 2010 WL 7505813 (W.D. Tex. Feb. 16, 2010) (implementing a cy pres award to six legal-aid organizations, including TAJF, and twenty-nine other charitable organizations); Final Judgment Approving Class Action Settlement at 5, *Shank v. Hudson & Keyse, LLC*, No. 06-CV-00508 (W.D. Tex. Aug. 15, 2007), ECF No. 27 (approving a cy pres award to Texas Lawyers Care of funds from all settlement checks not cashed within 120 days after distribution to class members); *Chemject Int'l, Inc. v. Sw. Bell Tel. Co.*, No. 13-04-567-CV, 2007 WL 177651, at *1 & n.3, *11 (Tex. App.—Corpus Christi Jan. 25, 2007, pet. denied) (mem. op.) (upholding a \$10 million cy pres award); see also *Legal aid groups get cut of multi-million dollar settlement*, San Antonio Bus. J. (Sept. 17, 2010), available at <http://www.bizjournals.com/sanantonio/stories/2010/09/13/daily42.html> (reporting distribution of cy pres award of \$2,600,000 to legal-aid organizations following settlement in *Meyers*); *Legal Hospice of Texas receives 'cy pres' award*, Dallas Voice (Nov. 12, 2010), available at <http://www.dallasvoice.com/legal-hospice-texas-receives-cy-pres-award-1052099.html> (describing cy pres awards, *Meyers* lawsuit, and share of \$9,000,000 award distributed to legal aid and other nonprofit organizations); *Legal Aid to Receive \$26,000 Donation*, Tex. RioGrande Legal Aid Newsroom (May 29, 2008), available at <http://trla.wordpress.com/2008/05/29/legal-aid-to-receive-26000-donation/> (describing a cy pres award to Texas RioGrande Legal Aid arising from a consumer class action); *Dallas firm The Rasansky Law Firm secures \$230K award for Texas Access to Justice Foundation*, Pegasus News (May 29, 2009), available at <http://www.pegasusnews.com/news/2009/may/29/dallas-firm-rasansky-law-firm-secures-230k-award-t/> (describing a cy pres award of \$230,160 to TAJF in a class settlement); *Legal Aid Receives \$18,000 Cy Pres Award*, LegalFront, 19 (Fall 2009), available at <http://www.texasatj.org/files/file/LegalFrontFall2009.pdf> (reporting second cy pres award from attorney Scott Vogelmeier to Texas RioGrande Legal Aid).

² See, e.g., *Nelson v. Mead Johnson & Johnson Co.*, No. 11-15956, 2012 WL 2947212, at *4 (11th Cir. July 20, 2012) (per curiam) (affirming district court's approval of a cy pres award in an \$8,000,000 deceptive-trade-practices settlement); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 30-39 (1st Cir. 2012) (affirming a cy pres award of \$11,400,000 for cancer research); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-36 (1st Cir. 2009) (affirming district court's approval, in a settlement between consumers and pharmaceutical companies, of a \$10 million cy pres award); *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 149 (2d Cir. 2005) (upholding a cy pres award to Holocaust victims totaling more than \$200 million); *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 683-84 (8th Cir. 2002) (ordering cy pres distribution to travel agencies in Puerto Rico

cases, the court ordered a cy pres distribution despite the objection of a settling party. *See, e.g., Nelson*, 2012 WL 2947212, at *4 (rejecting a class member’s objection that cy pres would prevent the class from being “fully compensated”); *In re Lupron Mktg.*, 677 F.3d at 30-39 (rejecting arguments by dissident class members that cy pres was improper because (1) residual settlement funds should have been used to provide treble damages, (2) the district court was impermissibly allowed to select the cy pres beneficiary, and (3) the cy pres beneficiary did not meet the alleged “nexus” requirement); *In re Motorsports Merch.*, 160 F. Supp. 2d at 1394 (rejecting Defendants’ argument that any residual settlement funds should be returned to them). Federal courts have also explicitly rejected arguments that residual settlement funds should escheat to the state in lieu of cy pres. *See, e.g., In re Lupron Mktg.*, 677 F.3d at 33 (“The ALI Principles also reject escheat to the state as a more preferable option [versus cy pres].” (citing A.L.I., Principles of the Law of Aggregate Litig. § 3.07 cmt. b)).

and the U.S. Virgin Islands in airline antitrust settlement); *Hart v. Guardian Credit Union*, --- F. Supp. 2d ---, 2012 WL 2512906 (M.D. Ala. 2012) (approving cy pres distribution to a local charity, the Public Safety Insurance Fund, in class settlement); *McDonough v. Toys "R" Us, Inc.*, 834 F. Supp. 2d 329, 351-53 (E.D. Pa. 2011) (approving cy pres award in \$35,000,000 settlement of an antitrust action against a major national retailer); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1354-57 (S.D. Fla. 2011) (approving cy pres award to charities in \$410,000,000 settlement); *In re Ky. Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 280 F.R.D. 364, 373, 387 (N.D. Ill. 2011) (approving class-settlement cy pres award to a domestic hunger-relief charity and two local bar associations providing legal-aid services); *La Parne v. Monex Deposit Co.*, No. SACV 08-0302, 2010 WL 4916606, at *4 (C.D. Cal. Nov. 29, 2010) (ordering that residual settlement funds be distributed via cy pres to the Red Cross); Order, *In re Infant Formula Multidistrict Litig.*, No. 4:91-cv-00878-MP (N.D. Fla. Sept. 8, 2005), ECF No. 706 (approving class-settlement cy pres award of over \$700,000 to the Red Cross); *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1394 (N.D. Ga. 2001) (ordering cy pres award of \$250,000 to each of nine legal-aid and charitable organizations in a price-fixing class-action settlement); *Jones v. Nat’l Distillers*, 56 F. Supp. 2d 355, 358-60 (S.D.N.Y. 1999) (approving cy pres award to Legal Aid Society in settlement of securities-fraud class action); *Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 480-87 (N.D. Ill. 1993) (ordering cy pres distributions of residual settlement funds—totaling over \$2,000,000—to fifteen charities, legal-aid providers, and educational institutions); *see also* 4 William B. Rubenstein, Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:33 (4th ed. 2010) (collecting cases in which cy pres awards have been made). Federal statutory law also favors cy pres awards in certain contexts. *See* 28 U.S.C. § 1712(e) (providing that, in “coupon” settlements under the Class Action Fairness Act, a federal court may require distribution of unclaimed settlement coupons to one or more charitable or governmental organizations selected by the parties).

Tracking these Texas and federal decisions, numerous other state courts have used cy pres to distribute residual settlement funds to nonprofit organizations. In New York, for instance, a state trial court approved a class settlement that included a \$2,500,000 cy pres award to the National Institute of Health (NIH). *Fiala v. Metro. Life Ins. Co.*, 899 N.Y.S.2d 531, 539-40 (N.Y. Sup. Ct. 2010). Justifying the award, the court explained that locating additional class members for distribution of the residual funds would require “great expense.” *Id.* at 540. Many class members would never be found; meanwhile, the cost of searching would significantly deplete the \$2,500,000. *Id.* Rather than requiring this counterproductive search, the court awarded the funds to the NIH for immediate allocation to national health-related research projects. *Id.* at 540, 542.

Other state courts have held similarly. As with the federal decisions above, many state courts have ordered cy pres distributions while rejecting competing claims to the residual settlement funds. *See, e.g., Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260, 264-67 (Mo. Ct. App. 2011) (per curiam) (affirming a cy pres award of residual settlement funds to a charitable housing foundation, despite the argument of class objectors that the funds should go to the class); *In re Vitamin Cases*, 132 Cal. Rptr. 2d 425, 429-35 (Cal. Ct. App. 2003) (holding that California law does not require a settlement to “allow for individual claims before its fund can be distributed via cy pres relief,” and rejecting objectors’ argument to the contrary); *see also In re Microsoft I-V Cases*, 37 Cal. Rptr. 3d 660, 675 (Cal. Ct. App. 2006) (“The court’s proper focus in this context is not so much whether another type of distribution might be better, but the extent to which the [cy pres] distribution, as proposed, is appropriately useful . . .”). Some

states have also gone a step further, enacting laws that *require* residual settlement funds to be designated for legal-aid organizations or other nonprofits. *See* Cal. Code Civ. P. § 384; Mass. R. Civ. P. 23(e)(2); N.C. Gen. Stat. § 1-267.10; S.D. Codified Laws § 16-2-57; 735 Ill. Comp. Stat. Ann. 5/2-807; Wash. Sup. Ct. Civ. R. 23(f).

The cases above are by no means exhaustive. Many courts have ordered cy pres awards to deserving nonprofits. Of course, some other courts have disallowed cy pres awards in certain cases. *See Highland Homes*, 2012 WL 2127721, at *6-8 (citing *State v. Snell*, 950 S.W.2d 108 (Tex. App.—El Paso 1997, no writ), and *All Plaintiffs v. All Defendants*, 645 F.3d 329 (5th Cir. 2011)). However, as explained by *Highland Homes*, these distinguishable cases do not dispose of the issue here. *See* HH Pet. at 12-14. And regardless, the decisions and statutes above signify cy pres as a favored method of distributing residual class-settlement funds.

B. Nonprofit organizations, particularly Texas legal-aid providers, have come to rely on cy pres awards.

As cy pres awards in class settlements have become increasingly prevalent, nonprofit organizations have come to rely on those awards as a source of funding. Because these organizations so often lack adequate resources, cy pres awards—though sporadic and unpredictable—have become a crucial part of their revenue streams.

This is especially true for legal aid in Texas. Because the need here is so great, every cent of available funding is essential. According to TAJF’s most recent data, 4.6 million Texans currently live below the poverty level. *Access to Justice Facts*, Tex. Access to Justice Found., <http://www.teajf.org/news/statistics.aspx> (last visited Oct. 1,

2012). In all, 6 million Texans qualify for legal aid. *Id.* However, due in part to low starting salaries and high law-school debt, Texas suffers from a significant shortage of public-interest lawyers. *See id.* There is approximately one legal-aid lawyer for every 11,152 Texans who qualify. *Id.* Texas legal-aid programs are meeting only 20-25% of the state’s needs. *Id.* For every low-income Texan helped by legal aid, another qualifying Texan must be turned away. *Id.*

Attempting to combat these harsh economic realities, Amici and other Texas nonprofits have worked to increase the use of cy pres for legal aid. In 2009—*before* the settlement in this case—TAJC published a five-year strategic plan for statewide delivery of legal aid to low-income Texans. *Five Year Strategic Plan for the Texas Access to Justice Commission*, TexATJ.org (May 27, 2009), <http://www.texasatj.org/files/file/5%20YR%20Strategic%20Plan%20Adopted%20052709.pdf>. This plan called for renewed efforts to promote cy pres, noting that cy pres distributions have “enormous[ly] benefit[ted]” access-to-justice initiatives in other states. *Id.* at 2. Through a comprehensive campaign, TAJF and TAJC’s Joint Court Awards Strategies Committee now actively encourages Texas lawyers and judges to consider making cy pres awards to Texas legal-aid organizations. *See, e.g., Impact on Justice Through Court Awards Toolkit*, Tex. Access to Justice Found. (Sept. 2010), [http://www.teajf.org/donate/Cy%20Pres%20Toolkit%20Version%20Sept%202010%20\(web-low-res\).pdf](http://www.teajf.org/donate/Cy%20Pres%20Toolkit%20Version%20Sept%202010%20(web-low-res).pdf).

This campaign has undoubtedly increased both statewide awareness about the importance of cy pres and the number and amount of cy pres distributions. As discussed

above, TAJF has been designated as a cy pres recipient in a handful of fairly recent class settlements. *See supra* at 5 & n.1. These generous awards have assisted tremendously in its mission to expand the scope and quality of legal aid throughout Texas.

Further, although resources are especially scarce in Texas, reliance on cy pres for legal aid is a nationwide phenomenon. For instance, the Chicago Bar Foundation actively promotes cy pres as a means of funding the organization's access-to-justice initiatives. *Cy Pres & Residual Fund Awards*, Chicago Bar Found., <http://www.chicagobarfoundation.org/cy-pres-awards> (last visited Oct. 1, 2012). Due to several cy pres awards in recent years, the Foundation has been able to "significantly increase its annual grants to almost 40 pro bono and legal aid organizations." *The Chicago Bar Foundation & Awards of Cy Pres & Residual Funds*, Chicago Bar. Found., 2, http://www.chicagobarfoundation.org/images/stories/Support-Us/cy_pres/cbf_cy_pres_fact_sheet.pdf (last visited Oct. 1, 2012).

Similarly, the New York State Bar Association has aggressively campaigned for cy pres awards to combat recent decreases in federal and state funding for legal aid. Special Comm. on the Funding for Civil Legal Servs., *Cy Pres for Civil Legal Services*, N.Y. State Bar Ass'n (Apr. 1, 2006), <http://www.nysba.org/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=58743>.

Unfortunately, despite similar efforts in Texas, the situation here is still far from satisfactory. Texas falls well below the national average in per-capita funding for civil legal aid, even accounting for the recent increase in cy pres awards. As of 2011, Texas ranked just 39th nationally in this area. Future improvements to Texas legal aid will

necessarily require increased revenue. To achieve the best possible results for all Texans, cy pres distributions will need to factor heavily into this potential revenue stream.

Put simply, legal aid in Texas faces a markedly uphill battle. With any decrease in the availability of cy pres, the climb becomes that much steeper.

II. The court of appeals' erroneous decision will impair cy pres funding for many Texas nonprofits, including TAJF and other legal-aid organizations.

As the data above illustrate, Texas legal aid currently faces serious challenges. The root of the problem is clear: demand vastly exceeds supply. In a climate where access to justice is already so tenuous, low-income Texans can hardly afford another impediment to legal-aid funding.

Yet the court of appeals has created precisely that impediment. If the cy pres award here cannot stand—as the court of appeals held—similar awards in future Texas class settlements will also fail.

Indeed, the settlement here is the perfect example of a properly executed cy pres award. The settling parties undertook extensive efforts to ensure that the settlement checks would successfully reach the class members. *See Highland Homes*, 2012 WL 2127721, at *2; *see also* HH Pet. at 1-2. Highland Homes hired Rust Consulting, one of the most experienced and effective claims administrators in the country, to implement the settlement and locate class members. *Highland Homes*, 2012 WL 2127721, at *2; *see also* 3 Supp. CR 4-5. Rust used advanced software to update the addresses of every class member, attempting to ensure that no class member would fail to receive a settlement check. *See* 3 Supp. CR 4-5.

In contrast to other types of settlement administrations, this procedure maximized the chances that the class members would receive their settlement checks. However, no claims-administration procedure can ever guarantee 100% success in locating class members. Correctly recognizing this fact, the parties here agreed that cy pres was an appropriate means of distributing any unclaimed settlement funds. Unlike in some other cases,³ the parties expressly agreed to both the cy pres distribution itself and the specific cy pres beneficiary—the Nature Conservancy, an international nonprofit organization. CR 258-60. Further, the settlement agreement did not allow *any* funds to be distributed via cy pres until the claims procedures were followed and a class member either (1) could not be located, or (2) did not negotiate his settlement check within 90 days. *See Highland Homes*, 2012 WL 2127721, at *2; *see also* CR 258-60 (settlement agreement).

Despite the parties' extensive efforts in ensuring a fair settlement administration, the court of appeals concluded that any unclaimed settlement funds must escheat to the state's custody under Texas's Unclaimed Property Act. Tex. Prop. Code, tit. 6, chs. 72-76. This conclusion was legally incorrect. Amici will not repeat in detail Highland Homes's convincing arguments about why the residual settlement funds here are not subject to the Act. *See* HH Pet. at 6-14. However, Amici wish to emphasize two pervasive flaws in the court of appeals' analysis.

³ Courts have frequently ordered cy pres distributions even in the absence of an agreement by the parties. *See supra* at 5-6. Courts have also ordered cy pres distributions over the objection of a party. *See, e.g., In re Motorsports Merch.*, 160 F. Supp. 2d at 1394 (rejecting Defendants' claim to residual settlement funds).

A. The court of appeals glossed over the controlling issue of ownership rights.

First, the court of appeals failed adequately to consider the most important issue in this case—ownership rights in the unclaimed settlement checks. As the court correctly noted, the Unclaimed Property Act protects “*the owner’s* right to receive or recover property.” *Highland Homes*, 2012 WL 2127721, at *5 (emphasis added). The Act accomplishes this goal by authorizing the Comptroller to hold abandoned property in escheat on the owner’s behalf. The Act defines abandoned property in terms of the property’s owner. *See* Tex. Prop. Code. § 72.101(a) (“[P]ersonal property is presumed abandoned if, for longer than three years: (1) the existence and location of the *owner* of the property is unknown” (emphasis added)). Once property has escheated to the Comptroller, the Act allows the owner to file a claim to retrieve the property. *Id.* § 74.501. In short, the Act establishes that only an owner can abandon property that then escheats, and only an owner can later claim that property from the state.

With this in mind, the court of appeals’ judgment rests on an important assumption: a class member owns “his” share of the settlement funds *even if* he failed to comply with the established procedure for claiming a settlement check. *See Highland Homes*, 2012 WL 2127721, at *8 (ordering the claims administrator to “hold the unclaimed checks for the benefit of the Comptroller *until such funds are presumed abandoned* [by the class members who ‘own’ them]” (emphasis added)).

This assumption is incorrect. As *Highland Homes* explains, the settlement agreement is the class members’ *only* source of ownership rights in the settlement funds.

See HH Pet. at 6-14. If a class member fails to comply with the terms of the settlement agreement—e.g., by failing to cash his check on time—he has no other possible basis for claiming that he owns any settlement funds. Further, if the class member does not own any settlement funds, he cannot presumptively “abandon” those funds under the Act. *See* Tex. Prop. Code § 72.101(a) (establishing that property can be presumed abandoned by its “owner”). And because the class member does not own the funds, he will never be able to file a claim with the Comptroller to retrieve those funds from escheat. *See id.* § 74.501(d)(1) (authorizing a claim by the property’s owner).

The court of appeals effectively usurped the parties’ authority to determine who owns the settlement funds and a defendant’s right to specify the terms under which it will use its property to fund a settlement. The terms of a settlement agreement are paramount in establishing ownership rights. *See In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1254 (7th Cir. 1984) (noting that, under the settlement agreement, “neither the class plaintiff nor the settling defendants have any right to the reserve fund”); *accord Wilson v. Sw. Airlines, Inc.*, 880 F.2d 807, 812 (5th Cir. 1989); *In re Motorsports Merch.*, 160 F. Supp. 2d at 1394. The court of appeals glossed over this basic principle. By doing so, the court erroneously applied the Act’s abandonment and escheat provisions to property that the nonparticipating class members simply do not own.

B. The court of appeals’ opinion endorses bad public policy for class settlements.

Second, the court of appeals’ opinion is troubling from a policy standpoint. The court of appeals reasoned that this case differs from many other class settlements

because: (1) “the class members were identified by name”; (2) “special software was used” to update class member addresses; (3) “an address was identified for each class member”; and (4) “a check was actually issued to each class member.” *Highland Homes*, 2012 WL 2127721, at *7. The court of appeals used these four facts to support its ultimate conclusion that the class members owned the settlement checks. *Id.*

What these four facts actually reflect, however, is that Highland Homes (and Rust Consulting) undertook the full administrative burden of identifying class members, updating their addresses, and issuing checks to each of them. *See* CR 258-60. This streamlining *increased* the likelihood that the class members would receive the checks.

Highland Homes was not obligated by law to undertake these obligations—the settling parties could have agreed to a “claims made” settlement. That type of settlement would have shifted the administrative burden of filing a claim to the class members, making it *less* likely that all class members would receive their settlement checks. However, it also would have eliminated the four facts above, on which the court of appeals relied in striking the cy pres award. If the court of appeals’ analysis is correct, then, the parties would have been *more* likely to preserve their cy pres award if they had agreed to a settlement administration *less* beneficial to the class members. As a matter of sound public policy, this should not be the law.

CONCLUSION & PRAYER

The court of appeals’ decision is legally erroneous and will inhibit future cy pres awards to deserving Texas nonprofits. Amici respectfully request that this Court grant Highland Homes’s petition for review and reverse the judgment of the court of appeals.

Respectfully submitted,

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