



National Housing Resource Center
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Philadelphia, PA 19130-2234

June 24, 2014

Ms. Janet Yellen
Chair, Federal Reserve Board of Governors
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Mr. Thomas J. Curry
Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, S.W.
Washington, DC 20219

Dear Chair Yellen and Comptroller Curry:

It is our understanding that, of the \$3.6 billion that was to be used to compensate homeowners as part of the settlement agreement that was entered into in February of 2013 by the Office of the Comptroller of the Currency (“OCC”), the Federal Reserve Board (“the Fed”), and thirteen mortgage servicing companies (the “Servicers”) to settle enforcement actions against the Servicers for their mortgage servicing and foreclosure processing practices (the “Settlement”), roughly 86 percent, or \$3.1 billion, has been claimed. By any measure, reaching 86% of potential claimants was a high rate of distribution of Settlement funds, but OCC and the Fed are now faced with the question of what to do with the remaining unclaimed roughly \$500 million.

We are concerned that OCC and the Fed may choose to direct these unclaimed funds to the States to be held as unclaimed property, which would not be the best possible use of these funds. A much preferable option would be applying the *cy pres* doctrine to use the funds to support programs that assist a class of people who are similarly situated to the intended beneficiaries of the settlement: homeowners who are in or at risk of foreclosure.

The *cy pres* doctrine is a common law rule of construction that was originally used “to preserve testamentary gifts that would otherwise fail.”¹ Applying the rule, “when it becomes impossible to carry out the charitable gift as the testator intended, the doctrine allows the ‘next best’ use of the funds to satisfy the testator’s intent ‘as near as possible.’”² Over time, the doctrine has been expanded to be used in class action settlements to benefit the ‘next best’ class of beneficiaries when individual plaintiffs cannot be personally compensated.³ Courts have also increasingly departed from the traditional view that the doctrine requires undistributed funds to be applied in a way that directly benefits the interests of class

¹ Democratic Cent. Comm. v. Washington Metro Transit Comm’n, 84 F.3d 451 n.1 (D.C. Cir. 1996).

² *Id.* (citation omitted).

³ *See id.* at 455 (citation omitted).

members or the subject matter of the litigation, opting instead for a flexible approach that allows funds to be used to benefit similarly situated classes.⁴

Escheatment is also a common law doctrine that could be applied to the unclaimed Settlement funds, but it would not be appropriate to apply it here since it is possible to identify a more precise way of benefiting the type of individuals whose rights were at stake in the Settlement. Like the *cy pres* doctrine, escheatment has been applied to class action cases when individual plaintiffs cannot be directly compensated. An escheatment may be specified (or “earmarked”) or general. In a specified escheatment, “funds are disbursed to a particular governmental agency for the purpose of benefitting a group of persons who approximate the injured class.”⁵ With a general escheat, “the funds are unconditionally deposited into the treasury of a governmental body for the benefit of the public at large.”⁶ However, “because this approach provides the least focused compensation to the injured class, it is only used when a more precise method cannot be found.”⁷ Accordingly, in this situation, it is not appropriate to apply escheatment to the leftover funds.

Sending the unclaimed settlement funds to the States to be held on behalf of potential claimants would be, in effect, a general escheatment, and an ineffective use of the leftover funds. States rarely return unclaimed property to its owners. For example, according to the New York State Office of Unclaimed Property, New York State returns \$365 million worth of unclaimed money each year, or just 2.8 percent of the more than \$13 billion of unclaimed money held by New York State.⁸ Texas does slightly better, but in 2013 still only returned about 6 percent of the unclaimed property it held.⁹ Unclaimed property generally can be claimed at any time, but until it is claimed, it is generally held in a trust and/or deposited in the state’s general fund.¹⁰ This means that, should the unclaimed Settlement funds be escheated to the States, the vast majority of the funds would be simply be held in trust or sent to state general funds.

⁴ See, e.g., *Superior Beverage Co. v. Owens-Illinois*, 827 F. Supp. 477, 478-70 (N.D. Ill. 1993) (“while use of funds for purposes closely related to their origin is still the best *cy pres* application, the doctrine of *cy pres* and courts’ broad equitable powers now permit use of funds for other public interest purposes by educational, charitable, and other public service organizations ...”); *Jones v. National Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (“where the parties have not agreed as part of a settlement for the distribution of ... unclaimed balance, the court ... may order the residual monies to be distributed to *a use completely unrelated to the injured class members*, such as to an educational institution, a recognized charity or public service organization, or to the general treasury of the local or state government.”) (quoting Newberg on Class Actions § 10.24, at 10-60, 10-61 (3d ed. 1992)); *Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, No. 01-2118 (CKK), 2007 U.S. Dist. LEXIS 49406, at *6-7, *15 (D.D.C. July 10, 2007) (collecting cases and establishing endowment fund for creation of a Center for Competition Law with leftover funds from antitrust settlement); *In re Motorsports*, 160 F. Supp. 2d 1392 (N.D. Ga. 2001) (awarding over \$2 million to 10 non-profit organizations, including Atlanta Legal Aid Society and the Lawyers Foundation of Georgia, from residual antitrust settlement involving price-fixing of NASCAR merchandise).

⁵ *Democratic Cent. Comm.* at 456.

⁶ *Id.*

⁷ *Id.*

⁸ See Office of the State Comptroller, New York State Comptroller Thomas P. DiNapoli, Office of Unclaimed Funds, Home Page, <https://www.osc.state.ny.us/ouf/> (last accessed June 23, 2014).

⁹ In 2013, Texas returned \$180 million dollars of previously unclaimed property. The State is currently holding about \$3 billion in unclaimed property. ClaimItTexas.org, The Official State of Texas Unclaimed Property Website, Home Page, <http://www.window.state.tx.us/up/>.

¹⁰ See, e.g., Mass. Gen. Laws ch. 200a, § 9 (providing that unclaimed money and the proceeds from the liquidation of unclaimed property be deposited in a Unclaimed Property Fund and any amount in the Unclaimed Property Fund in excess of \$500,000 to be credited to the General Fund); N.H. Rev. Stat. Ann. § 471-C: 30-31 (providing that

There is also reason to believe that these funds would be claimed at an even lower rate than the already-low rates at which other unclaimed property is claimed, since the OCC and the Fed have already expended considerable resources to find potential claimants.

A much better use of these funds would be to apply the *cy pres* doctrine to distribute the funds to non-profit organizations whose work directly benefits the class of beneficiaries at issue in the Settlement: homeowners who are in or at risk of foreclosure. The intended class of recipients of the Settlement funds is all homeowners who were at any stage of foreclosure during 2009 or 2010. Thus, the obvious next best use of the funds would be to assist homeowners who are in any stage of foreclosure—at this time and in the future. Moreover, it would be appropriate to expand this class to include homeowners who are at risk of foreclosure, as these homeowners are also similarly situated to homeowners who are already in the foreclosure process, and there is a compelling public interest in preventing homeowners from going into foreclosure.

The best possible way to use the unclaimed Settlement funds to benefit homeowners who are in or at risk of foreclosure would be to direct the unclaimed funds to a *Homeowner Capability Fund*, which will support a comprehensive financial management program for recession-impacted households, and will be delivered through HUD-approved, nonprofit housing counseling organizations. The October 3, 2013 letter to OCC and the Fed from twelve housing organizations provides more detail on the *Homeowner Capability Fund*, and how the Fund provides assistance to homeowners. As you know, the Settlement itself recognized the value of a program such as the proposed *Homeowner Capability Fund* when it allowed servicers to receive credit against their foreclosure prevention requirements for “the provision of cash or other resource commitments to borrower counseling or education”¹¹ Likewise, many state Attorneys General directed funds from the National Mortgage Settlement to fund similar programs through HUD-approved housing counseling agencies.¹²

The unclaimed Settlement funds are a significant amount of money and have the potential to benefit many people who are similarly situated to the intended beneficiaries of the Settlement. An investment in HUD-approved housing counseling will help keep struggling homeowners, like those who were facing foreclosure in 2009 and 2010, in their homes. Escheating the money to the States will likely get the

property that remains unclaimed after 36 months be paid or delivered to the treasurer of the county where the holder was located at the time the property was delivered to the state); N.Y. ABP. Law § 1403 (providing that unclaimed property be sold and the proceeds be deposited in the state’s abandoned property fund); Tex. Prop. Code § 74.601 (providing that unclaimed money and the proceeds from the sale of unclaimed property be deposited in general revenue fund); Mo. Rev. Stat. § 447-543 (providing that unclaimed money be deposited into an Abandoned Fund Account and requiring at least once per year that the balance of the Abandoned Fund Account that exceeds one-twelfth of the previous year’s dispositions be transferred to the state’s general revenue).

¹¹ *In the Matter of Aurora Bank FSB*, Amendment to April 13, 2011 Consent Order, #2013-123 (amending #NE-11-16), Article IV(4)(f).

¹² *See, e.g.*, New York State Attorney General Eric T. Schneiderman, New York State Mortgage Settlement, About the Settlement, <http://www.nysmortgagesettlement.com/about.html> (last accessed June 24, 2014) (describing the Settlement as including more than \$130 million for New York that could be used to fund legal services and housing counseling).

money to a tiny number of the intended beneficiaries, but will otherwise be a windfall to state general funds and will not be used to assist homeowners. We urge you to consider applying the *cy pres* doctrine and direct the money to a *Homeowner Capability Fund*.

Sincerely,

A handwritten signature in black ink that reads "Bruce L. Dorpalen". The signature is written in a cursive, flowing style.

Bruce L. Dorpalen
Executive Director, National Housing Resource Center