Distribution of Funds in Class Actions—Claims Administration

Francis E. McGovern*

I. INTRODUCTION

Most class action securities cases result in a settlement where the parties agree on a defined amount of money to be placed in a fund for distribution to eligible beneficiaries. Although the size of the fund and the losses suffered by eligible beneficiaries are defined, the number of potential beneficiaries who decide not to participate in the settlement by opting out and the number and value of losses eventually claimed by those eligible beneficiaries are not known until long after the settlement amount has been established. In any closed-end fund, like the securities class action settlements, there is the potential for a "Goldilocks" dilemma—the fund may be too large or too small for the claims being made, not "just right." The ensuing tensions created by this mismatch between funds

* Professor of Law, Duke University School of Law, Durham, North Carolina. Professor McGovern served as a court appointed neutral in the cases described in this Article. Special thanks to ILEP conference organizer Ed Labaton, moderator James Cox, and panelists Lynn Powalski and Joy Ann Bull as well as Nancy Baker, Roger Bauser, Peter Crudo, Pat Ebener, Jeff Leibell, Dan Marotto, and Barry Weprin for commenting on the ILEP presentation and assisting with the earlier drafts of this Article. In addition, recognition is due to the editorial staff of the Journal for ensuring that this Article met the standards of the *Journal of Corporation Law*.

available and claims on those funds can be one of the most significant problems in any settlement fund distribution. The ability of courts, special masters, and claims administrators to cope with this mismatch is critical to the success of the distribution process. Courts, lawyers, academics, and claims administrators have generally accepted the traditional approaches normally taken in securities class action distribution processes as appropriate under the circumstances. This Article presents several alternative approaches for coping with the mismatch dilemma that are worthy of consideration for incorporation in future distributions. The literature on distribution processes has given too little attention to the successes and failures in cases that have utilized non-traditional techniques, and it is likely that future distributions can benefit from these actual experiences. The following case studies in both securities and non-securities contexts illustrate the Goldilocks dilemmas that arise and discuss approaches that courts, lawyers, and claims administrators might take to ameliorate them in situations where there are too many opt-outs, too few claims, too many claims, too little money, or too much money.

II. TRADITIONAL APPROACHES

The traditional approaches for coping with the mismatch between available funds and funding needs are to use pro-ration when there is a shortage and cy pres when there is an excess.[1] The general assumptions underlying these approaches are that the distribution process is a sunk cost and any additional distribution costs would be inefficient, counterproductive, or both.[2] At the same time, it is possible to use pro-ration and cy-pres to reach an outcome that most viewers would consider satisfactory—the process of satisficing. The argument here is that there are changes both in the pre- and post-distribution processes that can ameliorate the degree of mismatch and should be considered in anticipation that a mismatch might occur. That is, the distribution process itself should incorporate techniques for coping with the mismatch rather than waiting until the precise mismatch is known. The distribution process should not assume that new techniques are inappropriate, even if they have not been approved by an appellate court and even if the claiming period has ended.

1. *See generally* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (Proposed Final Draft 2009), *available at* http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=80;
James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 STAN L. REV. 411 (2005) [hereinafter Cox & Thomas, *Letting Billions Slip*]; James D. Cox & Randall S. Thomas, *Leaving Money on the Table: Do Institutional Investors Fail to File Claims in Securities Class Actions?*, 80 WASH. U. L.Q. 855 (2002) [hereinafter Cox & Thomas, *Leaving Money*].

2. Cox & Thomas, *Leaving Money*, *supra* note 1, at 878, 879; Robert H. Klonoff, Mark Herrmann & Bradley W. Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 730–33, 750 (2008).

III. ALTERNATIVE APPROACHES

A. Surveys

It is often possible to gain a greater appreciation of the nature of mismatch problems by surveying a sample of the universe of participants who seem to be exacerbating the problem. If, for example, claimants have misunderstood the claiming process, they may be able to be recategorized into a more appropriate claiming status. Surveys can be implemented quickly to identify reasons for higher or lower than expected response rates. Survey results can then inform mid-course corrections in a distribution process. In one case, for example, survey results showed that the main reason for failure to file a claim was related to a misunderstanding of the potential compensation.[3] Using this information the claims administrator could add the estimated losses to future outreach initiatives, thereby increasing response rates.

B. Filters

It is normal for a settlement agreement to define certain criteria for determining eligibility for compensation in a settlement; in other words, to identify true positives. In implementing those criteria, there is often a great deal of flexibility in the distribution process for establishing filters, other than straight pro-ration, to deal with any anticipated shortfall in distribution funds. By looking at the rationale for the settlement, or the nature of the alleged wrongdoing, it may be possible to establish filters that perform a more equitable triage function. These filters may enable the shortage of money to be borne less evenly but more equitably.

C. Claim Forms

Most class action securities cases are handled by claims administrators who develop claim forms that vary from case to case and from claims administrator to claims administrator, resulting in a lack of standardization.[4] At the same time, these forms often tend to be focused on legal and administrative needs rather than on the needs of the claimant.[5] It is now possible to have multiple forms to meet all of those needs: electronic forms, web forms, pre-populated forms, certification forms, option forms, and many others to reduce the burden of filing and claim processing. By tailoring forms to certain claimants and standardizing forms for others, it may be possible to increase response rates significantly.

---

3. SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 408 (S.D.N.Y. 2009), *available at* http://www.globalresearchanalystsettlement.com/memorandum.pdf.

4. For an illustration of the variation among claim forms see the cases described on claims administrators' websites, for example, The Garden City Group, Inc., http://www.gardencitygroup.com (last visited Oct. 27, 2009), and Gilardi & Co., LLC, http://www.gilardiandcompany.com (last visited Oct. 27, 2009); Rust Consulting, http://www.rustconsulting.com (last visited Oct. 27, 2009).

5. Federal Judicial Center, Section on Class Action Notices, Securities Class Action Certification and Settlement: Full Notice, *available at* http://www.fjc.gov/public/home.nsf/autoframe?openform&url_r=pages/376. In *In re Currency Conversion Fee Antitrust Litigation*, MDL No. 1409, M 21-95, 05 Civ. 7116 (WHP), 04 Civ. 5723 (WHP), slip op. at 12 (S.D.N.Y. Oct. 22, 2009), for example, the forms were changed to focus on the needs of consumers by having a series of options.

D. Outreach

In an effort to meet the legal requirements for notice and to conserve funds for eventual distribution by minimizing transaction costs, there has been a standard outreach process for class action securities distributions.[6] There are, however, many new—generally electronic—methods for increasing outreach, and there are follow-up programs that are not necessarily more expensive and that can be more efficient. For example, the use of a central website that allows potential claimants to register and receive notice online has shown much success.[7] Automated follow-ups and deadline reminder messages can also increase response rates.

E. Selective Pro-Ration

Rather than an across-the-board reduction in claim payments, there are a number of more sophisticated methods for pro-rating claims that can be incorporated into a distribution plan. Normally the distribution plans are written after the settlement agreement has been reached. Anticipating a potential shortfall or excess of funds for distribution can lead to provisions in the plan that would allow for a more fine-tuned necessary reduction in payments on claims. If, for example, there is a disparity in the types of claims—commercial/consumer, large/small, foreign/domestic, quantifiable/ non-quantifiable, and many others—it is possible to create different pro-ration rules for those different categories rather than the one-size-fits-all approach. There may be an independent yardstick that provides a more appropriate measure than linear mathematics; there may be a progressive staging of pro-ration steps that are not uniform; there may be statistical limits for categories of claims that can otherwise impact linear models.

IV. CASE STUDIES

A. In re Pharmaceutical Industry Average Wholesale Price Litigation[8]

Forty-two pharmaceutical manufacturers were sued in 2001 for reporting false and inflated average wholesale prices for certain types of drugs and for overpayments for the affected drugs.[9] In 2006, one defendant settled with the plaintiffs for $70 million.[10] After preliminary approval of the settlement, the claims administrator provided nationwide notice by publication, website, and 2.5 million letters that included an explanation of the settlement, a claim form, and an opt-out form.[11]

Within five months approximately 10,000 consumer claim forms were filed with a preliminary estimated average value of about $230, and approximately 20,000 requests

6. Cox & Thomas, *Letting Billions Slip, supra* note 1, at 419; Cox & Thomas, *Leaving Money*, *supra* note 1, at 867, 868.

7. *See, e.g.*, Settlement Fund Clearinghouse, http://www.settlementfundclearinghouse.com (last visited Oct. 23, 2009); Klonoff, Herrmann & Harrison, *supra* note 2, at 749, 750.

8. *In re* Pharm. Indus. Average Wholesale Price Litig., 254 F.R.D. 35 (D.Mass. 2008) (MDL No. 1456), *as discussed in* Francis E. McGovern, *Second-Generation Dispute System Design Issues in Managing Settlements*, 24 OHIO ST. J. ON DISP. RESOL. 53, 58–63 (2008).

9. *Id.* at 58.

10. *Id.*

11. *Id.* at 59.

for exclusion, or "opt-outs," were received.[12] The large number of requests for exclusion, relative to the number of claim forms, led to a survey of consumers who filed exclusion forms.[13] The purpose of the survey was to analyze the responses of claimants in order to understand the disparity between claim forms and exclusions. Survey participants

> answered a series of questions to determine (a) whether they were truly class members, as opposed to, for example, persons who took an eligible drug but had insurance that covered their co-payments, and (b) if they were part of the class, why they chose to exclude themselves from the settlement.
>
> . . . .
>
> A significant number of those surveyed did not remember taking any of the covered drugs, many had insurance that covered their co-payment obligation, and many had no recollection of a percentage co-payment or full payment for the drug. Of those surveyed, 15.65% were estimated to be actual class members based on recalling the covered drugs, being charged for the drugs, and either having no insurance or having a percentage co-payment. During the course of the phone survey, those determined to be actual class members were told that they may be able to reconsider their decision to exclude themselves if they wished to do so, and 18% indicated that they were interested in filing a claim. This, added to the 16% who said they originally intended to file a claim when they submitted the exclusion form, totals 34% of those determined to be class members who said they were interested in filing a claim form. The estimates derived from the survey were subject to unobserved sampling, response and measurement error, but nonetheless provided important insights about the eligibility and intention[s] of the opt-outs.[14]

Eventually, new claim forms were mailed to everyone who originally filed an exclusion form and who indicated an interest in filing a claim form, along with a letter saying that they could revoke their exclusion request and file a claim form by a new deadline.[15] The survey results suggested that 15.65% of 21,365 consumers who had filed exclusion forms were, in fact, likely to be members of the class.[16] This result extrapolates to an estimate of 3344 actual class members who requested to opt out of the settlement. In addition, the survey results suggested that some 16% of the actual class members who sent in an exclusion form did so under the mistaken view that they were then filing a claim; therefore, there would be 535 fewer opt-outs, or an amended total of 2809 actual class members who intended to exclude themselves from the settlement.[17]

Using the results of the survey, the universe of class members was redefined. Ultimately, the number of opt-outs shrunk to a more acceptable number, which allowed the administration of the distribution to proceed in accordance with the settlement agreement.[18]

12. *Id.*
13. McGovern, *supra* note 8, at 59–60.
14. *Id.* at 60.
15. *Id.* at 60–61.
16. *Id.* at 61.
17. *Id.*
18. McGovern, *supra* note 8, at 62–63.

B. In re Foreign Currency Exchange[19]

Plaintiff counsel filed an antitrust lawsuit against several credit card companies and their related issuing banks, alleging that they had overcharged their customers from one to three percent in foreign currency conversion fees in the use of their credit, charge, debit, and ATM cards.[20] Counsel settled the case with some of the defendants for $336 million.[21] Counsel developed a claim form and a campaign to provide notice as part of their settlement agreement.[22] The claim form required that an eligible cardholder record their annual expenditures in foreign transactions for each of their cards.[23] The credit card companies enclosed the claims forms with one monthly account statement mailed to cardholders.[24] The claims administrator provided a website for downloading a claim form and a toll free telephone number to answer questions from potential beneficiaries.[25]

In the first six months, there were 90,000 claim forms filed—representing a response rate of 0.45% in light of the 20.8 million notices mailed to card holders.[26] There were also complaints filed with the court concerning the detailed reporting requirements in the claiming process and inquiring why the expenditure information was not already available to the claims administrator in a computerized format from the credit card companies.[27] The court halted the notice campaign and appointed a special master who

> recommended a new notice and claim form to incorporate three options for claimants to choose from depending on their estimated losses and ability to thoroughly document their claim: (1) a flat payment of $25; (2) an estimate of the number of days spent in foreign countries during the covered time period so an algorithm of typical expenses would be applied to estimate a payment; and (3) the original form of annual estimates of foreign expenditures by credit card. . . . The flat payment option was designed to take advantage of claimants' propensities to make claims only if the form is easy to understand and easy to complete, in comparison to having to obtain 10 years of proof of foreign spending. Based upon the forms filed prior to June 30, 2007, it was recommended that an individual who spent no more than one week abroad or had foreign currency expenditures not greater than $2500 would have been eligible for a $25 payment that would be consistent with the limited foreign conversion fees charged to most cardholders. At the same time, the level of potential fraud was reduced from this option because only cardholders who had foreign currency expenditures were included in the mailings.

19. *In re* Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385 (S.D.N.Y. 2003), *as discussed in* McGovern, *supra* note 8, at 54–58.

20. *Id.* at 54.

21. *Id.*

22. *Id.*

23. McGovern, *supra* note 8, at 54.

24. *Id.*

25. *Id.*

26. *Id.*

27. *In re* Currency Conversion Fee Antitrust Litig., MDL No. 1409, M 21-95, 05 Civ. 7116 (WHP), 04 Civ. 5723 (WHP), slip op. at 10 (S.D.N.Y. Oct. 22, 2009).

> The second option was designed for customers who might feel that $25 was inadequate but that compiling annual records was too onerous or not feasible. Most foreign travelers can remember how many days they spend overseas annually more easily than they can remember how much money they charged on their credit cards. In an optimal world, the issuing banks would have had a computerized listing of annual charges, but the databases for those charges were not accessible for a variety of reasons, including changes in bank ownership of cards, changes in card names, and incompatibility resulting from changes in databases and their management software over time. By listing the number of days spent overseas, however, a claimant would be more likely to feel that the settlement payment would be based upon their actual circumstances. The calculation of the algorithm could be accomplished from publicly available data from the travel industry about foreign expenditures. Although the public travel industry data was not a perfect fit, assumptions could be made to approximate the annual currency conversion fees based upon the number of days spent in a foreign country.
>
> The third option was virtually identical to the one offered on the original claim form. The resulting cover letter and claim form options were reviewed by the lawyers and the claims administrator, and were further refined based on testing and feedback obtained from focused interviews with potential beneficiaries.[28]

The new claim form generated a remarkable 27% response rate, with 10,115,836 claims filed.[29] 7,200,413 claimants chose option one, 2,600,315 claimants chose option two, and 315,108 claimants chose option three. In addition, approximately 22,000 late claims and 2910 requests for exclusion were filed.[30]

C. Personal Injury Cases

There are a number of lessons that can also be learned about settlement fund distributions from experiences in connection with personal injury cases. These cases often involve determinate amounts of funding and even more indeterminate demands on that funding than securities cases. In the Dalkon Shield case there was excess money;[31] in the asbestos funds there is usually either too much or too little money;[32] in the DDT cases there were too many claimants;[33] and in the Rhode Island Station Fire case[34] there was a potential conflict among different types of claimants.[35]

---

28. McGovern, *supra* note 8, at 55–56.

29. *Id.* at 57.

30. *Id.*

31. *In re* A.H. Robins Co., 88 B.R. 742 (E.D. Va. 1988); Georgene M. Vairo, Georgine*, The Dalkon Shield Claimants Trust, and The Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 123 (1997).

32. Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. ANN. SURV. AM. L. 163, 175 (2006).

33. Francis E. McGovern, *The Alabama DDT Settlement Fund*, 53 LAW & CONTEMP. PROBS., Autumn 1990, at 61, 63, 68.

34. Grey v. Derderian, Nos. CA 04-312L, CA 03-483L, 2009 WL 2997066 (D.R.I. Aug. 14, 2009).

35. Proposed Plan of Distribution, Grey v. Derderian, Nos. CA 04-312L, CA 03-483L (D.R.I. Mar. 5,

A.H. Robins Co. filed for bankruptcy and established a qualified settlement fund for persons who had filed claims for personal injuries suffered in connection with the use of the Dalkon Shield.[36] The fund contained $2.475 billion, the amount estimated during a section 502(c) proceeding by the U.S. District Court overseeing the bankruptcy to be the full value of the Dalkon Shield claims.[37] Approximately five years later, after all the claims had been processed and paid, there were significant monies remaining in the fund.[38] The U.S. District Court decided that the claims process should be supplemented and ordered the distribution of the remaining money directly to claimants, regardless of whether they were represented by counsel or pro se, so that they received an additional 85% of their original payment.[39]

In the asbestos bankruptcies there have been qualified settlement trusts with very detailed trust distribution plans (TDP) designed to cope with the inevitable mismatch between available and needed funding.[40] Some of the TDPs have a straight payment percentage based upon a schedule of benefits negotiated by the claimants as part of the TDP.[41] Sometimes that percentage is less than 100%.[42] In other instances, the schedule of benefits is increased to reflect the available assets.[43] In other TDPs, there is a collar or payment ratio that limits the amount of the funds in a given year that can be paid to certain categories of claims.[44] In other instances, there are maximum available payments or maximum annual payments that can roll over from year to year in the event that a certain category of claims does not exhaust the funds available in a given year.[45]

In the DDT cases in Triana, Alabama, over 13,000 claimants alleged that they had been exposed to DDT from eating catfish.[46] There was evidence that DDT had been deposited in tributaries of the Tennessee River by a chemical plant, but that large a number of persons whose background risk of DDT exceeded normal limits seemed excessive. Counsel resolved the lawsuit by creating a single qualified settlement fund.[47] The distribution plan, however, provided that claimants would need to be tested for DDE, a metabolite of DDT, in their blood and have a DDE level above normal background levels of DDE in order to be compensated.[48] If the initial threshold of DDE was exceeded, then the claimant could receive compensation.[49] Additional compensation was made for claimants with multiples of DDE levels and for specific harms for claimants

2009) (No. 1964).

36. Vairo, *supra* note 31, at 123; s*ee generally* RICHARD B. SOBEL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY (1991) (detailing the history and resolution of the Dalkon Shield litigation).

37. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659, 685 (1989).

38. Vairo, *supra* note 31, at 151.

39. *Id.*

40. McGovern, *supra* note 32, at 175.

41. *Id.* at 174–75.

42. *Id.* at 175 (explaining a fixed percentage payout when not all claims can be paid in full).

43. *Id.* at 174 (noting that the percentage may change over time).

44. *Id.*

45. McGovern, *supra* note 32, at 174.

46. McGovern, *supra* note 33, at 67.

47. *Id.* at 63–64.

48. *Id.* at 72–75 (discussing settlement plans and criteria).

49. *Id.* at 75 (listing testing for DDE and regulating levels above expected background as requirements for payment).

with excessive DDE in their blood.[50] Needless to say, the number of eligible claimants was substantially reduced.[51]

The Rhode Island Station Fire Settlement fund was based upon a "point system" allocation formula.[52] There was a negotiation among the lawyers representing the claimants to establish a consensus on a yardstick that was commensurate with normal tort system values.[53] The point system used a base case with a predetermined number of points for all personal injury and wrongful death cases.[54] The system then included provisions allowing additional points for more substantial harm factors also derived from tort system values.[55] Once the point system was agreed to by the parties and approved by the court, each claimant's points were determined.[56] Then all the points were added together and divided into the total amount of available settlement money to determine the dollar value of each point.[57] Once a claimant knew their individual total number of points and the value of a point, their payment amount was calculated.[58] The potential for conflicts among claimants over horizontal and vertical equity was avoided.[59]

D. The Global Research Analyst Settlement

The Global Research Analyst Settlement provides examples of new techniques in claim forms, outreach, and triaging claim payments.[60] In that case, the SEC brought an action against certain brokerage firms alleging wrongdoing by various research analysts.[61] The case settled for $432.75 million, which was placed in a qualified settlement fund for the benefit of purchasers of certain stocks during certain time frames from certain defendants, during which there had been alleged wrongdoing by various research analysts.[62] The court required the defendants to provide the names of all eligible purchasers as well as qualifying sales of the applicable securities.[63] As a result, it was possible to send pre-populated certification forms that contained all the information necessary to approve a claim; the claimant was required merely to verify and sign the

50. *Id.* at 73–74.

51. McGovern, *supra* note 33, at 68–72 (reporting the number of plaintiffs having elevated DDT levels to be 33%, and the number that alleged specific harms to be even less).

52. Proposed Plan of Distribution, Grey v. Derderian, Nos. CA 04-312L, CA 03-483L (D.R.I. Mar. 5, 2009) (No. 1964).

53. *Id.* at 2.

54. *Id.*

55. *Id.* at 2–4.

56. Proposed Plan of Distribution, *Grey*, Nos. CA 04-312L, CA 03-483L (D.R.I. Mar. 5, 2009) (No. 1964).

57. *Id.*

58. *Id.*

59. Abby Goodnough, *5 Years After a Nightclub Fire, Survivors Struggle to Remake Their Lives*, N.Y. TIMES, Feb. 17, 2008, at A18.

60. Letter from Francis E. McGovern, Professor of Law, Duke Univ., to the Honorable William H. Pauley III, U.S. Dist. Court Judge, S. Dist. of N.Y. (June 5, 2006) at 2, 3, *available at* http://www.globalresearchanalystsettlement.com/letter.pdf (recommending approaches to disburse funds from the Global Research Analyst Settlement) [hereinafter McGovern, Letter].

61. SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 404–05 (S.D.N.Y. 2009), *available at* http://www.globalresearchanalystsettlement.com/memorandum.pdf, at 2, 3.

62. *Id.* at 3.

63. *Id.* (describing requirement to provide transaction data).

form.[64] This preprinting process resulted in a claim filing rate that was three times greater than the normal response rate for securities and other commercial class actions.[65]

Notwithstanding the success of the claims process, there were still monies available in some of the defendants' funds, although others had been completely depleted.[66] The court decided to proceed with a second distribution using state-of-the-art survey research methodology in order to reach an unprecedented number of eligible claimants.[67] The additional techniques included pre-claim form letters to alert eligible purchasers that they would be receiving a claim form, follow-up letters, and, in some instances, telephone calls to encourage recipients to return their claim forms. Extensive outreach for claimants who did not cash their checks was accomplished by mail and by telephone. Some letters were sent in a special delivery format to enhance the chances that the recipient would focus on them. All of these efforts resulted in increasing the response rate from 46% in the first distribution to a total of 70% overall among potential claimants with estimated losses, quite impressive given the fact that the second effort involved only those who had not responded to the first distribution.[68]

For those defendants whose funds were oversubscribed, the court approved a novel triaging process that focused on the alleged harms caused by the stock analysts' research—the proximity principle and the information principle:

> If there is enough money available in a Distribution Fund to meet all claims for losses from purchases through the relevant Settling Firm, investors will receive 100 cents on the dollar. If, however, there is not enough money to meet all claims, then a key goal is to distribute settlement funds to investors who are more likely to have been affected by the events that are the subject of the settlement. Although that goal may not be perfectly achievable, the plan uses two principles to achieve a better approximation of that goal.
>
> *A. The Proximity Principle*
>
> The first principle is that purchases of equity securities that were made shortly after the events that are the subject of the settlement are more likely to have been affected by those events than purchases made more distant in time from the events: the proximity principle. This principle is consistent with provisions in the Final Judgments. If funds are not sufficient to compensate investors in full for their eligible losses, the compensation formula will involve a "proximity adjustment."
>
> Specifically, those investors who purchased the equity security closer to the beginning of the "relevant period of purchase" will receive a higher compensation rate (that is, compensation as a share of eligible losses) than those who purchased later. A maximum proximity adjustment rate of three percent per trading day will help to ensure an equitable distribution of funds.

64. *Id.* at 9 (providing a description of Certification Form).

65. Analysis of historical case data compiled for presentation to the court in the Global Research Analyst Settlement (on file with the author).

66. McGovern, Letter, *supra* note 60, at 1, 2.

67. SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 409–10 (S.D.N.Y. 2009), *available at* http://www.globalresearchanalystsettlement.com/memorandum.pdf, at 12.

68. *Id.* at 10, 12, 13.

> The proximity adjustment rate will be set at zero for the first eleven trading days of the "relevant period of purchase."
>
> . . . .
>
> *B. The Information Principle*
>
> The second principle focuses on the consumption of information prior to making equity security purchases: the information principle. Purchasers who make larger investments in equity securities are more likely to spend more on obtaining information regarding those equity securities. Conversely, purchasers of smaller amounts of equity securities are more likely to spend less on information. This principle suggests, therefore, that the events that are the subject of the settlement are more likely to have affected those investors making smaller purchases than those investors making larger purchases. Like the proximity principle, the information principle is consistent with provisions in the Final Judgments.
>
> Specifically, if an investor's total purchases from a Settling Firm over the relevant periods of purchase are larger than the median value for purchases of the relevant equity securities from the Settling Firm, the adjustment will equal a maximum of three percent for each multiple above the median. The information adjustment will not apply to those investors with total purchases from a Settling Firm over the relevant periods of purchase that are smaller than the median value for purchases of the relevant equity securities from the Settling Firm.[69]

In addition, the court provided for pre- and post-judgment interest, rounding up to a minimum $100 payment and payment of late filed claims for those defendants' funds that had not been fully depleted.[70] Any remaining funds were to be remitted to the U.S. Treasury.[71]

V. CONCLUSION

Closed end settlements in class action securities cases must invariably cope with a mismatch between the dollar amount available for distribution and the dollar amount actually claimed by eligible beneficiaries. This mismatch occurs because the settlement amount becomes fixed before the distribution process begins and the claimed amount can be determined. Traditional distribution methodology has primarily concentrated on insuring that any shortfall is shared by the eligible beneficiaries evenly in a linear pro-ration wherein all claims are reduced by the same proportionate amount. Any excess monies remaining have been subject to cy pres distribution.

The suggestion here is that there are additional techniques beyond pro-ration that should be considered in coping with the mismatch between distribution funds and

69. APPENDIX B: GLOBAL RESEARCH ANALYST SETTLEMENT DISTRIBUTION FUND PLAN, *available at* http://www.globalresearchanalystsettlement.com/fund.pdf (last visited Oct. 19, 2009).

70. SEC v. Bear, Stearns & Co., Nos. 03 Civ. 2937-48, 04 Civ. 6909–10 (S.D.N.Y. July 8, 2009) (order directing disbursement of remaining funds), *available at* http://www.globalresearchanalystsettlement.com/courtorder.pdf.

71. *Id.*

claimed funds: surveys to identify excess or insufficient categories of claimants, filters to concentrate on true positive claimants, more user friendly forms to reduce the burden of participation, more selective proration techniques, secondary distributions, and better outreach programs. By ensuring these and many other methods that are articulated in social science and marketing research, it is possible to reduce the inevitable mismatch and deliver settlement funds more efficiently and equitably with less residual monies remaining.