The Supreme Court Appears Ready to Permit 100% *Cy Pres* Awards in Class Actions Under Very Limited Circumstances*

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Background

The *cy pres* class action doctrine takes its name from the French term "*cy pres comme possible*" or "as near as possible." It came into use in connection with unclaimed remainders in class actions on the theory that distributing such funds to charities was preferable to allowing the funds to revert to the defendant. Its status became uncertain in 2013 when the Supreme Court denied certiorari in a case in which class members received no monetary damages in a settlement, but class counsel was awarded a substantial legal fee with the balance awarded to a charity allegedly controlled by the defendant. In a brief explanation accompanying the denial, Chief Justice Roberts wrote that there were "fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness"; what the respective roles of the judge and parties should be; and "how closely the goals of an enlisted organization must correspond to the interests of the class. . . ." It was somewhat unclear whether he was referring only to 100% *cy pres* settlements or also to the use of *cy pres* in dealing with funds remaining after settlement distributions to class members.

Chief Justice Roberts' actual concerns appear to have been clarified on October 31, however, during argument in Frank v. Gaos, a case in which the district court had approved a 100% *cy pres* class action settlement that was confirmed by the Ninth Circuit.**[1]** Indeed, it appeared from the argument that the majority of the Court would approve 100% *cy pres* settlements, but under extremely limited circumstances. The permissibility of the use of *cy pres* with respect to funds remaining after distribution to a class was not even mentioned during the argument.

The Case at Issue

Frank v. Gaos involves the settlement of a consumer class action challenging the legality of Google's disclosure of a user's search terms through a "reference header" pursuant to which a website learns that someone has clicked on to its website. The consolidated complaint of three plaintiffs representing a purported class of 129 million Google users settled their consolidated class action pursuant to an agreement by Google to pay $8.5 million, including $1 million in notice and administrative costs, $5,000 in incentive awards to each of the three named plaintiffs, and $2.125 million to their counsel. The remainder of $5.3 million was awarded *cy pres* to six academic and non-profit institutions "to promote public awareness and education and to support research and initiatives related to protecting privacy on the internet."

Google also agreed to "maintain information on its website" disclosing "how information concerning users' search queries are shared with third parties," and to direct them to Google's privacy policy for more information There was no direct compensation to class members, the parties having contended that direct distribution of the funds was "infeasible" because the settlement provided only four cents per class member and the costs of identifying, processing, and paying claims would exceed available funds. Only 13 of the 129 million putative class members opted out of the class. Only five class members (including the Supreme Court Petitioners) filed objections, arguing that *cy pres* relief was inappropriate because it would in fact be practical to distribute the settlement fund through a claims-made process or a lottery, and because class counsel were alumni of several of the *cy pres* recipients.

The Ninth Circuit affirmed, with one dissenter to the award of funds to alma maters of several class counsel.**[i]** The Supreme Court granted certiorari on the question whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members comports with the three requirements of Federal Rule of Civil Procedure 23(e) that a class action settlement must be "fair, reasonable, and adequate."

The Supreme Court Argument

The argument before the Supreme Court essentially focused on two issues: whether a 100% *cy pres* award comports with the requirements of Rule 23(e), and whether the named plaintiffs met the Article III "injury-in-fact" standing requirements of the Court's decision in *Spokeo Inc. v. Robins*,**[ii]** which the Solicitor General raised in an amicus brief.

Cy Pres

There was no indication that any of the Justices opposed the use of *cy pres* relief in a case only involving remaining funds after monetary distribution to class members. Therefore, such use of a *cy pres* award appears safe.

The liberal Justices who asked questions concerning 100% *cy pres* relief—the issue before the Court--all appeared to allow for such relief, but only when the costs of identifying class members, notice and processing claims "far exceed" the potential payout to class members and the *cy pres* recipients are to provide indirect benefits to the class. Justice Sotomayor in particular emphasized that 100% *cy pres* awards were "rare," noting that a list she had reviewed identified only five such awards in a number of years. Justice Breyer commented that courts should scrutinize "indirect" recovery "very carefully" pursuant to a multi-part test that ensures that: (i) direct monetary relief is not feasible; (ii) the *cy pres* funds are to be used in a manner that addresses injury similar to those that were the subject of the suit; and (iii) there are no conflicts of interest between the *cy pres* recipients and the class. Justice Sotomayor supported such a three-part test, adding that all the circuits appear to have adopted it. However, she questioned whether attorney fees to class counsel should be discounted when *cy pres* relief is awarded, because such relief only indirectly benefits the class, a concept that had been raised by the Solicitor General. Chief Justice Roberts responded that class counsel should get a fee if the *cy pres* award provides indirect relief to the class.

None of the conservative Justices indicated that 100% *cy pres* settlements should be prohibited, although Justice Kavanaugh suggested that the issue as to what constitutes a fair, reasonable, and adequate class action settlement should be decided by the Rules Committee of Congress. He also suggested that a lottery system could be a better way to ensure that at least some of the injured class members are compensated, a proposition recommended by the Petitioners and supported by the DOJ. There did not appear to be support for this concept among the other Justices, although Justice Sotomayor declared that she opposed a lottery or variations where only a small percentage of the class received damages.

Chief Justice Roberts and Justice Alito were both concerned about the identity of *cy pres* fund recipients. Specifically, Justice Alito queried whether the court or parties should decide who the charitable beneficiaries should be. The Chief Justice responded that the district court "should never be the one suggesting possible recipients" of the settlement funds.

Standing of Class Representatives

Although not raised by the parties, the Solicitor General had argued in an amicus brief that there was a substantial question as to whether the three named class representatives had Article III standing under the jurisdictional standard established by the Supreme Court in *Spokeo, Inc. v. Robins* that a plaintiff must have suffered an "injury in fact" that is both "concrete and particularized." The Ninth Circuit had adopted a lesser standard in its decision, which was issued prior to *Spokeo*. It is well established that the Supreme Court has the authority to assure itself that plaintiffs have Article III standing, even if the issue has not been considered by the lower courts.**[iii]**

The Solicitor General contended that the plaintiffs had not identified any particular injury that actually resulted from Google's challenged practice, and for that reason the Court should consider remanding the case for the lower courts to address standing in the first instance. This recommendation occupied a considerable amount of time during the argument. In particular, Justice Breyer stressed that he could not distinguish the case from *Spokeo*. Justice Alito seemed to agree, adding that if standing had not been alleged properly the case should be dismissed. Chief Justice Roberts also questioned whether the case should be dismissed. Justice Ginsburg commented that because the parties had not addressed the standing issue, the Court should not decide it in the first instance, while Justice Kavanaugh appeared to believe that disclosure of what was searched might be sufficient to establish standing.

It appears from the thrust of the standing argument that the Court has three choices to make if it rules on the standing issue: (i) dismiss the case on the ground that certiorari was improvidently granted (which would leave the Ninth Circuit decision approving the settlement in effect); (ii) remand the case for the standing issue to be reconsidered by the Ninth Circuit pursuant to the *Spokeo* standard; or (iii) decide the standing question itself. There seems to be no doubt that the majority of the Court considered the standing issue to be unsettled. The Court likely is not likely, however, to dismiss the case on the ground that certiorari was improvidently granted, because that would leave the Ninth Circuit decision in effect. Whether it will remand the standing issue or itself decide it is difficult to predict based on the Supreme Court argument. Of interest, the Court has, since the argument, asked the parties for briefing on the standing issue, to be completed by December 21.

Footnotes

*Article has been revised and expanded from an article that appeared in Law360 on Nov. 5, 2018.

[i] *In re.* Google Referrer Header Privacy Litig., 869 F.3d 737 (9th Cir. 2017).

[ii] 136 S. Ct. 1540, 1548 (2016).

[iii] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000).

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