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U.S. Supreme Court puts class action doubleheader on the calendar – cy pres awards and class arbitration

by Jay Bogan

On April 30, the U.S. Supreme Court granted certiorari in two class action cases, on issues involving *cy pres* awards and class arbitration. Both cases arise out of the Ninth Circuit.

The Supreme Court's decision in the *cy pres* case will likely be the more important of the two, if only because the issue presented in the class arbitration case can in most cases be eliminated by the use of a class action waiver.

Cy pres

In the first case (*Frank v. Gaos*), the Ninth Circuit affirmed a district court's approval of a *cy pres*-only settlement. *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), *cert. granted sub nom. Frank v. Gaos*, No. 17-961 (U.S. Apr. 30, 2018). That case (ultimately, two consolidated class actions) involved breach of privacy allegations (asserting claims primarily under the federal Stored Communications Act of 1986) based on Google's transmission of search term data to third party websites. 869 F.3d at 739. The plaintiffs eventually filed a consolidated class action complaint seeking to represent everyone in the United States who had submitted a search query to Google at any time between October 25, 2006, and the date of notice to the class of certification – a class of "approximately 129 million people." *Id.* at 740.

According to Google, the claims were meritless, low value claims that "limp[ed] past the pleadings stage yet still pose[d] a risk of huge liability based on uncertain law at the time of settlement." *Frank v. Gaos*, Br. in Opp. of Resp. Google LLC, No. 17-961, 2018 WL 1304880, at *3 (U.S. filed Mar. 9, 2018).

The case settled after mediation. Google agreed to pay $8.5 million into a settlement fund. After covering claims administration costs, incentive payments to the class representatives, and attorneys' fees, the parties agreed that the remaining $5.3 million would be distributed directly to six organizations to establish projects devoted to Internet privacy issues. *Google*, 869 F.3d at 740. The settlement provided for no monetary distribution to any of the class members. And the settlement provided no injunctive relief, either. While Google agreed to make additional disclosures on its website, the settlement provided that Google would not make any changes to Google Search.

Two objectors entered written objections. The objections were overruled by the district court and the Ninth Circuit affirmed, agreeing with district court that such an amount could not feasibly be distributed to such an enormous class. *Google*, 869 F.3d at 742 (describing the $0.04 recovery for each class member "a *de minimis* amount if ever there was one").

According to the objectors, not only were the class members short-changed by the settlement, but the *cy pres* payments were made to "class counsel's *alma maters* and nonprofits already funded by the defendant" (the selected organizations were Carnegie-Mellon University; World Privacy Forum; Chicago Kent College of Law Center for Information, Society and Policy; Stanford Law School Center for Internet and Society; Berkman Center for Internet & Society at Harvard University; and AARP Foundation). *Frank v. Gaos*, Pet. for Cert., No. 17-961, 2018 WL 347810, at *1 (U.S. filed Jan. 3, 2018).

The Supreme Court will in all likelihood clarify the legal standards governing *cy pres* awards, including addressing the issues of (1) whether a district court can approve such an award where it is impractical to distribute any money to a class and (2) what qualifies an organization to be a proper *cy pres* recipient.

Class arbitration

In *Lamps Plus, Inc. v. Varela*, Frank Varela, an employee of Lamps Plus, filed suit against Lamps Plus, alleging claims based on a data breach suffered by Lamps Plus (employee tax data was stolen from Lamps Plus and a fraudulent federal income tax was filed in Mr. Varela's name). There, the Ninth Circuit affirmed a district court ruling authorizing class arbitration, based on arguably ambiguous language in an arbitration agreement that did not mention class arbitration. *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 672-73 (9th Cir. 2017), *cert. granted*, No. 17-988 (U.S. Apr. 30, 2018)

In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* , 559 U.S. 662 (2010), the Supreme Court noted the vast difference between your typical, bi-lateral arbitration, on the one hand, and "class arbitration," on the other, ruling that a district court could not infer an agreement to conduct arbitration on class basis simply from the fact that the parties had agreed to arbitrate. Rather, there has to be an express contractual basis for a district court to compel class arbitration.

The arbitration agreement in *Lamps Plus* included language generally providing for the arbitration of "all claims that may … arise in connection with [Mr. Varela's] employment," that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment," and that the arbitrator "is authorized to award any remedy allowed by applicable law." *Lamps Plus, Inc. v. Varela*, Pet. for Writ of Cert., No. 17-988, 2018 WL 389119, at *5-*6 (U.S. filed Jan. 10, 2018).

According to the Ninth Circuit, the contract's failure to mention class arbitration was not dispositive under *Stolt-Nielsen*. Instead, because the language was ambiguous on the issue of class arbitration, the language had to be construed against the drafter (Lamps Plus), under the state law contractual interpretation doctrine of *contra proferentem*. Accordingly, a divided panel of the Ninth Circuit affirmed the district court's order sending the parties to class arbitration. *Varela*, 701 F. App'x at 672-73.

Judge Fernandez, in his two-sentence dissent, stated the arbitration agreement was "not ambiguous" and "[w]e should not allow Varela to enlist us in this palpable evasion of *Stolt-Nielsen*." *Varela*, 701 F. App'x at 673 (Fernandez, J., dissenting).

The Supreme Court will likely provide its own interpretation of the Lamp Plus/Varela arbitration agreement, while at the same time noting the obvious differences between "regular" and "class" arbitration, as it did in *Stolt-Nielsen*.