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Cy pres-only class settlements – anticipated Supreme Court decision may never come to pass

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Takeaway:On April 30, the U.S. Supreme Court granted certiorari in a Ninth Circuit case approving a *cy pres*-only class action settlement. As we reported in a May 2018 post [U.S. Supreme Court puts class action doubleheader on the calendar – cy pres awards and class arbitration], we expected the Supreme Court in that case to clarify the legal *standards* governing *cy pres* awards. But, during oral argument, the case veered in the direction of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), and whether the district court had the required jurisdiction to enter a judgment approving the *cy pres* settlement. Given that the Supreme Court directed the parties (and the Solicitor General) to submit supplemental briefs on the standing issue, it seems unlikely the Court will address the *cy pres* issue. And while it is possible the Supreme Court will use this case to issue a significant post-*Spokeo* ruling, our bet is that the case will be remanded to the lower courts to address standing in the first instance.

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 (actually 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 focused on 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 significant 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.

The district court overruled objections submitted by two objectors and the Ninth Circuit affirmed, agreeing with the district court that the remaining settlement amount could not feasibly be distributed to such an enormous class. *Id*. at 742 (describing the $0.04 recovery for each class member as "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).

When the Supreme Court granted certiorari, most commentators expected the Court to 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.But during the October 31 oral argument, the case moved in a different direction, focusing on whether the class plaintiffs had Article III standing to press their claims under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).Indeed, six of the Justices (Kagan, Roberts, Gorsuch, Breyer, Alito, and Kavanaugh) actively participated in the Article III discussion.Just a week later (on November 6), the Supreme Court directed the parties and the Solicitor General to file supplemental briefs on the standing issue.

The Solicitor General, who appeared as *amicus curiae* supporting neither party, had identified the standing issue in its merits brief addressing the *cy pres* issues. In its supplemental brief, the Solicitor General argued forcefully that none of the named plaintiffs has Article III standing, because plaintiff's theories of harm rested on mere technical violations of the Stored Communications Act or other unduly speculative injuries. *Frank v. Gaos*, Supp. Br. of U.S., No. 17-961 (U.S. filed Nov. 2018) ("U.S. Supp. Br."). According to the Solicitor General, the Supreme Court should vacate the class action judgment approving the settlement and remand with instructions either to dismiss the case for lack of subject matter jurisdiction or to the standing issue. *Id*. at 22.

The oral argument included debate about whether the Court should resolve the standing issue itself or remand the issue to the lower courts. Transcript of Oral Argument, pp. 18, 29. We believe there is a good chance the Supreme Court will *not* decide the standing issue itself and instead remand the issue. As the Solicitor General pointed out in his supplemental brief, the "[Supreme] Court is 'a court of review, not of first view.'" U.S. Supp. Br., at 3 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). And with the issue of standing left to be resolved, the Court would have no reason to address the *cy pres* merits issue that was the focus of its initial certiorari grant.