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SCOTUS punts in cy pres-only class settlement case, remanding on Spokeo standing issue

by James F. Bogan III

As we predicted in a January 2019 post [*Cy pres-only class settlements – anticipated Supreme Court decision may never come to pass*], the United States Supreme Court, in a closely-watched case, declined to rule on the fairness of a *cy pres*-only class action settlement.

When the Supreme Court granted certiorari in that case (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)), 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).

The class plaintiffs advanced a claim under the federal Stored Communications Act ("SCA"), alleging that Google's use and disclosure of information in connection with the transmission of search result "referrer headers" violated the SCA. The settlement approved by the district court and Ninth Circuit provided no monetary relief to the putative class members, but it was also not clear that the named plaintiffs suffered a sufficient injury-in-fact – and therefore had standing – to bring their own claims and represent a class.

Because there had been no ruling by the courts below on the standing issue, and observing that the Supreme Court is "a court of review, not of first view," the Court remanded the case for a ruling on the standing issue. *Frank v. Gaos*, No. 17-961, 2019 WL 1264582, at *3 (U.S. Mar. 20, 2019) (citation omitted). The Court made no substantive pronouncement on the standing issue, emphasizing that "[n]othing in our opinion should be interpreted as expressing a view on any particular resolution of the standing question." *Id*.

In a dissenting opinion, Justice Thomas stated his view that the Court did have standing to review the *cy pres*-only class settlement, because the plaintiffs alleged a violation of the SCA as well as private rights

under state law. *Id.*, 2019 WL 1264582, at *3 (Thomas, J., dissenting). On the merits, he would have vacated the *cy pres*-only settlement, on the grounds that the settlement showed the interests of the class members were not adequately represented (given that class counsel and the named plaintiffs agreed to a settlement that provided benefits only to them and not to the class members), and that the lack of benefit for the class rendered the settlement unfair and unreasonable under Rule 23(e)(2). *Id.* at *4.

If anything else, the Court's decision emphasizes that a federal court must always ensure that it has subject matter jurisdiction (*i.e.*, that plaintiffs have standing to pursue their claims), including when presented with requests for "court approval of proposed class action settlements." *Id.* at *3. "A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing." *Id.*

It remains to be seen whether the Supreme Court will have another opportunity to review the fairness of a *cy pres*-only class settlement. Although *Frank v. Gaos* morphed into the latest reiteration of the Court's rigorous scrutiny of Article III standing issues, the fact the Court granted certiorari on the *cy pres*-only issue (and that Justice Thomas would have reversed on the merits) may lead courts – and class litigants – to reconsider the viability of such a settlement in the future.