

Supreme Court Dodges Cy Pres Issue in Class Action Settlements; Remands for Standing Inquiry Under Spokeo

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The federal rules of civil procedure require that class action settlements be “fair, reasonable, and adequate.” In *Frank v. Gaos*, No. 17-961, the U.S. Supreme Court was expected to decide whether a district court properly approved a class action settlement, which gave \$2 million to class counsel, \$5 million to *cy pres* recipients and nothing but future disclosures to class members. However, on March 20, 2019, the Court ducked that issue, deciding instead to remand to the lower court for a decision on whether the federal court may have jurisdiction and class plaintiffs have standing to sue under *Spokeo, Inc. v. Robins*, 578 U.S.

Plaintiffs in the *Gaos* action complained that a Google search feature that transmitted information, including the terms of the search (called “referrer headers”) to the server that hosted the selected webpage, violated the Stored Communications Act (18 U.S.C. §2701). The Stored Communications Act allows any person “aggrieved” by a violation to sue and recover relief, and Ms. Gaos filed such a suit on behalf of herself and all other Google users.

Google moved three times to dismiss the case for lack of standing, arguing that neither Ms. Gaos nor the other class members had alleged any concrete harm or damage, and that a bare violation of the statute was not damage that created standing. After the district court denied Google’s motions, the parties negotiated a settlement that required Google to make additional disclosures about referrer headers and pay \$8.5 million, none of which would go to class members. Instead, some of the money would go to class counsel and Gaos the rest to entities selected by class counsel and Google to “promote public awareness and education and/or to support research, development and initiatives related to protecting privacy on the Internet.”

Some class members objected to the settlement as not being “fair, reasonable, and adequate” because the class members did not get any relief and the money went instead to entities selected by persons with conflicts of interest. Nonetheless, the district court approved the settlement, and the court of appeals affirmed. The Supreme Court granted *certiorari* to decide whether such a settlement satisfies Rule 23’s “fair, reasonable, and adequate” standard.

The U.S., through the Solicitor General, filed an *amicus curiae* brief that argued that the Court should

not decide that issue, but instead should vacate and remand for a decision as to whether the plaintiffs had standing to sue. On October 31, 2018, most of the discussion at oral argument—even by the Solicitor General—dealt with the merits of the case, with less than one-quarter of the time being devoted to the jurisdictional issue. Even so, the Court chose to go down that avenue and focused on its “obligation to assure ourselves of litigants’ standing under Article III,” an obligation which “extends to court approval of proposed class action settlements.” While the district court had held there was standing, it did so under an earlier decision. The Court noted that since its *Spokeo* decision, no lower court in the case had analyzed whether the plaintiffs had alleged standing in the context of the Stored Communications Act, particularly whether a person who suffers a violation has necessarily suffered an injury “sufficiently concrete and particularized to support standing.” So, the Court remanded the case to the district court for such an inquiry.

As a result, *Gaos* left the *cy pres* issue undecided. The Court’s questions at oral argument, however, suggested skepticism about whether the settlement in this case would pass the “fair, reasonable, and adequate” test. It would be one thing to use *cy pres* to distribute unclaimed settlement proceeds, for example where class members don’t come forward to claim their share or cannot be found, the Justices suggested, and at least hinted that it’s another thing to not even try to distribute real value to class members, and send all the money to persons or entities with tenuous, if any, relationships to the case. Nevertheless, the answer to the *cy pres* question will have to await another case—or perhaps this case again after the standing question has been addressed.

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National Law Review, Volume IX, Number 80

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