129 Million Class Members $0, Charities $6.5 Million, Attorneys $2 Million: Are *Cy Pres*-Only Settlements Fair, Adequate, and Reasonable?

CASE AT A GLANCE

This appeal involves a class action settlement with Google, where the 129 million class members received no compensation, the class action attorneys received $2.125 million in attorney's fees, and Google and the class counsel agreed to contribute $6.5 million to be distributed to seven charitable and nonprofit organizations as a *cy pres* resolution of the litigation. The Court will decide whether such *cy pres*-only awards in settlement classes comport with the requirement that such settlements be "fair, adequate, and reasonable."

Frank v. Gaos
Docket No. 17-961

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From: The Ninth Circuit

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ISSUE

Do *cy pres*-only awards in class action settlements, where the class members receive no compensation, charitable and nonprofit entities receive settlement funds, and class counsel are awarded significant attorney's fees, comport with the Federal Rule of Civil Procedure 23(e) requirement that class settlements must be adjudged as "fair, adequate, and reasonable"?

FACTS

In October 2010, Paloma Goas filed a class action lawsuit against Google in the Northern District of California. Goas's lawsuit alleged that when she used Google to search her own name and personal information and clicked on the resulting links, Google disclosed her search terms and other personal information to third-party websites through the "referral headers" the Google browser collected. Websites use this referral information in editorial and marketing efforts.

Goas's lawsuit alleged claims include fraud, invasion of privacy, breach of contract, breach of the covenant of good faith and fair dealing, breach of implied contract, unjust enrichment under California law, and violations of the federal Stored Communications Act, 18 U.S.C. § 2707(c)(the SCA). The nationwide class action embraced all Google users, an estimated 129 million class members. The SCA provides for statutory damages of $1,000 per violation and attorney's fees for a successful action. The complaint requested class certification, monetary damages, and injunctive and equitable relief. Goas amended her complaint several times, dropping various state-based claims.

After several of Goas's claims were dismissed over concerns as to whether her complaint sufficiently alleged an Article III injury, her lawsuit was consolidated with another SCA action for settlement purposes. During this litigation, the Northern District of California dismissed three cases alleging similar SCA violations. *Zynga Privacy Litigation,* 750 F.3d 1098 (9th Cir. 2014).

Against this background of litigation uncertainty, in March 2013 Google and the Goas plaintiffs reached a settlement agreement after one day of mediation. This settlement provided that the class claimants would receive no compensation, but that Google would pay $8.5 million into a settlement fund to be disbursed to organizations that "agree to devote funds to promote public awareness and education, and/or support research, development, and initiatives, related to protecting privacy on the Internet." Google also agreed to make new disclosures on three of its web pages, to inform users of Google's handling of search-query data. The settlement required Google to make new disclosures in addition to existing disclosures already in place.

Class counsel sent letters to proposed *cy pres* recipients seeking proposals on what they would do if they were designated as beneficiaries. Forty organizations submitted applications that outlined the entity's intended use of the *cy pres* funds consistent with the problems identified in the litigation, the institution's experience with privacy issues, and the organizations' prior financial connection with the defendant Google.

Class counsel and Google designated six recipients to receive the *cy pres* award, without disclosing the proposals or the methodology by which recipients were chosen or rejected. The *cy pres* recipients were the Center for Information, Society,

and Policy at the Chicago-Kent College of Law; the Berkman Center for Internet and Society at Harvard University; the Stanford Center for Internet and Society; World Privacy Forum; Carnegie Mellon University; and AARP, Inc. Three of the *cy pres* recipients—Harvard, Stanford, and Chicago-Kent—were *alma maters* of class counsel who entered into the agreement with Google. In addition, Google already was a donor to several of the designated *cy pres* recipients.

In return for this *cy pres* settlement, Google received a general release of any and all of privacy-related claims from the approximately 129 million U.S. Google users between 2006 and 2014. In addition, Google negotiated a term that provided that it would not be required or requested to make any changes to the practices or functionality of Google Search engine or other services.

The third leg of the settlement provided for class counsels' fees. The parties agreed that the $2.125 million in attorney's fees would come out of the settlement fund. The attorney-fee award represented 25 percent of the settlement fund and more than double the class counsels' alleged lodestar.

Theodore Frank and Melissa Holyoak, class members and public interest attorneys with the Center for Class Action Fairness, objected to class certification, approval of the settlement, and the attorney-fee agreement. The objectors raised four challenges to the settlement.

First, the objectors argued that the all-*cy pres* settlement was inappropriate because there were feasible, standard claims processes to compensate the class members. If the court were to find that any distribution to class members was not feasible, then the class action should not have been certified. Second, the objectors contended that the parties' selection of the *cy pres* recipients, based on preexisting relationships, represented a conflict of interest and divided loyalties, which breached the attorneys' fiduciary duties to the class members. The objectors claimed that even the appearance of conflicts precluded the *cy pres* awards to these recipients. Third, the objectors maintained that the *cy pres* distribution compelled some class members to subsidize the lobbying and policy efforts of entities with whom the objectors disagreed. And fourth, the objectors challenged the attorney-fee award, based as it was on the assumption that the $8.5 million *cy pres* fund was equivalent to the actual compensation amount to the class.

Relying on Ninth Circuit precedent, the district court overruled all the objectors' contentions and approved the *cy pres*-only settlement. The court rejected the objectors' argument that *cy pres*-only settlement classes could never be certified. The court found that trying to divide a $6.5 million net settlement fund to 129 million class members would be "infeasible." The court further found that the designated *cy pres* recipients would meet the objectives of the SCA and further the interests of class members. The court indicated that it was sufficient that the *cy pres* recipients' activities were "sufficiently related" to the subject matter of the litigation. The court further concluded that there was no indication that any counsel's allegiance to a particular *alma mater* factored into the selection process or were tainted by a conflict of interest. Therefore, a *cy pres* distribution in such circumstances was well established under Ninth Circuit case law. Nonetheless, the court raised a number of concerns about the lack of transparency in the selection of the *cy pres* recipients and the potential conflicts of interest, which the court noted raised "a red flag" and "did not pass the smell test."

The Ninth Circuit upheld the district court's approval of the *cy pres*-only settlement, finding the approval consistent with Ninth Circuit precedents supporting *cy pres* awards. Again, the court rejected the argument that *cy pres*-only settlements are categorically improper. Considering the three factors relevant to a determination of the legitimacy of *cy pres* relief, the Ninth Circuit upheld the lower court's findings. The district court did not abuse its discretion or clearly err in approving the settlement. The court held that a district court could approve a *cy pres*-only settlement provided that the court found the settlement to be "fair, adequate, and free from collusion." It did not matter whether there might be possible alternatives to compensate class members.

The Ninth Circuit also dismissed the argument that a class action that provided no compensatory relief to class members was therefore not "superior" to other means of adjudication, requiring denial of class certification. The same factors that make individual litigation economically infeasible likewise supported the rationale for *cy pres*-only settlements.

The Ninth Circuit rejected the contention that preexisting relationships among counsel and the *cy pres* recipients raised a problem of conflicts of interest. The fact that Google had previously donated funds to some of the designated beneficiaries was not disqualifying. The court refused to further scrutinize the parties' selection of the *cy pres* beneficiaries, suggesting that such inquiries would be "an intrusion into the private parties negotiations" and therefore "improper and disruptive to the settlement process." The Ninth Circuit indicated that the standard was that *cy pres* "be [ ] tethered to the objectives of the underlying statute and the interests of the silent class members."

Finally, the Ninth Circuit rejected the argument that the attorney's fees should have been calculated on some lesser amount because it was a *cy pres*-only deal, and not a settlement that provided actual compensation to class members. The court held that a 25 percent fee was a permissible benchmark, whether or not class counsel obtained actual compensation for class members. The court further rejected the objectors' suggestion of a "random lottery distribution" to some class members as an alternative to *cy pres* relief.

Judge J. Clifford Wallace dissented in part. While he agreed that the *cy pres* settlement was sustainable under Ninth Circuit precedents, he took issue with the district court's failure to probe the preexisting relationships between counsel and the *cy pres* recipients. He explained that the burden should be on counsel to show that any prior relationship played no role in the negotiations. Judge Wallace thought that a remand to the district court to make further findings was appropriate.

CASE ANALYSIS

Cy pres is derived from trust law, traceable at least to the 19th century. If a charitable testamentary bequest would fail for lack of an ascertainable beneficiary, the *cy pres* doctrine allowed a probate court to reassign the gift to another purpose. In modern trust law, the *cy pres* doctrine applies where it becomes unlawful, impracticable, or wasteful to fulfill a testator's original directive. *Restatement (Third) of Trusts* § 67 (2003).

Class action settlements entail problems with the allocation of settlement funds not claimed by a substantial number of eligible class members. This problem typically arises in small claims consumer class actions, where there are large numbers of claims but the value of each claim is very small. In such cases, it may be difficult to notify all the claimants, the administration of the funds might consume the payout to class members, or large portions of a fund might go unclaimed. In the past, to address this contingency, corporate defendants negotiated for "reversionary clauses" whereby unclaimed settlement funds reverted to the defendant.

Reversionary clauses came under significant attack and courts began to disfavor reversionary provisions, declining to approve settlements with such provisions. Because it was well known that claim rates in consumer class actions typically were very low, defendants reaped the benefit of agreements that released them from liability, without imposing significant financial burdens on the offending corporation.

With the mounting disapproval of reversionary clauses, settling parties looked for other means to deal with the prospect of unclaimed settlement funds. Attorneys turned to innovative use of the *cy pres* doctrine. The application of *cy pres* to class action settlements is a relatively recent development, first appearing in the 1980s. Settling parties used the doctrine to redirect settlement funds if portions of settlement monies might go undistributed to class members.

Settling parties gradually expanded the *cy pres* doctrine to permit settling parties to designate portions of settlements for charitable entities, nonprofits, or foundations, in addition to, or in place of, monies distributed to class members. In recent years, parties have negotiated *cy pres*-only settlements where class members receive no compensation at all, but the entire settlement fund is distributed to a variety of charitable institutions designated by class counsel and defense attorneys. These nonmonetary settlements have been justified as providing indirect benefits to the class.

Courts have developed three general standards to evaluate *cy pres* provisions. First, direct distribution of settlement funds to class members must be infeasible, for example if there are millions of class members who are difficult to locate or notify, or the administrative costs of making such a distribution would exceed the value of the fund. Courts have defined the concept of "feasibility" in various ways. Thus, some courts have indicated that *cy pres* awards as part of a settlement are permissible even if it might be feasible to accomplish a claims distribution process that would award class members some small monetary compensation.

Second, *cy pres* recipients must have a mission tied to addressing the problems identified in the underlying litigation. This requirement ensures that class members will receive an indirect benefit from the settlement, even if they do not receive direct monetary compensation.

Third, the court or any party must not have any significant prior affiliation with the *cy pres* beneficiary that would raise substantial questions about whether the selection of the recipient was made on the merits. ALI's *Principles of the Law of Aggregate Litigation* § 3.07 cmt. b. Courts have indicated that they will not police possible collusion between class counsel and settling defendants, to ascertain whether a *cy pres* resolution was the result of improper coordination among the attorneys. The Ninth Circuit, which permits *cy pres* settlements, has indicated that the court will not intrude on the negotiations of settling parties, which would be disruptive to the settlement process. *Lane v. Facebook, Inc.,* 696 F.3d 811 (9th Cir. 2012). In addition, the Ninth Circuit requires evidence of collusion before rejecting a settlement, shifting the burden to objectors to prove such collusion.

As is true for all class action settlements, settlements that incorporate *cy pres* relief must be presented to a court for approval under Rule 23(e). In order for a court to approve a proposed settlement, the court must conduct a fairness hearing and determine that the agreement is fair, adequate, and reasonable. Typically, class settlements with *cy pres* provisions specify the charitable designees for receipt of the *cy pres* funds. However, the settling parties are under no obligation to explain the reasons for the selection of particular *cy pres* beneficiaries, or the process by which the settling parties chose the recipients. Nonetheless, courts consistently have approved class action settlements with *cy pres* provisions, expressing reluctance and distaste for probing into the motivations of the settling parties.

As settling parties expanded the use of *cy pres* relief with concomitant judicial approval, the deployment of *cy pres* provisions have come under increased scrutiny and criticism. The designation of certain favored charitable entities to receive *cy pres* funds has drawn especial attention, where the named beneficiaries consisted of the attorneys' *alma mater* law schools or universities, or charities favored by the attorneys, presiding judge, or the judge's family. In some instances, *cy pres* provisions designated charitable causes having no relationship to the underlying subject matter of the litigation.

The increased use of *cy pres* provisions has generated an array of objections and challenges. First, critics note that *cy pres* awards create potential conflicts of interest between the settling parties and class members to whom class counsel, at least, owed a fiduciary duty of loyalty. Under this theory, class attorneys' primary obligation is to obtain the best monetary result for class members, and not have those monies siphoned off to the attorneys' favored charities. This potential for conflict of interest extended to judges responsible for approving the settlement, but nonetheless who would benefit if the judges' favored charities were included among the *cy pres* recipients.

Second, critics argue that *cy pres* provisions illegitimately and unconstitutionally deprive class members of their property without

due process of law. In this view, class members in Rule 23(b)(3) consumer actions are entitled to monetary compensation if the defendant chooses to settle the action. Thus, settling parties who divert settlement funds to other entities that are not parties to the litigation effectively deprive class members of their property. Moreover, settling parties have no right to award the class members' property to third parties with no relationship to the litigation.

Third, critics contend that *cy pres* provisions allow class counsel to be awarded outsized attorney's fees based on inflated valuation of the *cy pres* fund. Instead, objectors argue that attorney's fees ought to be based solely on the actual monetary value of the settlement to class members, rather than an illusory figure tied to *cy pres* relief.

Fourth, critics maintain that the increased use of *cy pres* remedies creates perverse incentives that encourage unscrupulous class counsel to file dubious consumer strike suits. Pursuant to this theory, the assurance of significant attorney's fees based on *cy pres* settlements inspires counsel to file and settle these suits quickly. The prospect of *cy pres* relief also incentivizes defense attorneys, who are able to obtain complete release from liability at relatively painless cost, with the added benefit of virtue signaling to charitable causes.

Notwithstanding the increased chorus of criticism, courts have continued to approve and uphold class settlements with *cy pres* provisions. With the increasing use of *cy pres* provisions in class action settlements and mounting condemnation from some quarters, Chief Justice John Roberts signaled the Court's interest in reviewing *cy pres* relief in an appropriate appeal. *See Marek v. Lane,* 134 S. Ct. 8 (2013)(Roberts, C.J., respecting denial of *certiorari*). In *Marek,* Chief Justice Roberts indicated that the Court should clarify the limits and use of *cy pres* remedies. He suggested that the Court should consider the role of the parties and the judge in shaping a *cy pres* remedy, how entities should be selected, and how closely the goals of designated organizations should be aligned with class interests. The *Frank* challenge crystallizes many of the *cy pres* issues that have been percolating in the class action arena for several years.

Petitioner Frank rehearses the multiple criticisms of *cy pres* remedies discussed above. He notes how *cy pres* creates perverse incentives for class and defense counsel to use *cy pres* relief for their own benefit, rather than to direct compensation to class members. Frank anchors this point to the larger problem of gamesmanship and self-dealing, at the expense of class members, in class settlements. Thus, *cy pres* incentivizes class counsels' pursuit of otherwise unprofitable strike suits that would be infeasible to litigate because of questionable merit or unmanageability.

He discusses at length the problem of unseemly conflicts of interest inherent in application of *cy pres.* He contends that courts and class counsel lack the authority or discretion to divert class members' property to third parties with no relationship to the litigation. He argues that the diversion of money to charitable entities violates the First Amendment rights of class members who do not wish to support the policies or actions of the charitable designees.

Frank raises five basic arguments against the use of *cy pres* relief. First, Frank claims that a settlement that awards disproportionate attorney's fees to class counsel, untethered to the actual monetary compensation to class members, is not fair or reasonable under Rule 23(e). In calculating attorney's fees based on the percentage of recovery to the class, courts should substantially discount *cy pres* distributions relative to direct payment to class members. To address this issue, Frank suggests that courts should apply a simple principle at the fairness hearing: "regardless of whether a settlement is 'adequate,' it is not fair or reasonable if the settlement pays attorney's fees that are disproportionate to the *actual* and *direct* benefit realized by the class compromising its claims."

Frank proposes a "proportionality rule" whereby courts would assess the ratio of the fee, to the fee plus what the class members received.

Second, Frank argues that *cy pres* awards are inappropriate where it is feasible to distribute monetary proceeds to class members, no matter how small those awards might be. Moreover, *cy pres* is inappropriate where a claims process can be developed to distribute proceeds to identifiable class members, without a requirement that all potential class recipients receive compensation. Frank contends that the Ninth Circuit ruling has the potential to sweep every consumer class action into the *cy pres* category, because such settlements typically compensate only a fraction of class members. Frank suggests, as an alternative to *cy pres* relief, that settling parties could conduct a "random lottery distribution" to ensure that some class members would receive compensation.

Third, if a class action settlement cannot provide direct relief to the class, defaulting to a *cy pres* alternative, then the settlement class cannot be certified under Rule 23(e). Thus, any class settlement that awards a disproportionate fee award to class counsel, with no actual or direct benefit to class members, is not fair or reasonable under Rule 23(e). Frank argues that though a settlement may be adequate, that does not mean it is fair or reasonable. Moreover, such *cy pres* agreements cannot satisfy the Rule 23(b)(3) requirement that the settlement be the superior means for resolving the dispute.

Fourth, if courts are to permit *cy pres* relief, then there should be strict restrictions against diverting funds to recipients with significant or prior relationships with the attorneys or the presiding judge. Frank suggests that the possibility of *cy pres* relief offers an enticing opportunity for attorneys who are interested in promoting their own personal and political preferences. Additionally, *cy pres* relief can enmesh presiding judicial officers in the appearance of impropriety, by flattering judges with *cy pres* beneficiaries favored by judges or their relatives (and thereby ensuring approval of the settlement). Moreover, courts should be wary of *cy pres* awards directing money to charitable causes that the defendant would have given to anyway, given the illusion of relief.

Fifth, Frank contends that *cy pres* awards fail to address class members' injuries for which they are waiving their rights to future litigation with the defendant. Neither class counsel nor the courts

have the authority or discretion to redirect class members' actual compensation (their property) to third parties. This application of *cy pres* doctrine, therefore, contravenes the Rules Enabling Act, 28 U.S.C. § 2072(b), which specifies that Rule 23 cannot operate to "abridge, enlarge, or modify any substantive right."

Finally, Frank urges that if the Court declines to adopt a *cy pres* rule that applies to all class action settlements, it should at least reverse the Ninth Circuit's judgment, which he claims exacerbates the conflict of interest problem in class actions. "A bright-line rule is required because of 'the substantial history of district courts ignoring and resisting circuit court *cy pres* concerns and rulings in class action cases.'"

In an unusual occurrence, the class itself and Google (as the defendant in the lawsuit) independently have submitted briefs as respondents, both seeking to preserve the *cy pres* settlement. The Class Respondents criticize the objectors for engaging in hyperbolic, inflammatory rhetoric that attacks class actions generally. They contend that the objectors' broadside attack impugns the bar's integrity and denigrates the district courts' capabilities to exercise sound discretion in approval of class settlements. They suggest that Frank's true goal is to punish counsel for cases that work out poorly or to discourage "bad" lawsuits. However, the Class Respondents note that Rule 23 is intended to protect class members, not to punish class counsel.

The Class Respondents point out that *cy pres* settlements and distributions are exceedingly rare, limited only to those occasions where payment to class members is infeasible. They note that from 1990 to 2008, an average of 5 class actions resulted in *cy pres* settlements, citing to 86 *cy pres* settlements over an 18-year period. The Class Respondents recite the three established criteria for courts to approve *cy pres* settlements and contend that the settlement satisfied all three requirements.

The Class Respondents note that parties can settle ordinary litigation that provides for no monetary compensation, arguing that Rule 23 does not prohibit class action settlements from doing the same. The objectors' proposal to categorically ban all *cy pres* settlements is not supported by relevant law or any Federal Rule of Civil Procedure. Instead, the objectors have recommended a series of legislative proposals based on policy arguments, but the Court is constitutionally inhibited from adopting atextual modifications to Rule 23, apart from the established federal rulemaking process. Courts are not free to amend a rule outside the rulemaking process Congress has ordered.

The Class Respondents argue that, while Congress and the Advisory Committee on Civil Rules have repeatedly considered *cy pres* settlements, both institutions have declined to overturn or amend existing *cy pres* standards. They note that Congress has addressed abusive class action practices in the Class Action Fairness Act by specifically cabining use of so-called "coupon settlements" but Congress did not provide any special rules for *cy pres* provisions. The Class Respondents contend that the objectors are attempting to rewrite Rule 23(b)(3), which enables small claims class actions and permits *cy pres* settlements. They argue that a categorical ban on *cy pres* settlements would leave such small claimants with no recovery at all. Finally, they criticize Frank's alternative proposal to institute a "random lottery distribution" to some percentage of claiming class members, which would deny some class members any benefit at all to increase the return to others.

The Class Respondents deny that *cy pres* settlements fail to satisfy the Rule 23(b)(3) superiority requirement. Thus, a class action that yields no monetary relief, but provides indirect benefit to the class, is superior to the alternative in which a court denies class certification and leaves claimants out of court. Thus, the Class Respondents note that in small claims class actions, the realistic alternative to a class action is not millions of individual suits, but zero individual suits. Therefore, *cy pres* settlements are superior to nothing.

In response to Frank's First Amendment argument, the Class Respondents maintain that the objectors failed to assert this theory in the lower courts and therefore waived this argument. In addition, any class member offended by the designation of *cy pres* recipients had the opportunity to opt out of the settlement. Likewise, Frank's objection to the calculation of fee awards presents an issue outside the scope of the Supreme Court's grant of *certiorari* and, therefore, was also waived. Nonetheless, Frank's fee award objections defy the text and history of fee awards in class litigation. Finally, the Class Respondents contend that *cy pres* settlements do not implicate a Rules Enabling Act violation, because settlements are contracts. Therefore, such settlements do not expand substantive remedies.

Google, as a party to the settlement, is aligned in interest with the class to assure that the Court upholds the settlement. Google's arguments substantially overlap with those advanced by Class Respondents, reiterating that district courts have discretion to approve *cy pres* remedies provided that three well-recognized conditions are met. Google urges that the objectors' categorical ban on *cy pres* settlements will not solve any underlying problems with class litigation, generally, and will actually harm class members. Google contends that banning *cy pres* settlements would make class action litigation more costly and less efficient, "imposing a cure that worsens the disease."

Similar to the Class Respondents, Google maintains that the settlement satisfied the conditions for approval of a *cy pres* remedy and that it benefited class members far more than *de minimus* payments to a very tiny number of class claimants. In Google's view, the administrative costs of attempting to compensate 129 million class members would consume small payments to even 1 percent of the class. Like the Class Respondents, Google attacks Frank's recommendation of a "random lottery distribution" to some class members.

Google rehearses the history of class actions as rooted in equity doctrine, noting that *cy pres* also is rooted in equity. Relying on the equitable powers of courts, Google notes that the Federal Rules of Civil Procedure do not abrogate the equitable powers of courts to approve *cy pres* remedies, and no rule expressly addresses *cy pres*. No prior amendments to Rule 23 have limited the availability of *cy pres* settlements. The Rules Enabling Act also does not somehow bar judicial approval of *cy pres* settlements, again observing that settlements are a matter of private contract between the parties.

Echoing the Class Respondents' point, Google suggests that Frank's concerns about violation of his First Amendment rights is insubstantial because Rule 23 permits dissenting class members the opportunity to opt out. That option was open to any class member who did not want to be associated with speech by any *cy pres* recipient.

Regarding Frank's objections to the attorney fee award, Google notes that concerns about attorney's fees "speak to a broader issue with the administration of class actions." Google contends that any limitations on a district court's discretion to award attorney's fees in *cy pres* cases should apply equally to all class actions. Google urges that a rule imposing a presumptive lodestar hourly model, rather than a percentage of the settlement fund, would best align attorney incentives with sound policy for the class.

Unlike the Class Respondents, Google expansively redirects the Court's attention to other class certification issues, which is not surprising as a repeat defendant in class litigation. Initially, Google notes that there are numerous abuses in class action litigation. Google would like the Court to further address problems such as the viability of no-injury classes and the ascertainability of class membership—issues not on appeal in this case. Google also suggests that it would favor a rule that required courts to conduct an early evaluation of the merits and magnitude of injury as a factor in the superiority evaluation at class certification. Noting the uncertainties of lower-court class action jurisprudence that impose settlement pressure on defendants, Google recommends a rule "barring certification of *de minimus* claims where the per-class-member damages are less than the cost to pay them, particularly if the determination could be made, and the case dismissed, early in the litigation."

SIGNIFICANCE

Class action attorneys will be closely watching the Court's attention to the issue of *cy pres* relief in class action settlements. *Cy pres* provisions have become increasingly prevalent in settlement agreements, raising heightened judicial concern and academic criticism. Notwithstanding the increasing concern, lower courts continue to approve settlement agreements with *cy pres* provisions, and class action lawyers continue to expand their use.

The heightened interest in this appeal is illustrated by the large number of amicus briefs filed on behalf of the parties. Generally, defense-minded actors have aligned with Frank, urging the Court to either outright ban *cy pres* remedies or restrict *cy pres* in very confining ways. Hence, most amici in support of petitioner urge reversal of the Ninth Circuit's decision, fearing that the circuit's sweeping precedent will encourage a flood of frivolous strike suits. Many of these amici also have used the appeal to rehearse a litany of class action abuses that they wish the Court to curb. On the contrary, the usual array of plaintiff-minded organizations have aligned to ask the Court to uphold the Ninth Circuit's decision and not outright ban or restrict *cy pres* relief, stressing the constructive benefits to society of various *cy pres* settlements, including support of legal aid entities otherwise publicly underfunded.

The *Frank* appeal embodies both the ideal as well as the imperfect vehicle for the Court to address the issue of *cy pres* relief. In contrast to the failed attempt to accomplish *cy pres* review in *Marek,* the *Frank* appeal capably perfects the issues of *cy pres* relief, which are well briefed to the Court. On the other hand, the *Frank* appeal could hardly have embraced a more extreme exemplar of possible *cy pres* overreaching: a no-compensation class, *cy pres*-only settlement, with 25 percent attorney fee.

The Court might adopt one of several approaches to addressing the use of *cy pres* relief in settlement agreements. Radically, the Court could declare *cy pres* provisions unconstitutional and not sustainable under Rule 23: issuing a categorical ban urged by objector Frank. This outcome would be possible if the Court's conservative wing, joined by a newly appointed conservative justice, endorsed this result. But at least some conservative justices will recognize that corporate defendants sometimes desire *cy pres* provisions, as did Google here, and therefore have little interest in a Court-mandated outright ban. A bright-line prohibition on *cy pres* awards, however, most certainly would not be joined by the Court's liberal justices.

Moreover, if a ninth justice is not appointed in time to hear and decide the appeal, the Court conceivably could split 4–4, leaving the current *cy pres* doctrine as the status quo. Another possibility, raised by the respondents, is for the Court to decide that it had improvidently granted *certiorari* for an array of reasons, including the dubious nature of the plaintiff's Article III standing.

More likely, however, given the extreme nature of the Google agreement, the Court will choose not to throw the proverbial baby out with the bathwater. Thus, it is possible that the Court may disapprove the *cy pres*-only settlement in the Google litigation, but nonetheless preserve the possibility of *cy pres* in more limited circumstances. The Court may set forth parameters and rules governing the permissible scope of *cy pres* relief that acknowledge the concerns raised by the objector, but nonetheless recognize situations where *cy pres* relief makes sense, as urged by the respondents and various amici. This compromise position could conceivably earn the endorsement of both liberal and conservative justices.

The complicated role that *cy pres* relief plays in the class settlement arena is reflected in the interesting array of amicus briefs. Normally, one would expect that the usual cohort of corporate, anti–class action groups to weigh in opposition to *cy pres* relief. However, corporate defendants sued in consumer class litigation do not always oppose *cy pres* remediation and frequently coordinate with class counsel to craft *cy pres* settlements that are to the defendants' advantage. Google's hybrid brief, urging that the Court uphold the *cy pres* settlement while also urging the Court to address various class action abuses, captures the complex position of defendants regarding this appeal.

It remains to be seen whether and how the Court might address Frank's arguments based on the First Amendment and attorney's fees. The respondents have challenged whether these issues were properly raised in the lower courts or whether these contentions exceed the scope of the questions certified for appellate review.

Three amici that have filed in support of neither party further illustrate the complex practical implications of *cy pres*. Thus, the

American Bar Association formally has taken no position "on the precise question before this Court," but instead asks the Court to preserve *cy pres* awards in certain circumstances, particularly for legal services organizations that serve low-income and indigent clients. The ABA further argues that state rules governing *cy pres* could be imperiled if the Court chooses to impose constitutional or other strict limits on *cy pres* awards.

The reliably corporate (and anti–class action) Chamber of Commerce of the United States also has filed an amicus brief in support of neither party, perhaps recognizing that certain *cy pres* awards can be beneficial to corporate defendants. Similar to the ABA, the Chamber takes no position on the *cy pres* award in the Google settlement.

Instead, the Chamber uses this appeal to urge the Court to rigorously police class certification requirements on the front end of class litigation. The Chamber contends that there is a "wide gap" between the Court's class action jurisprudence and the ways in which lower federal courts implement that jurisprudence—a position articulated by Google in its respondent's brief. The Chamber suggests that apart from the most egregious cases, courts have been unwilling to discipline class action abuses.

Finally, the U.S. Department of Justice (DOJ) has filed an amicus brief supporting neither party. At the threshold, the DOJ raises skepticism about the plaintiff's Article III standing in the underlying litigation. Despite taking no side, the DOJ currently disfavors *cy pres* provisions, and the Attorney General has issued a memorandum that directs DOJ litigating entities not to enter into *cy pres* settlements. The government suggests that *cy pres* settlement provisions require careful scrutiny and should be approved only if the provisions satisfy certain limitations, which substantially track petitioner Frank's recommendations. Thus, *cy pres* awards should be permitted only if they redress the plaintiffs' injuries, and *cy pres* distributions should be discounted in determining attorney's fees.

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