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April 18, 2018

Is SCOTUS Going to Tackle Cy Pres Awards in Class Action Settlements?



*Cy pres* remedies ... are a growing feature of class action settlements. ... In a suitable case, this Court may need to clarify the limits of the use of such remedies." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari).

In *Marek*, the U.S. Supreme Court denied cert in a case questioning the propriety of a *cy pres* award in a class action settlement. But Chief Justice Roberts suggested he might nevertheless be on the lookout for "an opportunity to address the more fundamental concerns surrounding the use of such [*cy pres*] remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; ... what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on." *Id.* Has that time now come? A petition for certiorari to the U.S. Supreme Court in *Frank v. Gaos*, Case No. 17-961, filed in January 2018, again raises the issue of *cy pres* settlements and class actions, in the content of a settlement of a privacy class action litigation brought against Google. Briefing will soon be complete and, if petitioners have their way, the U.S. Supreme Court may soon be addressing the issues that Chief Justice Roberts raised almost five years ago. **Case Background** In *Frank*, two objectors to a class action settlement argue that the settlement's reliance on a *cy pres* award—with no payments made directly to class members—is not "fair, reasonable, and adequate," as required by the Federal Rules of Civil Procedure. In the underlying case, the class settlement included only a *cy pres* award paid by defendant Google to six entities that focus on research into issues of internet privacy, and an award of attorneys' fees. **Petitioners' Arguments for Review** The petitioners claim that *cy pres* awards (1) "typically fail to redress class members' alleged injuries"; (2) drive a wedge between class counsel and their clients; (3) are used in settlements that minimize costs or benefit defendants; (4) satisfy the requirement of manageability where it might not be met; and (5) create the appearance or reality of judicial conflicts of interest. Because of these concerns, and what petitioners assert is the increasing prevalence of *cy pres* awards in class action settlements and a conflict between the underlying Ninth Circuit decision and the other circuit courts of appeal, the petitioners have urged the Supreme Court to grant cert. Petitioners have garnered amicus support

from the Center for Constitutional Jurisprudence, the Cato Institute, the Center for Individual Rights, and 17 state attorneys general. **Google's Arguments in Response** Google has opposed the petition for certiorari, arguing that a *cy pres* award was particularly well-suited to this settlement because, as the trial court determined, distribution to class members was infeasible and class members had not and could not allege they had suffered any actual damage. Google has also asserted that, in fact, the use of *cy pres* awards in class action settlements is actually declining and there is no conflict among the circuit courts. The class action plaintiffs have also joined in to oppose the petition, essentially mirroring Google's arguments. **What Happens Next?** The petition is scheduled to be circulated for conference at the Supreme Court at the end of March. We should know shortly thereafter if this is case in which the Court may finally examine the issues and concerns that the Chief Justice raised in *Marek*. Stay tuned for updates.

## Authors

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