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Questions Regarding Cy Pres Settlements Remain after Frank v. Gaos

PIERCE ATWOOD LLP

Article By Pierce Atwood LLP
Joshua D. Dunlap

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Today, in a case that was being watched closely for its potential ramifications for class settlements, the Supreme Court opted not to address the merits of the *cy pres* issues that were presented to it. *Frank v. Gaos* involved a settlement that would have distributed millions of dollars to *cy pres* recipients and class counsel, but no money to class members. Objectors complained that the settlement did not comply with the requirement that class settlements be "fair, reasonable and adequate," and the Supreme Court granted certiorari to resolve that issue. It ultimately did not.

Instead, the Supreme Court, in a *per curiam* decision, vacated and remanded for the lower courts to address whether the named plaintiff had Article III standing in light of *Spokeo, Inc. v. Robins*. After the district court rejected the argument the plaintiff lacked injury and thus standing to pursue its claim that Google violated federal law by sharing search terms, the parties had reached a settlement. Between the district court's final approval of the settlement and the Ninth Circuit's affirmance of that approval, the Supreme Court had clarified the injury-in-fact inquiry in *Spokeo* (as I have discussed elsewhere). Nevertheless, the Ninth Circuit did not consider the standing issue anew. After requesting briefing on the issue, the Supreme Court remanded the case for further proceedings, directing the lower courts to satisfy their obligation to ensure that the plaintiff had standing. Justice Thomas wrote a dissent, concluding that the plaintiff did have standing and that the *cy pres* settlement did not satisfy Rule 23.

While *Frank* is most notable for what it did not do – thereby leaving the *cy pres* issues to be resolved at a later date – it does at least suggest a few tentative conclusions.

First, it illustrates the difficulties plaintiffs face in certain types of cases, including privacy and data security class actions. Plaintiffs in such cases have struggled to articulate bases for Article III standing. The Court in *Frank* emphasized that, because class settlements must be judicially approved, the standing issue cannot be avoided even if both parties find settlement to be mutually beneficial. As the Court observed, "[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." Courts must therefore diligently fulfill their role to examine Article III standing before approving a class settlement.

Second, Justice Thomas' dissent indicates the uncertain footing of *cy pres* settlements, or at least *cy pres*-only settlements. Justice Thomas noted disapprovingly that the settlement agreement provided members of the class "no damages and no other form of meaningful relief." Instead, all of the payments went to nonprofit organizations, plaintiffs' lawyers, and incentive payments to the named plaintiffs. In Justice Thomas' view, because class members would receive no meaningful relief from the settlement, the interests of the class were not adequately represented, and Rule 23(a)(4) and (g)(4) therefore were not satisfied. He further concluded that the settlement did not satisfy the fairness and reasonableness requirements of Rule 23(e)(2), and questioned whether it would pass muster under the superiority requirement of Rule 23(b)(3) because it "extinguish[ed] the absent class members' claims without providing them any relief." Justice Thomas' dissent expands upon the "fundamental concerns" regarding *cy pres* settlements previously expressed by Chief Justice Roberts in *Marek v. Lane*.

It is becoming increasingly clear that the justices view *cy pres* settlements skeptically, but a final answer as to

the validity of those settlements will wait for another day.

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