

Chaos in Gaos: Supreme Court Avoids Cy Pres Ruling and Remands Google Settlement for Standing Analysis

Thursday, March 21, 2019

On March 20, 2019, the U.S. Supreme Court issued a per curiam opinion vacating the decision of the Ninth Circuit in *Frank v. Gaos*. The Court granted certiorari to evaluate a *cy pres* settlement in a class action. The district court approved a settlement fund granting \$8.5 million in monetary relief in a suit brought by plaintiffs alleging that Google's privacy practices violated the Stored Communications Act. The class included tens of millions of Google users. Because the class was so large, the district court found that it was appropriate to distribute the entire fund — less attorneys' fees — to charitable causes.

The settlement was approved over the objections of five class members who then carried their objections to the Ninth Circuit. The Ninth Circuit approved the settlement, and the case moved to the Supreme Court.

Meanwhile, while the case was proceeding in the lower courts, the Supreme Court issued its decision in *Spokeo v. Robins*, where the Court rejected a categorical rule that a plaintiff can always sue in federal court by citing a violation of a statute. In *Frank*, the U.S. solicitor general filed a brief in the Supreme Court arguing there was no standing under *Spokeo* — or at least that the issue was not analyzed. The standing issue became front and center at oral argument, and the Court called for supplemental briefing to address the standing issue.

The result: The Court remanded the case to the lower courts to address the standing issue. The eight-judge per curiam opinion (more on that in the next paragraph) said the Court was taking no position on how the standing issue should come out and instead the lower courts — either the Ninth Circuit or the district court — should address the issue in the first instance.

Justice Thomas dissented. He stated that he believed there was standing, which was consistent with his *Spokeo* concurrence, and he went on to say he would void the settlement because the *cy pres* arrangement really awarded no relief to the class.

Some takeaways:

- The type of aggressive *cy pres* settlement at issue in this case is probably not likely to come up again before the Court. Anecdotally, parties settling class actions in federal court have significantly peeled back the use of *cy pres*. Some speculation is that Justice Kagan — who aggressively pushed the standing issue at the oral argument — didn't want the Court to decide the *cy pres* issue in the context of this case, as the facts were especially compelling against the use of *cy pres*.
- Justice Thomas is digging in on his view of standing. This may make counting to five votes for a narrow view of standing, typically advocated by defendants, tougher in the typical statutory class action type case.
- The Court has so far denied certiorari on a number of post-*Spokeo* cases, but there are some emerging circuit splits that will likely harden in the near future. While *Spokeo* is only three years old, there are hundreds of detailed district court opinions and dozens of circuit opinions applying the lessons of the case.



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[*Frank v. Gaos*](#), No. 17-961 (U.S. Mar. 20, 2019).

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