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Supreme Court Sidesteps Class Settlement Issue to Remand, Questioning Article III Standing Under Spokeo

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On March 20, 2019, in *Frank v. Gaos*, 586 U.S. ___ (2019), the United States Supreme Court sidestepped a novel question regarding a *cy pres* class action settlement, instead remanding the case back to the lower courts with instructions to consider Article III standing issues in light of the high court's 2016 decision in *Spokeo, Inc. v. Robins*.[1]

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In the class action context, *cy pres* refers to the practice of distributing settlement funds to public interest or charitable recipients whose work is determined to indirectly benefit class members. Sometimes this is done with a portion of settlement funds (that go unclaimed by class members). Sometimes the *cy pres* award is the only cash payment (other than fees and costs to counsel), on the theory that this comes as close as possible ("*cy près comme possible*") to awarding damages in a case that is not amenable to individual relief. Federal courts—which must review any class action settlement and find that it is "fair, reasonable, and adequate" to the class—have been generally critical of *cy-pres*-only settlements.

In the *Gaos* case, which challenged Google's privacy practices on behalf of tens of millions of Google users, the litigants requested court approval for an $8.5 million class settlement that sought to distribute more than $5 million to *cy pres* recipients largely selected by class counsel, and more than $2 million to class counsel, without individual monetary relief to absent class members. The trial court approved the settlement over the objections of certain opt-out class members, who then continued to press those objections at the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed, and at the request of two of the objectors, the Supreme Court granted *certiorari* to weigh in on the appropriateness of the settlement.

However, a new issue soon emerged. During briefing, the United States filed a brief as *amicus curiae*, not to support either party, but instead to express concern about whether the Court had jurisdiction to even address the question presented. The Solicitor General's brief raised the issue of whether the class-action plaintiffs may have lacked Article III standing in the federal district court and suggested that the Supreme Court might wish to remand the case for the lower courts to address standing in the first instance. Without Article III standing, the federal courts would not even have jurisdiction to approve a class settlement.

The issue raised by the Solicitor General gained traction. After hearing argument, the Supreme Court ordered supplemental briefing on the threshold question of Article III standing. The objectors, the plaintiffs, defendant Google, and the United States as *amicus curiae*, all briefed the subject, with the objectors and plaintiffs arguing that there was standing and Google and the United States taking the opposite view.

In the end, the Supreme Court shunted the case back to the lower courts, instructing them to grapple with the Article III standing issue under *Spokeo*, leaving the *cy-pres* settlement issue unresolved.

One obvious takeaway is that the Supreme Court continues to express a concern that not every alleged statutory violation gives rise to Article III standing.

These issues are addressed in greater detail below.

Spokeo

Spokeo, Inc. v. Robins[2] was decided in 2016 to help clarify the proper analysis of Article III standing issues in cases alleging statutory violations and has been applied with differing results by federal court across the country. In *Spokeo*, the Supreme Court addressed whether an alleged willful violation of the Fair Credit Reporting Act (FCRA), absent any claim of damages or other actual harm, constitutes sufficient injury to confer Article III standing. In offering guidance to the lower courts on how to resolve that question, the Court held that "Article III standing requires a concrete injury even in the context of a statutory violation."[3] To determine whether an "intangible harm constitutes injury in fact," the Court advised, "both history and the judgment of Congress play important roles."[4]

As we have previously written, lower courts have struggled to consistently apply the Court's *Spokeo* guidance, sometimes leading to varied results.

History of the *Gaos* Case

Frank v. Gaos made its way to the Supreme Court by way of *Gaos v. Google*, a case originating in the United States District Court for the Northern District of California. In *Gaos v. Google*, plaintiffs alleged that, when an Internet user conducted a Google search and clicked on a hyperlink to open one of the webpages listed on the search results page, Google transmitted information including the terms of the search to the server that hosted the selected webpage. This "referrer header" told the server that the user arrived at the webpage by searching for particular terms on Google's website. Plaintiffs claimed that Google's use of referrer headers violated the Stored Communications Act[5] by transmitting internet users' search terms to the servers of the pages the user ultimately visited. Plaintiffs sought to represent a class of people who conducted a Google search and clicked on any of the resulting links within a certain time period.[6]

Google challenged plaintiffs' Article III standing multiple times, pointing out that there was a question about whether some plaintiffs claimed to have actually clicked on a link from the Google search page. Ultimately, the Northern District of California decided that the claimed statutory violation itself conferred standing, relying on a Ninth Circuit decision, *First American Financial Corp. v. Edwards*,[7] which was later abrogated by *Spokeo*.

The Proposed Settlement

Eventually, the *Gaos* litigants negotiated a class-wide settlement. The proposed settlement required Google to pay $8.5 million to a fund, which would be distributed in part to six third-party *cy-pres* recipient organizations chosen by class counsel and Google—none of the funds would be issued to absent class members. Five of the absent class members objected to the settlement on multiple grounds, but the district court overruled their objections and approved the settlement.[8]

Two of the objectors appealed to the Ninth Circuit, just as *Spokeo* came out and abrogated *Edwards*, changing the landscape in which the appeal would be decided.[9] Nevertheless, the Ninth Circuit affirmed without addressing *Spokeo*.[10] The objectors petitioned the Supreme Court for review, and the Court granted the review "to decide whether a class action settlement that provides a *cy pres* award but no direct relief to class members satisfies the requirement that a settlement binding class members be 'fair, reasonable, and adequate.'"[11]

Treatment of the Standing Issue at the Supreme Court

In response to the Supreme Court's request for supplemental briefing on the Article III issue, plaintiffs and the objectors struggled to identify an injury or threatened injury separate from the statutory violation itself—the allegedly unauthorized disclosure of plaintiffs' search queries—but argued that courts historically have adjudicated privacy cases without proof of harm beyond the breach itself, and furthermore have treated such claims as breaches of contract begetting nominal damages, even in the absence of calculable damages.

For their part, Google and the United States as *amicus curiae* argued that plaintiffs failed to identify a concrete, particularized harm or threat of harm they personally faced as a result of the alleged search-term disclosure. Instead, the mere disclosure of search terms and the potential for third-party re-identification of plaintiffs would not support a non-speculative common-law suit. Google urged the Court to consider that acceptance of plaintiffs' position would result in every single search-term disclosure amounting to harm sufficient to confer Article III standing, even when the person conducting the search is not actually identified as a result of the disclosure and no real-world harm occurs.

The Supreme Court opted to remand the Article III standing question to the lower courts, citing longstanding precedent that the Court is "a court of review, not of first view."[12] It did not provide further guidance on how the Ninth Circuit and other courts should implement *Spokeo*.

Frank v. Gaos thus joins a varied collection of cases in which the Court has left lower courts to contend with Article III issues in light of *Spokeo* on their own. How the Ninth Circuit will rule on this question—and whether yet another Supreme Court appeal will arise—remains to be seen.

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[1] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

[2] 136 S. Ct. 1540 (2016).

[3] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

[4] *Id.*

[5] 18 U.S.C. § 2702(a)(1). which prohibits entities like Google from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service,"

[6] *See Frank v. Gaos*, 586 U.S. ___ (2019) (slip op. at 2).

[7] *Gaos v. Google Inc.*, Case No. 5:10–CV–4809 EJD, 2012 WL 1094646 at *3 (N.D. Cal., Mar. 29, 2012); *First Am. Fin. Corp. v. Edwards*, 610 F.3d 514 (9th Cir. 2010).

[8] *In re Google Referrer Header Privacy Litigation*, 87 F.Supp.3d 1122, 1138 (N.D. Cal. Mar. 31, 2015).

[9] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

[10] *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737 (9th Cir. 2017).

[11] 568 U.S. ___ (2019) (slip op. at 5) (*citing* Fed. Rule Civ. Proc. 23(e)(2); 548 U.S. ___ (2018)).

[12] 568 U.S. ___ (2019) (slip op. at 6) (*citing Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).