GT GreenbergTraurig

Alert | Class Action Litigation

April 2019

Cy Pres Survives, but for How Long?

Cy pres awards – where money goes to nonprofit organizations instead of class members – are an increasing and often criticized component of class action settlements. On March 20, the United States Supreme Court decided *Frank v. Gaos*,[1] a case that was expected to be the high court's first opportunity to address the validity of *cy pres* settlements. Although the court ultimately ruled on an unrelated standing issue, the justices' questions during oral argument and seeming eagerness to weigh in suggest that the days of large *cy pres* awards may soon come to an end.

Overview of *Gaos*

In *Gaos*, plaintiffs sued Google for ostensibly failing to warn customers that their "search terms" were forwarded to the websites that customers ultimately selected after running an internet search. There were serious disputes as to whether any plaintiff could identify an actual injury suffered from this alleged failure to warn other than the technical violation of the federal statute.

Google settled the case for $8.5 million. Importantly, none of the settlement went directly to absent class members. Instead, the bulk of the settlement – approximately $5 million – was set up as a *cy pres*[2] award that would be distributed to various nonprofits, with another $2 million going to class counsel. One of the absent class members challenged the settlement, asserting that the *cy pres* award is not "fair, reasonable,

[1] *Frank v. Gaos*, __ S.Ct. __, 2019 WL 1264582 (Mar. 20, 2019).
[2] *Cy pres* awards take their name from the Norman/French phrase "cy près comme possible," roughly translating as "as near as possible."

and adequate" compensation to class members and, without the *cy pres* component, class counsels' attorney's fees were unreasonable. The Ninth Circuit affirmed the *cy pres* award, noting that each class member would only be entitled to "a paltry 4 cents in recovery."

The Supreme Court granted cert to address whether, and under what circumstances, *cy pres* awards that provide no direct relief to class members are appropriate. However, nearly five months after cert was granted, the Solicitor General filed an amicus brief arguing that plaintiffs needed to show an identifiable injury, not just a statutory violation, to have standing. The court ordered additional briefing on standing and ultimately adopted the Solicitor General's suggestion, vacated the Ninth Circuit's opinion, and instructed the Ninth Circuit to address standing.

Thus, although *Gaos* was advertised as the Supreme Court's first foray into *cy pres* awards, it ultimately proved to be the wrong vehicle for the issue.

What This Means for Class Actions in the Future

As Chief Justice Roberts recognized, *cy pres* awards "are a growing feature of class action settlements."[3] According to a 2017 article, the use of *cy pres* awards were at their highest level ever in 2015 or 2016, the last years covered by the referenced study.[4] Moreover, with the rise of lawsuits like *Gaos* that relate to electronic privacy – where the class size may be millions but any individual harm is minimal – *cy pres* awards are a means of addressing class harm where the administrative burdens of paying class members are cost-prohibitive.

However, *cy pres* settlements have been criticized as a justification for reaping large attorney's fees while giving nothing directly to class members. Indeed, Justice Thomas dissented in *Gaos*, stating that:

> Whatever role *cy pres* may permissibly play in disposing of unclaimed or undistributable class funds, . . . *cy pres* payments are not a form of relief to the absent class members and should not be treated as such (including for calculating attorney's fees). . . . [T]he fact that class counsel and the named plaintiffs were willing to settle the class claims without obtaining any relief for the class—while securing significant benefits for themselves—strongly suggests that the interests of the class were not adequately represented.

Chief Justice Roberts and Justices Alito and Kavanaugh expressed similar concern during oral argument. In a future case, it thus appears likely that the current makeup of the Supreme Court would be likely to at least severely scrutinize large *cy pres* awards.

Also on appeal from the Ninth Circuit, *Perryman v. Romero* is another cert petition pending before the court that presents nearly identical *cy pres* issues as *Gaos*. *Perryman* presents a different set of facts regarding class settlement, given that class members directly received $225,000 in actual settlement, while $3 million was allocated as a *cy pres* award to local schools. Furthermore, **class counsel received $8.85 million** as their portion of the settlement – nearly three times as much as the *cy pres* recipients and **nearly 40 times as much as all class members**. *Perryman* does not appear to have any of the standing issues that plagued *Gaos*.

The responses to the cert petition in *Perryman* are due in the coming weeks. Nevertheless, the attorney generals for 15 separate states have filed an amicus brief in support of the petition, and opposing *cy pres*

[3] *Marek v. Lane*, 571 U.S. 1003, 1003 (2017) (Roberts, C.J., concurring on denying cert).
[4] Natalie Rodriguez, *Era of Mammoth Cases Test Remedy of Last Resort*, Law360 (May 2, 2017).

awards. As those attorney generals argue, *Perryman* "presents an ideal vehicle for the Court to address when (if ever) *cy pres* class action settlement arrangements are acceptable."

Thus, *Perryman v. Romero* is the case to watch regarding the fate of *cy pres* awards.

Authors

This GT Alert was prepared by **Alan W. Hersh** and **Stephen L. Saxl**. Questions about this information can be directed to:

- Alan W. Hersh | +1 512.320.7248 | hersha@gtlaw.com
- Stephen L. Saxl | +1 212.801.2184 | saxls@gtlaw.com
- Or your Greenberg Traurig attorney