



States' top lawyers ask Supreme Court to review charity-only class settlements

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State attorneys general are once again calling on the U.S. Supreme Court to restrict the use of charitable donations as an alternative to class payouts in class action settlements.

Led by Arizona's Mark Brnovich, 20 state AGs filed an amicus brief on Thursday, backing a petition for Supreme Court review of a \$13 million privacy class-action settlement that called for Google Inc to donate money to universities and non-profits dedicated to internet privacy issues instead of paying the funds to class members.

The petition was filed last month by Ted Frank of the Hamilton Lincoln Law Institute, who, as you will surely recall, is a longtime critic of class settlements calling for charitable donations in lieu of payments to class members, which are known as cy pres-only settlements. Broadly speaking, Frank contends that cy pres deals contravene the principle that class settlements belong to class members.

Frank previously argued a challenge to a different Google cy pres settlement at the Supreme Court, but the justices dismissed the case in 2019 because of concerns about the constitutional standing of the lead plaintiff in the underlying class action.

Frank and his state AG amici contend that cy pres remains a critical problem in class action litigation in the 9th U.S. Circuit Court of Appeals, which affirmed approval of the \$13 million Google settlement in December. (I've previously written about the case, which alleges that Google Street View vehicles improperly accessed wireless electronic communications of as many as 60 million internet users.)

The 9th Circuit's permissive view of cy pres – and, in particular, of cy pres-only class settlements that do not even attempt to distribute funds to class members – has made it an outlier

among appellate courts that have become increasingly skeptical of cy pres, according to Frank and the AGs. So it's up to the Supreme Court, they said, to resolve the split and rein in the 9th Circuit.

Neither Google counsel Brian Willen of Wilson Sonsini Goodrich & Rosati nor class counsel Daniel Small of Cohen Milstein Sellers & Toll responded to my query about the AGs' brief and Frank's petition. But it's a very good bet that Google will argue in this case – much as it argued in Frank's previous cy pres foray at the Supreme Court – that cy pres-only settlements have become a vanishing species.

My admittedly anecdotal sense of the prevalence of cy pres settlements aligns with what Google told the Supreme Court in 2018: Settlements like the Street View deal are extremely rare. Courts continue to approve cy pres donations for leftover money after class funds have been disbursed to class members, but class action lawyers on both sides of the bar have become wary of deals that resort to cy pres donations without even attempting to pay class members.

I haven't seen any good statistical analysis of cy pres-only settlements in recent years. The AGs' new brief cites a 2021 law review article, Saving Class Members from Counsel, for the broad proposition of increased reliance on cy pres settlements. But that study just searched Westlaw for references to cy pres in federal-court class actions. It didn't actually analyze the cases.

The Supreme Court dockets in Ted Frank's 2018 and 2022 cy pres cases, moreover, suggest that there may be less backing for his new call for Supreme Court intervention. In the previous case, Frank's cert petition attracted an amicus brief from 16 state AGs, but also briefs from the Cato Institute, the Center for Individual Rights and the Center for Constitutional Jurisprudence. This time, there are more AGs rallying behind Frank's petition – but they are his only amici.

Frank had good answers to my email questions about fewer amici and the apparent rarity of cy pres-only settlements. A couple of potential amicus briefs fell through at the last minute, he said, and it's no surprise that one of his amici in the last go-round, John Eastman of the Center for Constitutional Jurisprudence, was preoccupied in the last several weeks with matters more pressing than cy pres settlements.

Frank acknowledged the dearth of cy pres-only settlements in his email. In fact, he took some credit for it, asserting that the Supreme Court's interest in his previous challenges has had a deterrent effect. "I'm told by both [plaintiffs] and [defense] attorneys that they use the bogeyman threat, 'Ted Frank would object to that,' to negotiate better settlements than cy pres," Frank said.

His pitch to the Supreme Court, he said, is forward-looking. The 9th Circuit's ruling in the Street View case, he said, endorsed the use of cy pres-only settlements when the administrative difficulty of determining class membership outweighs the minimal recovery class members can expect to receive. (In the Street View case, with 60 million potential class members, that recovery would have amounted to pennies.) The 9th Circuit's holding, in Frank's view, will allow plaintiffs' lawyers who file cases in the 9th Circuit to justify cy pres deals with arguments that it's not worth bothering to identify class members.

“By defining a plaintiff class broadly enough, class counsel can grease the skids for a quick and easy cy pres deal with defendants that sells class members ‘down the river,” Frank said in the new petition. Ninth Circuit precedent “would permit almost every consumer class-action settlement to completely ignore payments to class members.”

That scenario would indeed be a setback in consumer class action litigation, in which plaintiffs' lawyers and claims administrators have spent the last several years thinking about ways to identify and notify class members.