

Supreme Court throws Google privacy settlement into doubt

(May 8, 2019) - Google LLC's \$8.5 million settlement of a California consumer privacy class action has been potentially upended by a U.S. Supreme Court decision that has questioned whether the named plaintiffs in the suit had standing to sue in federal court.

Frank v. Gaos, No. 17-961, 139 S. Ct. 1041 (Mar. 20, 2019).

The Supreme Court remanded the case, which accuses Google of unlawfully sharing users' search terms with third-party websites, to the 9th U.S. Circuit Court of Appeals to determine whether the plaintiffs suffered actual harm.

Professor Jonathan Askin of the Brooklyn Law School commented that "it was unfortunate that the Supreme Court had to punt on the privacy law issues raised in *Frank v. Gaos*."

"As a result, we will likely have to wait a few more years before we get any meaningful judicial guidance as to how to demonstrate harm from a privacy violation and how to effectively seek redress," he added.

California privacy class action

In October 2010 San Francisco resident Paloma Gaos sued Google in the U.S. District Court for the Northern District of California.

According to the suit, Google had a practice of disclosing to third-party websites the exact terms that users typed into its search engine whenever the users clicked on a website from the results list.

Gaos said the practice affected her because she had conducted "vanity searches" on Google that included her name and the names of her family members and had clicked on links from the results list.

Specifically, the suit accused Google of violating the Stored Communications Act, 18 U.S.C.A § 2701, which prohibits providers of electronic communication services from knowingly disclosing the contents of a communication while it is in electronic storage.

Gaos sought to represent a class of all U.S. residents who had conducted a Google search and clicked on a link from the results list at any time after October 2006.

The court consolidated the proposed class-action suit in April 2013 with a similar class action filed in Chicago federal court.

Google reached a proposed settlement with the plaintiffs in July 2013, in which it agreed to pay \$8.5 million and include disclosures on three of its webpages about its practice of sharing users' search terms.

Under the settlement, the plaintiffs' attorneys would receive about \$2.1 million in fees and the remaining money would be distributed to selected charitable groups that promote internet privacy.

Known as the cy pres doctrine, courts may award damages to charitable organizations dedicated to advancing the plaintiffs' aims when it would be impractical to allot damages among a large class of plaintiffs.

Several class members, including Theodore H. Frank and Melissa Holyoak of the Center for Class Action Fairness, objected to the settlement on the basis that it unduly favored the cy pres recipients over individual class members.

U.S. District Judge Edward J. Davila rejected the objectors' arguments and granted final approval of the settlement in March 2015. *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122 (N.D. Cal. 2015).

Frank and Holyoak appealed.

Spokeo standing analysis

Before the 9th Circuit resolved the appeal, the Supreme Court issued its decision in *Spokeo Inc. v. Robins*, 136 S.Ct. 1540 (2016).

In *Spokeo*, the Supreme Court held that plaintiffs who allege violations of their statutory rights must still demonstrate a concrete injury to have Article III standing.

Article III of the U.S. Constitution requires plaintiffs to show they have suffered an actual, concrete or imminent injury to have standing to sue in federal court.

A divided 9th Circuit panel affirmed Judge Davila's decision granting final approval of the settlement in August 2017 without addressing the issue of standing following *Spokeo*. *In re Google Referrer Header Privacy Litig.*, 869 F. 3d 737 (9th Cir. 2017).

The settlement objectors petitioned for certiorari, and the Supreme Court agreed to hear the case.

In December 2018 U.S. Solicitor General Noel J. Francisco filed an amicus curiae brief, arguing that the none of the named plaintiffs had suffered a sufficient injury to support Article III standing.

Francisco asked the Court to either dismiss the case for lack of jurisdiction or remand it to the 9th Circuit to address the standing issue.

The Supreme Court issued a per curiam opinion March 20 vacating the 9th Circuit decision and remanding the case with instructions to address the named plaintiffs' standing under *Spokeo*.

"A court is powerless to approve a proposed class action settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing," the opinion said.

Justice Clarence Thomas dissented, arguing that the named plaintiffs had standing to sue, and the court should have reached the merits of the appeal.

He also argued that the court should have invalidated the proposed settlement because it provided the individual class members no meaningful relief.

Baker Donelson attorney Zachary Busey noted that "'Professional' or 'serial' objectors to class action settlements have been making headlines for years, and Justice Thomas handed them further ammunition for attacking cy pres settlements."

On remand, Google has argued that the 9th Circuit should allow the District Court to conduct the standing analysis in the first instance.

However, both the plaintiffs and the objectors have opposed Google's motion, asking the 9th Circuit to decide the standing issue based on the existing record.

By Dave Embree

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