

Class Action Update

THIRD CIRCUIT VACATES *CY PRES* SETTLEMENT IN RULE 23(B)(2) DATA PRIVACY CLASS ACTION

Authored by Steven P. Benenson¹

In a case of first impression, the Third Circuit Court of Appeals set aside a district court's approval of a nationwide data privacy class action settlement where the only class relief was a *cy pres* award to organizations the defendant approved. The class plaintiffs claimed that Google invaded users' privacy under the California constitution and state tort law by installing tracking cookies on their browsers that operated even if the user configured privacy settings to prevent this. In a Fed. R. Civ. P. 23(b)(2) injunctive relief class settlement, Google agreed to stop using the cookies for Safari browsers and pay \$5.5 million for counsel's fees and costs, incentive awards for the named class representatives, and *cy pres* distributions to six data privacy organizations that research and promote browser security and privacy—with no direct compensation to the absent class members. *In re: Google Inc. Cookie Placement Consumer Privacy Litigation*, ---F.3d---, 2019 WL 3559113 *1-3 (3rd Cir. August 6, 2019).

A consumer advocate institute objected to the settlement arguing it improperly provided no direct compensation to the class members, or alternatively, that the class could not be certified if such compensation was impossible. The objector contended that a *cy pres* award is "always inappropriate if some individual class members could be compensated through a claims or lottery process." *Id.* at *6. He further argued that because class counsel was on one *cy pres* recipient's board and Google was a regular donor to four others, a conflict of interest existed. *Id.* at *4. After a hearing, the district court issued a cursory opinion certifying the class, without making any factual findings that the settlement was "fair, reasonable, and adequate," as required by Rule 23(e)(2). In rejecting the objector's arguments, the district court found that problems identifying the millions of potential class members and translating their alleged loss of privacy into cash awards would be "burdensome, impractical, and economically infeasible," and that the *cy pres* awards bore a substantial nexus to the absent class members' interests. *Id.* at *5.

The Third Circuit rejected the objector's argument that *cy pres* only settlements are unfair per se under Rule 23(e)(2). The Court of Appeals noted that potential conflicts of interest are inherent in such settlements because they may increase the common fund and class counsel's fee, and provide the defendant repose, with no concomitant benefit to the class members. *Id.* at *7. However, where individual distributions are infeasible because of difficulties ascertaining the class, *cy pres* distributions to data privacy institutions that will work to prevent future intrusions serve a deterrent effect and provide equal relief to the class members. *Id.* at 8.

¹Steven P. Benenson is a senior litigation principal with Porzio, Bromberg & Newman, PC, in New York City and Morristown, New Jersey, and chairs the firm's complex litigation practice. He has been defending class actions for 35 years in diverse industries and businesses in state and federal trial and appellate courts across the country. He is recognized in Best Lawyers in America, in Mass Tort Litigation/Class Actions – Defendant, served as the Program Chair of the 2016 ABA National Class Action Symposium and co-authored the New Jersey chapter of the ABA's *A Practitioner's Guide to Class Actions*. Steve is a frequent presenter and author on class action topics.

But the Third Circuit also found that the district court’s “perfunctory” opinion did not adequately consider the broad class-wide release of claims for money damages and the selection of the *cy pres* recipients. By seeking a Rule 23(b)(2) injunctive relief settlement class, the parties had avoided the heightened certification and notice requirements of Rule 23(b)(3). The Third Circuit remanded this “troubling aspect” of the settlement to the district court for further analysis and explication. *Id.* at 9. Specifically, the district court’s failure to determine the nature of the relationships between the recipients and Google or class counsel, whether it played any role in the selection process, whether others were considered, and why these recipients are the proper choice, also warranted remand. The Third Circuit suggested that class members or a neutral participant should be involved in the selection process. *Id.* at 10-11.

In conclusion, the Third Circuit observed that the “vista view of this case is not pretty,” noting the modest sized settlement when weighed against the tens of millions of potentially affected class members, the appearance of conflicts of interest, and the release of monetary damage claims. *Id.* at 11. Although the Court of Appeals left open the possibility that the parties’ *cy pres* recipient selection could be supported on a more detailed record, the money damage release and lack of class wide notice could presumably prove fatal if not remedied. Difficulties ascertaining the absent class members to provide them with compensation, of course, was the *raison d’être* of the Rule 23(b)(2) injunctive relief settlement structure. *In re: Google Inc. Cookie Placement Consumer Privacy Litigation* stands for the proposition that data privacy settlements will invite objections and heightened judicial scrutiny where they contain only a *cy pres* award. For the time being, these cases will continue to be very costly to resolve.

