

Cy Pres Class Action Settlements Just Fine, Ninth Circuit Says

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What should a corporation do when a class action lawsuit claims it broke the law, the group of allegedly affected people is massive, but the real-world “harm” is effectively nil?

If the lawsuit fails to state a valid claim, obviously you move to dismiss it. But what if your best arguments require expensive discovery, you can’t be certain of a victory even then, and the downside risk—such as from statutory minimum damages—is intolerable to you?

One good strategy for corporate defendants facing these situations is to settle by making corrective changes to address the alleged problem and, in lieu of what would be tiny damages payments to affected class members, contribute a palatable amount of money to non-profit groups working to protect the interests of those consumers.

Last month, I [reported](#) on an objection to one of these “*cy pres*” settlements filed by 12 state Attorneys General. Echoing concerns expressed in an objection by the Competitive Enterprise Institute’s Center for Class Action Fairness (“CCAF”) in a case against Google, these AGs argued to the Third Circuit that the \$3 million Google would pay to non-profits should go to class members instead. The AGs agree that the class is massive, and that if everyone claims relief, the damages would be minuscule. Because only a tiny percentage of class members would file claims, the AGs argued, the relief could be \$15 or \$20 per class member. The AGs think it better to give those intrepid few claimants the money than to have it go to non-profits.

The Third Circuit case remains undecided, but yesterday the Ninth Circuit—in another case involving Google, which drew the same kind of objection from the CCAF—rejected that argument out-of-hand. The panel in *In re Google Referrer Header Privacy Litigation*, No. 15-15858, split 2-1 on the separate question of whether the district court appropriately vetted the non-profits the parties selected for ties to the plaintiffs’ counsel. The panel held unanimously, however, that paying non-profits instead of the class was appropriate in the case. The language the judges used—“we quickly dispose of the argument that the district court erred by approving a *cy pres*-only settlement—shows the question was not close.

Google’s total agreed payment in the case is \$8.5 million, with \$3.2 million paying the plaintiffs’ fees and the rest (after administrative costs) going to six non-profits. With “an estimated 129 million class members,” each one would have been “entitled to a paltry 4 cents in recovery.” Acknowledging that “*cy pres*-only settlements are considered the exception, not the rule,” the Ninth Circuit held this case to fall well within the exceptional category. Rejecting the CCAF’s proposed alternatives of a “random lottery distribution,” or simply relying on tiny claims rates, the Ninth Circuit held that “[o]ur review is not predicated simply on whether there may be ‘possible’ alternatives...[but] whether the district court discharged its obligation to assure that the settlement is ‘fair, adequate, and free from

collusion.”

The Third Circuit case has different facts, and that court will have to take seriously an objection from 12 Attorneys General. Unless the Third Circuit departs radically from the [Ninth Circuit's reasoning](#), however, an important and well-trod path to settle privacy and consumer fraud class actions by contributing to non-profit groups will remain open.