

“Give the Money to One Percenters, Not to Non-Profits,” 11 State Attorneys General Argue

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On July 5, bipartisan Attorneys General from 11 states filed an astonishing brief in the Third Circuit Court of Appeals, asking that court to reject the proposed class action settlement in *In re Google Inc. Cookie Placement* that would give settlement monies to non-profits rather than class members.

The plaintiffs in *Google Cookie* allege that Google circumvented the cookie-blocker settings in Microsoft’s Internet Explorer and Apple’s Safari browsers and placed advertising tracking cookies without user consent. The putative class—theoretically, every user of those hugely popular browsers—obviously is massive. The “damages” suffered by class members, however, if any, is vanishingly small.

In 2016, Google and the plaintiffs’ counsel reached a proposed \$5.5 million class action settlement. The plaintiffs’ counsel requested a \$2.5 million fee, with the balance (after administrative costs) to be distributed to privacy rights non-profits such as the Berkman Center for Internet and Society at Harvard University and the Privacy Rights Clearinghouse. Individual class members would receive nothing.

The Competitive Enterprise Institute’s Center for Class Action Fairness filed an objection to the settlement, arguing that if money cannot be distributed to class members, then the settlement class should not be certified at all. The Delaware federal judge hearing the case disagreed and approved the settlement. The objector took its arguments to the Third Circuit, and now 11 state Attorneys General have joined it.

The AG coalition brief, written by the office of the Arizona Attorney General, took no issue with the amount of the settlement and acknowledged that the settlement class is huge. They contend, however, that “[d]irecting settlement funds to members of the class wherever feasible is important,” and that “there is a feasible path to distribution here.” That “feasible path” is where the brief took an unprecedented turn for an AG objection.

“Claims rates in small-dollar cases are reliably in the very low single digits (if not below one percent),” the brief argued, citing cases with low claims rates. “Even assuming a class in the tens of millions, such a claims rate would result in an economically meaningful” payment of “a few dollars to \$15 or \$20, if not more) to those lucky “one-percenters.” That, these Attorneys General argued, “is preferable to making no distribution to any class members.”

In the years since the Class Action Fairness Act of 2005 required federal litigants to notify State AGs of proposed class action settlements, State AGs have taken a leading pro-consumer role in trying to limit the forms that settlements can take. A multistate AG objection to a coupon settlement a decade

ago, for example, has sharply curtailed the use of coupon settlements. This is the first time, however, that AGs have argued it is better to direct small dollars to a tiny fraction of a large class than to pay millions of dollars to non-profits that ostensibly could advocate on behalf of the interests of the class as a whole.

It will be very interesting to see how the Third Circuit responds to this argument.

Joining Arizona on the brief were the Attorneys General of Alaska, Arkansas, Louisiana, Mississippi, Missouri, Nevada, Oklahoma, Rhode Island, Tennessee, and Wisconsin.

**BRIEF OF ELEVEN STATE ATTORNEYS GENERAL AS AMICI CURIAE IN SUPPORT OF OBJECTOR-
APPELLANT AND REVERSAL**