GDR NEWS

US Supreme Court quizzes lawyers on standing in Google cy-pres case

Lauren Morris
05 November 2018

iStock.com/dkfielding

US Supreme Court judges have questioned the standing rights of users suing Google for alleged data privacy violations when deciding who should receive an $8.5 million class action settlement.

The Supreme Court judges on 31 October heard arguments against a lower court's decision to uphold a cy-près award of a 2013 class action settlement with Google. The settlement would

distribute the award to charities, the three original plaintiffs and their lawyers, rather than the other 129 million class members.

Plaintiffs had sued Google in 2010 over its disclosure of user search terms to third-party websites. They claimed that the company disclosed search queries that could contain personal information such as users' real names and social security numbers to third parties; and that while the shared data mostly did not directly identify users, reidentification was possible.

Google ultimately proposed the $8.5 million cy-près settlement, leading to some members of the plaintiff class challenging the settlement in the US Court of Appeals for the Ninth Circuit and the Supreme Court.

Last week, alongside arguments about the cy-près settlement, the Supreme Court judges questioned whether the plaintiffs had suffered sufficient harm to bring the lawsuit, determining that the Court of Appeal of the Ninth Circuit had incorrectly interpreted *Spokeo v Robins*.

In *Spokeo,* the Supreme Court in 2016 ruled that plaintiffs could only have standing to seek statutory damages for intangible injuries if they had suffered a concrete injury. The Ninth Circuit had allowed the plaintiffs in that case to proceed without requiring a showing of such an injury.

Some of the judges last week also dismissed Frank's argument that Google's breach of the common law tort of public disclosure of private facts constituted harm. Justice Stephen Breyer said that he did not see how a plaintiff's name, home address and the name of his soon-to-be ex-wife were "secret or private information" and that he was having a "hard time distinguishing this [case] from *Spokeo*."

Justice Neil Gorsuch asked whether it should be referred to a lower court to decide "whether there is actual standing as opposed to a mere allegation of standing", and Justice Samuel Alito asked "is there any reason why we should not decide the standing question? It's a question of law."

Counsel for all sides suggested that the standing issue should be addressed before the court can determine the cy-près issue that led the case to the Supreme Court. Google's lawyer Andrew Pincus, a partner at Mayer Brown, said the standing question is "complicated under *Spokeo*."

First published on the *Global Data Review* website, November 2018

David Carpenter, a partner at Alston & Bird in Atlanta, told GDR that he found the court's pressing of the standing issue interesting as the petitioners "did not seem too concerned with standing, and it was not a major issue in either of the lower courts."

He added that it seems more likely that the court would send the case back to the Ninth Circuit for further findings than order it be dismissed outright.

"Given the lack of attention the district court paid to the standing issue post-*Spokeo*, the Supreme Court may prefer to see a more fulsome factual record before deciding the issue outright," Carpenter said.

Theodore Frank told GDR that he expects lower courts to conclude standing requirements have been met, and does not know how the court will handle the question of whether the current instance is sufficient to satisfy *Spokeo*.

He added that the plaintiffs "seem to have made a tactical choice that they would rather lose on standing than on the cy-près issue, and did surprisingly little to defend their position."
If the Supreme Court remands the case, it would be referred back to the Ninth Circuit and potentially further to the US District Court for the Northern District of California.

The respondents are plaintiffs who agreed with the cy-près agreement, including lead plaintiff Paloma Gaos.

Counsel to the petitioners
Center for Class Action Fairness
Senior counsel Theodore Frank in Washington, DC

Counsel to Gaos
MoloLamken
Partner Jeffrey Lamken in Washington, DC

Counsel to Google
Mayer Brown
Partner Andrew John Pincus in Washington, DC

First published on the *Global Data Review* website, November 2018