

## Google's \$8.5M Privacy Deal Cracks Puzzling Injury Issues

By **Allison Grande**

*Law360, New York (August 26, 2013, 9:43 PM ET)* -- Google Inc. is facing backlash over a recently proposed \$8.5 million settlement that would resolve a pair of privacy class actions without giving consumers any money, but attorneys predict the pact will gain approval from the court and become a model for companies addressing thorny injury issues.

The Google settlement came under fire Thursday, when Consumer Watchdog, the Electronic Privacy Information Center and other consumer groups penned a letter urging U.S. District Judge Edward Davila to reject the settlement of claims that Google illegally divulged search information to third parties. They blasted the deal for not providing direct monetary relief to consumers, not requiring the company to make substantive changes to its business practices, and containing a “cy pres” award to privacy research organizations like the World Privacy Forum and Harvard Law School’s Berkman Center for Internet and Society that didn’t align with class members’ interests.

Still, attorneys say the application of cy pres awards and other creative forms of relief to privacy claims makes sense and is likely to garner favor with both companies and judges.

“Given the uncertainties regarding damages in privacy actions, even for claims that may involve statutory damages, cy pres awards may be an inevitable component of class action settlements,” Snell & Wilmer LLP partner Timothy Toohey told Law360. “[And] given the broad discretion that district courts have to find class action settlements ‘fair, reasonable and adequate,’ it will be difficult for class members to launch effective challenges to settlements unless there is some serious flaw in the remedy.”

Cy pres mechanisms, which allow money to be used to promote the interests of class members, have been used in class actions since the California Supreme Court first endorsed them in 1986 and have been proven to be particularly attractive to parties litigating privacy disputes, according to attorneys.

“The cy pres doctrine seems particularly well-suited to privacy, because these lawsuits are purportedly brought to advance consumer privacy interests, and cy pres awards in these cases are meant to advance the mission of consumer privacy,” Steptoe & Johnson LLP partner Jason Weinstein said.

The parties in the Google privacy class actions claim that their settlement represents a fair and reasonable way to resolve the suits, with plaintiffs’ attorney Kassra Nassiri of Nassiri & Jung LLP saying he believes the cy pres projects will result in tremendous benefit to the class and will set a new benchmark for cy pres in mega-class actions.

"We are raising the level of transparency and accountability far beyond what has been done in any previous cy pres settlement," Nassiri said Thursday. "Although it is too early to provide specifics, I can tell you that I modeled the cy pres procedure here with some of the recent good work done by forward-thinking charity watchdogs."

While the judge overseeing the Google cases raised some questions about how the cy pres recipients were chosen during a settlement hearing Friday, attorneys say the parties have a good chance of convincing the court to endorse their pact, given that courts on the whole seem to be willing to look beyond the lack of direct monetary relief and support other ways that an agreement can benefit consumers.

"If devoting some resources to the broader goal of consumer privacy and changing how the defendants do business are able to adequately advance the plaintiffs' interests in improving consumer privacy, it seems as if courts are willing to look at those two factors as more significant than the individual payouts being given to class members, given that it's hard to quantify the extent of injuries of some privacy violations," Weinstein said.

Sheppard Mullin Richter & Hampton LLP partner David Almeida said the lack of monetary relief afforded to class members doesn't necessarily doom a proposed consumer privacy settlement, and that attorneys would be wise to stress the value of these types of settlements in their totality in order to avoid drawing objectors.

The recent handling of privacy pacts that have raised similar objections provide some indication of how the Google agreement may fair, attorneys say.

In a September ruling affirming the lower court's decision, the Ninth Circuit rejected arguments that a settlement resolving privacy claims over Facebook Inc.'s Beacon feature was inadequate because it called for the company to pay \$6.5 million to set up an organization to educate the public about user control over Internet privacy rather than provide direct monetary relief to consumers. The appeals court found the objections to be nothing more than general dissatisfaction with the class representatives' decision to not hold out for more money.

Judge Davila has also recently weighed in on a settlement similar to the pact currently before him. In March, he accepted a deal that allowed Netflix Inc. to distribute more than \$6 million in cy pres payments to privacy groups and others to resolve claims that it violated the Video Privacy Protection Act by storing former customers' personal information, overruling objections from class members who claimed the settlement benefited attorneys more than them.

While attorneys noted that the way that courts evaluate cy pres awards could soon change if the U.S. Supreme Court takes up a recent request by a Facebook user to review the Beacon settlement, current precedent suggests that a lack of direct monetary relief to consumers does not automatically render a settlement unfair.

"Provided that a settlement is reached on an arm's length basis and is fair and reasonable under the circumstances, the fact that monetary relief is not afforded to the class members should not necessarily be an impediment to final approval provided that other, difficult to quantify things like injunctive relief are provided," Almeida said. "While [cy pres] is a controversial doctrine, it does in the appropriate case ensure that the funds are spent beneficially as opposed to significant sums being expended in administration."

The plaintiffs in the Google cases are represented by Michael Aschenbrenner of Aschenbrenner Law PC, Kassra Nassiri of Nassiri & Jung LLP and Ilan Chorowsky of Progressive Law Group LLC.

Google is represented by Randall W. Edwards of O'Melveny & Myers LLP.

The cases are Gaos v. Google Inc., case No. 5:10-cv-04809, and Priyev v. Google Inc., case number 5:13-cv-00093, in the U.S. District Court for the Northern District of California.

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