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Chief Justice Roberts Turns Up The Heat On Cy Pres Pacts

By **Allison Grande**

Law360, New York (November 04, 2013, 10:17 PM ET) -- Though he and his colleagues refused on Monday to review a cy pres privacy settlement reached by Facebook Inc., U.S. Supreme Court Justice John Roberts said the court hoped to review a similar pact in the near future, a warning expected to make litigants and judges think twice before using or approving the increasingly popular form of settlement.

The court **declined to review** a divided Ninth Circuit opinion approving a class action settlement in which Facebook agreed to terminate its short-lived Beacon feature and pay \$9.5 million to set up an online privacy foundation and compensate class counsel. In a statement, Justice Roberts said the appeal was not the right vehicle for resolving "more fundamental concerns surrounding the use of [cy pres] remedies" because it was too fact-specific.

But the chief judge noted that the court has never addressed when it's OK to use cy pres mechanisms — which allow for settlement funds to be used to promote the interests of class members in cases where distributing them would be difficult or unreasonable — or whether they should be used at all. Given that cy pres remedies are a "growing feature" of class action pacts, "in a suitable case, this court may need to clarify the limits on the use of such remedies," he said.

While the warning won't spell the end of these types of pacts, litigants will likely be more meticulous in their negotiations, to ensure their agreement isn't the one the high court takes up, attorneys on both sides of the bar told Law360 on Monday.

"In the end, Justice Robert's statement — which was not joined by another justice — simply identifies what most of us already know: Cy pres settlements can be tricky, so it is very important to use them only in appropriate situations, and even then, to spend significant effort making sure the funds are distributed in the cleanest way possible," said plaintiffs attorney Jay Edelson of Edelson LLC.

Defense attorneys agreed, saying litigants would be wise to read Justice Roberts' statement with care, to avoid incorporating elements in their pacts that may not fly with the chief justice and his colleagues.

"Counsel would benefit from reading into Justice Roberts' words and carefully [crafting] class settlements to most effectively provide at least some relief to the alleged aggrieved parties," said Torin A. Dorros, managing attorney of Los Angeles-based boutique firm Dorros Law.

The chief justice's musings — which several attorneys described as a "shot across the bow"

— are also likely to impact the district court judges who regularly act as the first line of approval for these settlements, according to attorneys.

"At least four circuits have recently considered these issues, so the district court is already well aware that the old days of just blind acceptance of proposed cy pres settlements is no longer going to be accepted by appellate courts and that there has to be a logical reason and rationale for approval," said King & Spalding LLP partner David Balsler. "And now they have a warning from the Supreme Court that it is looking for the right vehicle to address those issues, as well."

Cy pres mechanisms have been used in class actions since the California Supreme Court first endorsed them in 1986 and have proven particularly attractive to parties litigating disputes over privacy, consumer protection and toxic tort issues.

But courts in recent years have been careful to refrain from rubber-stamping these types of settlements without conducting a thorough assessment of the legality and fairness of liquidating individual rights without providing much, if any, direct compensation.

Justice Roberts' note on Monday highlighted many of the concerns with cy pres settlements that have been articulated by district and appellate court judges, including Ninth Circuit Judge Andrew J. Kleinfeld, who **dissented from the opinion** upholding Facebook's Beacon settlement in September 2012, on the grounds that it deprived aggrieved users of an actual remedy. Six Ninth Circuit judges **unsuccessfully voted to rehear** the challenge to the pact in February.

Besides listing "fundamental concerns" about the general fairness of the remedy and the process for choosing settlement recipients, the chief justice also appeared critical of several elements of the Facebook pact, including the placement of a Facebook representative on the new foundation's board and the barring of future claims from those injured by Beacon not only when it was an opt-out program, but also after it had been changed to an opt-in.

"As judges look at cy pres awards, the chief justice's statement may cause them to look more closely at such factors as the universe of people covered by the settlement and to more closely scrutinize what type of organization is receiving the funds, who runs and funds it, and if it serves the cause of privacy that purportedly prompted the class claims in the first place," said Steptoe & Johnson LLP partner Jason Weinstein.

What remains to be seen is what case the justices will deem broad enough to address the issues they wish to tackle.

One candidate is a dispute over a successful bid to give to charity part of a \$333.2 million award that NationsBank Corp. secured in securities litigation over a botched merger with Bank of America Corp. The **Eighth Circuit is considering** that case.

Meanwhile, Balsler pointed to the \$35 million settlement of an antitrust class action that claimed Toys R Us had colluded with manufacturers to restrict prices on baby products, which was **rejected by the Third Circuit** in February and is currently on remand.

However, other attorneys expressed skepticism over whether any settlement could ever meet the Supreme Court's criteria for review.

"Using Chief Justice Roberts' logic, one could conclude that a cy pres opinion will not draw certiorari unless the lower court judge makes a particularly controversial pronouncement of cy pres law, rather than simply finding the settlement appropriate or inappropriate given the totality of its features," said Cozen O'Connor member Ronald Wick. "While Chief Justice Roberts' statement might suggest at first blush that a Supreme Court cy pres case is

coming soon, it may bode quite the opposite."

Plaintiffs attorney Brian Kabateck of Kabateck Brown Kellner LLP added that there is no reason for the high court to take up the issue, given that the case law is clear and any attempt to eliminate or drastically curtail the remedy would only make it more difficult for parties to resolve tricky cases.

"The cy pres remedy is not broken, so it doesn't need to be fixed," he said.

The petitioner in the Facebook case is represented by David B. Rivkin Jr. and Andrew M. Grossman of BakerHostetler; Theodore H. Frank and Adam Ezra Schulman of the Center for Class Action Fairness; John W. Davis of the Law Office of John W. Davis; and Steven F. Helfand of Helfand Law Offices.

Facebook is represented by Kristin Linsley Myles, Rosemarie T. Ring, Jonathan H. Blavin and Michael J. Mongan of Munger Tolles & Olson LLP; and Michael G. Rhodes, Matthew D. Brown and Lori R. Mason of Cooley LLP.

The settlement class is represented by Scott Adam Kamber of KamberLaw LLC.

The case is *Marek v. Lane et al.*, case number 13-136, in the Supreme Court of the United States.

--Additional reporting by Andrew Scurria. Editing by Kat Laskowski and Edrienne Su.

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