

Class Notice & Settlement Administration: Avoiding the Pitfalls – Part I

Counsel negotiating class action settlement terms are often focused primarily on class relief, class definition and release terms. As a result, counsel may not anticipate and provide procedures to deal with issues and problems that typically arise in the context of providing notice and distributing settlement benefits to class members, leading to delays and additional costs. Some common notice and distribution pitfalls include:

- A lack of comprehensive planning for the handling of class members' claims, fund distribution and tax issues.
- The setting of impractical time lines for notice and class distribution.
- Data disasters resulting from the failure to properly manage class members' records.
- The failure to communicate with class members, government officials and the court in accordance with legal requirements for notice.

The first three planning, timing and records pitfalls—and tips on how to avoid them—are addressed below. Tips on avoiding the fourth—pitfalls arising from changes in the law regarding class notice—will be addressed in an upcoming monograph, *Class Notice and Settlement Administration: Avoiding the Pitfalls – Part II*.

▲ Planning Pitfalls: “I Never Thought About That”

Utilizing the services of an experienced notice and claims administrator before a settlement agreement is finalized can help minimize a number of pitfalls resulting from unfamiliarity with some common problem areas in the management and distribution of your settlement funds. You may have never thought about residual fund or uncashed check questions, but your administrator has. Claims administration and distribution issues that should be addressed early in the settlement process include:

- *Uncashed checks and residual funds.* Case law is replete with controversies over the appropriate disposition of monies remaining after distribution of the settlement

fund to class members. Anywhere from five to 25 percent of settlement checks are never cashed, and undistributed interest may accumulate. Avoid the necessity of returning to court for new orders or the possibility of escheatment by stale dating checks and by providing for the disposition of any residual funds in the settlement agreement and preliminary approval order.

- *Reissued checks.* Class members will lose checks or new checks will need to be issued because of death or divorce. Decide up front the deadline for cashing reissued checks, keeping in mind that the longer the period, the longer you continue to pay banking charges.
- *Internal Revenue Service scrutiny.* Early attention to the tax implications of the settlement monies and distribution to class members can minimize the chance of unwanted attention from the IRS. Know whether interest earned will be taxable, and if necessary, segregate distribution funds between governmental and private recipients. The settlement agreement should also include the required elements to ensure treatment of the money as a qualified settlement fund under IRS rules.
- *Deceased, underage or foreign class members.* Before the claim form is designed, decide whether, and with what types of proof, the heirs of deceased class members can recover, or whether class members who are minors can release or make claims without a guardian's signature. If some percentage of the class resides in foreign countries, account for and allow more time at each stage of the notice and claims distribution procedures. Remember that foreign mailings will take four to five times longer than domestic mail.

▲ Timing Pitfalls: Setting Deadlines

The laudable goal of getting benefits to class members as quickly as possible all too frequently leads to the setting of unrealistic time frames for the provision of notice and filing and processing of claims. As a result, additional delays may occur and expenses may accelerate as the parties head back to court for modification of deadlines or resolution of claimants' objections to decisions on their claims.

Make sure your deadlines are reasonable and include enough time for:

- *Resending undeliverable notices/claim forms.* The three to four week processing time for re mailing should be taken into account when setting claim filing deadlines, as well as opt-out and objection deadlines.
- *Completion of claim forms by class members,* particularly where claim forms are complex or require the location and submission of documentation.
- *Processing claims and curing deficiencies before distribution.* Complex forms and claim procedures requiring class members to submit supporting documentation take more time to process accurately. Predictably, they also create significant numbers of improperly submitted claims that must be "cured" by the claims administrator. Consider some flexibility with distribution dates because some cures can be complex, but are necessary to ensure valid claims are ultimately paid.

Timing considerations also come into play when planning a notice campaign that includes both published and mailed notice. Mail and media notice should be coordinated to achieve maximum impact and savings on administrative costs by doing the following:

The laudable goal of getting benefits to class members as quickly as possible all too frequently leads to the setting of unrealistic time frames for the provision of notice and filing and processing of claims.

- *Staggering mail dates.* Particularly when the class size is large, spread out notice mailings to help manage your costs. Staggered mail dates require a smaller staff and provide for more efficient processing of undeliverable items.
- *Coordinating mailing with the media plan.* Where possible, send mailed notices three or four days *before* media notice. Media notices are designed to provide a brief summary of rights and to direct class members to sources for further information. Class members who receive a mailed notice before the media campaign are more likely to have their questions answered, thereby diminishing the number of calls that must be handled.
- *Monitoring the media.* Any press reports about a settlement—accurate or not—are guaranteed to generate more calls and communications from class members. Notify your administrator in advance of planned press releases or of any news stories you see or hear. That way, the administrator can staff call centers appropriately and respond quickly and accurately to class members' questions.

▲ Records Pitfalls: Data Disasters

The federal rules require the best notice possible be directed to class members, "including individual notice to all members who can be identified..." for any class certified under Rule 23 (b)(3). Fed. R. Civ. P. 23(c)(2). The Supreme Court has made clear this means individual notice must be mailed to those class members who are identifiable through reasonable effort, regardless of cost. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

In large class actions where the parties have access to databases of potential class members' names and addresses, the costs of individual notice can be astronomical, not only for the mailing itself, but for the formatting of data into a useable configuration for mailing. Too often, poor planning and lack of understanding of the data's limitations result in the mailing of more notices than there are class members.

In a recent settlement, for example, the parties allocated insufficient time for data extraction from seven million files, resulting in the mailing of four million notices to a class numbering only one million, and a quadrupling of their notice costs. This could have been avoided had the parties heeded the following records rules:

Mail and media notice should be coordinated to achieve maximum impact and savings on administrative costs.

- *Allow the technical experts to manage the data.* Leave the creation and management of your mailing databases to the computer experts. Excessive duplication and other database flaws can be minimized by putting your database's technical experts in touch with your notice provider's technical experts from the beginning. Lawyers for the parties should help the technical experts understand class characteristics so they can eliminate non-class members from the data set.
- *Give the data experts ample time.* The creation of a mailing database containing only the necessary information takes time because the data usually requires review and cleansing. The technical experts should receive and begin working with the available data sets as early as possible in order to deal with formatting, duplication, missing data and multiple platform issues. The earlier the data is received, the more likely problems will be resolved prior to mailing.

- *Employ data sampling.* It is not unusual for large-scale databases to encompass multiple and different platforms covering both current and outdated addresses. In these circumstances, the technical experts can and should research the quality of the data by running samples using National Change of Address databases or Social Security numbers to test assumptions as to whether the use of older addresses will in fact provide reasonable notice to the class. This sampling will not only provide better information about the costs of notice, it can help you determine what types of notice will best serve Rule 23's requirement of the best possible notice under the circumstances—whether direct mail, publication notice, or a combination.

With proper planning, data problems and their attendant costs can be eliminated, or at least minimized. The simple rules above will go far in helping you avoid the more common data pitfalls.

Watch for our next monograph, *Class Notice and Settlement Administration: Avoiding the Pitfalls – Part II*, which will address pitfalls arising from changes in the law regarding class notice.

Utilizing the services of an experienced notice and claims administrator before a settlement agreement is finalized can help minimize a number of pitfalls.



Have a question about Claims Administration, please contact Jennifer Huart at:

RUST CONSULTING, INC.
625 MARQUETTE AVENUE, SUITE 880
MINNEAPOLIS, MN 55402
T 800.999.7940

WWW.RUSTCONSULTING.COM
E JHUART@RUSTCONSULTING.COM

Headquartered in Minneapolis, Rust Consulting, Inc. is the national leader in the class action settlement administration industry. With experience on more than 2,500 cases worth billions of dollars, Rust has expertise in antitrust, consumer, finance, insurance and healthcare, labor and employment, property, securities, Securities and Exchange Commission and telecom matters. Rust and its partner, Kinsella Media, LLC (Washington, D.C.) offer a full complement of services including class member location, data management, notification, claims processing, call center services, distribution and tax reporting.