

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

▲ by Matthew Potter; Director, Rust Consulting, Inc.

▲ A Failure To Communicate

The administration of a class action settlement, including distribution of settlement benefits, raises a host of potential problems that can lead to delays and additional costs. Part I of this monograph addressed a number of common administrative pitfalls and ways to avoid them. Part II covers pitfalls related to class member notification.

Certain legal requirements present myriad avenues for challenges to class action notices and notice experts. Failure to communicate in accordance with these laws and decisions can have far-reaching, expensive consequences. These legal obligations and the audience affected in the communication of notice include:

- Federal Rule of Civil Procedure 23 and notice to class members;
- The Class Action Fairness Act of 2005 (CAFA) and notice to government officials; and
- The Supreme Court's *Daubert* decision and the presentation of notice plans to the courts.

▲ Communications With Class Members

RULE 23 PLAIN LANGUAGE REQUIREMENTS

In the past, a typical class notice was a dense, lengthy document filled with jargon incomprehensible to its audience. In response to the problem of such notices, federal rules were amended to require that notices to class members use “plain, easily

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understood language.” Fed. R. Civ. P. 23(c)(2). Parties that don’t comply with the rule’s plain language requirement are likely to face challenges and objections to the notice, and in the worstcase scenario could find themselves paying for the publication or mailing of new notices.

Plain language is not just simplified English; it is an approach to communicating with a reader based on who the reader is and how to deliver an understandable message to him or her. The following are the keys to an effective plain language notice:

- *Organize the flow of information in a notice by putting the reader first.* Who is the class member, and what does he or she want and need to know? By anticipating and answering the class members’ questions in a logical sequence, the notice becomes less intimidating and therefore more likely to be read.
- *Design the notice to present the information in an easy-to-read format that gives the reader visual cues and signposts.* Break up the text with headings, subheadings, lists and tables to help the class member find needed information. Enhance readability by using sufficient white space and readable font sizes, while avoiding ALL CAPS (which is harder to read). Remember, the headline is critical—eliminate case captions and use a headline that engages the reader.
- *The content of the notice should be clear and concise.* Use short sentences and paragraphs, and eliminate unnecessary information. Avoid the use of legal jargon, definitions, acronyms and difficult words.

Additional articles about class member communication, such as the *Plain Language Primer for Class Action Notice*, are available at The Plain Language Resource Center at rustconsulting.com and kinsellamedia.com.

▲ Communications with Government Officials

THE NEW CAFA REQUIREMENTS

The Class Action Fairness Act of 2005 (CAFA), 18 U.S.C. §§ 1711 – 1715, places new burdens on the class action bar, especially defendants. No later than 10 days after a proposed settlement is filed with the court, each defendant must identify and notify the appropriate federal and state officials of the settlement. Defendants must provide such officials with copies of specified case-related documents, including information about class members and their share of the recovery. You can read more details about CAFA’s requirements in our November 2006 Class Action Perspectives monograph, *For Better or Worse: The New CAFA Notice Requirements*, by Katherine Kinsella, president, Kinsella Media, LLC. Download a copy of the monograph at rustconsulting.com and kinsellamedia.com.

The result of failure to communicate with the appropriate officials under CAFA is clear: class members who demonstrate that appropriate notice was not given are not bound by the settlement or the final judgment. Outlined below are some steps to help avoid this communication pitfall.

- **Work as a team.** While CAFA requires the defendants to provide notice, the committee notes indicate that class counsel bears the burden of proving to the court that it is not feasible to supply the names of the class members who reside in each state and the estimated proportionate share of their claims. Moreover, class

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counsel has an obvious interest in the identification of class members and their proportionate shares of the settlement benefits. It makes sense for class and defense counsel to work together closely to meet CAFA’s mandates.

- **Choose a point person.** It is critical to remember that CAFA notice is not a single step, but an ongoing process. One person—preferably the attorney most knowledgeable about CAFA—should be responsible for ensuring CAFA compliance both initially and as the settlement progresses.
- **Choose your experts early.** Bring in a notice provider and any necessary economic or actuarial experts well before the settlement is finalized. CAFA requires that both the proposed class notice and identification of class members (and their estimated share of the claims) be provided within 10 days of filing the settlement with the court. Consequently, research on target class demographics, damage calculations and appropriate notice content must begin in the early stages of the settlement process. Make sure your notice provider and other experts preserve records of their research and are available to testify in the event of a late challenge to the finality of the settlement.

▲ Communications with the Court

DAUBERT AND THE ADEQUACY OF NOTICE

In many class actions—and in most product liability, mass tort and consumer cases—class members are not readily identifiable. Therefore, they must be reached through paid-media notice that could include magazines, newspapers, television, radio and the Internet. Rule 23(c)(2) requires the “best notice under the circumstances,” and notice experts often must provide the court with affidavits or testimony verifying the adequacy of the notice. In the wake of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), courts now require experts to employ the “same level of intellectual rigor that characterizes the practice of an expert in the relevant field” (526 U.S. at 141.). This could lead to a court’s rejection of expert notice testimony if it does not rely on accepted data and methodology for measuring the effectiveness of paid media notice.

The most common pitfalls in published notice programs include the failure to provide a target demographic for selecting the media to be utilized and a lack of data quantifying the reach and effectiveness of the media chosen. Under most circumstances, a defensible notice plan should:

- **Identify the demographics of class members and establish a target audience.** Syndicated data available from nationally accredited media and marketing research firms can identify the characteristics of the class, such as gender, age, income and education levels.
- **Outline the methodology for selecting the appropriate media.** The data can also identify class members’ media habits, including the types they regularly consume. This information is critical in determining the most effective media vehicles for notice.
- **Quantify the adequacy of the notice.** Industry tools enable the notice expert to measure and quantify the *reach* (the percentage of a target audience reached through specific media vehicles) and *frequency* (the average number of times an audience is exposed to the media vehicle) of a notice program.

A more comprehensive discussion of notice design methodologies and measurement of the adequacy of notice is contained in *Quantifying Notice Results in Mass Tort Class Actions—the Daubert/Kumho Mandate*, by Katherine Kinsella. Download a copy of this article at kinsellamedia.com. Good notice practice dictates that counsel provide the court with the tools to judge the adequacy of a mediabased notice program. *Daubert* makes it imperative.

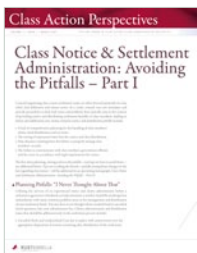
The legal requirements of Fed. R. Civ. P.23(c)(2), CAFA and *Daubert* open the door to challenges in settlements. Drafting materials in plain language, working as an organized team to meet CAFA requirements and providing notice that meets quantifiable measures of adequacy will not only help ensure class members receive notice and understand their options, but also help ensure settlement approval.

▲ Tips and Trends in Class Action Administration and Notice: A Monograph Series from Rust Consulting, Inc.

We hope you've found this information to be helpful and encourage you to read past editions as well . . .

- *Class Notice & Settlement Administration: Avoiding the Pitfalls Part I*
- *Class Action Settlements: What You Should Know About Claim Filing*
- *For Better or Worse: The New CAFA Notice Requirements*

Printed back issues are available by request, or you can download copies at rustconsulting.com or kinsellamedia.com.



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