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4 Steps For Smooth Class Action Settlement Administration

Law360, New York (June 21, 2013, 1:57 PM ET) -- It's no secret that courts have taken greater interest in all aspects of class action litigation. Settlement of class action litigation is no exception. When settling a class action, counsel often works closely with a settlement administrator to ensure the settlement is implemented with efficiency and accuracy. The settlement administration process can be complex, and if not executed properly, scrutinized by the court. Below are four imperative steps to ensure your settlement administration runs smoothly.

1) Ensure Your Notice Plan Will Receive Approval

Rule 23 requires provision of direct notice to class members in certain types of cases. While there are narrow exceptions to this rule — such as in cases where it would be unreasonably expensive and time-consuming to locate class member contact information — direct notice remains the standard, particularly at the settlement stage. Where class member information is not available, courts have come to rely on publication notice.

The emerging question is just how robust a publication notice campaign must be, and courts have begun to weigh in on this question with increasing frequency. Some have taken a limited approach, and criticized certain types of traditionally accepted publication notice, while others have embraced a sea change in publication notice, requiring a comprehensive effort in line with the Federal Judicial Center's (FJC) Class Action Notice and Claims Process Checklist.

The more limited approach has been seen in courts such as the Second Circuit, which recently ruled (in a 23(b)(2) case no less, where notice is typically undertaken only at the initiative of the court) in Hecht v. United Collections Bureau that a single-day publication in *USA Today* did not satisfy due process, even though the size of the settlement paled in comparison to the cost of providing notice. This resulted in a plaintiff who would have been precluded by the res judicata effect of a previous settlement had notice been sufficient, instead not being bound by the settlement and proceeding with their lawsuit. Courts have begun to follow Hecht. Earlier this year, in Corpac v. Rubin & Rothman, the Southern District of New York, after approving a notice plan which was then paid for and implemented, reviewed Hecht and decided that the Corpac notice plan no longer sufficed, thus requiring further expense for notice.

Failing to include a carefully calibrated notice plan thus can delay and potentially even derail a proposed settlement. For example, in Kaufman v. American Express, after granting preliminary approval and reviewing the response of the class to the notice plan, the Northern District of Illinois found fault with the low response rate (in terms of both class member inquiries and claims) and ordered a second, wider round of notice, which of course imposed additional expense.

These issues all arose after settlement, though — hence the question: how can you protect against this issue at the outset? One option is to adhere to the Federal Judicial Center's checklist, which has come to be seen as a safe harbor of sorts, particularly in the Ninth Circuit. While the checklist was at first primarily relevant only in the Ninth Circuit, it has been cited by a growing number of courts across the country, including the Northern District of Illinois, the District of Maine and the Middle District of Florida.

The checklist's most eye-catching recommendation deals with the percentage of a class to be reached in a notice plan — it endorses anywhere from 70 percent to 95 percent as "reasonable." Clearly this raises the specter of substantial expense which may not have been previously considered by parties calculating out the cost of settlement.

With that range in mind, it is useful to have an understanding of the interplay among various media options available to counsel. Traditional publication notice is done via print media — which is often costly and constrained in flexibility by long lead times that may not be convenient for the circumstances of the case. Internet banner advertising continues to grow in popularity, and often provides a more cost-effective option to achieve high levels of reach. It also offers an effective option to reach a class in certain types of litigation — and where the class is composed of online customers or relates to transactions conducted online, it is particularly well-suited to Internet notice rather than print media. Often, using a hybrid of the two mediums can create a cost-effective means of reaching a larger number of class members without exhausting a previously set media budget. Likewise, there are cases that are particularly suited for television or radio, but those are the exception rather than the norm.

The rising influence of the checklist changes the landscape for parties trying to settle class action cases — most obviously, it raises costs and visibility. Weighing that concrete, known cost against the risk of having a proposed settlement rejected will surely occupy class action practitioners for the foreseeable future.

2) Be Aware of Five Key Factors Affecting Claims Rates

Courts faced with proposed class action settlements are paying more and more attention to claims rates. The Third Circuit, in In re Baby Products Antitrust Litigation, recently added another factor to the previously standard calculus for making settlement approval determinations — the direct benefit to the class.

Even before courts had begun taking greater interest, the most common question settlement administrators received related to the claims rate that could be expected in a given case. The short answer to the question is that projecting a claims rate is an art, not a science. The reality is that while an administrator can compile a table of claims rates from similar cases, the claims rate that will ultimately prevail in a given case is driven by many different interrelating factors.

1. Simple is Smart

The type of notice and the design of the claim form can drastically influence the final claims rate. Obviously the complexity of the procedures class members must follow to file a valid claim will impact the claims rate. Using claim forms that require narrative responses as opposed to check boxes for instance, can have a profound effect on claims rates. Consulting with your settlement administrator in advance of drafting the claim form is advised.

2. Cash is King

The nature of the potential benefit to be obtained by the class will also impact the final claims rate. In general, claimants tend to prefer cash over anything else, including coupons, certificates and free services. For example, in one illustrative case, class members chose between a $10 check and several days of free car rental services worth hundreds of dollars. The majority of claimants opted for the small monetary award.

3. Media Hype

Claims rates can also be impacted by media coverage, especially in cases that generate media attention outside of the legal notification plan. Like anything else in life, a settlement that attracts media attention will naturally attract claimants.

4. A Class that Plays Together gets Paid Together

Another factor that affects claims rates is the cohesiveness of the class — that is, how familiar class members are with each other and the litigation. The best illustration of this concept is a comparison between current and former employees in an employment related class action settlement and consumers in a false advertising settlement. While the employees may very well know each other and discuss the settlement at work or after hours, and thus file claims at a high rate, it is much less likely that unconnected consumers who purchased a product are linked in the same fashion. Accordingly, the better a class in a given case knows each other, the higher the claims rate.

5. Sometimes It's Who You Know

Claims rates can also be impacted by the percentage of the class that is actually qualified to file a claim. This is particularly the case in product defect litigation. In many cases, the manufacturer of the product may know how many of the products they manufactured, and also possess repair records related to the allegations in the litigation. If this sort of data is available, it can be used to project the likely claims rate in a given case.

3) Project the Check Redemption Rate and Plan for the Remainder

Projecting the claims rate is not the end of the story. After claims are filed and validated, checks (or other awards) are disbursed to valid claimants. That does not mean, however, that everyone who filed a claim will actually cash their check. To the contrary, in the majority of cases, some percentage of checks will go uncashed. There are certain dollar value thresholds beyond which a certain percentage of claimants typically do not cash their checks.

The question therefore becomes what will happen to the unclaimed funds. Will they revert to the defendant? If so, it may behoove a defendant to know the likely check cashing rate beforehand. If the funds will instead go to a cy pres recipient, counsel will want to research the relevant jurisdiction's view on how closely tied a cy pres recipient must be to the underlying litigation, as courts are taking a greater interest in that issue as well, as evinced by the Baby Products litigation, as well as the recent Dennis v. Kellogg decision in the Ninth Circuit. If the residual funds in the settlement will not revert to the defendant, or go to a cy pres recipient, depending on the jurisdiction, the residue may escheat to the state, which may also be useful knowledge for planning purposes.

4) As Email Notice Rises, Know Its Pitfalls

Court preference for direct notice is well known and long standing. The standard form of direct notice, via postal mail, can be quite costly, especially for larger class sizes. One alternative that has grown in popularity in recent years is email notice, which offers a direct line to class members that can be easy to monitor and relatively cost effective. While email notice offers certain benefits, it also has pitfalls that are in some ways similar, but in other important ways very different than postal mail. The main pitfall of postal mail is well known — the available addresses may not be the class member's most current point of contact.

Email also faces deliverability issues in that emails can be blocked from reaching the intended recipient by the system that facilitates its delivery. Having email notices blocked, or otherwise returned as undeliverable, thwarts the notice effort, with potentially dire consequences. For example, preliminary approval of a class action settlement was denied in Schlesinger v. Ticketmaster, a case in Los Angeles Superior Court, due to the fact that 20 percent of the email effort was ultimately undeliverable. While the sheer volume — as opposed to the percentage — of notices that were not delivered (there were approximately 10 million undeliverable email notices) certainly factored into the court's decision, it is nonetheless a precedent that cannot be overlooked.

Fortunately, there are various ways to protect against undeliverable email notice issues, such as using white-listed IP addresses (which are approved as non-spam by major email domains), strategic planning of email notice dissemination, and contacting the major internet service providers to alert them that there will be a batch of email notices going out on a particular date and time. It is therefore critical that in a day and age with sophisticated spam filters and firewalls, that a settlement administrator be well-versed in these issues and know-how to plan for and combat them.

Class action issues are under the microscope more than ever before. Settlement issues certainly have not been spared the scrutiny. It is therefore critical that counsel partner with an experienced settlement administrator to ensure not only a smooth administration, but to set reasonable expectations and help guide the parties smoothly through an often complex process.

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