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SETTLEMENTS

NOTICE

Consulting early and often with a settlement claims administrator will allow for stronger class communications, resulting in a seamless and cost-effective claims administration process, says attorney Steven Weisbrot in this BNA Insight. The author offers practical advice on how an administrator can help attorneys with communicating potential rights and responsibilities to class members.

When Choosing a Settlement Administrator: *Do Not Settle for Less*

BY STEVEN WEISBROT

The moment counsel picks up the phone to contact a settlement claims administrator should signal the end to the administrative nuisance that is often associated with protracted class action litigation. However, communicating potential rights and responsibilities to class members, as well as distributing millions or even billions of dollars, can be a difficult and daunting task.

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In order to maximize the true value of a claims administrator's expertise, counsel should use their claims administrator as a partner in executing their particular settlement needs, engaging in extensive questions and answers to craft innovative solutions to the distinctive requirements of their unique settlement. Through communication and several simple but often overlooked procedures and methodologies, the right claims administrator can flawlessly handle the administration of a class action settlement from notification to distribution. Thus, by following the guidelines outlined here and engaging a knowledgeable and capable claims administration partner early in the litigation, counsel should be able to rest easy that the settlement they have carved out will be seamlessly implemented, earning counsel a profound feeling of liberation and well-deserved sigh of relief.

Engage Early

Involve Administrator in Notice Form Design

With professional objectors looming behind every corner, it is crucial to have an easily understandable Notice form that lay people will read and understand. In order to effectively tackle the challenges of communicating complex information to class members in a manner they can understand, it is essential to solicit the services of a claims administrator with considerable experience designing plain-language, legal-notice documents. It is important to engage the settlement ad-

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ministrator well in advance of the actual settlement such that they can draft the Notice for review by all parties to the litigation, prior to presenting the same to the court. By engaging early, counsel allows considerable time for review and revision which is a luxury not afforded those who contact the administrator on the eve of filing their motions.

Counsel would do well to keep in mind the series of illustrative cases in which the plain language requirement was not met. A particularly egregious example of a Notice that failed to use plain language occurred in *White v. Alabama.* In its decision, the Court found that the language used in the Notice Form ''. . . was printed in very small type and couched in 'legalese' at times so dense that even a lawyer would have had difficulty determining the settlement's probable impact. . . . It is not surprising that few people objected.''[1]

Another meaningful example of a plain language Notice failure can be seen in *Orrill v. AIG Inc.* Here, the Court emphatically stated that the Notice was overly complex and failed to communicate the potential consequences that failing to opt-out would have on the class members.[2] Failure to properly communicate to class members can doom an otherwise satisfactory settlement.

In addition to obvious concerns raised above, such as limiting legalese by carefully monitoring both the length and complexity of sentences, attorneys need to be aware of formatting concerns such as notice size, layout, and text size and text effects. By enlisting an expert with verifiable experience drafting plain language Notices, counsel can effectively satisfy the due process requirements of Rule 23 of the Federal Rules of Civil Procedure.[3] Likewise, counsel and their claims administrator should be knowledgeable regarding the Federal Judicial Center guidelines and be cognizant of those requirements when they draft the legal Notice. Therefore, it is important to work with a claims administrator who has experience writing plain language notice to class members in a manner that will survive judicial scrutiny.

Measure Twice, Cut Once

Design Claim Form to Minimize Confusion

Careless claim form design can be one of the most detrimental and expensive pitfalls of the entire administration process. However, some easy, yet often overlooked methods can assure a virtually seamless administration.

For instance, designing a claim form that allows claimants to answer questions in a narrative form can be unwieldy. When drafting claim forms, it is important to remember that the forms will be read, interpreted and sorted by human beings, not machines. If class members are allowed to answer an open-ended question in narrative form, it will likely add to the administrative costs, since it will take more time to read and interpret the class members' responses. It also allows for potential human error since the claims are now open to interpretation. Claim forms should include check boxes or multiple choice questions whenever feasible.

In Re Foreign Currency Exchange, a well known antitrust case wherein plaintiff's counsel settled with several credit card companies over allegations that they had overcharged their customers from 1 to 3 percent in foreign currency conversion fees, settled for $336 million. Subsequently, 20.8 million notices were mailed to potential claimants. However, in the first six months, the response rate was a dismal .45 percent. Due to complaints regarding the claim form design and the initial response rate, the court cut short the notice campaign and appointed a special master who recommended a new, streamlined claim form that did not require the claimants to obtain 10 years of proof of foreign spending. Rather, claimants were able to choose one of three options which best approximated their particular foreign spending habits and their ability to substantiate their claims. The new claim form generated a noteworthy 27 percent response rate, with more than 10 million claims filed.[4]

If the ability to categorize claims and review metrics is a priority of counsel, online claims filing should be considered. A dynamic website provides the extra benefit of being able to accept online claims filing. This functionality can minimize confusion and allow for easy claim categorization. Thus, it is particularly well suited to claims that involve several sub-classes.

Another common error of claim design occurs when in an effort to appease all parties to the litigation, counsel will decide to include both an Opt-out form and a Claim form in the same Notice packet. This can lead to confusion as claimants faced with a lack of plain language explanation, often file *both* forms, leading to a defective claim and additional processing time. It is preferential to include only a claim form in a Notice packet, along with explicit instructions on how to opt-out of the settlement. However, if including both forms is deemed absolutely necessary by the parties, it is important to preemptively determine an *order of priority* to deal with those cases where both forms are filed.

Additionally, counsel ought to be realistic and recognize at the outset of the administration process that mistakes can and do happen and that no claim form is perfect. The best way to minimize the impact of any potential mistake in claim form design is by including specific wording in the Preliminary Approval Motion that allows for subsequent enhancements and/or modifications to the Claim.

Don't Be Afraid to Ask the Big Questions

Plan With the Bottom Line in Mind

A question that claims administrators are routinely asked is how to predict the claims rate of a particular

[1] *White v. Alabama* , 541 F.2d 1092 (5th Cir. 1976).

[2] *Orrill v. AIG Inc.*, 38 So. 3d 457 (La. Ct. App., 4th Cir. Apr. 21, 2010). ''We venture to say that most lay persons do not know what *res judicata* means; thus, there is the potential that many interested persons did not realize that by not opting out of *Orrill,* their claims in *Oubre* [*Oubre v. Louisiana Citizens Fair Plan,* 961 So. 2d 504 (La. Ct. App., 5th Cir. 2007)] would never be litigated and that they could potentially lose thousands of dollars.''

[3] See generally Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide 2010; Richard C. Wydick, Plain English for Lawyers (5th ed. 2005); and Robert Eagleson, *Short Definition of Plain Language*, http://www.plainlanguage.gov/whatisPL/definitions/eagleson.cfm.

[4] For an in-depth review of the claim form process of this case please see Francis E. McGovern's seminal article *Distribution of Funds in Class Actions—Claims Administration*.

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settlement. While there is no way to predict the future, one should be able to leverage a claims administrator's historical data, professional expertise and proprietary formulas to produce a range of claims filing rates that allows the parties to properly plan for the financial implications of a particular settlement.

Among the most important factors that can affect claims rates are the method of Notice (Direct, Media, Electronic), the ease of filing a claim, the class member's relationship to the alleged wrong, class demographics, the amount of the award and the use of reminder notices. Careful analysis of these and other factors can allow counsel and the claims administrator to devise a realistic expectation of the claims rates in a particular case.

While determining the estimated claims rate is certainly important, it should not predominate counsel's thought process. Frequently, an equally important question may be what percentage of the overall settlement fund was actually claimed (i.e., what percentage of the money will actually be claimed as opposed to how many claimants filed claims). Considerations as to what will be done with the remainder of the unclaimed funds such as cy pres or escheatment have a profound impact on the financial analysis that counsel must undertake when considering settlement. Therefore, it is important to discuss both the potential claims filing rates as well as the plan for any unclaimed remaining funds with your claims administrator well in advance of settlement.

Communication Works For Those Who Work at It

All too often, counsel only consults an administrator after the settlement papers have been filed with the clerk. As outlined above, this can be unduly detrimental to the administration and an expensive mistake, since changing a Notice or administration plan after it has already received formal court approval can be challenging and time consuming.

Consulting early and often with a claims administrator will allow for stronger class communications resulting in a seamless and cost-effective claims administration process. By following these suggestions and working closely with a claims administrator, counsel can be certain that the Notice and distribution plan they are presenting to the court is the strongest possible, and finally earns them that long sought after sigh of relief.