

## Expert Analysis

### Is Your Legal Notice Designed To Be Noticed?

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Effective communication with class members is an essential element of the class-action process. As guided by Rule 23 of the Federal Rules of Civil Procedure, the Manual for Complex Litigation (Fourth) and the Federal Judicial Center, two critical components of notices are necessary to meet due process: reaching class members and communicating effectively.

Getting noticed is the first step in effective communication with class members; therefore, a conscious effort must be made to design a “noticeable notice.” Like any other editorial or advertisement, class-action notices must be clear, concise, informative and inviting. They should grab the attention of potential plaintiffs, alert them that they have been affected and provide them with a compelling reason to continue reading. The notice should take very little time to read, supply readers with the facts they need to make an informed decision and allow them to learn more, if they wish.

#### POSITIONING

Due process requires a “desire to actually inform,” so it is important to seek positioning of notices among content that is highly read. Intentionally placing an ad in the legal-notice section of a newspaper or in the back pages of a magazine does not necessarily benefit class members. Instead, consider the demographics of the class to determine which sections they are most likely to read.

For example, the main news and local news are the highest-read sections of the newspaper. A total of 82.2 percent of newspaper readers read the main news section of the newspaper, as compared with 50.8 percent who read classifieds. If the class is highly composed of men, the sports and business sections would rank next in terms of readership. Among women, entertainment/lifestyle and cooking sections are highly read.<sup>1</sup>

#### NOTICE SIZE

The size of a notice should be based on the amount of space needed to communicate all the required information with easily legible print. Often, cost is the primary fac-

tor in the determination of size. However, since the goal is to provide absent class members with an opportunity to receive and understand their legal rights and options, the size of the notice should attract attention.

Advertising professionals routinely analyze the effectiveness of ad sizes and the impact they have on readership. Research shows that larger ads attract higher readership because they are “more often seen than smaller ads.”<sup>2</sup> There is nothing appealing about a lot of text crammed into a small space. Instead, select the size of the notice to attract attention, and include a prominent headline and all necessary information. Copious amounts of white space, such as large margins, will attract attention and get the notice read.

## HEADLINE

The headline is the single most important element of a print ad. Research indicates that 90 percent of body copy is not read, making an informative and inviting headline essential in capturing the reader’s attention and encouraging him or her to read on.<sup>3</sup>

The headline should be broad enough to draw in all potential class members, yet specific enough to allow the reader to determine whether he or she should continue reading. Unfortunately, many class-action notices are still printed with the use of a pleading-style case caption.

Assuming the ad is seen (which is highly unlikely given that it does not contain a headline), will average people – who most likely do not understand that they can be

## Example of a bad legal notice

### COURT-ORDERED LEGAL NOTICE

The following is a summary of information presented in more detail in the Notice of Proposed Class Action Settlement, Settlement Hearing and Right to Appear (the “Notice”), which Settlement Class Members should have received in the mail. Since this is just a summary, you should see the full Notice for additional details.

Please read this information carefully. If you are a Settlement Class Member (as defined below), your rights will be affected by these proceedings and you may be entitled to receive benefits under a proposed settlement.

**IF YOU ARE AN INSURANCE COMPANY AND YOU PARTICIPATED IN THE NATIONAL WORKERS COMPENSATION REINSURANCE POOL (THE “NWCARP”) OR THE NEW MEXICO WORKERS COMPENSATION ASSIGNED RISK POOL (THE “NMWCARP”) AT ANY TIME DURING THE PERIOD FROM 1970 THROUGH THE PRESENT (THE “SETTLEMENT CLASS”), YOU MAY BE ELIGIBLE TO PARTICIPATE IN A \$450 MILLION CLASS ACTION SETTLEMENT.**

If you believe that you are eligible to participate in the class action settlement described in this Court-Ordered Legal Notice but did not receive in the mail the detailed Notice describing the Settlement, please visit [www.WCPoolSettlement.com](http://www.WCPoolSettlement.com), where you can obtain the Notice, or contact the Court-approved Administrator as set out below to request a copy of the Notice.

#### SUMMARY STATEMENT BY THE SETTLEMENT CLASS REPRESENTATIVES

**The Settlement** - A settlement consisting of \$450 million in cash, plus interest as it accrues (the “Settlement”), has been reached with American International Group, Inc. (“AIG”) in a class action lawsuit (the “Class Action”) alleging, among other things, claims for fraud, breach of contract, accounting, violation of the federal anti-racketeering statute and other theories in connection with the alleged underreporting of workers compensation premium to the NWCARP and the NMWCARP from 1970 to the present (the “Class Period”). If approved, the Settlement will create a Class Fund to pay the claims of insurance companies that participated in the NWCARP and/or NMWCARP during the Class Period that qualify for distributions under a Plan of Allocation which must be approved by the Court. The Settlement, if approved, would be a final resolution and release of the claims brought on behalf of the Settlement Class against AIG and of every Settlement Class member’s claims by reason of any matter whatsoever arising out of the underreporting of workers’ compensation premium in any of the 50 States or the District of Columbia for all years from the beginning of time through January 28, 2011, against every other member of the Settlement Class.

The Settlement has the support of the Board of Governors of the NWCARP and the Board of the NMWCARP, and the settlement amount has been endorsed as reasonable by the Examiner-in-Charge appointed by the Lead States of the Multistate Targeted Market Conduct Examination conducted pursuant to the National Association of Insurance Commissioners’ (“NAIC”) Market Regulation Handbook (the “Multistate Examination”). The Lead States are Delaware, Florida, Indiana, Massachusetts, Minnesota, New York, Pennsylvania and Rhode Island. The other 42 states and the District of Columbia were Participating States in the Multistate Examination which concerned AIG’s writing and financial reporting of workers compensation insurance. The Examiner-in-Charge, pursuant to confidentiality agreements with AIG and the NWCARP, also facilitated the settlement discussions that ultimately led to the Settlement.

**The Class Action** - The Class Action complaint, captioned *Safeco Insurance Company of America, et al. v. American International Group, Inc., et al.*, No. 09-CV-2026 (N.D. Ill.), alleges, among other things, that during the Class Period, AIG underreported its workers compensation premiums in connection with its participation in the NWCARP and NMWCARP and, as a result, underpaid its taxes and assessments, including residual market assessments.

The Class Action claims stem from the New York Attorney General and Department of Insurance’s (the “New York Authorities”) 2005 investigation of, and subsequent settlement with, AIG regarding AIG’s historic reporting of workers compensation premium. As part of its settlement with the New

York will receive no cash consideration under the Settlement, even though their claims against AIG and all other premium underreporters will be released. For these reasons, and others, Safeco and Ohio Casualty believe the Settlement is unfair, unreasonable and inadequate to the Settlement Class. Safeco and Ohio Casualty urge the members of the Settlement Class to reject the Settlement and continue the Class Action. The bases for their position are outlined in summary form in Section 10 of the Notice, and Safeco’s and Ohio Casualty’s previously-filed objections to the Settlement are available on the Court’s website as Docket #370. Settlement Class Representatives’ and AIG’s responses to those objections are available on the Court’s website as Docket #386 and 387, respectively. Further information about the grounds upon which Safeco and Ohio Casualty oppose the settlement can be accessed at [www.aig-objectoutout.com](http://www.aig-objectoutout.com).

**Terms of the Settlement** - In exchange for the releases set forth in the Settlement Agreement, as amended (the “Releases”), AIG has agreed to fund a \$450 million “Class Fund” to be allocated, after deduction of Court-awarded attorneys’ fees and expenses, possible incentive compensation payments not to exceed \$175,000 in the aggregate to the Settlement Class Representatives, Notice and administrative expenses, and any applicable taxes (the “Distribution Amount”), among all eligible Settlement Class insurance companies (the “Settlement Class Members”), provided that such Settlement Class Members do not submit a valid and timely request for exclusion from the Settlement Class in accordance with the procedures set out in Section VI of the Settlement Agreement.

If approved by the Court, the Distribution Amount will be allocated to the Settlement Class Members pursuant to a Plan of Allocation prepared by the National Council on Compensation Insurance, Inc. (the “NCCI”) in its capacity as administrator of the NWCARP and the NMWCARP. A copy of a summary of the Proposed Plan of Allocation is attached to the Notice and available by visiting [www.WCPoolSettlement.com](http://www.WCPoolSettlement.com), and a full copy of the Plan of Allocation may also be obtained by contacting the Court-approved Administrator or by logging into [www.WCPoolSettlement.com](http://www.WCPoolSettlement.com).

If any Settlement Class Members “opt out” of the Settlement Class (as described below), the Distribution Amount will be reduced by the amount allocated to those excluded parties by the Plan of Allocation.

*If you are a Settlement Class Member and you do not wish to participate in the settlement, you must request exclusion from the Settlement Class by no later than October 3, 2011.*

Under Paragraphs I.A 49-50 of the Settlement Agreement, all parents, predecessors, successors, subsidiaries and affiliates are treated as a single Settlement Class Member for purposes of inclusion or exclusion from the class.

**The Legal Effects of the Settlement** - If the Court approves the Settlement, AIG and the Settlement Class Representatives will seek the entry of an Order Approving Settlement and accompanying Judgment that, among other things, will (a) find that the Settlement is fair, reasonable, and adequate; (b) enter a final order certifying the class for settlement purposes; (c) dismiss with prejudice all claims and counterclaims in the Litigations between AIG, the NCCI, the NWCARP, and/or the Settlement Class Members, meaning that no member of the Settlement Class including you (unless you timely exclude yourself) will be able to bring another lawsuit or proceeding against any of the Releasees (as that term is defined in the Settlement Agreement) based upon the claims that have been raised or that could have been raised in the Litigations; (d) incorporate the Releases as part of the Order Approving Settlement; (e) permanently bar members of the Settlement Class from filing or participating in any lawsuit or other legal action against any or all Releasees arising from or relating to any and all claims that have been raised or that could have been raised in this Class Action; (f) enter a bar order that will: (i) prevent any person or entity from commencing, prosecuting, or asserting any claim (including any claim for indemnification or contribution or otherwise denominated, including, without limitation, claims for breach of contract and for misrepresentation) against any Releasee where the alleged injury to the barred person or entity is based upon

part of lawsuit they did not initiate — actually read a notice that begins with a case caption? The FJC does not think so, since its studies show that “a first impression must persuade readers that they may have a stake in the class action and that they will be able to comprehend the notice.”<sup>4</sup>

The FJC recommends stating the potential benefit to the class and/or individual class members as part of the headline. Advertising research proves that this is an effective tactic, noting that benefit statements usually draw more readers than general headlines.<sup>5</sup> When a headline tells readers they may have something to gain, they are more likely to invest the time to continue reading.

## LAYOUT

A good design and layout of an ad are essential. Print ads are often poorly designed and are easily ignored because they do not attract the eye to any particular feature or element.<sup>6</sup> Readers are naturally drawn to photos and strong typography, so these strategic design tactics should be utilized when possible. Photos can be especially useful in helping class members identify a particular product or brand they otherwise would not identify.<sup>7</sup> If a photo cannot be used, the size and shape of a block of text or diagram can create a similar effect.

## Example of a good legal notice

### LEGAL NOTICE

## If you purchased Innova, EVO, California Natural, HealthWise, Mother Nature, or Karma dog or cat food you could get a payment from a class action settlement.

A \$2,150,000 settlement has been reached with Natura Pet Products, Inc., Natura Pet Food, Inc., Natura Manufacturing and Peter Atkins (“Defendants” or “Natura”) in a class action lawsuit about the statements made in the advertising of Natura brand dog and cat food. Natura denies all of the claims in the lawsuit, but has agreed to the settlement to avoid the cost and burden of a trial.

### WHO IS INCLUDED?

Those included in the class action, together called a “Class” or “Class Members” include anyone in the U.S. who purchased Natura brand dog or cat food products from March 20, 2005 through July 8, 2011.

### WHAT DOES THE SETTLEMENT PROVIDE?

The maximum payment you can get is \$200. A \$2,150,000 settlement fund will be created by Natura. After paying the lawyers representing the Class for attorneys’ fees of up to 35% of the fund and costs and expenses of up to \$60,000; costs to administer the settlement of up to \$400,000; and up to \$20,000 to the Class Representative (Judy Ko), payments will be made to Class Members who submit valid claim forms.

### HOW DO YOU ASK FOR A PAYMENT?

Submit a claim form online, or get one by mail by calling the toll free number. The deadline to submit or mail your claim form is **January 8, 2012**.

### WHAT ARE YOUR OPTIONS?

You have a choice about whether to stay in the Class or not. If you submit a claim form or do nothing, you are choosing to stay in the Class. This means

you will be legally bound by all orders and judgments of the Court, and you will not be able to sue or continue to sue Natura about the legal claims resolved by this settlement. If you stay in the Class you may object to the settlement. You or your own lawyer may also ask to appear and speak at the hearing, at your own cost, but you don’t have to. The deadline to submit objections and requests to appear is **December 28, 2011**. If you don’t want to stay in the Class, you must submit a request for exclusion by **December 28, 2011**. If you exclude yourself, you cannot get a payment from this settlement, but you will keep any rights to sue Natura for the same claims in a different lawsuit. The detailed notice explains how to do all of these things.

### THE COURT’S FAIRNESS HEARING.

The U.S. District Court for the Northern District of California will hold a hearing in this case (*Ko v. Natura Pet Products, Inc.*, Case No 5:09cv2619), on February 17, 2012, at 9:00 a.m. to consider whether to approve: the settlement; attorneys’ fees, costs, and expenses; and the payment to the Class Representative. If approved, the settlement will release the Defendants from all claims listed in the Settlement Agreement.

### HOW DO YOU GET MORE INFORMATION?

The detailed notice and Settlement Agreement are available at the website. You can also call 1-888-768-2047, or write to Natura Settlement Administrator, PO Box 2005, Chanhassen, MN 55317-2005, or contact Class Counsel at 800-851-8716.

**1-888-768-2047**

**www.PetProductsSettlement.com**

The use of strong typography can be easily incorporated into any class-action notice by breaking up the text with subheadings, tables or bullet points. Smart design helps readers locate information, adds depth to the notice design and avoids a gray-mass look. Subheadings allow text to flow in logical sequences that highlight the major points of a settlement agreement or class-action complaint. In turn, readers are able to gain a general understanding of the case without having to read the entire document.

### TEXT SIZE

The appropriate font size of class-action notices should also be selected in order to maximize readership. Small text is and should be reserved for the fine print of a contract or disclaimer of an advertisement. Although publications will generally accept smaller fonts, the font size used in a class-action notice should be similar to that of the publication's editorial.

#### Class action notices should:

- grab the attention of potential plaintiffs
- alert them that they have been affected
- provide them with a compelling reason to continue reading

Publications base the font size of their editorial on their target audience (standard-size fonts for general audiences and larger fonts for older audiences or children); a significant reduction in font size can greatly reduce readership.

### USE OF TEXT EFFECTS

To emphasize text, the design should include the use of bullets, underlining, bold or italics. Be selective in the words that are emphasized to ensure that only important information such as recovery amounts, dates and product identifiers are highlighted. It is critical to avoid the use of long strings of capital letters and bold text. When overused, text effects tend to blur together and can become very difficult to read and distract the reader from the message.

### THE 'PLAIN-LANGUAGE' TEST

According to the Center for Plain Language, when you write in plain language, you create material that works well for people who use that material. The definition of "plain" depends on the audience. One measure of plain language is behavioral: can the audience quickly and easily (1) find what they need, (2) understand what they find and (3) act appropriately on that understanding?

In most notices, plain language is designed to be read and understood by the average person. It speaks directly to the reader in a simple manner and avoids the use of unnecessarily complex words, terms and phrases. Plain language provides information in short, concise sentences, paragraphs and sections; uses at most a high-school-level vocabulary; and is presented in an inviting fashion. It avoids redundancy and encourages readership. Consider the words and sentence structure used in the editorial of your local newspaper. Most newspaper editorials are written on a sixth-grade reading level.<sup>8</sup>

*Two critical components of notices are necessary to meet due process: reaching class members and communicating effectively.*

Class members do not understand jargon that is common to attorneys and legal professionals. During their research on plain-language notices, the FJC found that most people did not understand even the most basic concepts of a class-action notice such as “a class” or “class members.” In fact, most people do not know or understand what a class action is or how our legal system can allow them to be a plaintiff in a lawsuit that they did not initiate.

When plain language is used properly, “legalese,” which is characterized by long sentences, complex vocabulary, modifying clauses and high abstraction, is not present. Legalese is insensitive to the average person’s need to comprehend the document.

According to Richard Wydick, author of “Plain English for Lawyers,” “We use eight words to say what could be said in two. We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has, according to one critic, four outstanding characteristics. It is (1) wordy, (2) unclear, (3) pompous and (4) dull.”<sup>9</sup>

When it comes to class members, legalese is intimidating, uninviting, lengthy, confusing and incomprehensible. For example, when legal terms such as *whereas*, *hereinafter* and *aforementioned* are used in documents intended to be read by non-lawyers, they baffle and frustrate the reader.

Notices that are written in legalese have and will continue to face scrutiny. In *White v. Alabama*, the court commented: “The notice ... 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 on Alabama’s judicial system and on the rights of Alabama voters. It is not surprising that few people objected.”<sup>10</sup>

More recently, in *Orrill v. AIG Inc.* the court found that class members probably would not understand common language used by attorneys or the ramifications of such language in the notice. Specifically, the court stated, “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.”<sup>11</sup>

### PLAIN-LANGUAGE DRAFTING TIPS

When drafting plain language, it is important to consider your audience, be specific and use short, concise sentences to summarize key points and highlight important information. Write the way people think. Omit unnecessary words, use an active voice, choose and arrange words with care and avoid footnotes. Consider the certified wording of the class definition and reword it if it will help readers better identify themselves as class members.

Be careful with release language. If it is complex and lengthy, this too should be rewritten so that class members can understand exactly what they are giving up. Define relevant terms upfront and in sentence format; use the defined terms throughout the document to avoid lengthy text and redundancies.

***It is important to consider your audience, be specific, and use short, concise sentences to summarize key points and highlight important information.***

It is important to avoid pleading formats, long strings of capital letters and deterrent language such as “Do not contact the court.” Pleading formats turn off the reader. Long strings of capital letters are difficult to read. Deterrent language in class-action notices can have an adverse effect, resulting in an increase in contact with the court.

## CONCLUSION

In order for unidentified or absent class members to learn about a class action, they have to be notified. To be notified, they have to *notice* the information and understand it. If it is noticed, it has a chance of being read. The advertising industry has conducted research on and analyzed what will attract readers. The FJC has taken that research a step further by determining how to apply it to class-action notices, and it has created models to help practitioners design notices and communicate with class members. These notices can be used as a guide to help create notices for almost every class action.

The information presented in the FJC models, combined with effective communication tactics, will help ensure that the notice will be noticed, read and understood to fulfill due process obligations.

## NOTES

- <sup>1</sup> See Newspaper Ass’n of America, Daily Newspaper Sections Read, available at [http://www.naa.org/Trends-and-Numbers/Readership/~media/NAACorp/Public%20Files/TrendsAndNumbers/Readership/Daily\\_Sections\\_2010.ashx](http://www.naa.org/Trends-and-Numbers/Readership/~media/NAACorp/Public%20Files/TrendsAndNumbers/Readership/Daily_Sections_2010.ashx).
- <sup>2</sup> Advertising for Dummies (2d ed. 2007).
- <sup>3</sup> *Id.* at 100.
- <sup>4</sup> Fed. Jud. Ctr., Detailed Discussion of Methodology, available at [http://www.fjc.gov/public/home.nsf/autoframe?openform&url\\_l=/public/home.nsf/inavgeneral?openpage&url\\_r=/public/home.nsf/pages/376](http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/376)
- <sup>5</sup> Riger Knowledge Base, Creativity: Can It Affect Ad Readership?, available at [http://www.riger.com/know\\_base/advertising/creativity.html](http://www.riger.com/know_base/advertising/creativity.html).
- <sup>6</sup> Advertising for Dummies at 103.
- <sup>7</sup> See, e.g., *Talalai v. Cooper Tire & Rubber Co.*, No. L-8830-00-MT, 2002 WL 34668710 (N.J. Super. Ct., Middlesex County Sept. 13, 2002).
- <sup>8</sup> Advertising for Dummies, at 69.
- <sup>9</sup> Richard C. Wydick, Plain English for Lawyers (5th ed. 2005).
- <sup>10</sup> *White v. Alabama*, 541 F.2d 1092 (5th Cir. 1976).
- <sup>11</sup> *Orrill v. AIG Inc.*, 38 So. 3d 457 (La. Ct. App., 4th Cir. Apr. 21, 2010).



**Carla Peak** is the director of legal notification services at **Kurtzman Carson Consultants**. With more than a decade of industry experience, she specializes in designing plain-language legal-notice documents to effectively tackle the challenges of communicating complex information to class members in a manner that they can understand. Her notice documents satisfy the notification requirements of Rule 23 of the Federal Rules of Civil Procedure, the Manual for Complex Litigation (Fourth) and applicable state laws.

She has successfully provided notice in both national and international markets, including communications in more than 35 languages. She can be reached at [cpeak@kccllc.com](mailto:cpeak@kccllc.com).