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NOTIFICATION

Notice is not just for class members anymore. With the recent passage of the Class Action Fairness Act in Congress, defendants inherited new governmental notification requirements for class action settlements. The new requirements involve more than simply adding another person to the mailing list.

Even more important to defendants and their counsel are the potential ramifications associated with failure to satisfy the requirements. In this article, Stephanie Fiereck provides a framework of the new provisions and identifies the potential issues that counsel should be aware of to avoid unintended consequences with their own cases.

Class Action Reform: Be Prepared to Address New Notification Requirements

BY STEPHANIE FIERECK

After more than seven years of lobbying in Congress, federal class action reform legislation has officially marked its place in history. On February 18, 2005, President Bush signed the Class Action Fairness Act[1] into law. Most notably, the new law made significant modifications to federal diversity jurisdiction and removal procedures to curb alleged ''forum shopping'' and decommission those state courts—popularly coined ''judicial hellholes.'' Coupon settlements and related attorneys' fees were also taken to task with new limitations and considerations to prevent repeated abuses. However, one section of the Act that has received little attention to date is the new settlement notification provisions imposed upon defendants.

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[1] Class Action Fairness Act of 2005, Pub. L. 109-2 (2005).

Although promoted as a business-backed initiative, defendants now bear the burden of providing detailed notice to ''appropriate'' governmental officials as each class action settlement is reached. Defendants who fail to satisfy every component of the requirements will be open to potentially damaging consequences. Such consequences could include removal of the legal protections previously held by defendants that settled federal class action lawsuits.

Res Judicata Trap Door

Rarely does a defendant welcome litigation, but one attractive aspect of class action litigation has been the ability to resolve what could be hundreds, thousands, or even more individual lawsuits in one settlement. This effectively absolves defendants of liability and bars future litigation on the matter by all class members that did not opt for exclusion from the settlement. Furthermore, ''for purposes of res judicata, many of the inevitable imperfections in any notice process are washed away with final court approval of the settlement. This is not so with imperfect notification to the appropriate state and federal officials,'' says Jacqueline Jauregui, a partner with Sedgwick Detert Moran & Arnold in Los Angeles.

This res judicata protection has been a strong contributing factor to the success of class actions. Based on the new requirements, if defendants ignore or do not properly notify the appropriate governmental entities as required by the Act, res judicata protection could be in jeopardy and compromise the finality of a settlement.

Why Add a Notification Requirement?

Along with momentum to modify diversity jurisdiction requirements for class actions, legislators included a ''Consumer Class Action Bill of Rights'' in the Act. The notification requirements are couched as one element of the consumer bill of rights. Providing notice to the appropriate state and federal officials is intended to be a mechanism to protect class members' rights. It allows the appropriate officials oversight to object to settlements that are not in the best interest of class members. This additional layer of ''independent oversight'' is an attempt to combat ''clientless litigation''—cases where clients are relatively uninvolved and counsel settle for large attorneys' fees with little or no tangible economical relief for the class members. This oversight function provides the appropriate federal and/or state officials a 90-day period to review the settlement and take action on class members' behalf before the court grants final approval of the settlement. The Act does not set forth any duties for governmental officials regarding their oversight function.

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ATTORNEY JACQUELINE JAUREGUI

The New Notification Provision

Housed in Section 1715 of the Act, the new notification provision requires that each defendant shall serve a notice of the proposed settlement upon the ''appropriate federal official'' and the ''appropriate state official'' for each state where a class member resides, within 10 days of filing a proposed class action settlement in federal court. The notice shall contain the following items:

- A copy of the complaint, amended complaints and accompanying materials, with some exceptions for electronic materials available through the Internet;
- Notice of scheduled judicial hearings;
- Class member communications—proposed or final notification to class members, including notice of settlement and right to exclusion;
- Proposed or final settlement agreements;
- Agreements between the defendant and class counsel;
- Final judgment or notice of dismissal;
- The names of the class members who reside in each state and their estimated proportional share of claims in the settlement, or a reasonable estimate of the number of class members who reside in each state and their proportional share of claims in the settlement, if providing the names is not feasible; and
- Any written judicial opinions regarding class notification, the settlement agreement, judgment or dismissal.

Unintended Consequences

Every defendant who settles a class action in federal court should be wary of any failure to comply with the notification requirements. The law is generous to class members in situations where a defendant does not comply with the requirements. Under the Act, a class member is not bound by a settlement agreement or consent decree if they can demonstrate the notification requirements were not satisfied. Although the burden of proof is on the class member, if invoked and achieved it could potentially destroy an entire settlement and all related efforts.

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Defendants need to ensure that all notification requirements have been satisfied within the 10-day window. In particular, Jauregui recommends, ''[T]he prudent defense attorney needs to pay careful attention to the substance and timing of these notices, and keep meticulous records of the notices. It may seem menial, but the client's res judicata protection hinges on it.''

Notification to Appropriate Officials

Defendants will need to identify who the ''appropriate'' governmental officials are prior to serving the actual notice of settlement. As mentioned above, the law mandates that notice shall be served on both the ''appropriate federal official'' and the ''appropriate state official.''

Appropriate Federal Official: Most often, this will be the U.S. Attorney General, unless the defendant is a federal depository institution, a state depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of one of these institutions.[2] In that case, notice will go to the official who has ''primary federal regulatory or supervisory responsibility'' over the defendant if the allegations in the class action are subject to regulation or supervision by that official. The legislative history illustrates the straightforwardness of the provision with the following example: ''[I]f a national bank were sued over its lending practices, notice would have to be provided to the Comptroller of the Currency. If it were sued in a nationwide lawsuit regarding the food in its cafeterias, notice would be provided to the Attorney General.''[3]

Appropriate State Official: Similar to the federal official, most often, the appropriate state official will be the state attorney general, unless the defendant's business conduct is authorized by a state official who has primary regulatory or supervisory responsibility or who licenses or authorizes the defendant to conduct business in the state. In that case, notice should be provided to the official who has such responsibility over the defendant if the allegations in the class action are subject to regulation, supervision or licensing by that official. Again, the legislative history puts this into context: ''[I]n a case against an insurance company involving insurance practices, such as how premiums are calculated, notice would be required to the state insurance commissioner in each state where the company is licensed and where class members reside. If some class members reside in states where the company does not do business and therefore is not subject to regulation, then notice would be given to those states' attorneys general. Similarly, if the company at issue were a toy manufacturer, which is not licensed by a particular regulatory body, then notice would have to be given to the state attorney general of each state where plaintiffs reside.''[4]

[2] *See* 12 U.S.C. 1813 (Federal Deposit Insurance Act). Definitions provided in Section 1813 will be relied upon to define the terms: federal depository institution, state depository institution, depository institution holding company, foreign bank and nondepository institution subsidiary, as provided for in 28 U.S.C. 1715.

[3] 109-14, S. Rep. No. 14, at 33-34 2005, 2005 WL 627977 (Leg. Hist.).

[4] *Id.* at 34.

Noteworthy Exceptions to Notification

There are a few exceptions provided for in the Act regarding notice to the ''appropriate'' officials, which affect depository institutions. In the case of federal and other depository institutions, the notice requirements will be met by serving the official who has ''primary federal regulatory or supervisory responsibility'' over the defendant if the allegations in the class action are subject to regulation or supervision by that official. No additional notice to an appropriate state official is required. Looking again to the legislative history with the same example involving a national bank sued over its depository or lending practices, ''notice would have to be given to the Comptroller of the Currency, who has regulatory authority over the institution. However, no notice would be required to state officials.''[5]

State depository institutions have their own separate exception, which limits the notice requirement. The notice requirements will be met by serving the ''state bank supervisor'' in the defendant's state of incorporation or charter if the allegations in the class action are subject to regulation or supervision by that official and the appropriate federal official. Again, there is no notice required to other state officials, even if class members reside in other such states.[6]

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Be Wary of Potential Pitfalls

As with any new requirement, there are potential pitfalls. A few traps to avoid include:

There Is No Luxury of Time: The new law provides a narrow window of time, only 10 days for defendants to satisfy the notification requirements. If the noticing requirements are not taken into account during negotiations and a settlement is agreed to, the 10-day timeframe could easily slip past. Rather than waiting until an agreement is presented to the court, consider including the service component within the actual settlement agreement. If nothing else, it will serve as a reminder to counsel and the settlement administrator that notice will be required.

Logistical Timing Issues: The items required for the settlement notice, such as the final version of the class settlement notification or the list of names of class members along with a proportionality share assigned, may not be ready for distribution at the point of settlement. To avoid missing the 10-day window, these items should be in final form and available for notification

[5] *Id.*

[6] *Id.*

purposes upon submission of the preliminary settlement agreement to the court.

Feasibility Conundrum: Defendants may not need to race to generate a list of class members and the corresponding proportionality share assessment if it is not feasible to do so. Plaintiff and defense counsel are likely to disagree about what is actually feasible in a given case. The legislative history provides an interesting twist to approaching disagreements on this topic. According to a Senate report, it was the intent of the Senate Judiciary Committee that ''class counsel bear the burden of proving that it is not feasible'' to provide the required information.[7] This is an interesting way to place the burden of proof—perhaps the word ''not'' was an oversight in the text. One would expect class counsel to have a burden of proving it is feasible, rather than the opposite. It will be interesting to see how both sides approach this issue.

Class Members on the Move: Since defendants are required to provide notice to the ''appropriate state official of each state in which a class member resides,'' a determination will need to be made as to the state residence of class members. Defense counsel will need to decide if it will be satisfactory to rely on potentially outdated address data. Counsel should also consider whether to blanket notice all 50 states in cases where consumers may have purchased a product in one state during the class period and now reside in a different state, unbeknownst to the defendant. Some practitioners may opt for providing blanket notice to all 50 state attorney generals in a multistate settlement, instead of wrestling with the issues.

Agency Rule Promulgation: As the new settlement notice requirements gain momentum in the upcoming months and years, it is likely that federal or state officials and their respective governmental entities will promulgate rules or regulations to specify service requirements for receipt of notice. Defendants will bear the burden of complying with any such alterations for providing service to the appropriate officials.

Reliance on Other Defendants to Provide Notice: Although it seems superfluous, every defendant that is participating in the proposed settlement must satisfy the notification requirements. Read literally, that means that every defendant must ensure that the proper steps are taken to provide appropriate officials with the required notice. Otherwise, they may invite future challenges to the requirements by unhappy class members.

It is plausible that an argument will arise that class members are not bound by the settlement agreement as it applies to any of the defendants, including those that satisfied the notice requirements when just one defendant has not satisfied their duty under law. Although this argument may not hold much weight, it is worth noting.

On the Hook

So, what happens if there is an honest mistake and the notification provisions are not satisfied within the required time frame? A good example of this is the situation where one defendant relies on another defendant's service to satisfy the requirements. In that case, defendants should look beyond the plain language of the statute to the legislative history. The Senate Judiciary Committee discussed how technical notification errors should be evaluated. The committee explicitly stated that plaintiffs should not be able to walk away from a settlement if the appropriate officials have not been served notice due to a technical mistake by the defendant.[8]

If a defendant makes a good faith effort to provide notice, but it is served on the incorrect person or was not received, then there is a good argument for binding class members to the settlement. Furthermore, if at least one defendant correctly served notice and it was received by the appropriate officials, the argument would be even stronger based on the Committee's vision as set forth in the legislative history.[9]

Retroactivity

One consideration defendants should not have to worry about is how to address the notification requirements for cases that were filed in federal court prior to enactment of the law. The law does not include any provisions regarding retroactive application of the Act. However, this consideration may not hold true for cases filed in state courts on or before February 18, 2005.

Conclusion

Although the new notification requirements of the Class Action Fairness Act have not yet received the same notoriety as the jurisdiction changes in the Act, defendants and their counsel should be aware of the changes and appreciate the potential consequences if the requirements are not met. Before cases reach settlement, counsel should identify a strategy to ensure that the appropriate officials will be served with all of the required components. Identifying and addressing potential pitfalls before a settlement agreement is signed will provide a better outcome in the end. Notice that is too little, too late, could undo countless hours of negotiations and settlement administration, not to mention the cost and liability of future lawsuits.

[7] *Id.*

[8] *Id.* at 35.

[9] *Id.*

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