

## Planning For The Next Mega-Sized Class Action Settlement

*Law360, New York (February 05, 2014, 4:33 PM ET)* -- It seems each year brings larger and more complex settlements. Due to the sheer volume of data, a larger number of settling and nonsettling defendants and the intricacy of reaching class members, mega-sized settlements create additional complexity for settlement administration. As a result, mega-sized settlements typically require a more involved planning process to prepare and properly execute settlement administration. This article will provide a framework from an experienced notice and settlement administrator's point of view as to what counsel should consider in preparing to settle the next mega case.

### Importance of Timing: Legal Notice

It is commonplace for counsel to seek the advice of a settlement administrator prior to reaching a final settlement to facilitate legal notice, data transfer, etc. With a mega-sized case, this pre-settlement consultation phase could start several months to a year prior to filing the settlement with the court. For example, in the monumental BP oil spill class action, *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, ("Deepwater Horizon")*, counsel retained legal notice experts eight months prior to filing the companion settlement notice programs for "Economic and Property Damages" and "Medical Benefits."

According to Cameron Azari, legal notice expert for Deepwater Horizon, "Collaborating with counsel pre-settlement was invaluable. We had time to explore with the parties all possible legal noticing options, allowing us to eventually develop and implement an enormous and complex notice program with a tight implementation schedule. Early consultation also provided time to work with the parties in crafting plain language legal notices and other documents to accurately convey the multi-faceted settlement, so class members could understand all their legal rights." Due to the complexity of planning and the sheer volume of media purchasing required in the Deepwater Horizon case, pre-settlement planning was essential to execute what was one of the most comprehensive legal notice plans ever implemented in the U.S. Ultimately, the notice effort as implemented included more than 7,900 television spots, more than 5,200 radio spots and more than 5,400 print insertions and reached over 95 percent of Gulf Coast residents.

Another important component of the pre-settlement phase is determining the availability and quality of individual class member data for individual notice. This information allows a legal notice expert to determine what percentage of the class can be reached by individual notice as well as to calculate the amount and type of media advertising that may be needed. This information is essential to design a legally adequate notice program that satisfies due process requirements.

## **Availability and Cost of Media**

In addition to timing, the actual availability of media, such as radio and broadcast (television commercial ad space) can be another consideration in a mega-sized case. In Deepwater Horizon, for example, the potential unavailability of broadcast media was a real consideration due to the notice program's timing coinciding with the 2012 presidential election.

As a result, an aggressive implementation schedule was devised during pre-settlement planning to place more than 7,900 commercial slots ahead of the presidential election peak broadcast period. Beyond ensuring the availability of broadcast media this also helped avoid higher rates. Since broadcast and radio rates vary based on supply and demand, periods of heavy inventory pressure and near sold out conditions create higher rates. These periods vary by local market conditions and popularity of stations and programs, but generally rates are highest during political periods and the traditional retail holiday season beginning on Black Friday. With proper planning, it can be advantageous to avoid these peak times.

## **Third-Party Websites: Be on the Lookout**

With a mega-sized case, it is common to see third-party websites appear once the case settles. This is especially true if there is controversy with the settlement and/or a large potential payout to class members. Unfortunately, sometimes these websites target class members and provide misleading information in direct conflict with the court-approved settlement website. This has become a real issue with the most recent mega-sized settlements. In fact, judges have responded strongly against such sites.

In Deepwater Horizon, several third-party websites were created to divert class members to third-party websites offering claim filing services as well as attorneys soliciting clients. Federal Judge Carl Barbier had issue with the sites providing information about the settlement that was misleading to class members. As a result, he directed the third parties to add a link on their websites to the official settlement website and to add text to clearly identify that the websites are not the official, court-approved website. Counsel should make sure the official, court-approved settlement website prominently displays text on the top of all pages, which identifies it as the "Official Settlement Website" or "Official Court-Authorized Website." This will help communicate to class members that they are on the correct website.

Once notice has been provided to class members (via direct mail, the media or in the form of a settlement website), it is also important to monitor the Internet for third-party websites to identify any misleading information as quickly as possible. Otherwise, there is a risk that misleading information may reach class members and ultimately undermine the court-directed notice program or settlement.

## **Direct Class Members to the "Official" Website**

Purchasing sponsored search listings from the most highly-visited search engines such as Google, Bing and Yahoo is an important form of online advertising to help class members reach the official, court-approved website rather than a third-party website. By purchasing common keyword combinations relevant to the settlement, the settlement website URL will be presented as a sponsored search listing. As a result, it can be the first item in the list of results thus increasing the site's visibility.

In Deepwater Horizon, when search engine visitors search for common keyword combinations such as "Deepwater Horizon," "Deepwater Horizon settlement," "BP oil spill," or "BP settlement," the sponsored

listing is displayed either at the top of the page prior to the search results or in the upper right-hand column. Within the first three months of launching the sponsored search listing portion of the notice program, the sponsored search listings were displayed 58,844,156 times, resulting in 199,588 clicks which displayed the settlement website. Using sponsored search listings is a simple way to increase the likelihood that class members will reach the settlement website instead of a third-party website.

### **Handling Data Complexities**

Similar to legal notice planning, handling massive amounts of data typically associated with mega-sized settlements requires proper planning at the front-end of a settlement. In a recent mega-sized case — a \$105+ million antitrust settlement with freight forwarders throughout the world over alleged price fixing spanning nearly a decade, *Precision Associates Inc. v. Panalpina World Transport (Holding), et al*, (“Freight Forwarders”), obtaining class member data was a critical component.

In order to provide notice, class member data had to be obtained and extracted from the purchasing records of 10 settling defendants and 23 nonsettling defendants. This required additional time to handle the legalities of subpoenaing data and negotiating confidentiality agreements with each nonsettling defendant. The amount of time this process takes can be significant.

Due to the sheer volume of data, the number of parties providing data and the fact that each party stores data differently, with a mega-sized case it is essential to design a comprehensive data mapping structure prior to uploading any data into the settlement administrator’s database. As part of this process, counsel should consider what potential reports and future data extracts may be needed for damage calculations, special mailings, unique queries, etc. This helps ensure the database design and data uploading methods will easily accommodate these future requests.

Once the data structure is developed, data can be uploaded and standardized to identify potential duplicates and flag invalid or nonmailable addresses. In a mega-sized case, these efforts can yield tremendous results. In *Freight Forwarders*, 792 separate data files, with approximately 11.8 million data records were received and reduced to approximately 2.4 million potential class members.

### **Enlisting a Database Administrator**

In some mega-sized cases, there are so many complexities and sources of data that it makes sense to enlist a formal database administrator to organize and maintain all the data in one database, separate and apart from the settlement database. In *Deepwater Horizon*, for example, data resided in numerous databases compiled by law firms and third-party administrators, which made it challenging to analyze all the data. The advantage of capturing and normalizing the data in one place is it allows all the parties access to query and report from one uniform, comprehensive database. Developing a comprehensive data mapping structure is a key to successful database administration.

### **Conclusion**

The legal landscape continues to evolve as more mega-sized class actions settle. In these cases, there is tremendous value to counsel to work with a legal notice expert and settlement administrator during the pre-settlement planning stage. It affords counsel the opportunity to identify and address issues unique to mega-sized settlements and determine a plan of action before the settlement is filed.

During the pre-settlement stage, it is critical to identify the data resources and map out a strategy with

the settlement administrator as to data transfer, mapping and data normalization. As nice as it would be to follow the strategies used to administer a standard class action settlement, counsel must be prepared to address issues unique to mega-sized settlements.

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[1] In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D.L.A).

[2] Cameron Azari, Director of Legal Notice at Hilsoft Notifications, a subsidiary of legal technology consulting firm Epiq Systems Inc. He has more than 12 years of experience in the design and implementation of legal notification and claims administration programs. He is a nationally recognized expert in the design of notification campaigns in compliance with Fed R. Civ. P. 23(c)(2)(d)(2) and (e) and similar state class action statutes.

[3] Precision Associates, Inc. v. Panalpina World Transport (Holding), et al., No. 08-cv-00042 (E.D.N.Y.).