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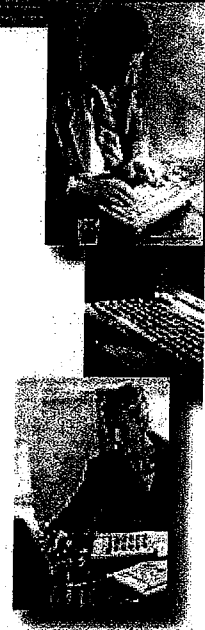
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EFFECTIVE LEGAL NOTICE PROGRAMS FOR CLASS ACTION PRACTICE

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The reality of class action litigation is that, for a multitude of reasons, these suits often settle prior to trial. See *Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1166-67 (7th Cir. 1980) (citation omitted) ("Federal Courts look with great favor upon the voluntary resolution of litigation through settlement. This rule has particular force regarding class action lawsuits."), *aff'd sub nom. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). In class actions, unlike individual actions, the parties may not reach agreement on their own. Rather, Rule 23(e) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") provides that "a class action shall not be dismissed or compromised without the approval of the court." This rule protects absent class members, who oftentimes are not aware of the lawsuit at all. See *Generally In re General Motors Corp. Pick-Up Truck Fuel Tank Product Liability Litigation*, 55 F.3d 768, 783-86 (3d Cir. 1995). One way judges protect the rights of absent class members is by ensuring that they receive proper and adequate notice. Consequently, attorneys must be careful at this stage of the case lest their hard work in achieving settlement be scuttled by a poorly constructed notice program.

Fed. R. Civ. P. 23(C)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974), maintained that the meaning of this part of the rule is "unmistakable." It held that "[i]ndividual notice must



be sent to all class members whose names and addresses may be ascertained through reasonable effort." This oft-cited holding in *Eisen* was effectively the death knell of that particular class action. The Supreme Court reasoned that because of the availability of computer records, individual notice had to be mailed to over two million class members, a cost that plaintiff refused to bear. *Eisen*, 417 U.S. at 179. Nevertheless, as the Court stated, "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Id.* at 176.* Obviously, under *Eisen*, counsel must be prepared to send individual notice where feasible. Where individual notice is not practicable, however, counsel should seek creative alternatives for publication or other forms of notice that will satisfy the most exacting standards of any court.

The proliferation of new communication vehicles actually has made it more difficult to reach target audiences -- and to capture their attention -- through notice programs. With the Internet explosion, consumers now are inundated with information from many varied sources, making the design and implementation of legal notice programs more important than ever for attorneys handling class action settlements. What follows are some guidelines on how best to conduct a legal notice program that will achieve the communications objective and be accepted by all parties and the Court as the "best notice practicable."

- *Eisen* involved a notice of pendency, not a notice of settlement. Financial considerations are less onerous for plaintiffs at the settlement stage since there is often a fund from which to pay notice costs. See H. Newberg & A. Conte, *Newberg on Class Actions*, ¶8.20 at 8-67 (3d Ed. Dec. 1992). Nevertheless, both parties are usually interested in providing notice in the most cost-effective way possible.

In the typical class action settlement, the parties seek court authorization for a notice plan prior to instituting that plan. Obviously, therefore, the court is validating the plan based on its construction rather than its ultimate effectiveness in eliciting responses.

This is a good thing for the parties and the notice experts because in typical class action settlements, only a fraction of the universe of potential class members actually submit claims. Response rates depend on several factors including the scope of the notice, the age of the case, and the publicity surrounding the alleged misconduct. As Professor Newberg explains: "[a]pathy, ignorance, burdensomeness, size of individual recovery involved,

as well as myriad other factors will affect each claimant's decision whether or not to file such a response." H. Newberg & A. Conte, *Newberg on Class Actions*, ¶ 8.35 at 8-114-115 (3d Ed. Dec. 1992) (hereinafter "*Newberg*").

It stands to reason, therefore, that even when a court evaluates the notice plan at the final approval stage, after notice has been disseminated, it should judge the program based on its design, content and scope, and not by the ultimate response rate. See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982) (method of notice may be proper despite evidence that some class members did not receive notice). For example, Judge Politan of the District of New Jersey recently approved a notice program in *In re American Family Publishers Business Practice Litigation*, MDL No. 1235, Master File No. 98 CV 1653 (D.N.J. Sept. 7, 2000), where approximately 3% of potentially eligible class members, filed claims. Nevertheless, Judge Politan noted that "[t]here have been no objections to the form or content of the Publication Notice or the Notice Packet, or the sufficiency of the Notice Plan, by any Class Members. The Notice Plan satisfied due process, constituted adequate and sufficient notice to all persons entitled to be provided with notice, . . . and fully complied with the requirement of Rule 23 of the Federal Rules of Civil Procedure and Rule 2002 of the Federal Rules of Bankruptcy Procedure." Slip op. at 9 - 10.*

In securities class actions where typically lists of shareholders exist and are easily accessible, it is relatively simple to design a notice program. Individual notice will be mailed to everyone on such lists. Individual notice will also be sent to brokerage firms and banks that may hold the stock in "street name." See, e.g., *In re Victor Technologies Securities Litigation*, 792 F.2d 862, 863 (9th Cir. 1986). To supplement these mailings the parties will publish a summary notice, usually in *The Wall Street Journal*. In cases where lists are not available, such as in the antitrust or consumer arena, publication notice is the most acceptable form of notice. However, such notice must be sufficiently targeted to the actual class. As Professor Moore explains: "In fashioning publication of notice, courts should consider the circumstances of each case, including the size and geographical diversity of the class, and characteristics of the class members that are relevant to determining which publication they would read." J. Moore, *Moore's Federal Practice*, ¶ 23.63 [8][c] at 23-305 (3d Ed. 1992). For example in *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1304 n.2 (9th Cir. 1990), notice to a class of undocumented migrant workers was accomplished, in

part, through publication in relevant United States and Mexican newspapers.

It is often necessary to use multiple communications vehicles to maximize the reach of a legal notice program. Paid advertising in newspapers, magazines, or Sunday supplements, or sometimes on radio and television, are just some of the techniques that

•*See also Vancouver Women's Health Collective Society v. A.H. Robins Co.*, 820 F.2d 1359, 1362-64 (4th Cir. 1987) (even though response rate was low outside the United States, notice program was "reasonable" because news outlets throughout the world received notice).

can be used. Other techniques include press releases, and maybe a video release for television if appropriate, and postings on the Internet and in other strategic locations. Although new publicity techniques are associated nowadays with new media, as far back as 1972, at least one scholar noted the importance of a creative approach. "The experience shows that a consumer claim program must be 'sold' like anything else, and the courts, like the nation's consumer industries and its politicians, must learn to use modern techniques of mass communication. Given the potential availability of free radio and television time for such purposes, these media can be far more effective in eliciting claims from injured consumers and far less expensive than traditional avenues of notice." Shapiro, *Processing the Consumer's Claim*, 41 Antitrust L.J. 257 at 267 (1972).

Some courts have held that publication notice alone is not enough. *See Silber v. Mabon*, 18 F.3d 1449, 1455 (9th Cir. 1994). Therefore, whenever publication is the primary means of notice it is a good idea to supplement such publication. In *In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534, 548-553 (N.D. Ga. 1992), this was accomplished by posting notice in defendants' ticket offices and in 36,000 travel agencies. Radio and television spots are also good supplements to publication. *See Montelongo v. Meese*, 803 F.2d 1341, 1351 (5th Cir. 1986) (court ordered bilingual radio announcements for sixty days in areas where class of migrant farm workers were most likely to be found). Giving notice to state agencies, which may be in contact with class members, is another way to supplement publication. *See In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 169 (2d Cir. 1987).

The trend for publication notice is to use simple language as much as possible. Display ads, which are

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short and to the point and which resemble commercial advertising, attract more attention than legalistic, long-winded summaries in small type. Although all legal notices must contain sufficient information to enable a claimant to understand his or her rights, information needs to be put in terms that can be easily understood by the class involved.

When possible, notice elements should be scheduled to reach the class during a focused period of time, to maximize the impact of the message. For example, advertised notice may be most effective if it appears after the direct mail notice has been sent. Similarly, radio notice can be used simultaneously with print notice to reinforce the message. However, there are no absolute rules for such timing, and logic should dictate. In *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 706 (D. Minn. 1975), for example, a nationwide publicity campaign was orchestrated before bulk mailing of claim forms and notices so that consumers would be expecting them. Checks were ultimately mailed to 885,000 responding claimants, the largest consumer refund distribution up to that time. See *Newberg* ¶8.38 at 8-122.

When trying to determine costs for a notice program, the major tension is between plaintiffs' desire to reach as many class members as possible and defendants' desire to limit the cost and negative publicity. This conflict between the parties, like all other issues in the stipulation of settlement, should simply be subject to negotiation. The only caveat is that both parties must be careful to construct a program that meets the requirements of Rule 23 and the court.

Finally, the budget for a notice program is not dictated by the size of the settlement alone. A small dollar value settlement does not mean that notice can be accomplished easily. Similarly, of course, a large settlement does not necessarily translate into a complex notice program. It is important to use a commonsense approach in looking at the factors that will influence notice costs. For example, the size of the class, location of the class, difficulty in reaching class members and their geographic dispersion will have a direct impact on the budget for legal notice. In the end of course, as *Eisen* teaches us, cost considerations must give way to due process concerns as the parties strive to effectuate the "best notice practicable," thereby reducing the risk of the settlement being successfully challenged.

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