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To: The Advisory Committee on Civil Rules of the
Judicial Conference of the United States,
and Members of the Rule 23 Subcommittee
by email

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Troubling Class Action Notice Trends
are Impacting Potential Rule 23 Changes

Dear Committee and Subcommittee Members:

I understand that a current "sketch" of a potential change to Fed. R. Civ. P. 23(c)(2)(B), if adopted, would specify that "electronic means" or "other appropriate means" are as acceptable for individual notice as "United States mail." Speaking respectfully as a notice expert who has practiced continuously for more than 25 years including devoting significant *pro bono* time to the Federal Judicial Center's work to improve notice, and who cares deeply about the improvements that have come about during this time, this change should not be adopted.[1]

Except the rare instance when one hands a notice to class members, first class mail is the most effective individual notice method, and suppositions to the contrary are erroneous. Physical mail should be required in almost all instances when reasonably possible. Not sending mailings when they can be sent will reduce already low class action notice response rates, and bring disrespect upon the courts that oversee class actions.

This letter also discloses problematic recent class action notice "industry" practices that may have fueled the proposal, and which pose grave risk to the future and legitimacy of the class action device. Other notice-related Rule 23 suggestions are addressed at the end of this report.

[1] Todd B. Hilsee is a class action notice expert who analyzes notice for courts, special masters, and attorneys. He was the first such expert recognized in the U.S. (1992) and in Canada (2000). Hilsee was trained in mass communications, advertising and media audience measurement, and has practiced continuously. He collaborated, *pro bono*, with the Federal Judicial Center to create the FJC's Illustrative "model" Plain Language Notices, at the invitation of the Advisory Committee on Civil Rules in 2002. Those models are used by Courts throughout the U.S. today. Hilsee also collaborated with the FJC to create their Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide in 2010. The FJC Checklist has been relied upon in countless filings and recognized in many court decisions. Hilsee was cited by the FJC for updating with them the notice and claims sections of their Managing Class Action Litigation: A Pocket Guide for Judges, also in 2010. He has designed and undertaken more than 275 of the most significant class action notice efforts in history. Hilsee has worked with the most experienced notice administrators for over 25 years, though he is independent from claims administrators, and no longer implements notice campaigns.

The Rule 23(c)(2)(B) "Sketch" Proposal

I have read the Jan. 29, 2016 report of the Rule 23 Subcommittee of the Civil Rules Advisory Committee. Apparently, a possible edited Rule 23(c)(2)(B) would read (in part) as follows (changes underlined):

> *"For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice—by United States mail, electronic means or other appropriate means—to all members who can be identified through reasonable effort."*

Administrators Know that First Class U.S. Mailings are Most Effective

The "sketch" is premised on these Rule 23 Subcommittee notes:

> *"Since Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts interpreted the rule to require notice by first class mail in every case. But technology has changed since 1974 and other forms of communication may be more reliable, more effective, and less costly. The rule calls for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may often be true that online notice, most often by email, is the most effective, it is important to leap in mind that a significant portion of class members in certain cases may have limited or no access to the Internet"*

While technology has obviously changed mass-communications:

a. It is not correct that "***other forms of communication may be more reliable, more effective"*** for class action notice than first class mail.
b. It is not correct that ***"online notice, most often by email, is the most effective."***

Claims administrators typically keep response rates private. They treat the data as proprietary information, despite the fact that they serve courts. This is wrong. Any significant rule change should be based on actual data that is fully vetted as to the true effectiveness of various forms of notice. The subcommittee should obtain and study response rate information before making a change of this magnitude.

I have worked together with many different claims administrators and have had access to data on many different cases. I talk to them often. If administrators were compelled to produce class action notice response rate data, and were called to testify, no experienced and credible administrator could, with any honesty, claim that 100 emails, let alone 100 exposures to some

other form of "electronic means" or "other appropriate means," would generate anywhere close to the response that 100 physical mailings of a notice and claim form still achieves. **The gold standard for effectiveness and highest response in class actions remains physical first class mail**.

High Notice Cost is not a Problem that Needs Curing

As the notes state, the current 23(c)(2) rule sketch is premised in part on reducing costs. However, there is no real controversy over notice costing too much. Class members are not clamoring for attorneys to spend less effort and money to reach them. There is no influx of court decisions rejecting notice plans for being too expensive. As discussed below, there is immense downward movement on notice cost driven mainly by various disincentives discussed below, and by vendors willing to bid notice down, in order to win assignments and grab market share. As a result, the effectiveness of notice is racing downwards, and with it, response rates.

A class will bind people's claims to the success of a particular set of plaintiffs' attorneys even if they lose, and a settlement will release all class members' claims even if they don't get a payment, so there should be enough money to properly reach and inform the class—as the FJC Notice Checklist advises. It is circular logic to suggest, when proposing a settlement, that the settlement does not afford mailed notice, or any truly high-reaching notice to the mass audience sought to be bound, when the reason to send any such notice is to allow the class to weigh in on whether the settlement is sufficient.

A mass-communications layperson can look at the cost of notice with wishful thinking—wishful that notice could be just as effective if a million dollars were removed from the budget. But just as removing a million dollars from a $1.2 million engineering budget will likely result in a significantly less safe building, dramatically reducing notice budgets will greatly reduce effectiveness.

Embarrassingly Low Response is the Problem that Needs Curing

The number of cases in which courts are faced with results from notice where a tiny percentage of class members submit claims, and where a much greater total amount will be paid to the lawyers, have been increasing and giving courts fits. This is a 'public relations' problem for courts, and a real-world problem for class members. It erodes confidence in class actions and in courts generally.

Pitifully low response is the real class action problem to cure, and now is not the time to encourage non-use of the most responsive tool that notifications have: first class mail. If this rule change is adopted, attorneys will propose to avoid first class mail in most if not all situations for the reasons discussed in this report. There are certain to be more news reports of

cases where few people benefitted from a settlement while available mailing addresses went unused. The class action device and the courts will suffer as a result.

Administrators commonly withhold response rates to notices from reports they submit to courts. Submissions often fail to offer: the percentage of email notices sent that were opened; the percentage of email notices that bounced back as undeliverable; the percentage of internet banner impressions that were clicked on; and the number of claims submitted from mailings as compared to emails, publication notices, and internet banners. Inquisitive courts are faced with re-notifying classes as a result of orchestrated efforts to "control" the response to a modest settlement.

The Notion that Electronic Ads Constitute Individual Notice

Perhaps the even greater risk resulting from the rule sketch and notes—greater than expressly allowing email in lieu of a physical mailing address when available—is the notion that an electronic communication which is not individualized might well be pitched to courts as being an acceptable form of individual notice nonetheless.

The notes deliberately distinguish between email and online notice generally ("…*it may often be true that online notice, most often by email, is the most effective*…"). This creates a dangerous premise where courts might believe that a social media posting, or an internet banner on a visited page, can be deemed individualized. This is a frightening thought in that such activities are, in reality, new targeted forms of "publication" or "advertising," which it is well-known are rarely clicked (an average of 0.6% of the time), such that a scant fraction ever sees a real notice.

The rule sketch itself allows one to interpret non-individualized notice as being acceptable individualized notice, by vaguely referring to email instead as "electronic means," and also then including "other appropriate means" to a list that includes U.S. mail as acceptable forms of "individual notice."[2]

The Notice Campaign Bidding Wars

Rule 23(c)(2) has long required the "best practicable" notice effort. However, attorneys responsible for notice at particular stages of class actions,[3] have increasingly "put out for bid" the administration of the class action, including leaving how much notice up to the suggestions

[2] *Note*: The Rule sketch does not use the phrase "First Class Mail." The phrase "United States Mail" allows the interpretation that one could employ far cheaper "Bulk Rate Mail," which, unlike First Class Mail, the Postal Service does not forward to those who have moved.

[3] *E.g.*, plaintiffs' lawyers spending against their own 'warchest' when a case is certified, or defendants who have reached a claims-made settlement and are funding the settlement notice by agreement.

of each bidder. As a result, bidders are incented to propose the least notice that their "expert" is willing to sign his/her name to. This is easy for someone who has never sworn to the importance of high-reaching notice or criticized low-reaching notice. Knowing a level of notice that lost a bidder the job in a prior case leads bidders to reduce his/her proposal further at the next opportunity. Sometimes counsel may prefer a certain bidder only if costs are reduced further, and the bidder will offer that its expert will willingly 'stand down,' *i.e.,* not make any supporting or adverse statement about the notice effort if the budget is less than the bidder's "expert" was willing to publicly stand behind. In those cases, others without appropriate credentials might sign supporting statements in place of the recognized expert employed, but silenced, by that vendor. Courts are routinely not made aware of this.

These bidders now regularly include many vendors who do not employ notice experts, nor any planners with sufficient training in media or any real knowledge of proper audience measurement techniques, especially regarding more complex digital media measurement. These unscrupulous vendors have created unrealistic expectations that for very low costs, one can reach high percentages of mass audiences using bargain-basement electronic notice.

Inflated Audiences for Internet Media

It is increasingly common to see proposals in which a vendor has proposed, in lieu of physical mailings, a campaign promising to reach outrageous percentages of mass audiences using banner ads on various internet sites. While vendors purport such efforts will reach 70% or more of national audiences for sometimes $100,000 or less, in reality, such efforts when tested commonly reach 20% or less. Beyond that, these programs often rely on exposure to 15-word banners that are known to be clicked on average 0.6% of time or less. As a result, after an inexpensive electronic banner-reliant notice effort, it is entirely knowable that a tiny fraction of those exposed to such banners will have been exposed to a Rule 23-compliant notice, because a banner cannot disclose the legal rights that Rule 23 requires practitioners to communicate. Over-reliance on weak banner ad campaigns is thus very problematic. Unless we are prepared to say "you were notified by this banner and shame on you for not clicking on 15 words"—words which might well have been perceived to be a lawyer solicitation—relying on electronic notice as heavily as the rule sketch would permit will be harmful to class actions.

Many of the administrator vendors who have pitched and won cheap internet banner ad notice bids have taken to submitting affidavits in connection with final settlement approval in recent years stating, in essence, that low response is typical and expected in such cases. These affidavits are typically submitted on behalf of settling parties who are arguing that settlements should be approved even though class members are receiving little in actual benefits, often less in total than the lawyers' fees, and with most of the money going to *cy pres* as a result.

Even more common are "expert" affidavits that do not offer critical metrics such as how many addresses were available that were not utilized, the email open and banner click rates, and the claims response data. It's understood that such disclosure might derail settlement approval.

The Lack of Critique of Notice Campaigns

I speak with well-respected experts who report to me the type of faulty notice submissions mentioned above. These phone calls are typically accompanied by their exasperation at the "ridiculous" promises that low bidders are making about the effectiveness of electronic-only media proposals. This to them amounts to unfair competition. Experts calling me include those who are well-known to the leading practitioners in class actions.

However, few if any notice experts are willing to accept an assignment today where one party seeks to critique another party's notice submission. This includes situations where Courts seek to retain their own experts. Experts affiliated with claims administrators turn down these assignments because they understand that criticism of notice plans may lead to "blackballing" by defense or plaintiff class action firms. They fear losing a future bid to disseminate notice or perform profitable claims processing. The blackballing phenomena has arisen in the last five to seven years. Lawyers from both sides of the "v" call me and report that another expert referred them to me because that other expert will not accept a critique assignment.

Leading administrators have informed me of "pressure" not to oppose notice submissions or appear adverse to leading firms. I have been subjected to intimidation as well, but I have always been outspoken, and these troubling issues are too important.

The result of the current environment is that very little extra-judicial scrutiny is being rendered on what could be questionable notice efforts. Without much evidence proffered that is contrary to minimal notice submissions, precedents where unaware courts approve such programs are increasing, making it easier and easier to adopt and approve future low-reaching notice campaigns. With the complexities in electronic media that can make one notice campaign "appear" effective while in fact utilize shoddy practices, and with the disincentives discussed below, the paucity of outside critique hurts courts.

The Disincentives to Adequate Notice

I see little adversarial process during the most typical notice situations:

> ***Class Certified for Trial***. When a class is certified for trial, the burden of notice typically falls to plaintiffs' counsel (in the absence of rare cost-shifting situations). At that point, plaintiffs' lawyers often want the least notice that will be acceptable because they are spending their own money without a guarantee of a settlement or judgment. More

notice does not help class members, many seem to believe, because they are convinced of their own veracity as representatives of the interests of the class. Better notice might prompt opt-outs. Defendants (who legitimately want to achieve finality) do challenge weak plaintiff proposals at this stage, but without experts willing to challenge leading plaintiffs' lawyers' submissions, their arguments are often just that, arguments. Some defendants do not push for stronger notice at this stage out of a desire to avoid bad publicity from notice that will bring the alleged behavior to customers' attention.

Certified and Notified Class Later Settles. When plaintiffs later settle a case where they earlier provided notice of the certification, it is very hard to negotiate from defendants a more effective notice effort than plaintiffs provided at certification. In this way, when money is available and notice is arguably meaningful to class members, plaintiffs often can't then provide the opportunity that they might wish their class members could get.

Notice of Certification and Settlement. When a 23(b)(3) case settles and notice is required when none has been issued previously, the notice typically provides opt-out rights together with rights to object, and to claim money. On the one hand, plaintiffs often desire enough claims to make a settlement look good—enough to gain final approval, but worry that too many claims will "swamp" a settlement and make the average payouts too low, such that it appears the settlement is insufficient. Plaintiffs' incentive depends on the nature of the settlement. In a claims-made settlement, where plaintiffs negotiated their fee regardless of the number of claims, they often have little voice relative to defendants, who fund the notice and resulting claims, and thus push back against strong, high-reaching notice. When there is a claims-made settlement and plaintiffs' fees depend on the total value of claims, they may have negotiated or push for very strong notice, but these situations are rarer.

In my experience, one party strongly advocating that notice reach the greatest practicable number of class members is increasingly uncommon. Also, by limiting notice, objections are limited, which suits the interests of both settling parties.

The Media Landscape Today

Today, electronic media is a vital mass communications tool. The number of media options and outlets are increasing every day. Almost every notice plan can and should utilize these tools. The falsity in the promises being made today is that not only will digital efforts be effective components of a successful notice campaign (true), but that notice efforts can rely almost solely on electronic efforts and cost dramatically less than notice plans which reached large national audiences in the past (not true). In fact, with more and more splintered media consumption, with inflation and rising ad costs, with print publication audiences dropping, with low-attention paid to many online advertising activities, and with the limited content that

internet ads convey (absent a viewer clicking to read a real notice), the cost to effectively reach high percentages of mass audiences is not dropping. The cost of gaining attention is increasing. It is very expensive to effectively reach nationwide audiences.

The Federal Judicial Center's Notice and Claims Process Checklist

The Federal Judicial Center's Checklist provides a best-practices resource for courts, and in 2010 it was ahead of the curve when cautioning against inflated electronic media effectiveness, and revealing that when courts approve notice plans and report the "reach," the median was 87%.

A cautionary tale of the class action notice industry's "race to the bottom" can be seen in notice plans from the influx of the "digital notice panacea" vendors who routinely hype inexpensive plans as meeting the lowest range identified in the FJC's study of reach percentages (70-95%) despite the 87% median. They routinely sell 70% notice plans as "meeting" the FJC guidance. The reach guidance was included in the FJC Checklist because the FJC sought to stop the great majority of notice submissions that give courts no information as to how effective a particular notice proposal would be at reaching a class. Sadly, the greatest problem class action courts face today are false promises of high reach low-cost electronic media proposals, that unbeknownst to them, are poorly planned and reach small slices of classes.

The Logic behind First Class Mail's Responsiveness Advantage over Email

Why are administrators reporting to me that response rates for email notice are significantly lower than response rates for first class mailings? Why am I told that response rates from the internet banner-reliant efforts are worse than summary notices in print publications (the audiences of which are plummeting)? Administrators inform me, consistent with my own experience, that they see 15% or significantly greater response rates for physical mailings vs. a ceiling of 5-6% or often much less for email. Does this make logical sense? Yes. Physical mailings do not have SPAM filters, and by law they are delivered by postal workers into "in-boxes." A mailing that is not responded to immediately is often present and visible in the house for future attention. With the volume of email *increasing*, the volume of advertising mail is *decreasing*, as is the risk of class action notice mail being discarded. The FJC envelope and notice design guidelines have helped in this regard as well. Email, on the other hand is subject SPAM filters. Dozens of emails arrive daily, if not a hundred for some people, and many emails do not really "arrive" because they are captured in SPAM filters.

There are many sources of public information available to update physical mailing addresses when class members move, including postal service and credit bureau data. When class members change email addresses there are few if any widely used such tools. Unlike most first class mail, an email that goes to an outdated address often does not bounce back as undeliverable and is not automatically forwarded to the new address.

Stories such as these abound: A leading administrator conveyed that defense counsel—a leading firm—had advocated email for a case. After the administrator had done everything reasonably possible to ensure email delivery and avoid SPAM filters, an associate (presumably not involved in the case) at that firm received an email as part of the notice campaign and reported it to the firm IT department. The IT department issued a firm-wide email instructing everyone not to open the email because it might be a virus. In another recent matter, counsel seeking settlement approval argued that the administrator, if had he testified, would have sworn that the 0.3% response rate to email notice was acceptable and typical.[4] There was no significant critique, and the settlement was approved.

When a class member does not respond immediately to a notice by email, what are the chances that at some later date he/she will scroll all the way to the bottom of a cluttered email inbox to search for and find an old email notice previously received? Consider your own behavior. Why would class members act differently?

Finally, some demographic and socio-economic groups do not use or have access to email and electronic media to the extent lawyers and other professionals do. The rule sketch and notes may be based on personal habits that attorneys apply to all levels of society. Lawyers or their associates perhaps must read all their emails in order to avoid malpractice claims, but average class members do not.

Conclusion

In sum, even without a rule endorsing it, email notice has been approved in the past, and I have supported appropriate uses. Yes, physical mailings can be botched, and rendered ineffective. But when feasible, first class mail is the best, and electronic means are not a replacement. The proposed rule would not make notice better, just cheaper. This at a time when response rates are already too low. In truth, a perfect storm of unsavory practices has led to false promises for cheap electronic notice effectiveness. The rule should not, and need not be changed.

Other Rule 23 Suggestions

While concerns about a relaxation of the individual notice requirement is the primary focus of this report, other notice issues warrant consideration by the Subcommittee:

a. As important as it was to for Rule 23(c)(2) to require "plain language" in 2003, it is even more important to require that a class be adequately reached with a notice. I urge attention to the decades-long use and reliance upon "reach and frequency" which are the definitive, objective tools which ensure that mass communication methods are

[4] It bears noting that in that case, it would appear that physical mailing addresses were available but were unused.

sufficient, regardless of the means available to provide notice. Without a rule requiring effective reach of massive audiences, courts are routinely left unaware that significant percentages of a class may not even get an opportunity to see a notice, despite reach being readily calculable. While the 2010 FJC Notice and Claims Process Checklist revealed that courts can always obtain audience measurement calculations if requested, and observed that in reported decisions—when reach was cited—the median reach was 87%, the greatest untold cause of low response remains low reaching, ineffective notice campaigns. Some parties still argue that reaching a high percentage of a class is not required, and courts accept this all too often. With the reach of digital notice campaigns often erroneously calculated by failure to use the necessary complex metrics, the importance of requiring a high reach and a careful determination of reach, is all the more important today;

b. Rule 23(e)(1)(B) could remove the phrase "in a reasonable manner." This phrase is commonly used to argue that somehow a lower standard applies to settlement notice vs. the "best practicable" certification notice standard under 23(c)(2). Compensation is the thing class members actually want from a class action, so settlement notices are at least as important to receive as certification notices; and

c. Rule 23(h)(1) could specify that motions for attorneys' fees be on file prior to the deadline for objections included in class notices, instead of a common historical practice of filing such motions after the deadline for objections in the notice has expired. If they were, courts would avoid re-notification that appellate decisions have compelled in recent years. I suggest consideration of the lessons of *Redman v. Radioshack, Corp*., 768 F.3d 622, 637 (7th Cir. 2014), and *In re Mercury Interactive Corp. Securities Litigation* 618 F.3d 998 (9th Cir. 2010) before approving and issuing notice.

This report is brief for purposes of expediency. I am available to discuss this at the Subcommittee's convenience if it wishes. I have left out specific case citations and examples. I expect to provide a more detailed report if specific notice-related rule change proposals are eventually released by the Advisory Committee for public comment.

Thank you for your consideration of these remarks.

Sincerely,

Todd B. Hilsee
Principal

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